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The US DOL's Final Rule that claimants for unemployment benefits must be "able and available for work" should serve as a reminder for employers that there are minimum qualifications for obtaining benefits. Employers should review their procedures for handling unemployment claims.

Employment Taxes

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DOL's Final Rule Regarding "Able and Available for Work" Should Remind Employers to Review All Unemployment Claims

By GJ Stillson MacDonnell and William Hays Weissman

On January 15, 2007, the United States Department of Labor (DOL) issued a Final Rule setting forth the requirements that state unemployment insurance (UI) laws must condition the payment of benefits on the claimant being able to work and available for work.¹ The DOL and its predecessors (the Social Security Board and the Federal Security Agency) have consistently interpreted provisions of Federal Unemployment Insurance Act and Social Security Act to require that states, as a condition of participation in the federal-state unemployment compensation program, limit the payment of benefits to individuals who are able and available for work. Although this interpretation is longstanding, it has never been comprehensively addressed in a rule in the Code of Federal Regulations (CFR), nor is it expressly set forth in federal law.

The "Able and Available for Work" Requirement

In order for an individual to receive unemployment benefits, he or she must generally show that they are able to work and available to work during the week in which benefits are sought. The Rule states that

Whether an individual is able to work and available for work under paragraph (a) of this section must be tested by determining whether the individual is offering services for which a labor market exists.

This requirement does not mean that job vacancies must exist, only that, at a minimum, the type of services the individual is able and available to perform is generally performed in the labor market. The State must determine the geographical scope of the labor market for an individual under its UC [unemployment compensation] law.²

This Rule is intended to act as a minimum "able and available" requirement while giving the states sufficient flexibility. Thus, the DOL commented that nothing in the rule requires that a state apply a single able and available test to all individuals. Thus, for example, states continue to have the flexibility to apply a more liberal "able and available" test to victims of domestic violence than to other individuals.³ The Final Rule also does not prohibit or limit a state's ability to impose disqualifications for separation.⁴

What the Final Rule Means for Employers

For employers, the DOL's Final Rule does not amount to a material change. However, it does serve as a reminder that there are minimum qualifications for obtaining benefits. In addition, many state employment tax audits are triggered by claims for benefits.

Accordingly, employers have every reason to carefully review every claim for benefits

¹ 72 F.R. 1890 (January 15, 2007); 20 C.F.R. § 604.

² 20 C.F.R. § 604.3(b).

³ 72 F.R. 1891.

⁴ 20 C.F.R. § 604.3(c).

made. Permitting even a single claim to proceed can trigger a costly and time consuming employment tax audit. Further, inappropriate claims can unnecessarily increase the employer's contribution rate, and thus its state unemployment insurance tax obligations. Thus, employers should at a minimum take the following steps:

- **Mailroom procedures.** Ensure that there are adequate mailroom procedures to immediately identify and route notice of claims. Employers usually have as little as 10 days to respond, with failure to do so generally resulting in an adverse ruling. Thus, it is important that incoming claims get to the appropriate personnel quickly so there is time to review and respond to such claims.
- **Determine the basis for separation.** As a threshold matter, determine the basis for the worker's separation. For example, it could be that the worker was terminated for cause under state law, which could make the employee ineligible for benefits, or that the worker was an independent contractor whose contract terminated.
- **Timely respond to all questionable claims.** It is important to timely respond to all questionable claims, even if you have not been able to obtain all necessary evidence and documentation by the time the response is due. Without a timely response, there is no real opportunity to contest the claim.
- **Contact counsel with questions.** If in doubt, employers should quickly confer with their counsel to determine whether claims are appropriate.

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