

Seasonality Provisions in Unemployment Compensation

Presented to the Virginia Commission
on Unemployment Compensation

M. Coleman Walsh, Jr

Chief Administrative Law Judge

September 2008

Background

- In the 1940's as many as 33 states had laws that limited eligibility for unemployment insurance (UI) for workers in seasonal occupations
- Primary reasons for these provisions:
 - Fear that UI trust funds would be depleted
 - Fear that seasonal employers would have very high tax rates

Background (continued)

- For the most part, these fears were not realized
- Seasonality provisions also proved to be difficult to administer and generated various anomalies and inequities
- As a result, trend has been to discard these provisions and only 15 states currently have them

Advisory Council on Unemployment Compensation

- The Advisory Council on Unemployment Compensation (ACUC) was created by act of Congress in the 1990's
- The ACUC conducted a comprehensive review of the UI system and issued a final report in 1996 with recommendations
- The ACUC recommended that seasonality provisions be abolished (Recommendation 95-19)

State Seasonality Provisions

- State seasonality laws generally fall in two broad categories, with some variation
 - Industry that customarily operates during a regularly recurring period of less than a certain number of weeks (ranges from 16-41 weeks)
 - Industry specific (processing agricultural or seafood products, hospitality & leisure), sometimes with a requirement that a certain percentage of the workforce is laid off (ranges from 40-75%)

States with Seasonality Provisions

- Regular recurring season
 - Colorado
 - Indiana
 - Maine
 - Massachusetts
 - Michigan
 - Ohio
 - North Carolina
 - South Dakota
- Industry specific
 - Arizona
 - Arkansas
 - Delaware
 - Mississippi
 - Pennsylvania
 - West Virginia
 - Wisconsin

Virginia's Experience with Seasonality

- During the 1970's Virginia had seasonality provisions as part of its UI law
- That law defined seasonality as a regular recurring season of at least 13 but not more than 40 weeks
- Employers had to petition the VEC to be classified as a seasonal employer
- Law was repealed in 1978

Virginia Post-Repeal

- After the 1978 repeal of the seasonality provisions, the VEC treated former seasonal workers the same as any other
- If those workers became unemployed through no fault of their own and had sufficient wage credits in their base period, they would be eligible for benefits

Employment for a Fixed Duration

- The VEC has faced numerous instances where workers were hired to work for a specific duration and then became unemployed upon completing the contract term
- Those workers were deemed to be unemployed through no fault of their own

Hutter v. VEC

- This scenario was before the Virginia Court of Appeals in the 2007 case of Hutter v. VEC
- Case involved a tax preparation firm that hired additional staff for the tax season and laid them off after April 15
- VEC and the Court rejected the argument that claimant had voluntarily quit by accepting a job knowing it had a fixed duration
- Claimant's unemployment deemed to be result of a lack of continuing work

Challenges Under Virginia's Former Law

- Problems under former seasonality law
 - The 13-40 week criteria was somewhat arbitrary and led to some inequities
 - Not every employer who could have met the seasonal criteria petitioned for that classification, so employees who were similarly situated were treated differently
 - Anecdotal evidence that law was very difficult to administer

Other Issues and Concerns

- Some “seasonal” workers are among the lower paid members of the workforce so they are not in a position to save money while working to offset lost income during off-season
- Unemployment because a season is over is not the fault of the worker or the employer, but the function of a dynamic economy
- Some seasonal employers use UI as a type of fringe benefit to attract and retain workers
- Loss of UI may shift some unemployed workers to public assistance funded by the general fund

Alternatives to Seasonality Provisions

- Qualifying requirement that effectively screens out workers with limited base period employment that is concentrated in less than 15 weeks, such as Virginia's current two-quarter earnings requirement
- Diligent enforcement of the “work search” test to ensure claimants are available for work and actively looking for work

Summary

- National trend has been in decline with respect to seasonality restrictions on UI
- Provisions tend to be very difficult to administer and result in anomalies and inequities
- Disparate impact on lower wage workers
- Inconsistent with general public policy to award UI if unemployment is not worker's fault
- Potential general fund impact
- Other means to address situation are available