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Indicates New Matter

COMMITTEE REPORT

March 20, 2013

**H. 3165**

Introduced by Reps. Tallon, Henderson, G.R. Smith, Long, V.S. Moss, Atwater and Taylor

S. Printed 3/20/13--H.

Read the first time January 8, 2013.

**THE COMMITTEE ON JUDICIARY**

To whom was referred a Bill (H. 3165) to amend Section 41‑35‑120, as amended, Code of Laws of South Carolina, 1976, relating to disqualifications from unemployment benefits, so as to revise the method, etc., respectfully

**REPORT:**

That they have duly and carefully considered the same and recommend that the same do pass with amendment:

Amend the bill, as and if amended, Section 41‑35‑120, as contained in SECTION 1, by deleting item (9) in its entirety and inserting:

/ (9) An employer is not liable for any acts or omissions arising out of disclosure to the department of a pre‑employment drug test that is offered and refused or failed by a potential employee, provided the employer complies with the requirements of this section and any applicable law. An employer may, but is not required to, disclose to the department when a pre‑employment drug test is offered and refused or failed by a potential employee. /

Amend the bill further, Section 41‑35‑120, as contained in SECTION 1, by inserting an appropriately numbered item at the end to read:

/ ( ) Records received by the department pursuant to this section must not be used for any purpose other than determining unemployment benefits. The department shall destroy any records of a failed or refused pre‑employment drug test received pursuant to this section pertaining to a person not currently receiving unemployment benefits from the department.” /

Renumber sections to conform.

Amend title to conform.

F. GREGORY DELLENEY, JR. for Committee.

**A** **BILL**

TO AMEND SECTION 41‑35‑120, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO DISQUALIFICATIONS FROM UNEMPLOYMENT BENEFITS, SO AS TO REVISE THE METHOD OF DETERMINING THE BENEFITS OF A PERSON DISCHARGED FROM EMPLOYMENT FOR ILLEGAL DRUG USE, GROSS MISCONDUCT, AND FAILURE TO ACCEPT WORK, TO DEFINE CERTAIN TERMS, TO SPECIFY CRITERIA FOR A LABORATORY QUALIFIED TO PERFORM A TEST FOR ILLEGAL DRUG USE BY A PERSON SEEKING OR RECEIVING UNEMPLOYMENT BENEFITS, TO LIMIT THE LIABILITY OF AN EMPLOYER FOR ACTS OR OMISSIONS IN THE DISCLOSURE OF A DRUG TEST PERFORMED UNDER THIS SECTION, AND TO PROVIDE THE MISUSE OF BIOLOGICAL MATERIAL OBTAINED IN THE COURSE OF THIS DRUG TESTING IS MISDEMEANOR SUBJECT TO CERTAIN MONETARY PENALTIES.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 41‑35‑120 of the 1976 Code, as last amended by Act 247 of 2012, is further amended to read:

“Section 41–35–120. An insured worker is ineligible for benefits for:

(1) Leaving work voluntarily. If the department finds he left voluntarily, without good cause, his most recent work prior to filing a request for determination of insured status or a request for initiation of a claim series within an established benefit year, with ineligibility beginning with the effective date of the request and continuing until he has secured employment and shows to the satisfaction of the department that he has performed services in employment as defined by Chapters 27 through 41 of this title and earned wages for those services equal to at least eight times the weekly benefit amount of his claim.

(2)(a) Discharge for misconduct connected with the employment. If the department finds that he has been discharged for misconduct connected with his most recent work prior to filing a request for determination of insured status or a request for initiation of a claim series within an established benefit year, with ineligibility beginning with the effective date of the request, and continuing for the next twenty weeks, in addition to the waiting period, with a corresponding and mandatory reduction of the insured worker’s benefits to be calculated by multiplying his weekly benefit amount by twenty. For the purposes of this item, ‘misconduct’ is limited to conduct evincing such ~~wilfull~~ wilful and wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in the carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of the employer’s interest or of the employee’s duties and obligations to his employer. No finding of misconduct may be made for discharge resulting from an extreme hardship, emergency, sickness, or other extraordinary circumstance.

(b) If the department finds that he has been discharged for cause, other than misconduct as defined in item (2)(a), connected with his most recent work prior to filing a request for determination of insured status or a request for initiation of a claim series within an established benefit year, then the department must find him partially ineligible. The ineligibility must begin with the effective date of the request, and continuing not less than five nor more than the next nineteen weeks, in addition to the waiting period. A corresponding and mandatory reduction of the insured worker’s benefits, to be calculated by multiplying his weekly benefit amount by the number of weeks of his disqualification, must be made. The ineligibility period must be determined by the department in each case according to the seriousness of the cause for discharge. 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.

(3)(a) Discharge for illegal drug use, and is ineligible ~~for~~ from benefits ~~beginning with the effective date of the request and continuing until he has secured employment and shows to the satisfaction of the department that he has performed services in employment as defined by Chapters 27 through 41 of this title and earned wages for those services equal to at least eight times the weekly benefit amount of his claim~~ for twenty weeks with a corresponding and mandatory reduction of the insured worker’s benefits to be calculated by multiplying his weekly benefit amount by the number of weeks of his disqualification if the:

(i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and

(ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or

(iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, provided:

(A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and

(B) the test was performed by a laboratory certified by the ~~National Institute on Drug Abuse~~ United States Department of Health and Human Services (USDHHS)/Substance Abuse Mental Health Services Administration (SAMHSA), the College of American Pathologists or the State Law Enforcement Division; and

(C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the ~~National Institute on Drug Abuse~~ USDHHS/SAMHSA;

(iv) for purposes of this item, ‘unlawfully’ means without a prescription.

(b) If an insured worker makes an admission pursuant to the employer’s policy, which provides that voluntary admissions made before the employer’s request to the employee to submit to testing may protect an employee from immediate termination, then the admission is inadmissible for purposes of this section as long as the:

(i) employer has communicated a written policy, which provides protection from immediate termination for employees who voluntarily admit prohibited drug use before the employer’s request to submit to a test; and

(ii) employee makes the admission specifically pursuant to the employer’s policy.

(c) Information, interviews, reports, and drug‑test results, written or otherwise, received by an employer through a drug‑testing program may be used or received in evidence in proceedings conducted pursuant to the provisions of this title for the purposes of determining eligibility for unemployment compensation, including administrative or judicial appeal.

(4) Discharge for gross misconduct, and is ~~ineligible for~~ disqualified from benefits ~~beginning with the effective date of the request and continuing until he has secured employment and shows to the satisfaction of the department that he has performed services in employment as defined by Chapters 27 through 41 of this title and earned wages for those services equal to at least eight times the weekly benefit amount of his claim~~ for twenty weeks with a corresponding and mandatory reduction of the insured worker’s benefits to be calculated by multiplying his weekly benefit amount by the number of weeks of his disqualification if he is discharged due to:

(~~i~~a) wilful or reckless employee damage to employer property that results in damage of more than fifty dollars;

(~~ii~~b) employee consumption of alcohol or being under the influence of alcohol on employer property in violation of a written company policy restricting or prohibiting consumption of alcohol;

(~~iii~~c) employee theft of items valued at more than fifty dollars;

(~~iv~~d) failure to comply with applicable state or federal drug and alcohol testing and use regulations including, but not limited to, 49 C.F.R. part 40 and part 382 of the federal motor carrier safety regulations, while on the job or on duty, and regulations applicable for employees performing transportation and other safety sensitive job functions as defined by the federal government;

(~~v~~e) employee committing ~~criminal~~ assault or battery of another employee or a customer;

(~~vi~~f) employee committing ~~criminal~~ abuse of patient or child in his professional care;

(~~vii~~g) employee insubordination, which is defined as wilful failure to comply with a lawful, reasonable order of a supervisor directly related to the employee’s employment ~~as described in an applicable written job description~~; or

(~~viii~~h) employee wilful neglect of duty directly related to the employee’s employment ~~as described in an applicable written job description~~.

(5) Failure to accept work.

(a) If the department finds ~~he has failed, without good cause~~:

(i)(A) he has failed, without good cause, either to apply for available suitable work, when so directed by the employment office or the department;

(B) he has failed, without good cause, to accept available suitable work when offered to him by the employment office or an employer; ~~or~~

(C) he has failed, without good cause, to return to his customary self‑employment, if any, when so directed by the department, the ineligibility begins with the week the failure occurred and continues until he has secured employment and shows to the satisfaction of the department that he has performed services in employment as defined in Chapters 27 through 41 of this title and earned wages for services equal to at least eight times the weekly benefit amount of his claim; or

(D) he has tested positive for drugs after being given a drug test on behalf of the prospective employer as a condition of an offer of employment, or if:

(1) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or

(2) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, provided:

(a) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel;

(b) the test was performed by a laboratory certified by the USDHHS/SAMHSA, the College of American Pathologists or the State Law Enforcement Division; and

(c) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the USDHHS/SAMHSA.

(ii) For purposes of this item, ‘unlawfully’ means without a prescription.

(b) In determining whether work is suitable for an individual, the department must consider, based on a standard of reasonableness as it relates to the particular individual concerned, the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

(c) Notwithstanding another provision of Chapters 27 through 41 of this title, work is not considered suitable and benefits may not be denied under these chapters to an otherwise eligible individual for refusing to accept new work under any of the following conditions:

(i) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(ii) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; or

(iii) if, as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

(d) Notwithstanding another provision of Chapters 27 through 41 of this title, an otherwise eligible individual may not be denied a benefit for a week for failure to apply for, or refusal to accept, suitable work because he is in training with the approval of the department.

(e) Notwithstanding another provision of this chapter, an otherwise eligible individual may not be denied a benefit for a week because he is in training approved under Section 236(a)(1) of the Trade Act of 1974, nor may the individual be denied benefits by reason of leaving work to enter training, if the work left is not suitable employment, or because of the application to a week in training of provisions in this law or an applicable federal unemployment compensation law, relating to availability for work, active search for work, or refusal to accept work. For purposes of this subitem, ‘suitable employment’ means, with respect to an individual, work of a substantially equal or higher skill level than the individual’s past adversely affected employment, as defined for purposes of the Trade Act of 1974, and wages for the work at not less than eighty percent of the individual’s average weekly wage as determined for the purposes of the Trade Act of 1974.

(6) Labor dispute. For a week in which the department finds that his total or partial unemployment is directly due to a labor dispute in active progress in the factory, establishment, or other premises at which he was last employed. This paragraph does not apply if it is shown to the satisfaction of the department that he:

(a) is not participating in, financing, or directly interested in the labor dispute;

(b) does not belong to a grade or class of workers of which, immediately before he became unemployed by reason of the dispute, there were members employed at the premises at which the dispute exists, any of whom are participating in or directly interested in the dispute. If separate branches of work, which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same premises, each department for the purpose of this item is considered to be a separate factory, establishment, or other premises.

(7) Receiving benefits elsewhere. For a week in which, or a part of which, he has received or is seeking unemployment benefits under an unemployment compensation law of another state or of the United States. If the appropriate agency of the other state or of the United States finally determines that he is not entitled to unemployment benefits, this disqualification does not apply.

(8) Voluntary retirement. If the department finds that he voluntarily retired from his most recent work with the ineligibility beginning with the effective date of his claim and continuing for the duration of his unemployment and until the individual submits satisfactory evidence of having had new employment and of having earned wages of not less than eight times his weekly benefit amount as defined in Section 41‑35‑40. For the purpose of this section, ‘most recent work’ means the work from which the individual retired regardless of any work subsequent to his retirement in which he earned less than eight times his weekly benefit amount.

(9) Compliance with drug testing procedure. An employer is not liable for any acts or omissions arising out of disclosure of the test results to the Department, provided the employer complies with the requirements of this section and any applicable law. In order to comply an employer must disclose to the Department when a pre‑employment drug test is offered and refused or failed by a potential employee.

(10) It is unlawful for any biologic material obtained in the course of conducting testing required pursuant to this section to be used for testing for any other purpose than the specific testing required by this section. A violation of this item is a misdemeanor and, upon conviction, must be punished by a fine of ten thousand dollars for a first offense and fifty thousand dollars for a second or subsequent offense.”

SECTION 2. This act takes effect upon approval by the Governor.

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