SOUTH CAROLINA
Department of Employment and Workforce

September 11, 2012

Update on Implementation of Act 247

At the last hearing before this Sub-Committee, the Senators asked the South Carolina Department of Employment and Workforce (SCDEW) for additional information concerning the department's implementation of the amendments to South Carolina Code Section 41-35-120. During two meetings with Senate staff members following the hearing, the staff members requested further information. SCDEW is pleased to provide the following in response to those questions.

- **Training**

  Throughout 2012, SCDEW has taken enormous steps in developing a training program for the entire staff at the department. This document will concentrate on the training for the fact finders and adjudicators who are the key personnel involved in making the initial determinations of eligibility and disqualification on applications for unemployment insurance benefits.

- **Fact Finding Training**

  Formal fact finding training has been conducted twice so far this year, and additional sessions are planned for every remaining month. We are preparing for the advent of "digital fact-finding" which will incorporate modern technology in the form of "intelligent" question trees where depending on how the first question is answered, the software will direct the respondent to the next question. This will also allow for a more in-depth information exchange because after the respondent (either the claimant or employer) enters their answers, the fact-finder will be able to follow-up and ask more pointed questions to get to the heart of the matter – the reason for the separation from employment. The digital fact finding project is expected to go live in the next few months.

  In the meantime, SCDEW is in the process of developing a continuous training program to ensure the acquisition and retention of both the critical skills and also the programmatic knowledge by those charged with finding the facts relevant to making an informed decision on the separation issues. Below is a list of some of the resources and methods SCDEW is using as part of its training program. By no means is this list meant

to be exhaustive; rather, it is merely the start to a robust training regimen that will grow and be refined with time.

- United States Department of Labor Employment and Training Administration's Handbook No. 301 – UI PERFORMS: Benefits Timeliness and Quality (BTQ) Nonmonetary Determinations Quality Review (frequent, if not daily, review)

- Nonmonetary Determinations Training, an on-line training series for adjudicators and fact finders (created by the Office of Unemployment Insurance (OUI), a division of the United States Department of Labor Employment and Training Administration) (seven module series, 20 hours, annual training)

- Fact Finding webinars created by the Policy & Procedure Unit of SCDEW (as needed)

- Fact Finding class-room training (quarterly)

- Hands-on scoring exercises (monthly)

- SCDEW on-line training materials and quizzes (Quizzes under development; will be monthly and as needed)

- SCDEW UI Certification (Specific Fact Finding certification under development, but all fact finders taking basic certification exam this month; will be annual)

• Adjudication Training

Some of the training materials and methodology used with the fact finders is also incorporated into the adjudicators' training; however, given the added responsibility of making the actual determination, the adjudicators participate in more in-depth review of the laws and other guidance on eligibility and disqualification. Specifically for the training to date on the Act 247 amendments, the adjudicators have spent a substantial number of hours reviewing the new law itself and then practicing the application of the changes to both hypothetical examples and on claims previously decided under the prior version of §41-35-120. The adjudicators have also attended learning sessions with senior management, general counsel and appellate personnel to analyze the law as written and compare the outcomes under the new law versus the old law.

Training is an on-going initiative, and we are constantly searching for new

materials and methods to assist the adjudicators in learning as much as they can about properly analyzing the facts presented according to the prevailing law. The following is a schedule of topics and timing of the training plan to date, but as with the fact finding training protocol, the training program is a work in progress.

- National Judicial College – Adjudicator Training materials (quarterly & as needed)
- United States Department of Labor Employment and Training Administration's Handbook No. 401- Unemployment Insurance Reports Handbook (frequent review)
- United States Department of Labor Employment and Training Administration's Handbook No. 301 – UI PERFORMS: Benefits Timeliness and Quality (BTQ) Nonmonetary Determinations Quality Review (frequent review)
- Nonmonetary Determinations Training, an on-line training series for adjudicators and fact finders (created by the Office of Unemployment Insurance (OUI), a division of the United States Department of Labor Employment and Training Administration) (seven module series, 30 hours, annual training)
- Review of statutory & case law and agency policy (frequent review)
- Coaching sessions with supervisors on weighing evidence and application of law to facts (weekly)
- Individual coaching sessions (as needed)
- Random review of 100 claims by supervisors (weekly)
- SCDEW on-line training materials and quizzes (Quizzes under development; will be monthly and as needed)
- BTQ review of non-monetary decisions – review of claims selected and the scores assigned (quarterly)
- SCDEW UI Certification (Specific Adjudicator certification under development; will be annual)

• Definition of "cause" in §41-35-120(2)(b)

Members of the committee and Senate staff have inquired about SCDEW's interpretation of the term "cause" found in §41-35-120(2)(b) because it is not defined in the statute, and appears to be an anomaly in most of the unemployment insurance jurisprudence. The term "cause" is also not defined in federal statute or guidance. Nonetheless, based on general principles of fault and disqualification, SCDEW interprets "cause" as an occurrence based in fault that requires some amount of disqualification, but an amount less than misconduct which requires a total disqualification.

In addition to general unemployment insurance principles, SCDEW relies on persuasive, but non-binding authority from our sister state of North Carolina. North Carolina uses a term called "substantial fault," which they define "to include those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job. …" N.C. Gen. Stat. Ann. § 96-14 (West) Thus, relying on the North Carolina definition of substantial fault, SCDEW is adding the following definition of "cause" to its policy concerning how to apply §41-35-120(2)(b):

- **Cause other than misconduct** may be defined as:
  - Conduct that demonstrates a level of "fault" of the employee but does not rise to the level of deliberate disregard for the standards of behavior which the employer has the right to expect of his employee.
  - "Fault" includes those acts or omissions of employees over which an employee exercised reasonable control and which violate reasonable requirements of the job.
- To establish **discharge for cause other than misconduct**, the employer must show that the conduct causing the discharge was within the claimant's control.

- **Definition of "inefficiency, inability or incapacity" in §41-35-120(2)(b)**

SCDEW has also been asked for its interpretation of the last sentence of sub-section (2)(b) which states: "Discharge resulting from substandard performance due to inefficiency, inability, or incapacity shall not serve as a basis for disqualification under either subitem (a) or (b) of this item." Unlike "cause," both the concept of "substandard performance" and the specific terms "inefficiency, inability or incapacity" have been part of unemployment insurance jurisprudence for decades. There is federal guidance and case law from across the country explaining the general principle of poor performance as a result of a former employee simply not being able to do the work to the level of satisfaction required by the employer, and in those instances, the former employee is not disqualified from receiving benefits..

In the ETA Handbook No. 301, USDOL makes the distinction between behavior that is classified as misconduct versus behavior that is merely "simple negligence" by making this contrast:

"Simple negligence with no harmful intent is generally not misconduct, nor is inefficiency, unsatisfactory conduct beyond the claimant's control, or good-faith errors of judgment or discretion." ETA Handbook No. 301, Guide Sheet 2 – Discharge.

Likewise, in the ETA Handbook No. 401: "Simple negligence with no harmful intent, inefficiency, unsatisfactory conduct beyond the claimant's control, or good-faith errors of judgment or discretion are not misconduct." ETA Handbook No. 401, ETA 207 – Nonmonetary Determination Activities.

Beyond the federal guidance, there is also case law supporting the concept that claimants who have lost their jobs because of a deficiency in work performance as a result of circumstances beyond their control, should not be disqualified from receiving benefits. In North Carolina, the "substantial fault" definition continues that it "shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee, (2) inadvertent mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment. In Pennsylvania, "mere incompetence, inexperience or inability of an employee, while it may justify a discharge will not constitute willful misconduct so as to render an employee

ineligible for unemployment compensation." *Sacks v. Unemployment Compensation Board of Review*, 74 Pa. Commonwealth 31, 34, 459 A.2d 461, 463 (1983).

"To satisfy the element of control in cases involving a discharge due to unsatisfactory work performance, it must be shown the claimant had the ability to perform the job duties in a satisfactory manner." Utah Admin. Code R994–405–202(3)(b). "[I]f the claimant made a good faith effort to meet the job requirements but failed to do so due to a lack of skill or ability and a discharge results, just cause is not established." *Id.* But "continued inefficiency, repeated carelessness or evidence of a lack of care expected of a reasonable person in a similar circumstance may satisfy the element of control if the claimant had the ability to perform satisfactorily."

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- **Failed background checks**

Senate staff asked if the fact in and of itself that a claimant had failed a background check was sufficient to find cause and thus disqualify the claimant for 16 – 19 weeks. SCDEW has not found authority that addresses this question directly, but SCDEW has confirmed with USDOL that the general principle of a fault-based system of disqualification would not require a default position that the sheer existence of a failed background check renders a claimant disqualified.

There are circumstances where a claimant could be disqualified for failing a background test, such as where a claimant lied in the application process about having anything negative on a background check. On the other hand, in a situation where a claimant was never asked about a background check and had been working for a business with no problems in a temporary capacity, if a background check was later performed and it showed a negative event from several years prior not connected with the current employment, then that claimant would not be disqualified.

- **Failure to meet sales quota**

Senate staff also asked if SCDEW thought that the inefficiency, inability or incapacity exception to "cause," would apply to a failure to meet sales quota. The question arises from the fact that Act 247 removed a clause from the substandard performance exception that referred to a "failure to meet production requirements." SCDEW interprets the existing law to mean that even though that particular reference is no longer in the statute, if the claimant's failure to meet a sales quota is a result of inefficiency, inability, or incapacity, then the claimant will not be automatically barred from benefits. SCDEW understands that the production language was "left-over" from an earlier time in the history of the statute where factory work was a predominant career path. The core of the substandard performance exception that endures despite that removal is the description of factors that limit a person's ability to perform the work as required by the employer. Said another way, if the poor performance was not the "fault" of the claimant, then that performance alone will not disqualify the claimant from receiving benefits. The terms "inefficiency, inability, or incapacity" are designed to acknowledge that there are situations in which people could have performed poorly through no fault of their own.

- **Attempts to contact employers**

Senate staff questioned whether SCDEW should attempt to contact an employer after a determination had already been made in those situations where it has not been documented that the fact finder had made the required number of attempts to contact the employer. The fact finder is required by federal guidance to make at least one reasonable attempt to reach the employer to respond to the claim. However, in an effort to reach out to the business community and solicit more involvement in the process from businesses, SCDEW added two more reasonable attempts to contact the employer if no response is received within the time period prescribed by state law (10 days). Senate staff inquired whether SCDEW thought it should re-open the determination if there had been fewer than three attempts. In consultation with USDOL, SCDEW has concluded that it is not required or recommended to re-open a determination because a fact finder did not document all three attempts. The employer will receive another notice of the claim when the determination has been issued, and if they disagree with it, they have the right to

appeal that determination.

- **"Right to fire" vs. "Right to receive UI benefits"**

Senate staff was interested in the distinction between an employer's "right" to fire someone (in an "at will" environment) versus a claimant's "right" to receive unemployment compensation as a result of losing his/her job. In the fourth training module for nonmonetary determinations, OUI provides the following insight: "In general, an employer can discharge an employee for any reason; however, for UI purposes, only a discharge from a job for reasons of misconduct in connection with the work is reason for disqualification." Of course, South Carolina law provides both for total disqualification and partial disqualification; but the principle still applies. Stated in a more broad way, case law holds "However, not every legitimate cause for discharge justifies a denial of benefits. A just cause discharge must include some fault on the part of the claimant."

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