THE "SOCIAL SECURITY OFFSET" UNDER VIRGINIA'S
UNEMPLOYMENT COMPENSATION LAW

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I. Virginia's Benefits Offset Statute

The offset requirement is codified at § 60.2-604 (captioned "Reduction of benefit amount by amount of pension; elimination of pension reduction based on fund solvency), as follows:

> The weekly benefit amount payable to an individual for any week which begins in a period for which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment under a plan maintained or contributed to by a base period or chargeable employer based on the previous work of such individual, including payments received by such individual in accordance with § 65.2-500 or 65.2-502, shall be reduced, but not below zero, by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week; except that (i) where the fund balance factor determined pursuant to subsection A of § 60.2-533 is below 50 percent, effective the first Sunday in January following the determination of the fund balance factor, the weekly benefit amount payable to an individual for any week shall be reduced, but not below zero, by an amount equal to 50 percent of Social Security Act or Railroad Retirement Act retirement benefits received by such individual and attributable to such week or (ii) where the fund balance factor determined pursuant to subsection A of § 60.2-533 meets or exceeds 50 percent, effective the first Sunday in January following the determination of the fund balance factor, the weekly benefit amount payable to an individual for any week shall not be reduced by any amount of Social Security Act or Railroad Retirement Act retirement benefits received by such individual and attributable to such week.

II. Federal Statute

Federal Code 26 U.S.C. § 3304(a)(15) frames the pension offset issue. It provides:

> The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that-
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> (A) subject to subparagraph (B), the amount of compensation payable to an individual for any week which begins after March 31, 1980, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous

work of such individual shall be reduced (but not below zero) by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week *except that—*

(i) the requirements of this paragraph shall apply to any pension, retirement or retired pay, annuity, or other similar periodic payment only if—

(I) such pension, retirement or retired pay, annuity, or similar payment is under a plan maintained (or contributed to) by a base period employer or chargeable employer (as determined under applicable law), and

(II) in the case of such a payment not made under the Social Security Act or the Railroad Retirement Act of 1974 (or the corresponding provisions of prior law), services performed for such employer by the individual after the beginning of the base period (or remuneration for such services) affect eligibility for, or increase the amount of, such pension, retirement or retired pay, annuity, or similar payment, and

(ii) the State law may provide for limitations on the amount of any such a reduction to take into account contributions made by the individual for the pension, retirement or retired pay, annuity, or other similar periodic payment, and

(B) the amount of compensation shall not be reduced on account of any payments of governmental or other pensions, retirement or retired pay, annuity, or other similar payments which are not includible in the gross income of the individual for the taxable year in which it was paid because it was part of a rollover distribution[.]

In 1976, Congress passed P.L. 94-566, which added subdivision (a)(15) to 26 U.S.C. Sec. 3304. The new provision required states to reduce unemployment compensation by 100% of all pension income effective October 1, 1979 (which date was postponed by separate legislation until April 1, 1980). The 1976 change was prompted by a reaction to a report that employers were sustaining a "double dip" by paying both pension benefits and unemployment benefits (through higher tax rates) to former employees. A 2004 report by the Congressional Research Service notes that in 1974, a New York study found that 11% of claimants received retirement income while receiving unemployment benefits. The size of the overlap raised questions of whether claimants were actually ready and available for work as required. Concerns were raised that some retirees were using unemployment benefits as a part-year supplement to their retirement income and that this was an inappropriate use of the payroll taxes paid by employers.

As the 1976 legislation was written, states would have been required to offset an unemployment insurance claimant's pension income against current unemployment benefits even if the unemployment benefits were being drawn against the unemployment insurance account of an employer who did not contribute to the employee's pension.

In order to ameliorate perceived inequities in the offset requirement, Congress amended subdivision (k) in 1980. The 1980 amendments, made pursuant to P.L. 96-364, are italicized above. These new provisions in subdivision (A)(i) limited the offset requirement to pension or similar payments under a plan maintained or contributed to by a base period employer and that were actually affected by the base-period employment.

The 1980 amendments also added the subdivision (ii) that permits a state to limit the offset where the worker made contributions for the payments. According to the U.S. Department of Labor, states may reduce the amount deducted from unemployment compensation by any amount, including 100%. The states that have eliminated or reduced the Social Security offset have done so under this provision.

On February 3, 2003, the Department of Labor issued UI Program Letter 22-87, which describes what states can do to eliminate or limit the Social Security offset. Issues addressed include:

- States may disregard part or all of a retirement payment in determining the amount of unemployment compensation payable “regardless of the relative proportions of employee and employer contributions.” Therefore, a state may disregard up to 100% of a retirement payment as long as the employee contributed some amount to the retirement plan, and any reduction in the amount of unemployment compensation payable need not be proportionate to the amount of the employee contribution.

- Since employees make contributions to Social Security, a state may “take into account” the employee’s contributions to Social Security.

- A state that chooses to exercise the “take into account” option need not explicitly state that it is “taking into account” the employee’s contributions to Social Security or other federal programs. However, for retirement plans that the state law singles out that are not governed entirely by federal law, the state’s law must explicitly state that it is “taking into account” the employee’s contribution.

In summary, while the federal law requires that all states reduce unemployment compensation for certain retirement income, states have flexibility (i) in treating employee contributions to pensions and (ii) in whether to apply the offset to all pension income or only to pensions paid by a claimant's base-period employer. Many states enacted laws that disregarded 50% of Social Security benefits because employers and employees generally each pay half the Social Security payroll tax.

III. History of Virginia's Retirement Benefits Offset Requirement

The retirement benefit offset provision was enacted in 1977 as § 60.1-48.1. The section was enacted in order for the Commonwealth to remain in compliance with federal law following the enactment by Congress of 26 U.S.C. Sec. 3304(a)(15). The section was subsequently amended in 1978 (to add the phrase "including payments received by such individual in accordance with § 65.1-54 or § 65.1-55," which addresses workers' compensation benefits) and 1987 (to add the phrase "under a plan maintained or contributed to by a base period or chargeable employer").

Legislation introduced in 1999 (by Delegate Robert Hull) and 2001 (by Senator Puckett and Delegate Phillips) to exclude Social Security payments from the offset provision did not pass.

In 2003, by House Bill 1431 (carried by Delegate J. Johnson) and Senate Bill 1014 (carried by Senator Watkins), the section was amended to limit the amount of the retirement benefit offset that would otherwise be triggered by receipt of Social Security Act or Railroad Retirement Act retirement benefits to 50 percent of Social Security Act or Railroad Retirement Act retirement benefits received (but in no event would unemployment benefits be reduced to less than zero). Note that as introduced, the bills would have completely eliminated the offset as it applied to Social Security benefits. The measure was expected to raise the state unemployment tax in 2006 by $0.45 per employee.

In 2004, Senator Watkins introduced Senate Bill 128. The bill eliminated the offset for Social Security or Railroad Retirement Act benefits completely but only during periods when the unemployment trust fund has a solvency level of 50 percent or more. The measure expressly provided that when the trust fund's solvency level falls below 50 percent, weekly unemployment benefits would be reduced by 50 percent of the amount of such benefits - as was provided by the Code prior to the enactment of Senate Bill 128.

Senate Bill 128 has an interesting procedural history. The measure passed the Senate unanimously and the House Commerce and Labor Committee by a vote of 12-10. It was then recommitted to committee on a floor vote of 52-46 in the House and was carried over to the 2005 Session. The bill was then unanimously reported by the House Commerce and Labor Committee in a carry-over meeting in December 2004. When the 2005 Session convened, it was on Second Reading on the House floor and passed unanimously on January 14. Because the House of Delegates had not amended the language approved in the prior Session by the Senate, the bill was sent to the Governor for signature and became Chapter 1 of the 2005 Acts of Assembly.

The trust fund solvency level for 2005, the year Senate Bill 128 became effective, was 54%. In the three years that followed, the solvency level ranged between 64% and 71%. As a result, in each of these years the offset under § 60.2-604 for 50% of Social Security benefits was suspended. However, the solvency level for 2009 of 24% triggered the reinstatement of the Social Security offset commencing January 1, 2010.

IV. Social Security Offset in Other States

According to the January 2010 edition of "Highlights of State Unemployment Laws" published by the National Foundation for Unemployment Compensation and Workers' Compensation (at footnote 5 to Table 25):

- 45 states (and Virginia when the trust fund balance is above 50% of the solvency level) and the District of Columbia do not reduce unemployment benefits on account of a claimant's receipt of Social Security benefits.
- In addition to Virginia during years when the trust fund balance is below 50% of the solvency level, the following states offset unemployment benefits by 50% of Social Security benefits:
    - Illinois
    - Louisiana

    - Minnesota, if Social Security claim was approved after the beginning of the base period, but if the Social Security claim was approved before the beginning date of the base period Social Security benefits will not affect unemployment benefit payments
    - South Dakota, though the offset will cease when the balance in the trust fund reaches $30 million
- Puerto Rico reduces unemployment benefits by 100% of Social Security benefits.

While the National Foundation for Unemployment Compensation and Workers' Compensation's list (which is based on legislation enacted through 2009) includes Utah as a state requiring an offset for 50% of Social Security benefits, this will no longer be accurate. In March 2010, Utah's Governor signed House Bill 43, which provides that Social Security benefits will not be offset against unemployment benefits starting in 2011.

The rapidity with which states have repeal the pension offset for Social Security is illustrated by the fact that in 2002, 22 states had offset requirements (five of which required a 100% offset).

V. Application of Social Security Offset to Extended and Emergency Benefits

Claimants in the Commonwealth who have exhausted the maximum 26 weeks of eligibility for unemployment benefits funded through Virginia's unemployment trust fund have been eligible for up to an additional 47 weeks of benefits under the federal emergency unemployment compensation program and up to an additional 13 weeks of benefits under the extended benefits program. The federal government provided all of the funding for the emergency and extended benefits.

Questions have arisen regarding the application of Virginia's "Social Security offset" requirement to unemployment benefits that are not funded through Virginia's trust fund. The VEC has advised that the issue is addressed in UI Program Letter No. 23-08, issued July 7, 2008. The Department of Labor's implementing and operating instructions for the Emergency Unemployment Compensation, 2008 (EUC08) program state (at item 7 on page A-5) that applicable state law provisions which apply to the payment and continuing eligibility for regular compensation also apply to the payment of EUC08. It states:

> An individual is not entitled to receive EUC08 for a week for which the individual is disqualified under the applicable state law. For example, if the applicable state law requires, as a condition of eligibility for regular compensation, that an individual be able and available for work, this requirement applies to EUC08. If an individual is not able or available for work, the individual would be disqualified from receiving EUC08 until the individual became able and available again.

In response to an informal inquiry, the VEC has advised that this provision of UI Program Letter No. 23-08 would require that extended and emergency benefits be subject to offset under § 60.2-604 to the same extent as regular unemployment benefits.

Staff then inquired whether amending § 60.2-604 to "bifurcate" the Social Security offset requirement by exempting its application to extended and emergency benefits, while leaving it intact as to regular benefits, would satisfy the requirement that "applicable state law provisions" be applied to extended and emergency benefits. VEC has replied that they discussed the proposal with personnel at the Department of Labor and that no one has found that the proposal would satisfy the federal requirements.