

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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SENATE BILL 828*

Short Title: Unemployment Insurance Changes. (Public)

Sponsors: Senators Rucho, Hartsell; Blue, Brunstetter, Clodfelter, Harrington, McKissick, Rabon, Rouzer, and Stevens.

Referred to: Finance.

May 21, 2012

1 A BILL TO BE ENTITLED
2 AN ACT TO MAKE CHANGES TO THE UNEMPLOYMENT INSURANCE LAWS.
3 The General Assembly of North Carolina enacts:

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5 **PART I. CHANGE THE LAW TO CONTINUE THE THREE-YEAR LOOK-BACK**
6 **TRIGGER FOR EXTENDED BENEFITS**

7 **SECTION 1.(a)** The General Assembly finds that the Governor's Executive Order
8 No. 93, entitled "Extend Unemployment Benefits to Protect the Safety, Health, and Welfare of
9 North Carolina's Long-Term Unemployed," was the purported basis for action by the then
10 Employment Security Commission to provide for the extension of unemployment benefits to
11 thousands of North Carolinians. The extension of unemployment benefits was grounded upon
12 amendments to Section 203 of the Federal-State Extended Unemployment Compensation Act
13 of 1970 (the "1970 Act"), as amended by Section 502(b) of the Tax Relief, Unemployment
14 Insurance Reauthorization and Job Creation Act of 2010 (the "Tax Relief Act of 2010").

15 **SECTION 1.(b)** The General Assembly finds that the Governor's Executive Order
16 113, entitled "Further Extend Unemployment Benefits to Protect the Safety, Health, and
17 Welfare of North Carolina's Long-Term Unemployed" was the purported basis for action by the
18 then Employment Security Commission to provide for the extension of unemployment benefits
19 to thousands of North Carolinians nearing the end of a two-month federal extension of
20 unemployment benefits under Section 201 of the Temporary Payroll Tax Cut Continuation Act
21 of 2011. That extension, authorized through February 29, 2012, was grounded upon
22 amendments to Section 203 of the 1970 Act, as amended by Section 502(b) of the Tax Relief
23 Act of 2010.

24 **SECTION 1.(c)** The General Assembly finds that Section 502(b) of the Tax Relief
25 Act of 2010 specifies that the extension of benefits is to be made only as "the State may by law
26 provide." Section 205(f) of the underlying 1970 Act defines "State law" as the "unemployment
27 compensation law of the State, approved by the [U.S. Secretary of Labor]." In North Carolina,
28 that law is Chapter 96 of the General Statutes, the "Employment Security Law." Nothing in
29 Chapter 96 of the General Statutes, then or now, authorizes the Governor to extend
30 unemployment benefits by Executive Order, nor does Executive Order 93 or Executive Order
31 No. 113, or any other such order, constitute a "State law" within the meaning of the 1970 Act or
32 the North Carolina Constitution. Section 1 of Article II of the North Carolina Constitution
33 provides that "The legislative power of the State shall be vested in the General Assembly."
34 Further, Section 6 of Article I of the North Carolina Constitution provides that the legislative
35 and executive powers are "...separate and distinct...."



1 **SECTION 1.(d)** The General Assembly finds that the people of this State entrusted
2 the creation of laws to the General Assembly, not to the executive branch, and that Executive
3 Order No. 93 and Executive Order No. 113 were issued and acted upon by the executive branch
4 in a manner contrary to the rule of law.

5 **SECTION 1.(e)** Further, the General Assembly finds that it enacted Section 6.16 of
6 Session Law 2011-145 and, in so doing, validated the effects of the Governor's Executive Order
7 No. 113 with the stated intent to allow extended benefits to be paid under the Tax Relief Act of
8 2010 so long as payment of the extended benefits did not hinder the State's ability to reduce its
9 debt owed to the federal government for unemployment benefits.

10 **SECTION 1.(f)** It is deemed, therefore, to be in the best interest of the people of
11 this State that the General Assembly now ratify and hereby validate the effects of the
12 Governor's Executive Order No. 113.

13 **SECTION 1.(g)** To maintain the rule of law with respect to State and federal
14 relations pertaining to employment security laws in North Carolina, any executive order issued
15 by the Governor that purports to extend unemployment insurance benefits, whether those
16 benefits will be paid from federal or State funds, is void ab initio, unless the executive order is
17 issued upon authority that is conferred expressly by an act enacted by the General Assembly or
18 granted specifically to the Governor by the Congress of the United States.

19 **SECTION 1.(h)** Section 6.16(d) of S.L. 2011-145 reads as rewritten:

20 **"SECTION 6.16.(d)** This section becomes effective April 16, 2011, and expires ~~January 1,~~
21 ~~2012.~~January 1, 2013."

22 **SECTION 1.(i)** G.S. 96-12.01(a1)(4)c.3. reads as rewritten:

23 "3. This section applies as provided under the Tax Relief,
24 Unemployment Insurance Reauthorization, and Job Creation
25 Act of 2010 (P.L. 111-312) as it existed on December 17,
26 2010, and is applicable to compensation for weeks of
27 unemployment beginning after December 17, 2010, and
28 ending on or before ~~December 31, 2011,~~December 31, 2012,
29 provided that:

- 30 I. The average rate of (i) insured unemployment, not
31 seasonally adjusted, equaled or exceeded one hundred
32 twenty percent (120%) of the average of such rates for
33 the corresponding 13-week period ending in all of the
34 preceding three calendar years and equaled or
35 exceeded five percent (5%) or (ii) total
36 unemployment, seasonally adjusted, as determined by
37 the United States Secretary of Labor, for the period
38 consisting of the most recent three months for which
39 data for all states are published before the close of the
40 week equals or exceeds six and one-half percent
41 (6.5%); and
42 II. The average rate of total unemployment in this State,
43 seasonally adjusted, as determined by the United
44 States Secretary of Labor, for the three-month period
45 referred to in this subsection, equals or exceeds one
46 hundred ten percent (110%) of the average for any of
47 the corresponding three-month periods ending in the
48 three preceding calendar years."

49 **SECTION 1.(j)** G.S. 96-12.01(a1)(4)e.3. reads as rewritten:

50 "3. This subdivision applies as provided under the Tax Relief,
51 Unemployment Insurance Reauthorization, and Job Creation

Act of 2010 (P.L. 111-312) as it existed on December 17, 2010, and is applicable to compensation for weeks of unemployment beginning after December 17, 2010, and ending on or before ~~December 31, 2011,~~ December 31, 2012, provided that:

- I. The average rate of total unemployment, seasonally adjusted, as determined by the United States Secretary of Labor, for the period consisting of the most recent three months for which data for all states are published before the close of the week equals or exceeds eight percent (8%); and
- II. The average rate of total unemployment in this State, seasonally adjusted, as determined by the United States Secretary of Labor, for the three-month period referred to in this subdivision equals or exceeds one hundred ten percent (110%) of the average for any of the corresponding three-month periods ending in the three preceding calendar years."

SECTION 1.(k) This section is effective when it becomes law and applies retroactively to January 1, 2012.

PART II. RESOLUTION OF OUTSTANDING ISSUES FROM S.L. 2011-401

SECTION 2.(a) The Current Operations Appropriations Act for the 2012-2013 fiscal year shall provide for the annual salaries of the Board of Review, as provided in G.S. 96-4(b).

SECTION 2.(b) G.S. 96-14(2) reads as rewritten:

"§ 96-14. Disqualification for benefits.

An individual shall be disqualified for benefits:

- ...
- (2) For the duration of the individual's unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Division that such individual is, at the time such claim is filed, unemployed because he or she was discharged for misconduct connected with the work. Misconduct connected with the work is defined as intentional acts or omissions evincing disregard of an employer's interest or standards of behavior which the employer has a right to expect or has explained orally or in writing to an employee or evincing carelessness or negligence of such degree as to manifest equal disregard.

"Discharge for misconduct connected with the work" as used in this section is defined to include but not be limited to any one or more of the following acts or conduct:

- a. ~~separation~~-Separation initiated by an employer for violating the employer's written alcohol or illegal drug ~~policy; reporting policy.~~
- b. Reporting to work significantly impaired by alcohol or illegal ~~drugs;~~ ~~consuming drugs.~~
- c. Consuming alcohol or illegal drugs on employer's ~~premises;~~ ~~conviction~~-premises.
- d. Conviction by a court of competent jurisdiction for manufacturing, selling, or distribution of a controlled substance punishable under

1 G.S. 90-95(a)(1) or G.S. 90-95(a)(2) while in the employ of said
2 employer; ~~being~~ employer.

3 e. Being terminated or suspended from employment after arrest or
4 conviction for an offense involving violence, sex crimes, or illegal
5 ~~drugs; any drugs~~ if the offense is related to or connected with an
6 employee's work for an employer or is in violation of a reasonable
7 work rule or policy.

8 f. Any physical violence whatsoever related to an employee's work for
9 an employer, including, but not limited to, physical violence directed
10 at supervisors, subordinates, coworkers, vendors, customers, or the
11 ~~general public; inappropriate~~ public.

12 g. Inappropriate comments or behavior towards supervisors,
13 subordinates, coworkers, vendors, customers, or to the general public
14 relating to any federally protected characteristic which creates a
15 hostile work ~~environment; theft~~ environment.

16 h. Theft in connection with the ~~employment; forging~~ employment.

17 i. Forging or falsifying any document or data related to employment,
18 including a previously submitted application for ~~employment;~~
19 ~~violation~~ employment.

20 j. Violation of an employer's written absenteeism ~~policy;~~
21 ~~refusing~~ policy.

22 k. Refusing to perform reasonably assigned work ~~tasks; and the failure~~
23 ~~to adequately perform any other employment duties as evidenced by~~
24 ~~tasks.~~

25 l. Intentional acts or omissions evincing disregard of the employer's
26 interest or standards of behavior that the employer has a right to
27 expect or has explained orally or in writing to the employee or
28 evincing careless or negligence of such degree as to manifest equal
29 disregard. For purposes of this sub-subdivision, evidence that an
30 employee has received no fewer than three written reprimands
31 received in the 12 months that immediately preceding precedes the
32 employee's termination. termination is prima facie evidence of
33 misconduct connected with the work. This

34 The phrase "discharge for misconduct connected with the work" does not
35 include the discharge or an employer-initiated separation of a severely
36 disabled veteran, as defined in G.S. 96-8, for any act or omission of the
37 veteran that the Division determines are attributed to a disability incurred or
38 aggravated in the line of duty during active military service, or to the
39 veteran's absence from work to obtain care and treatment of a disability
40 incurred or aggravated in the line of duty during active military service."

41 **SECTION 2.(c)** G.S. 96-15(b)(2) reads as rewritten:

42 "(2) Adjudication. – When a protest is made by the claimant to the initial or
43 monetary determination, or a question or issue is raised or presented as to the
44 eligibility of a claimant under G.S. 96-13, or whether any disqualification
45 should be imposed under G.S. 96-14, or benefits denied or adjusted pursuant
46 to G.S. 96-18, the matter shall be referred to an adjudicator. The adjudicator
47 may consider any matter, document or statement deemed to be pertinent to
48 the issues, including telephone conversations, and after such consideration
49 shall render a conclusion as to the claimant's benefit entitlements. The
50 adjudicator shall notify the claimant and all other interested parties of the
51 conclusion reached. The conclusion of the adjudicator shall be deemed the

1 final decision of the Division unless within 30 days after the date of
2 notification or mailing of the conclusion, whichever is earlier, a written
3 appeal is filed pursuant to rules adopted by the Division. The Division shall
4 be deemed an interested party for such purposes and may remove to itself or
5 transfer to an appeals referee the proceedings involving any claim pending
6 before an adjudicator.

7 Provided, any interested employer shall be allowed ~~30~~10 days from the
8 ~~earlier of mailing or~~ delivery of the notice of the filing of a claim against the
9 employer's account to protest the claim and have the claim referred to an
10 adjudicator for a decision on the question or issue raised. A copy of the
11 notice of the filing shall be sent contemporaneously to the employer by
12 telefacsimile transmission if a fax number is on file. Provided further, no
13 question or issue may be raised or presented by the Division as to the
14 eligibility of a claimant under G.S. 96-13, or whether any disqualification
15 should be imposed under G.S. 96-14, after 45 days from the first day of the
16 first week after the question or issue occurs with respect to which week an
17 individual filed a claim for benefits. None of the provisions of this
18 subsection shall have the force and effect nor shall the same be construed or
19 interested as repealing any other provisions of G.S. 96-18.

20 An employer shall receive written notice of the employer's appeal rights
21 and any forms that are required to allow the employer to protest the claim.
22 The forms shall include a section referencing the appropriate rules pertaining
23 to appeals and the instructions on how to appeal."

24 **SECTION 2.(d)** G.S. 96-15(f) reads as rewritten:

25 "(f) Procedure. – The manner in which disputed claims shall be presented, the reports
26 thereon required from the claimant and from employers, and the conduct of hearings and
27 appeals shall be in accordance with rules adopted by the Division for determining the rights of
28 the parties, whether or not such ~~regulations~~ rules conform to common-law or statutory rules of
29 evidence and other technical rules of procedure. All testimony at any hearing before an appeals
30 referee upon a disputed claim shall be recorded unless the ~~the~~ parties have waived the
31 evidentiary hearing and entered into a stipulation resolving the issues pending before the
32 appeals referee, hearing officer, or other employee assigned to make the ~~decision,~~ decision. The
33 appeals referee, hearing officer, or other employee assigned to make the decision may either
34 accept or reject the stipulation. If the stipulation is rejected, the parties may appeal the decision
35 to the Board of Review. ~~but~~ If the testimony is recorded, it need not be transcribed unless the
36 disputed claim is further appealed and, one or more of the parties objects, under such rules as
37 the Division may adopt, to being provided a copy of the tape recording of the hearing. Any
38 other provisions of this Chapter notwithstanding, any individual receiving the transcript shall
39 pay to the Division such reasonable fee for the transcript as the Division may by regulation
40 provide. The fee so prescribed by the Division for a party shall not exceed the lesser of
41 sixty-five cents (65¢) per page or sixty-five dollars (\$65.00) per transcript. The Division may
42 by regulation provide for the fee to be waived in such circumstances as it in its sole discretion
43 deems appropriate but in the case of an appeal in forma pauperis supported by such proofs as
44 are required in G.S. 1-110, the Division shall waive the fee."

45 **SECTION 2.(e)** This section becomes effective November 1, 2012.

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47 **PART III. COMPLIANCE WITH THE TRADE ADJUSTMENT ASSISTANCE**
48 **EXTENSION ACT OF 2011: NEW HIRE DIRECTORY**

49 **SECTION 3.(a)** G.S. 110-129.2(c) reads as rewritten:

50 "(c) Report Contents. – Each report required by this section shall contain the name,
51 address, ~~and~~ social security number of the newly hired employee, the date services for

1 remuneration were first performed by the newly hired employee, and the name and address of
2 the employer and the employer's identifying number assigned under section 6109 of the
3 Internal Revenue Code of 1986 and the employer's State employer identification number.
4 Reports shall be made on the W-4 form or, at the option of the employer, an equivalent form,
5 and may be transmitted magnetically, electronically, or by first-class mail."

6 **SECTION 3.(b)** G.S. 110-129.2(j) is amended by adding a new subdivision to

7 read:

8 "(j) Definitions. – As used in this section, unless the context clearly requires otherwise,
9 the term:

10 ...

11 (5) "Newly hired employee" means (i) an employee who has not previously
12 been employed by the employer and (ii) an employee who was previously
13 employed by the employer but has been separated from such prior
14 employment for at least 60 consecutive days."

15 **SECTION 3.(b)** This section becomes effective July 1, 2012.

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17 **PART IV. EFFECTIVE DATE**

18 **SECTION 4.** Except as otherwise provided, this act is effective when it becomes
19 law.