

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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SENATE BILL 828*
Finance Committee Substitute Adopted 6/6/12
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Short Title: Unemployment Insurance Changes.

(Public)

Sponsors:

Referred to:

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:

4
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 of
13 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 No. 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 No. 93 or Executive
31 Order No. 113, or any other such order, constitute a "State law" within the meaning of the 1970
32 Act or the North Carolina Constitution. Section 1 of Article II of the North Carolina
33 Constitution provides that "The legislative power of the State shall be vested in the General
34 Assembly." Further, Section 6 of Article I of the North Carolina Constitution provides that the
35 legislative and executive powers are "...separate and distinct...."



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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

1 Act of 2010 (P.L. 111-312) as it existed on December 17,
 2 2010, and is applicable to compensation for weeks of
 3 unemployment beginning after December 17, 2010, and
 4 ending on or before ~~December 31, 2011,~~ December 31, 2012,
 5 provided that:

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

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

21
 22 **PART II. RESOLUTION OF OUTSTANDING ISSUES FROM S.L. 2011-401**

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

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

27 **"§ 96-14. Disqualification for benefits.**

28 An individual shall be disqualified for benefits:

- 29 ...
 30 (2) For the duration of the individual's unemployment beginning with the first
 31 day of the first week after the disqualifying act occurs with respect to which
 32 week an individual files a claim for benefits if it is determined by the
 33 Division that such individual is, at the time such claim is filed, unemployed
 34 because he or she was discharged for misconduct connected with the work.
 35 Misconduct connected with the work is defined as intentional acts or
 36 omissions evincing disregard of an employer's interest or standards of
 37 behavior which the employer has a right to expect or has explained orally or
 38 in writing to an employee or evincing carelessness or negligence of such
 39 degree as to manifest equal disregard. Receipt by the employee of no fewer
 40 than three written reprimands from the employer in the 12 months that
 41 immediately precedes the employee's termination is prima facie evidence of
 42 misconduct connected with the work. Examples of misconduct connected
 43 with the work include the following:

44 ~~"Discharge for misconduct with the work" as used in this section is~~
 45 ~~defined to include but not be limited to~~

- 46 a. separation—Separation initiated by an employer for violating the
 47 employer's written alcohol or illegal drug ~~policy; reporting policy.~~
 48 b. Reporting to work significantly impaired by alcohol or illegal ~~drugs;~~
 49 consuming drugs.
 50 c. Consuming alcohol or illegal drugs on employer's ~~premises;~~
 51 conviction premises.

- 1 d. ~~Conviction~~ by a court of competent jurisdiction for manufacturing,
2 selling, or distribution of a controlled substance punishable under
3 G.S. 90-95(a)(1) or G.S. 90-95(a)(2) ~~while in the employ of said~~
4 ~~employer; being~~if the offense is related to or connected with an
5 ~~employee's work for an employer or is in violation of a reasonable~~
6 ~~work rule or policy.~~
- 7 e. ~~Being~~ terminated or suspended from employment after arrest or
8 conviction for an offense involving violence, sex crimes, or illegal
9 ~~drugs; any drugs~~ if the offense is related to or connected with an
10 ~~employee's work for an employer or is in violation of a reasonable~~
11 ~~work rule or policy.~~
- 12 f. ~~Any physical violence whatsoever related to an employee's work for~~
13 ~~an employer, including, but not limited to, physical violence directed~~
14 ~~at supervisors, subordinates, coworkers, vendors, customers, or the~~
15 ~~general public; inappropriate~~public.
- 16 g. ~~Inappropriate~~ comments or behavior towards supervisors,
17 subordinates, coworkers, vendors, customers, or to the general public
18 relating to any federally protected characteristic which creates a
19 ~~hostile work environment; theft~~environment.
- 20 h. ~~Theft in connection with the employment; forging~~employment.
- 21 i. ~~Forging~~ or falsifying any document or data related to employment,
22 including a previously submitted application for ~~employment;~~
23 ~~violation~~employment.
- 24 j. ~~Violation~~ of an employer's written absenteeism ~~policy;~~
25 ~~refusing~~policy.
- 26 k. ~~Refusing~~ to perform reasonably assigned work ~~tasks; tasks. and the~~
27 ~~failure to adequately perform any other employment duties as~~
28 ~~evidenced by no fewer than three written reprimands received in the~~
29 ~~12 months immediately preceding the employee's termination. This~~
30 The phrase "discharge for misconduct connected with the work" does not
31 include the discharge or an employer-initiated separation of a severely
32 disabled veteran, as defined in G.S. 96-8, for any act or omission of the
33 veteran that the Division determines are attributed to a disability incurred or
34 aggravated in the line of duty during active military service, or to the
35 veteran's absence from work to obtain care and treatment of a disability
36 incurred or aggravated in the line of duty during active military service."

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

- 38 "(2) Adjudication. – When a protest is made by the claimant to the initial or
39 monetary determination, or a question or issue is raised or presented as to the
40 eligibility of a claimant under G.S. 96-13, or whether any disqualification
41 should be imposed under G.S. 96-14, or benefits denied or adjusted pursuant
42 to G.S. 96-18, the matter shall be referred to an adjudicator. The adjudicator
43 may consider any matter, document or statement deemed to be pertinent to
44 the issues, including telephone conversations, and after such consideration
45 shall render a conclusion as to the claimant's benefit entitlements. The
46 adjudicator shall notify the claimant and all other interested parties of the
47 conclusion reached. The conclusion of the adjudicator shall be deemed the
48 final decision of the Division unless within 30 days after the date of
49 notification or mailing of the conclusion, whichever is earlier, a written
50 appeal is filed pursuant to rules adopted by the Division. The Division shall
51 be deemed an interested party for such purposes and may remove to itself or

1 transfer to an appeals referee the proceedings involving any claim pending
2 before an adjudicator.

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

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

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

21 "(f) Procedure. – The manner in which disputed claims shall be presented, the reports
22 thereon required from the claimant and from employers, and the conduct of hearings and
23 appeals shall be in accordance with rules adopted by the Division for determining the rights of
24 the parties, whether or not such rules conform to common-law or statutory rules of evidence
25 and other technical rules of procedure. ~~All~~

26 All testimony at any hearing before an appeals referee upon a disputed claim shall be
27 recorded unless ~~the parties have waived the evidentiary hearing and entered into a~~
28 ~~stipulation resolving the issues pending before the appeals referee, hearing officer, or other~~
29 ~~employee assigned to make the decision, recording is waived by all interested parties. If the~~
30 testimony is recorded, it but need not be transcribed unless the disputed claim is further
31 appealed and, one or more of the parties objects, under such rules as the Division may adopt, to
32 being provided a copy of the tape recording of the hearing. Any other provisions of this
33 Chapter notwithstanding, any individual receiving the transcript shall pay to the Division such
34 reasonable fee for the transcript as the Division may by regulation provide. The fee so
35 prescribed by the Division for a party shall not exceed the lesser of sixty-five cents (65¢) per
36 page or sixty-five dollars (\$65.00) per transcript. The Division may by regulation provide for
37 the fee to be waived in such circumstances as it in its sole discretion deems appropriate but in
38 the case of an appeal in forma pauperis supported by such proofs as are required in G.S. 1-110,
39 the Division shall waive the fee.

40 The parties may enter into a stipulation of the facts. If the appeals referee, hearing officer,
41 or other employee assigned to make the decision believes the stipulation provides sufficient
42 information to make a decision, then the appeals referee, hearing officer, or other employee
43 assigned to make the decision may accept the stipulation and render a decision based on the
44 stipulation. If the appeals referee, hearing officer, or other employee assigned to make the
45 decision does not believe the stipulation provides sufficient information to make a decision,
46 then the appeals referee, hearing officer, or other employee assigned to make the decision must
47 reject the stipulation. The decision to accept or reject a stipulation must occur in a recorded
48 hearing."

49 **SECTION 2.(e)** Subsections (b) through (d) of this section become effective
50 November 1, 2012. The remainder of this section is effective when it becomes law.

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

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

4 "(c) Report Contents. – Each report required by this section shall contain the name,
5 address, ~~and~~ social security number of the newly hired employee, the date services for
6 remuneration were first performed by the newly hired employee, and the name and address of
7 the employer and the employer's identifying number assigned under section 6109 of the
8 Internal Revenue Code of 1986 and the employer's State employer identification number.
9 Reports shall be made on the W-4 form or, at the option of the employer, an equivalent form,
10 and may be transmitted magnetically, electronically, or by first-class mail."

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

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

15 ...

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

20 **SECTION 3.(c)** This section becomes effective July 1, 2012.

21
22 **PART IV. EFFECTIVE DATE**

23 **SECTION 2.(e)** Subsections (b) through (d) of this section become effective
24 November 1, 2012. The remainder of this section is effective when it becomes law.