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HOUSE BILL NO. 2040

AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the House Committee on Labor and Commerce
on January 28, 2021)

(Patrons Prior to Substitute—Delegates Hudson and Askew [HB 1977])

A BILL to amend and reenact §§ 60.2-528.1, 60.2-619, and 60.2-633 of the Code of Virginia, relating to unemployment compensation; failure to respond; continuation of benefits; repayment of overpayments.

Be it enacted by the General Assembly of Virginia:

1. That §§ 60.2-528.1, 60.2-619, and 60.2-633 of the Code of Virginia are amended and reenacted as follows:

§ 60.2-528.1. Charging of benefits relating to certain overpayments; penalty for pattern of failure to respond to requests for information.

A. As used in this section, unless the context requires a different meaning:

"Employer," with regard to the timeliness and adequacy of responses, includes an agent of the employer used by the employer to respond to the Commission on the employer's behalf; however, an employer's agent's failure to respond timely or adequately to requests for information with regard to claims involving the agent's other clients shall not be used in determining whether the employer has established a pattern of failing to respond timely or adequately to written requests for information.

"Erroneous payment" means a payment of benefits under this title made prior to a determination by the Commission that the claimant is not eligible or qualified for the benefits paid.

"Information relating to a claim" means information material to a determination or decision by the Commission relating to the payment of benefits under this title, including separation information and information required by the Commission for the establishment of a claim for compensation and information about wages, days, and hours worked.

"Review period" means the 48 consecutive calendar month period ending on the June 30 that precedes the Commission's next annual calculation of the employer's benefit ratio pursuant to subdivision A 1 a of § 60.2-530.

"Written request" includes a request sent electronically.

B. An employer's account shall not be relieved of charges relating to an erroneous payment if the Commission determines that:

1. The erroneous payment was made because the employer failed to respond timely or adequately to a written request by the Commission for information relating to the claim; and

2. The employer has established a pattern of failing to respond timely or adequately to written requests by the Commission for information relating to claims.

C. For purposes of this section, an employer's response to a written request by the Commission for information relating to a claim shall be deemed not to be:

1. "Adequate" if it fails to provide sufficient material facts to enable the Commission to make a correct determination regarding a claim for benefits; however, (i) a response shall not be deemed inadequate if the Commission failed to request the necessary information or if information is provided in a format other than as requested, provided that the information is capable of being read by the recipient, and (ii) there shall be a rebuttable presumption that an employer that participates in a fact-finding interview or responds fully to the questions set out on the written request for information has provided an adequate response; or

2. "Timely" if it is not made within 10 calendar days after the delivery or mailing of the Commission's request for information.

D. An employer shall be deemed to have established a pattern of failing to respond timely or adequately to written requests for information relating to claims if the Commission determines that the employer has failed to respond timely or adequately to a written request for information relating to a claim on ~~four~~ *two* or more occasions within the applicable review period. The Commission shall not find that an employer has established a pattern of failing to respond timely or adequately to written requests for information relating to claims unless the Commission has provided the employer with the notices required pursuant to subsection E.

E. The Commission shall provide the employer with a written notice following the ~~employer's first, second, and third determinations~~ *determination by the Commission* that the employer failed to respond timely or adequately to a written request for information relating to a claim within the applicable review period. Each such notice shall be delivered or mailed to the employer's last known address of agency record and shall advise the employer of the potential implications of the employer's failure to respond timely or adequately to written requests for such information.

60 F. Upon the Commission's ~~third~~ *second* determination within the applicable review period that an
61 employer failed to respond timely or adequately to a written request for information relating to a claim,
62 the Commission shall assess upon the employer a civil penalty of \$75. A copy of the notice of
63 assessment of a civil penalty shall be delivered or mailed to the employer with the notice of the
64 employer's ~~third~~ *second* such failure as required pursuant to subsection E. Civil penalties collected
65 pursuant to this subsection shall be paid into the Special Unemployment Compensation Administration
66 Fund established pursuant to § 60.2-314. The Commission may compromise, settle, and adjust any such
67 penalty as authorized by § 60.2-521.

68 G. An employer shall not be found to have failed to respond timely or adequately to a written
69 request by the Commission for information relating to a claim if the Commission finds good cause for
70 such failure. The Commission ~~may~~ *shall* not find good cause for an employer's failure to respond timely
71 or adequately to such a written request unless the failure is due to compelling and necessitous
72 circumstances beyond the employer's control.

73 H. If the Commission has determined that an employer has established a pattern of failing to respond
74 timely or adequately to written requests for information relating to claims, such determination shall
75 remain in effect until the end of the applicable review period. Any benefit charges for an erroneous
76 payment that the Commission has determined are not to be relieved from the employer's account
77 pursuant to subsection B shall remain chargeable to the employer's account through the period ending on
78 the fourth June 30 following the Commission's determination.

79 I. The issue of whether an employer's account shall be relieved of charges relating to an erroneous
80 payment, including whether an erroneous payment was made because the employer failed to respond
81 timely or adequately to a written request by the Commission for information relating to the claim, shall
82 be decided in every Commission proceeding arising from an employer's appeal of an award of benefits.
83 Any such decision shall be subject to appeal pursuant to § 60.2-620. Final decisions shall be used in
84 determining whether the employer has established a pattern of failing to respond timely or adequately to
85 written requests for information relating to claims, whether the employer is subject to a civil penalty
86 pursuant to subsection F, and whether the Commission has given the notices required pursuant to
87 subsection E.

88 J. The costs of benefits charged to any governmental entity, Indian tribe, or nonprofit entity that is a
89 reimbursable employing unit under this title shall not include any credits of benefit overpayments
90 actually collected by the Commission if the Commission finds that the overpayment was made because
91 the entity or its agent was at fault for failing to respond timely or adequately to a written request for
92 information relating to a claim and the entity or agent has established a pattern of failing to respond
93 timely or adequately to such requests.

94 K. If the erroneous payment results from a combined-wage claim, the determination of noncharging
95 for the combined-wage claim shall be made by the paying state. If the response from the employer does
96 not meet the criteria established by the paying state for an adequate or timely response, the paying state
97 shall promptly notify the transferring state of its determination, and the employer shall be appropriately
98 charged.

99 L. This section applies to erroneous payments established on or after July 7, 2013.

100 *M. If an employer fails to respond timely or adequately to a written request by the Commission for*
101 *information relating to a claim, the employer shall forfeit any appeal rights to that claim otherwise*
102 *available pursuant to § 60.2-619.*

103 **§ 60.2-619. Determinations and decisions by deputy; appeals therefrom.**

104 A. 1. A representative designated by the Commission as a deputy, shall promptly examine the claim.
105 On the basis of the facts found by him, the deputy shall either:

106 a. Determine whether or not such claim is valid, and if valid, the week with respect to which
107 benefits shall commence, the weekly benefit amount payable and the maximum duration thereof; or

108 b. Refer such claim or any question involved therein to any appeal tribunal or to the Commission,
109 which tribunal or Commission shall make its determination in accordance with the procedure described
110 in § 60.2-620.

111 2. When the payment or denial of benefits will be determined by the provisions of subdivision 2 of
112 § 60.2-612, the deputy shall promptly transmit his full finding of fact with respect to that subdivision to
113 any appeal tribunal, which shall make its determination in accordance with the procedure described in
114 § 60.2-620.

115 B. Upon the filing of an initial claim for benefits, the Commission shall cause an informatory notice
116 of such filing to be mailed to the most recent 30-day or 240-hour employing unit of the claimant and all
117 subsequent employing units, and any reimbursable employing units ~~which~~ *that* may be liable for
118 reimbursement to the Commission for any benefits paid. However, the failure to furnish such notice
119 shall not have any effect upon the claim for benefits. *If a claimant has had a determination of initial*
120 *eligibility for benefits under this chapter, as evidenced by the issuance of compensation or waiting-week*
121 *credit, payments shall continue, subject to a presumption of continued eligibility and in accordance with*

the terms of this subsection, until a determination is made that provides the claimant notice and an opportunity to be heard. When a question concerning continued eligibility for benefits arises, a determination shall be made as to whether it affects future weeks of benefits or only past weeks. With respect to future weeks, presumptive payment shall not be made until but no later than the end of the week following the week in which such issue arises, regardless of the type of issue. With respect to past weeks, presumptive payment shall be issued immediately, regardless of the type of issue. Notice shall be given to individuals who receive payments under such presumption that pending eligibility may affect their entitlement to the payment and may result in an overpayment that requires repayment.

C. Notice of determination upon a claim shall be promptly given to the claimant by delivering or by mailing such notice to the claimant's last known address. In addition, notice of any determination which involves the application of the provisions of § 60.2-618, together with the reasons therefor, shall be promptly given in the same manner to the most recent 30-day or 240-hour employing unit by whom the claimant was last employed and any subsequent employing unit which is a party. The Commission may dispense with the giving of notice of any determination to any employing unit, and such employing unit shall not be entitled to such notice if it has failed to respond timely or adequately to a written request of the Commission for information, as required by § 60.2-528.1, from which the deputy may have determined that the claimant may be ineligible or disqualified under any provision of this title. The deputy shall promptly notify the claimant of any decision made by him at any time which in any manner denies benefits to the claimant for one or more weeks.

D. Such determination or decision shall be final unless the claimant or any such employing unit files an appeal from such determination or decision (i) within 30 calendar days after the delivery of such notification, (ii) within 30 calendar days after such notification was mailed to his last known address, or (iii) within 30 days after such notification was mailed to the last known address of an interstate claimant. For good cause shown, the 30-day period may be extended.

E. Benefits shall be paid promptly in accordance with a determination or redetermination under this chapter, or decision of an appeal tribunal, the Commission, the Board of Review or a reviewing court under §§ 60.2-625 and 60.2-631 upon the issuance of such determination, redetermination or decision, regardless of the pendency of the period to file an appeal or petition for judicial review that is provided in this chapter, or the pendency of any such appeal or review. Such benefits shall be paid unless or until such determination, redetermination or decision has been modified or reversed by a subsequent redetermination or decision, in which event benefits shall be paid or denied for weeks of unemployment thereafter in accordance with such modifying or reversing redetermination or decision. If a decision of an appeal tribunal allowing benefits is affirmed in any amount by the Commission, benefits shall continue to be paid until such time as a court decision has become final so that no further appeal can be taken. If an appeal is taken from the Commission's decision, benefits paid shall result in a benefit charge to the account of the employer under § 60.2-530 only when, and as of the date on which, as the result of an appeal, the courts finally determine that the Commission should have awarded benefits to the claimant or claimants involved in such appeal.

§ 60.2-633. Receiving benefits to which not entitled.

A. ~~Any~~ Except as provided in this section, a person who has received any sum as benefits under this title to which he was not entitled shall be liable to repay such sum to the Commission. For purposes of this section, "benefits under this title" includes benefits under an unemployment benefit program of the United States or of any other state. In the event that the claimant does not refund the overpayment, the Commission shall deduct from any future benefits such sum payable to him under this title. However, if an overpayment of benefits under this chapter, but not under an unemployment benefit program of the United States or of any other state, occurred due to administrative error, the Commission shall have the authority to negotiate the terms of repayment, which shall include (i) deducting up to 50 percent of the payable amount for any future week of benefits claimed, rounded down to the next lowest dollar until the overpayment is satisfied; (ii) forgoing collection of the payable amount until the recipient has found employment as defined in § 60.2-212; or (iii) determining and instituting an individualized repayment plan. The Commission shall collect an overpayment of benefits under this chapter caused by administrative error only by offset against future benefits or a negotiated repayment plan; however, the Commission may institute any other method of collection if the individual fails to enter into or comply with the terms of the repayment plan. Administrative error shall not include decisions reversed in the appeals process. In addition, the overpayment may be collectible by civil action in the name of the Commission. Amounts collected in this manner may be subject to an interest charge as prescribed in § 58.1-15 from the date of judgment and may be subject to fees and costs. Collection activities for any benefit overpayment established of five dollars or less may be suspended. The Commission may, for good cause, determine as uncollectible and discharge from its records any benefit overpayment which remains unpaid after the expiration of seven years from the date such overpayment was determined, or immediately upon the death of such person or upon his discharge in bankruptcy occurring subsequently

to the determination of overpayment. Any existing overpayment balance not equal to an even dollar amount shall be rounded to the next lowest even dollar amount.

B. *For an overpayment of benefits under this chapter, but not under an unemployment benefit program of the United States or of any other state, the individual recipient shall not be liable to repay such sum to the Commission, after an individualized case review, if the Commission determines that:*

1. *The overpayment was not due to fraud, misrepresentation, or willful nondisclosure on the part of the recipient and its recovery would be against equity and good conscience;*

2. *The overpayment was a direct result of inducement, solicitation, or coercion on the part of the employer; or*

3. *The overpayment occurred due to administrative error. For the purposes of this subdivision, "administrative error" means an error committed by the Commission on an individual claim due to circumstances associated specifically with that claim. "Administrative error" does not include (i) a programming or technological error, not directly associated with an individual claim, that results in overpayments to a group of claimants or (ii) decisions reversed in the appeals process.*

C. *For an overpayment of benefits under an unemployment benefit program of the United States, if such program authorizes the Commission to waive the repayment of such overpayment, the Commission shall waive any repayment that it determines qualifies for such waiver.*

D. *In each determination by the Commission related to an overpayment, the Commission shall determine if the overpayment is eligible for a waiver pursuant to subsections B and C. Any determination by the Commission that an overpayment is not eligible for a waiver shall be subject to appeal pursuant to § 60.2-619. The Commission shall clearly communicate the potential availability of a waiver to individuals as an appealable issue. A final determination of the waiver request shall occur before initiating overpayment recovery, which shall occur if the Commission determines that no waiver is applicable. To the extent that such programs described in subsection C require a different process for evaluating waivers, the Commission shall implement such process.*

E. *Unless the Commission determines that the person has committed an act of fraud, no person who receives benefits under this title for which such person was not entitled shall be required to repay such overpayment if the Commission determines, pursuant to § 60.2-528.1, that such overpayment was made because the employer failed to respond timely or adequately to a written request by the Commission for information relating to the claim. The Commission shall provide information about this waiver provision. If the Commission determines that the person has committed an act of fraud, the Commission shall provide notice of such determination and of the associated requirement of repayment to the claimant. A determination that a person has committed an act of fraud shall be appealable.*

F. *The Commission is authorized to accept repayment of benefit overpayments by use of a credit card. The Virginia Employment Commission shall add to such payment a service charge for the acceptance of such card. Such service charge shall not exceed the percentage charged to the Virginia Employment Commission for use of such card.*

G. *No determination with respect to benefit overpayments shall be issued until after a determination or decision that finds a claimant ineligible or disqualified for benefits previously paid has become final.*

H. *Final orders of the Commission with respect to benefit overpayments may be recorded, enforced, and satisfied as orders or decrees of a circuit court upon certification of such orders by the Commissioner as may be appropriate.*

2. That the Virginia Employment Commission (the Commission) shall notify each person with unpaid overpayments of benefits in existence prior to July 1, 2021, under Chapter 6 (§ 60.2-600 et seq.) of Title 60.2 of the Code of Virginia but not under an employment benefit program of the United States or any other state, that such person may file and qualify for a waiver established in subsection B of § 60.2-633 of the Code of Virginia, as amended by this act. The Commission shall notify each person with unpaid overpayments of benefits in existence prior to July 1, 2021, under an unemployment benefit program of the United States or any other state, that such person may file and qualify for a waiver established in subsection C of § 60.2-633 of the Code of Virginia, as amended by this act, if such programs permit such a waiver. The Commission shall accept each waiver request submitted within 30 days of sending notice after individualized case review if and only to the extent permitted by state and federal law.