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## SENATE BILL NO. 381

Offered January 10, 2024

Prefiled January 9, 2024

A *BILL to amend and reenact §§ 60.2-528.1 and 60.2-619 of the Code of Virginia, relating to unemployment compensation; employer failure to respond to requests for information; determinations and decisions by deputy.*

Patrons—Ebbin; Delegates: Bennett-Parker and Ware

Referred to Committee on Commerce and Labor

**Be it enacted by the General Assembly of Virginia:**

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

**§ 60.2-528.1. Charging of benefits relating to certain overpayments; penalty for 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 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. The Commission shall include in any written request for information from an employer notice of (i) the deadline to provide a timely response, (ii) the requirement to provide an adequate response, and (iii) the consequences of such employer's failure to provide such timely and adequate response. Upon the Commission's receipt of an employer's response to a written request for information, the Commission shall inform the employer of the date of such receipt.

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E. The Commission shall provide the employer with a written notice following the employer's first, second, and third determinations that each instance in which the employer fails 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 electronically delivered, including delivery through the Employer Self-Service Tax System website maintained by the Commission, or mailed to the employer's last known address of agency record employer 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.

F. Upon the Commission's third determination within the applicable review period that an employer failed to respond timely or adequately to a written request for information relating to a claim, the Commission shall assess upon the employer a civil penalty of \$75. A copy of the notice of assessment of a civil penalty shall be delivered or mailed to considered to have waived all rights in connection with the claim, including participation and appeal rights otherwise available pursuant to Article 5 (§ 60.2-619 et seq.) of Chapter 6, unless the employer with demonstrates to the notice of the employer's third such failure as required pursuant to subsection E. Civil penalties collected pursuant to this subsection shall be paid into the Special Unemployment Compensation Administration Fund established pursuant to § 60.2-314. The Commission may compromise, settle, and adjust any such penalty as authorized by § 60.2-521 that good cause exists for such failure.

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

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

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

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

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

L. K. This section applies to erroneous payments established on or after July 7 1, 2013 2024.

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

A. 1. A representative designated by the Commission as a deputy, shall promptly examine the claim. The deputy shall not examine or consider in the claim review process (i) facts contained within the employer's untimely or inadequate response, as identified by the Commission pursuant to § 60.2-528.1, without exception, or (ii) information or evidence from an employer or third party, unless the Commission, either electronically or by written copy according to the claimant's election, provides the claimant with a reasonable opportunity to review and respond to such information or evidence, and any such response is also considered in the deputy's evaluation of the claim. On the basis of the facts found by him, the deputy shall either:

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

b. Refer such claim or any question involved therein to any appeal tribunal or to the Commission, which tribunal or Commission shall make its determination in accordance with the procedure described

in § 60.2-620.

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

B. Upon the filing of an initial claim for benefits, the Commission shall cause an informatory notice of such filing to be mailed to the most recent 30-day or 240-hour employing unit of the claimant and all subsequent employing units, and any reimbursable employing units which may be liable for reimbursement to the Commission for any benefits paid. However, the failure to furnish such notice shall not have any effect upon the claim for benefits.

C. Notice of determination upon a claim, *the reasoning behind the decision, and a statement of case-specific facts material to the determination* 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~~ *the deputy, the reasoning behind the decision, and a statement of case-specific facts material to the determination* at any time which in any manner denies benefits to the claimant for one or more weeks. *As used in this subsection, the reasoning behind the decision means an explanation in plain language of (i) the law or regulation upon which the determination is based; (ii) the application of the law to the material information or evidence obtained from the claimant, employer, or third party; and (iii) the legal conclusion drawn from the application of the law to such information or evidence.*

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. A claim that the Commission has determined to be invalid because of monetary ineligibility shall first be subject to review only upon a request for redetermination pursuant to § 60.2-629. The Commission shall issue a new monetary determination as a result of such review, and such monetary determination shall become final unless appealed by the claimant within 30 days of the date of mailing. The Commission shall clearly set out the process for requesting a redetermination and the process for filing an appeal on each monetary determination issued. Monetary ineligibility does not include an appeal on the effective date of the claim, unless the claimant has requested and received a redetermination of the monetary determination pursuant to § 60.2-629.

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.