

Commission on Unemployment Compensation
August 19, 2011
Richmond, Virginia

The Commission on Unemployment Compensation's first meeting of the 2011-2012 interim focused on the status of the Unemployment Trust Fund and related legislation introduced in the 2011 Session of the General Assembly.

EMPLOYMENT DATA

John Broadway, Commissioner of the Virginia Employment Commission (VEC), provided Commission members with just-released preliminary data that the Commonwealth's seasonally adjusted unemployment rate for July 2011 increased 0.1 percent, to 6.1 percent, from the previous month. However, July's unadjusted rate of 6.2 percent is 0.1 percent lower than the rate for June. July's unemployment rate is 0.7 percent lower than the rate for July 2010. Virginia's unemployment rate (tied for eighth lowest in the nation) continues to be lower than the national rate of 9.1 percent. In July, Virginia's labor force declined by 3,395, and the number of Virginians receiving regular unemployment benefits increased by 173 to 55,195; a year earlier, 72,493 were receiving regular unemployment benefits.

Overall, the data presented by Mr. Broadway shows an employment situation that is improving but not robust. In 2011, Virginia's unemployment rate has averaged about 12 percent lower than rates for the same months in 2010. The Commonwealth's unemployment rate peaked in January 2010 at 7.8 percent, the highest rate since February 1983's rate of 8.1 percent.

The number of initial claims for unemployment benefits for the first six months of this year is 169,089; the corresponding figure for the first six months of last year was 204,320. This figure is 17.2 percent fewer than for the same period last year, and 37.7 percent fewer than for the first six months of 2009. This year's decline was attributed to fewer layoffs in the manufacturing, construction, wholesale trade, and mining sectors.

First payments of unemployment insurance benefits from January through June 2011 are down 15.5 percent from the corresponding period in 2010 and down 39.7 percent from the corresponding period in 2009. The average duration for receipt of unemployment benefits was 14.8 weeks in June 2011; for the same month of 2010, the average duration was 16.7 weeks. Final payments of benefits in the first six months of 2011 are down 26.5 percent from the same period in 2010 and down 23 percent from the same period in 2009. The exhaustion rate, which reflects the percentage of unemployment compensation recipients who use up all of the weeks of regular unemployment benefits for which they are eligible, was 45.7 percent in June 2010; in the same month of 2009 it was 51.8 percent.

Virginia's maximum weekly unemployment benefit is \$378; the national average is \$407. The maximum weekly benefit reflects a weekly benefit replacement rate of 41 percent of the state's average weekly wage. In 2010, the same maximum weekly unemployment benefit amount provided a weekly benefit replacement rate of 42.6 percent.

UNEMPLOYMENT TRUST FUND

The Unemployment Trust Fund is funded by state unemployment taxes, which are paid by employers at a rate that varies depending on the solvency level of the Trust Fund and each employer's claims experience. The balance in the Trust Fund fell from \$546.7 million on January 1, 2009, to negative \$122.4 million on January 1, 2010, and to negative \$347.5 million on January 1, 2011. As of June 30, 2011, the balance was negative \$101 million. The balance is projected to be negative \$266.6 million at the end of 2011. The amount of unemployment compensation benefits paid in 2010 was \$755.2 million; it is projected to fall to around \$611 million this year. State unemployment tax revenue is projected to rise from \$530.6 million in 2010 to \$692 million this year.

The solvency level of the Trust Fund is calculated by dividing its balance on June 30 by an amount, determined in accordance with a statutory formula, that represents an adequate balance. The Trust Fund's solvency level declined from 24.4 percent on June 30, 2009, to negative 8.2 percent on June 30, 2011. One year ago, it was negative 8.1 percent. The solvency level of the Trust Fund is projected to rise to 10 percent in June 2012, 30 percent in June 2013, and 51 percent in June 2014. Reaching a solvency level of 50 percent in 2014, starting the next calendar year, will suspend imposition of the fund builder tax of 0.2 percent of the first \$8,000 of each employee's wages.

The low level of solvency of the Trust Fund automatically increases the state unemployment tax (SUTA) rate assessed on employers. The program's counter-cyclical funding formula links higher tax rates to low Trust Fund solvency rates. At the Trust Fund's current level, employers are taxed under the highest of the 15 existing tax tables. The average annual state unemployment tax per employee assessed on employers in Virginia, exclusive of the federal unemployment tax (FUTA) assessment, has risen from \$103 in 2009 to \$166 in 2010 and to \$207 this year. For the year ending September 30, 2010, Virginia's average SUTA rate was 1.96 percent. The average annual SUTA assessment per employee is projected to peak at \$229 next year, after which it will decline to \$225 in 2013, \$205 in 2014, and \$157 in 2015. Nationally, the average tax per employee is \$350, which corresponds to a tax rate of 2.39 percent.

A factor contributing to rising SUTA assessments is the increasing number of business failures, which has increased the number of unemployment benefit payments charged to the pool rather than to an active employer's account. The average pool tax assessment per employee is expected to increase from \$22.40 in 2010 to \$37.60 in 2011 and to \$46.40 in 2012.

Title XII of the federal Social Security Act provides a mechanism by which states may borrow funds to offset shortfalls in their unemployment trust funds. In order to meet its obligations to pay unemployment benefits, the Commonwealth began borrowing from the federal government in October 2009. As of July 1, 2011, the loan balance owed is \$347 million. Between September 2011 and April 2013, Virginia is expected to borrow an additional \$251 million.

States that borrow from the federal government are required to pay interest on the loans. Virginia is required to make interest payments totaling \$20.2 million in September 2011 and

2012. Interest payments cannot be paid from the Trust Fund or federal grants, and are expected to be made from general fund appropriations and the VEC's Penalty and Interest Fund.

Failing to repay the borrowed federal funds within two years has triggered the loss of 0.3 percent of the 5.4 percent credit against an employer's FUTA liability. Coupled with the expiration earlier this year of a 0.2 percent FUTA surtax on employers that was first levied in 1976, the automatic reduction in the FUTA credit will raise employers' rate from 0.6 percent to 0.9 percent of the first \$7,000 of each employee's wages. This rate change will increase an employer's annual FUTA liability for each employee by \$21, from \$ 56 to \$77. The \$82 million generated from the partial loss of the credit will be applied to Virginia's loan balance.

Virginia has repaid over \$400 million in 2011 on its federal loans. The FUTA credit reduction will reduce the loan balance by an additional \$82 million next February. In May 2012, the VEC expects to repay the outstanding balance of \$300 million, and that no further borrowing will occur in 2012. However, Virginia is expected to resume borrowing for the first four months of 2013. In May 2013, these funds will be repaid by a final \$70 million payment.

2011 LEGISLATION

Staff provided the Commission with an overview of legislation pertaining to unemployment compensation that was introduced during the 2011 Session. Each of the measures that passed was endorsed last year by the Commission.

House Bill 2357, patroned by Delegate McClellan, and Senate Bill 1113, patroned by Senator Watkins, eliminated the requirement that unemployment compensation benefits be reduced by 50 percent of the amount of the claimant's Social Security Act or Railroad Retirement Act retirement benefits in years when the solvency level of the Unemployment Trust Fund is less than 50 percent. The "Social Security offset" was not required in years when the solvency level of the Trust Fund exceeded 50 percent.

Senate Bill 790, patroned by Senator Watkins, requires that bills enhancing unemployment compensation benefits payable to a claimant contain a statement reflecting the projected impact on the solvency level of the unemployment trust fund and the average increase in state unemployment tax liability of employers. Such bills had been required to contain an estimate of potential revenue losses of state tax revenues.

Senate Bill 791, patroned by Senator Watkins, clarifies the expiration of provisions that expanded the criteria for a state "on" indicator. The legislation repeals an enactment clause added in 2009 that made alternative versions effective upon contingencies that could result from Congressional action.

Senate Bill 1010, patroned by Senator Watkins, postpones the scheduled increase, from \$2,700 to \$3,000, in the minimum amount of wages an employee must have earned in the two highest earnings quarters of his base period in order to be eligible for unemployment benefits. The increase will apply to claims filed on or after July 1, 2012; it was scheduled to apply to claims

filed on or after July 3, 2011. This bill is similar to legislation enacted in the three preceding Sessions.

The appropriation act included provisions that address the payment to the federal government of the interest on the funds borrowed to make benefits payments. The Comptroller is directed to reserve \$8,900,000 in general funds and additional nongeneral funds for interest repayments due by September 30, 2011. The measure also provides that it is the intent that sufficient general fund and nongeneral fund appropriation be provided in fiscal year 2013 for an anticipated interest payment due September 30, 2012, to the federal government.

Five bills related to unemployment programs failed in the 2011 Session. Two identical measures (House Bill 1914 carried by Delegate Jackson Miller and Senate Bill 789 carried by Senator Watkins) would have required the VEC to use the E-Verify program for each individual the Virginia Employment Commission refers to an employer to perform work within the Commonwealth. The House bill was referred to the Immigration subcommittee of the House Courts Committee, where it was tabled. The Senate bill was passed by in the Senate Commerce and Labor Committee with a letter asking the VEC to report on issues raised by the proposal. The VEC's report is due November 1, 2011.

Senate Bill 1401, patroned by Senator McEachin, passed the Senate 25-15 but failed in the House Commerce and Labor Subcommittee #1. The bill, which would have made Virginia eligible for \$125.5 million in federal funds, would have expanded eligibility for unemployment benefits in two ways. First, certain individuals who have exhausted eligibility for unemployment benefits and who are enrolled in approved training programs would be eligible for up to 26 weeks of additional benefits. Second, an individual who voluntarily separates from employment as the result of a compelling family reason would not be disqualified from receiving unemployment compensation benefits. Compelling family reasons include domestic violence; the illness or disability of a member of the individual's immediate family; or the need for the individual to accompany such individual's spouse to a place from which it is impractical for such individual to commute and due to a change in location of the spouse's employment.

The two other unsuccessful bills from the 2011 Session, Senate Bills 1460 and 1474, were referred by standing committees to this Commission for further study. Though the Commission received information about these bills, the patrons were unable to appear and no action was taken on the proposals.

SENATE BILL 1460 - WORKFORCE SKILLS ENHANCEMENT TRAINING

Senate Bill 1460, patroned by Senator Locke, passed the Senate unanimously after it was amended to provide that it would become effective only if funds for its implementation are appropriated by the General Assembly. The House Appropriations Committee passed the bill by with a letter asking this Commission to examine it.

The bill would have established a program whereby unemployed workers may continue to receive unemployment compensation benefits while participating in workforce skills enhancement training from a potential employer. The bill provides that an individual's

participation in the such a training program does not disqualify him from unemployment benefits, and exempts him from requirements that he be available for work and accept an offer of employment. Workers may participate in the program for a maximum of 24 hours per week for a maximum of six weeks. When the program is complete, workers are assessed for possible employment. Participating workers do not receive any compensation from the potential employer providing the training, but are eligible for a Commonwealth-funded training stipend averaging \$100 per week (for up to six weeks for a maximum of \$600) to cover costs of child care, transportation, and other training-related costs. The Commonwealth will also be required to reimburse the potential employer for the incremental additional cost of its workers' compensation insurance coverage. Funding for the workers' stipends and the reimbursement for workers' compensation insurance costs is subject to appropriation.

The proposal is based on the "Georgia Work\$" program. At least two other states (New Hampshire and Missouri) adopted similar programs. Georgia Work\$ provides employers the opportunity to train and appraise candidates at no cost and with no obligation to hire any given trainee. Through Georgia Work\$, more than 4,000 trainees have been hired upon completion of training and about 60 percent of participants have found jobs.

In Pennsylvania, lawmakers proposed "Keystone Works" but federal regulators said the draft bill failed to comply with unemployment laws and the Fair Labor Standards Act (FLSA). On January 29, 2010, the U.S. Department of Labor issued Advisory Guidance Letter 12-09 to provide guidance to states that may be considering implementation of subsidized work-based training initiatives for unemployed workers. The guidance stresses that unemployment compensation (UC) funds may only be paid to individuals with respect to their unemployment and may not be paid as a subsidy or stipend, or to an employer to encourage hiring. While trainees may be eligible for benefits, employees are not.

Trainees may receive unemployment benefits, notwithstanding the requirement that they be able and available for work, as long as they are available for work during some portion of the week. Employees may not. The guidance letter adopts the FLSA tests for whether an individual is an employee or a trainee. The test is whether a person, without any compensation agreement, works for his own advantage on the premises of another, and is further dependent on application of the facts and circumstances to the following six factors:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to what would be given in a vocational school or academic educational instruction;
2. The training is for the benefit of the trainees;
3. The trainees do not displace regular employees, but work under their close observation;
4. The employer that provides the training derives no immediate advantage from the activities of the trainees, and on occasion the employer's operations may actually be impeded;
5. The trainees are not necessarily entitled to a job at the conclusion of the training period; and
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

The Department of Planning and Budget's fiscal impact statement (FIS) estimated that the bill would require appropriations of \$984,400 for each of fiscal years 2011 through 2017. Based on

Georgia's program, it is estimated that 1,424 Virginians will be eligible for the training programs. Of the annual estimated cost, \$130,000 is the amount estimated to cover the employers' incremental increase in costs of workers' compensation insurance.

The FIS states that the estimate may result in reduced unemployment benefit payments, reduced employer taxes, and a possible increase in general fund revenues, if the program increases the likelihood of unemployed persons receiving work. While the Georgia program has been estimated to contribute to an average reduction in payment of unemployment benefits over a seven-year period, the exact source of the Georgia savings is not certain enough to predict a similar outcome for Virginia.

The FIS also states that the bill has the potential to result in an additional cost to the state and to employers by (i) authorizing the payment of unemployment benefits to individuals who may not have otherwise qualified to receive benefits for the six weeks of training authorized by this bill and (ii) extending benefits to individuals who turn down a job offer if it interferes with participation in a work training program authorized by this bill. The FIS estimates that the VEC would incur additional administrative costs of \$103,960 in its first year and \$94,538 in years thereafter, to come out of federal employment service grants, thereby displacing other workforce training responsibilities.

SENATE BILL 1474 - SHARED WORK PROGRAM

Senate Bill 1474, patroned by Senator Whipple, was passed by in the Senate Commerce and Labor Committee with a letter asking this Commission to examine the issues. The bill would have established a shared work program whereby employers would have the option to reduce the hours worked by employees, while permitting the employees whose hours are reduced to receive partial compensation for lost wages. Program participation requires Virginia Employment Commission approval of a plan, which must provide that the reduction in hours of work is in lieu of a layoff of an equivalent percentage of employees, and that employees' fringe benefits cannot be reduced or eliminated during the plan.

The bill is substantially the same as House Bill 2559 (2003 Session), carried by Delegate Jim Scott. Delegate Scott's bill tracks largely with model language provided by the U.S. Department of Labor. The concept behind work sharing legislation is that it may be preferable to reduce the hours and earnings to all employees (who will get prorated unemployment benefits), than to lay off some employees (who will get full unemployment benefits).

The bill establishes the procedure whereby an employing unit that wishes to institute a work share program may apply to the VEC for approval of a plan. To be approved, among other requirements:

- A plan shall provide that the normal weekly work hours of affected employees in the affected unit shall be reduced by at least 10 percent but not by more than 50 percent;
- Fringe benefits will continue to be provided to employees in affected units as though their work weeks had not been reduced;

- The plan must certify that the total reduction in normal weekly work hours is instead of layoffs that (i) would have affected at least the number of employees participating in the program and (ii) would have resulted in an equivalent reduction in work hours; and
- Unless sooner revoked for good cause, the maximum duration of a plan is 12 months.

The FIS's estimated costs are based on a weighted average of the 0.75 percent increase in the number of weeks of benefits paid that was attributable to the work share programs in 18 states with such programs. The FIS estimates that, in the years between 2012 and 2017, the legislation will:

- Cost the unemployment trust fund between \$3.1 and \$4.4 million each year;
- Increase unemployment tax revenues between \$1.5 and \$12.6 million each year;
- Reduce general fund revenue by an annual average of \$13,688;
- Require the VEC to incur administrative and management costs of \$179,451 in the first year and \$155,897 each year thereafter, which can be paid from the federal unemployment insurance grant, without any increase in the grant; and
- Require the VEC to borrow additional moneys from the federal government to make benefit payments, which borrowings are anticipated to result in an additional \$300,000 in interest payments (which must be made from VEC special funds, a general fund appropriation, or increased taxes on employers).

Delegate Morrissey questioned why the measure would increase the amount of unemployment benefit payments. The VEC agreed to appear at the Commission's next meeting to explain the assumptions that generated the estimate, to quantify the amount of any favorable impact resulting from the implementation of such a program, and what changes to the legislation would be required in order to neutralize its impact on the Trust Fund.

FUTURE MEETING

The Commission is expected to convene prior to the 2012 Session to receive updated information regarding the Trust Fund's solvency level and unemployment data. The VEC may report on its study of Senate Bill 789 and on the impact statement for Senate Bill 1474.