

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011**

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**SENATE BILL 828*
PROPOSED COMMITTEE SUBSTITUTE S828-PCS35369-RB-80**

Short Title: Unemployment Insurance Changes.

(Public)

Sponsors:

Referred to:

May 21, 2012

A BILL TO BE ENTITLED

AN ACT TO MAKE CHANGES TO THE UNEMPLOYMENT INSURANCE LAWS.

The General Assembly of North Carolina enacts:

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

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

SECTION 1.(b) The General Assembly finds that the Governor's Executive Order No. 113, entitled "Further Extend Unemployment Benefits to Protect the Safety, Health, and Welfare of North Carolina's Long-Term Unemployed" was the purported basis for action by the then Employment Security Commission to provide for the extension of unemployment benefits to thousands of North Carolinians nearing the end of a two-month federal extension of unemployment benefits under section 201 of the Temporary Payroll Tax Cut Continuation Act of 2011. That extension, authorized through February 29, 2012, was grounded upon amendments to section 203 of the 1970 Act, as amended by section 502(b) of the Tax Relief Act of 2010.

SECTION 1.(c) The General Assembly finds that section 502(b) of the Tax Relief Act of 2010 specifies that the extension of benefits is to be made only as "the State may by law provide." Section 205(f) of the underlying 1970 Act defines "State law" as the "unemployment compensation law of the State, approved by the [U.S. Secretary of Labor]." In North Carolina, that law is Chapter 96 of the General Statutes, the "Employment Security Law." Nothing in Chapter 96 of the General Statutes, then or now, authorizes the Governor to extend unemployment benefits by Executive Order, nor does Executive Order No. 93 or Executive Order No. 113, or any other such order, constitute a "State law" within the meaning of the 1970 Act or the North Carolina Constitution. Section 1 of Article II of the North Carolina Constitution provides that "The legislative power of the State shall be vested in the General



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1 Assembly." Further, Section 6 of Article I of the North Carolina Constitution provides that the
2 legislative and executive powers are "...separate and distinct...."

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

7 **SECTION 1.(e)** Further, the General Assembly finds that it enacted Section 6.16 of
8 Session Law 2011-145 and, in so doing, validated the effects of the Governor's Executive Order
9 No. 113 with the stated intent to allow extended benefits to be paid under the Tax Relief Act of
10 2010 so long as payment of the extended benefits did not hinder the State's ability to reduce its
11 debt owed to the federal government for unemployment benefits.

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

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

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

22 "**SECTION 6.16.(d)** This section becomes effective April 16, 2011, and expires ~~January 1,~~
23 2012; January 1, 2013."

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

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

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

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

1 "3. This subdivision applies as provided under the Tax Relief,
 2 Unemployment Insurance Reauthorization, and Job Creation
 3 Act of 2010 (P.L. 111-312) as it existed on December 17,
 4 2010, and is applicable to compensation for weeks of
 5 unemployment beginning after December 17, 2010, and
 6 ending on or before ~~December 31, 2011,~~ December 31, 2012,
 7 provided that:

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

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

23
 24 **PART II. RESOLUTION OF OUTSTANDING ISSUES FROM S.L. 2011-401**

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

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

29 **"§ 96-14. Disqualification for benefits.**

30 An individual shall be disqualified for benefits:

- 31 ...
- 32 (2) For the duration of the individual's unemployment beginning with the first
 33 day of the first week after the disqualifying act occurs with respect to which
 34 week an individual files a claim for benefits if it is determined by the
 35 Division that such individual is, at the time such claim is filed, unemployed
 36 because he or she was discharged for misconduct connected with the work.
 37 Misconduct connected with the work is defined as intentional acts or
 38 omissions evincing disregard of an employer's interest or standards of
 39 behavior which the employer has a right to expect or has explained orally or
 40 in writing to an employee or evincing carelessness or negligence of such
 41 degree as to manifest equal disregard.

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

- 45 a. ~~separation~~ Separation initiated by an employer for violating the
 46 employer's written alcohol or illegal drug ~~policy;~~ reporting policy.
- 47 b. Reporting to work significantly impaired by alcohol or illegal ~~drugs;~~
 48 consuming drugs.
- 49 c. Consuming alcohol or illegal drugs on employer's ~~premises;~~
 50 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; ~~and the failure~~
27 ~~to adequately perform any other employment duties as evidenced by~~
28 tasks.
- 29 l. Intentional acts or omissions evincing disregard of the employer's
30 interest or standards of behavior that the employer has a right to
31 expect or has explained orally or in writing to the employee or
32 evincing carelessness or negligence of such degree as to manifest
33 equal disregard. For purposes of this sub-subdivision, evidence that
34 an employee has received no fewer than three written reprimands
35 ~~received~~in the 12 months that immediately preceding precedes the
36 employee's ~~termination. termination is prima facie evidence of~~
37 misconduct connected with the work. This

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

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

- 46 "(2) Adjudication. – When a protest is made by the claimant to the initial or
47 monetary determination, or a question or issue is raised or presented as to the
48 eligibility of a claimant under G.S. 96-13, or whether any disqualification
49 should be imposed under G.S. 96-14, or benefits denied or adjusted pursuant
50 to G.S. 96-18, the matter shall be referred to an adjudicator. The adjudicator
51 may consider any matter, document or statement deemed to be pertinent to

1 the issues, including telephone conversations, and after such consideration
2 shall render a conclusion as to the claimant's benefit entitlements. The
3 adjudicator shall notify the claimant and all other interested parties of the
4 conclusion reached. The conclusion of the adjudicator shall be deemed the
5 final decision of the Division unless within 30 days after the date of
6 notification or mailing of the conclusion, whichever is earlier, a written
7 appeal is filed pursuant to rules adopted by the Division. The Division shall
8 be deemed an interested party for such purposes and may remove to itself or
9 transfer to an appeals referee the proceedings involving any claim pending
10 before an adjudicator.

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

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

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

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

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

48 The parties may enter into a stipulation of the facts. If the appeals referee, hearing officer,
49 or other employee assigned to make the decision believes the stipulation provides sufficient
50 information to make a decision, then the appeals referee, hearing officer, or other employee
51 assigned to make the decision may accept the stipulation and render a decision based on the

1 stipulation. If the appeals referee, hearing officer, or other employee assigned to make the
2 decision does not believe the stipulation provides sufficient information to make a decision,
3 then the appeals referee, hearing officer, or other employee assigned to make the decision must
4 reject the stipulation. The decision to accept or reject a stipulation must occur in a recorded
5 hearing."

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

7
8 **PART III. COMPLIANCE WITH THE TRADE ADJUSTMENT ASSISTANCE**
9 **EXTENSION ACT OF 2011: NEW HIRE DIRECTORY**

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

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

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

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

22 ...

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

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

28
29 **PART IV. EFFECTIVE DATE**

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