



Testimony

Submitted on behalf of the
Pennsylvania Chamber of Business and Industry

Public Hearing on HB 1754 Amendments to the Pennsylvania Unemployment Compensation Law

Before the:

House and Senate Labor Relations Committees

Presented by:

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Chairman Miller, Chairman Gordner and members of the House and Senate Labor and Industry Committees thank you for the opportunity today to present testimony on behalf of the Pennsylvania Chamber of Business and Industry regarding HB 1754. We also wish to thank you and the General Assembly for the passage of SB 1030 this past June. We believe that bill is a much needed first step in trying to restore solvency to the PA UC Fund.

First, some background on me and my firm. My name is Geoff Moomaw and I am President of Interstate Tax Service, Inc., a registered PA corporation and member of the PA Chamber that has been representing PA employers in the field of unemployment compensation since 1943. My sister and I are the 3rd generation of our family to own and operate the firm and we currently represent almost 1,900 PA employers. My grandfather, Paul C. Moomaw was the primary sponsor of the original UC bill passed by the General Assembly in December 1936 and was in fact the Democratic chairman of House Labor Committee at that time. During the last 3 fiscal years, I have attended approximately 330 unemployment hearings myself and our firm as handled approximately 2,000.

HB 1754 addresses two main separations that are litigated every day throughout the UC system in PA - voluntary and involuntary, i.e., quits/leaves and discharges. Dealing with Section 402(b) of the PA UC Law first, please note when you review that section of HB 1754 that the word quit does not appear. It states "in which his unemployment is due to voluntarily leaving work..." This means this section of law applies to individuals who have permanently separated from their employer via an outright quit AND to individuals who take a temporary leave for reasons such as a medical condition. I would like to address the situation of an employee taking a leave of absence and being granted UC benefits first.

Let me be very clear, individuals who take a voluntary leave, even those who go on leave protected by the FMLA are granted UC benefits every day. HB 1754 would change this outcome which the business community believes is imperative to bring the UC system back to its stated purpose. Our courts have made it clear that a medical condition can be a necessitous and compelling reason to voluntarily leave one's employment. This has turned our UC system into a disability program which was not the purpose of the original Act. I would respectfully recommend that at a minimum, that HB 1754 be modified to draw a distinction between a permanent separation/quit and a temporary separation/leave. Reason being is that the employer community makes a promise to the employee that their job will be available to them upon the expiration of the agreed upon leave time and yet, in most cases they are paying for the employee's health care and/or other benefits during this leave time, all the while the UC Law is granting UC benefits also. While not addressed in HB 1754, an individual who is applying for UC benefits must have a realistic attachment to the labor market, i.e., must be able and available for work per Section 401(d)(1) of the Act. The next time it is discovered that an employee who is on leave and while on leave finds employment with another employer; I respectfully suggest it will be the first time. Individuals on a voluntary leave with intent to return to work for said employer should not be entitled to UC benefits.

As part of the Federal government's stimulus in 2008 and 2009, monies were offered to States that amended their UC laws to permit individuals who left employment due to domestic abuse/violence to collect UC benefits. Why did the Federal government hang this type of carrot in front of the States, we propose that it was because the vast majority of states did not grant benefits in such situations, i.e., the voluntary leaving was for reasons not attributable to the employment. PA was in the minority in this type of cases and benefits are often granted. The language proposed here today, would bring the UC Law back to its original intentions that for a voluntary separation to be of a necessitous and compelling reason there should at least be something work related about the reasons for voluntarily leaving one's employment.

The language of HB 1754 dealing with a voluntary separation would also have a huge impact on the solvency of the PA UC Fund. The UC Law permits an employer to be relieved of any charges to their UC account when the former employee is separated "...due to his leaving such work without good cause attributable to his employment..."¹ Thus, when an employer is relieved of those charges, the UC Fund as a whole is charged for those benefits, not the individual employer. When this occurs the UC Fund attempts to provide revenue to cover these benefits that cannot be charged to a single employer via the State Adjustment Factor (SAF). The SAF is charged to all employers at the same rate, currently 1.5% of taxable payroll (first \$8,000 earned by an employee in a calendar year). Unfortunately, the revenue generated by the SAF is not sufficient to cover the benefits for which the employer is relieved. Through the accounting processes of the Department, they keep track of these charges, as well as other charges that are not assigned to an individual employer and compare the total of these benefits to the revenue generated by the SAF. When the SAF fails to produce enough revenue to cover these unassigned benefits, the Department carries forward those benefits that exceed the revenue from year to year as they determine the SAF each year. The SAF has been 1.5% since I started my consulting work in 1986. If HB 1754 were to become law, this situation of the employer being relieved of having their account charged, yet benefits are still being paid out of the UC fund would cease in the vast majority of claims covered by Section 402(b) of the Act and thus, this drain on the UC Fund would no longer exist and a move toward solvency would be established.

Please note that HB 1754 would not be creating any new standard as the language, "not attributable to his employment" has been in the UC Law for as long as I can remember and, as a matter of fact, is contained in the vast majority of other States' respective UC laws. Relief from charge determinations are an appealable determination and as such, there is case law, regulations, etc., already in effect to determine what is and is not

¹ See Section 302(a)(1) of the UC Act as amended by the Legislature in Act 6, 2011.

“attributable to the employment.” I am certainly willing to review and to provide my opinion on any scenarios on which you desire feedback as to whether or not benefits would be payable. In addition, I’m sure legal counsel for the Department could shed some insight on what they deemed to be “attributable to the employment.”

HB 1754 also amends the UC law to provide for the involuntary separation, i.e., discharge/suspensions. Under current law, the burden of proof is on the employer to prove that the claimant’s behavior rises to the level of willful misconduct. Willful misconduct is not defined in the UC Law, but the Courts have interpreted it has as “...an act of wanton or willful disregard of the employer’s interests, a deliberate violation of the employer’s rules, a disregard of the standards of behavior which the employer can rightfully expect from his employee or negligence which manifests culpability, wrongful intent, evil design or intentional and substantial disregard for employer’s interests or employee’s duties and obligations.”² The proposed language of HB 1754 eliminates the word “willful.” This change is very significant. In addition, the proposed language also provides some examples of what should be considered misconduct.

The employer community welcomes this change due to the burden of proof being set so high by decades of case law interpreting Section 402(e). The bar is set so high that it seems impossible to have someone denied benefits under the current standard. One such example is an employee terminated via an employer’s attendance policy. Below is a common set of facts that would render a claimant entitled to benefits.

- Claimant was discharged via the employer’s no fault attendance policy.

- Claimant was aware of said policy.

² Kentucky Fried Chicken of Altoona, Inc., vs. UC Board of Review, 309 A2d 165, PA Comm. Ct., (1973).

- Policy dictates warnings be issued after the 5th, 8th and 10th absence in a rolling twelve month period.
- The employer followed said policy and issued the necessary warnings.
- Policy calls for termination after 14 absences in a rolling twelve month period.
- Claimant was absent on day X, Y and Z and was terminated.
- Claimant had good cause for his absences on (enter a single date or multiple dates).
- Claimant did not commit willful misconduct.

Why are benefits approved in the above situation; because the courts have deemed that if the claimant has a valid absence for even one absence in the 14 absence which triggered the discharge that that sole absence (or multiple) can't be counted against the employee and as such, they didn't violate the policy. What is the claimant's burden to prove good cause for said absence, simply testify that he/she was ill, had the stomach bug, child home from school (snow day or whatever) and benefits will be approved. No documentation is needed by the claimant to prove said good cause.

An employer certainly has a right to expect their employees to report for work and an employee who is absent 14 times unexpectedly certainly should NOT be entitled to UC benefits. Remember, these 14 absences do not count approved vacation days, paid time off, jury duty, etc. The vast majority of individuals in such a situation actually use the attendance policy as unpaid days off to get a break from work and simply take the days off knowing the employer can't discharge them until they reach 14 absences. Note the rolling twelve month time frame; this permits absences to be expunged from one's record. The above is one situation of why we believe the proposed language

of HB 1754 is necessary and would be addressed by the first example provided – “violation of any reasonable workplace rule...”

In conclusion, please remember that the UC Law is not an entitlement program. One is not entitled to UC benefits simply because they meet the definition of being unemployed, i.e., they are not receiving a paycheck. The UC Law is an eligibility program; one must meet the eligibility requirements as set by the General Assembly in order to receive benefits. Numbers are sighted often that X percentage of individuals unemployed do not receive UC benefits and that is true. Why, because they do not meet the eligibility requirements and therefore, we respectfully request that you set those eligibility requirements to the language proposed here today.

Once again, I wish to thank Chairman Miller, Chairman Gordner and the committees for your time and effort to review this subject and to hopefully bring some more meaningful change to the PA UC Law that would bring much needed common sense back to the system and move us further in the direction of restoring solvency to the UC Fund. I along with representatives of the Pennsylvania Chamber am eager to sit down and discuss this language in more detail with you in the near future.