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S 02/06/2013 Referred to Committee

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**DEPARTMENT OF EMPLOYMENT AND WORKFORCE**

CHAPTER 47

Statutory Authority: 1976 Code Section 41-29-110

47-100. Cause Other Than Misconduct

47-101. Substandard Performance Due to Inefficiency, Inability, or Incapacity

47-103. Waiver of Non-Fraudulent or No-Fault Overpayments

**Synopsis:**

The South Carolina Department of Employment and Workforce proposes to add regulations in Article 4. Unemployment Insurance. Regulation 47-100 and 47-101 to is to clarify legislative changes made by the General Assembly during the 2012 session. Regulation 47-103 is to provide guidance for waivers of non-fraudulent or no fault overpayments under South Carolina Code Section 41-41-40(b)(2).

47-100. Cause Other Than Misconduct. This regulation is being added to explain “cause other than misconduct” for the purposes of South Carolina Code Annotated Section 41-35-120(2)(b).

47-101. Substandard Performance Due to Inefficiency, Inability, or Incapacity. This regulation is being added to explain “substandard performance due to inefficiency, inability, or incapacity” for the purposes of South Carolina Code Annotated Section 41-35-120(2)(b)

47-103. Waiver of Non-Fraudulent or No-Fault Overpayments. This regulation is being added to outline the factors used when the Department determines whether to waive a non-fraudulent/no-fault overpayment under South Carolina Code Annotated Section 41-41-40(B)(2).

The Notice of Drafting regarding these regulations was published on October 26, 2012 in the *State Register*.

**Instructions:**

Print the regulations in accordance with directions given below to reflect new regulations.

Regulation 47-100. Cause Other Than Misconduct.

Regulation 47-101. Substandard Performance Due to Inefficiency, Inability, or Incapacity.

Regulation 47-103. Waiver of Non-Fraudulent or No-Fault Overpayments.

Print as shown below:

**Text:**

ARTICLE 4

UNEMPLOYMENT INSURANCE

47-100. Cause Other Than Misconduct.

 Under South Carolina Code Annotated Section 41-35-120(2)(b), if a claimant is discharged for cause other than misconduct, the claimant is partially disqualified from unemployment insurance benefits. “Cause other than misconduct” is 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 or her employee. Fault includes those acts or omissions of employees over which an employee exercised reasonable control and which violate reasonable requirements of the job.

47-101. Substandard Performance Due to Inefficiency, Inability, or Incapacity.

 Under South Carolina Code Section 41-35-120(2), a discharge resulting from substandard performance due to inefficiency, inability, or incapacity shall not serve as a basis for disqualification of unemployment insurance benefits. “Substandard performance due to inefficiency, inability or incapacity” describes a claimant’s failure to perform to the satisfaction of the employer where such failure was beyond the claimant’s control, had no harmful intent or was a good faith error in judgment or discretion.

47-103. Waiver of Non-Fraudulent or No-Fault Overpayment.

 Pursuant to South Carolina Code Annotated Section 41-41-40(B)(2), the Department may waive repayment of overpayments if the overpayment was not due to fraud, misrepresentation, or willful disclosure, was received without fault on the part of the claimant, and recovery of the overpayment would be contrary to equity and good conscience.

 1. WAIVER

 a. When an overpayment determination is issued, a claimant may request a waiver.

 b. A request for waiver by an individual shall be in writing and set forth the grounds for waiver.

 c. The Department’s denial of a request for waiver of the repayment of an overpayment is an appealable decision.

 d. When a waiver of an overpayment has become final, it shall not be re-determined in the absence of fraud, misrepresentation, or willful nondisclosure by the claimant relating to the waiver.

 2. FAULT

 In determining whether fault exists, the following factors must be considered:

 a. whether a statement or representation was made by the individual in connection with a claim for benefits that resulted in the overpayment, and whether the individual knew or should have known that the statement or representation was inaccurate;

 b. whether the individual failed or caused another to fail to disclose a material fact, in connection with a claim for benefits that resulted in the overpayment, and whether the individual knew or should have known that the fact was material; and

 c. whether the individual knew or could have been expected to know that the individual was not entitled to the benefit payment.

 In the event of an affirmative finding on any of the FAULT factors outlined above, the overpayment shall not be waived and further determination of any factors will not be necessary.

 3. EQUITY AND GOOD CONSCIENCE

 In determining whether recovery of an overpayment is against equity and good conscience for the purpose of deciding whether the overpayment of benefits shall be waived, the Department shall consider the following non-exclusive factors:

 a. The extent to which recovery of the overpayment would create an extraordinary financial hardship on the claimant. Extraordinary financial hardship as used herein means the claimant would be unable to provide himself or his immediate family with minimal necessities (e.g., food, shelter, basic utilities) as a result of the Department recovering the overpayment;

 b. The nature and cause of the overpayment, including whether Department error contributed to causing the overpayment;

 c. Whether the claimant had notice that if a decision to pay benefits was reversed, an overpayment would be created;

 d. Whether the claimant detrimentally changed his/her position in reliance upon receipt of benefits; and

 e. Any other relevant factor that relates to fairness and good conscience.

**Fiscal Impact Statement:**

There will be no increased costs to the State or its political subdivisions.

**Statement of Rationale:**

South Carolina Code Section 41-29-110 provides for the Department to promulgate regulations as necessary to effectuate the purposes of Title 41, and these proposed Regulations 47-100 and 47-101 are being made to clarify statutory law. Regulation 47-103 is to provide guidance on how the Department determines waivers of non-fraudulent or no-fault overpayments where recovery of the overpayment would be contrary to equity and good conscience.