Commission on Unemployment Compensation
December 13, 2010
Richmond, Virginia

The second meeting of the Commission on Unemployment Compensation during the 2010-2011 interim was held on December 13, 2010. Chairman Watkins began the meeting by presenting Senate Joint Resolution 113 to William F. Mezger. The resolution commended Mr. Mezger for his 47 years of dedicated service to the Commonwealth. The longtime chief economist of the Virginia Employment Commission retired in December 2009.

## ECONOMIC DATA

John R. Broadway, Jr., Commissioner of the Virginia Employment Commission (VEC), provided an update of data regarding the Commonwealth's economy and the solvency level of the unemployment trust fund that had been presented at the Commission on Unemployment Compensation's August 9 meeting.

Virginia's unemployment rate (not seasonally adjusted) for both September and October 2010 was 6.5 percent. The unemployment rates in 2010 have averaged about 6 percent higher than rates from 2009.

First payments of unemployment insurance benefits from January through October 2010 are 25.4 percent less than in the corresponding period in 2009 but 32.5 percent higher than in the corresponding period in 2008. The average duration for receipt of unemployment benefits was 15.7 weeks in October 2010; for the same month of 2009, the average duration was 14.9 weeks. Final payments of benefits in the first 10 months of 2010 are down 15.3 percent from the same period in 2009 and up 115.2 percent from the same period in 2008. 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 50.7 percent in October 2010; in the same month of 2009 it was 51.5 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 42 percent of the state's average weekly wage, which is the second lowest rate among the six jurisdictions in the Fourth Circuit. The national average replacement rate is 47 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 Unemployment Trust Fund on January 1, 2009, was $546.7 million. On January 1, 2010, the balance was negative $122.4 million, which included a $62.8 million Incentive Distribution from the federal government. The balance is projected to fall to negative $338.4 million at the end of 2010. State unemployment tax revenue is projected to rise from $327.7 million in 2009 to $524.2 million in 2010. The amount of unemployment compensation benefits paid in 2009 was almost $1.074 billion; it is projected to fall to around $740.2 million in 2010.

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 Unemployment Trust Fund's solvency level on June 30, 2008, was 64 percent, and on June 30, 2009, was 24.4 percent. Commissioner Broadway reported that the solvency level on June 30, 2010, was negative 8.1 percent. While discouraging, at the Commission's August meeting the solvency level was projected to be negative 12.8 percent. The solvency level of the Trust Fund is projected to be about negative 10 percent in June 2011, and then return to a positive balance of eight percent in 2012, 29 percent in 2013, and 51 percent in 2014.

The average annual state unemployment tax (SUTA) per employee assessed on employers in Virginia for calendar year 2010 was $162, up from $103 in 2009. The 2009 average tax per employee was the lowest among the six Fourth Circuit jurisdictions. The corresponding national average for the 2009 was $262. The average annual SUTA assessment per Virginia employee is projected to rise to $202 in 2011 and $225 in 2012, after which it will decline to $221 in 2013, $193 in 2014, and $145 in 2015.

The negative balance in the state's trust fund requires Virginia to borrow from the Federal Unemployment Account to pay benefits. Since October 2009, the Commonwealth has borrowed $346 million from the federal government. The VEC anticipates that Virginia will borrow an additional $838 million through April 2013; in August 2010, the VEC estimated that the state would need to borrow an additional $613 million over the same period.

If pending federal legislation that would waive the requirement that states make interest payments for 2011 is not enacted, Virginia will be required to pay $11 million in interest on the federal loans by September 30, 2011, and an additional $9.2 million will be due in 2012. Interest payments cannot be made from the Trust Fund or federal grants; it must be repaid either from general funds or a tax on employers. Failure to repay the borrowed federal funds will result in the loss of 0.3 percent of the 5.4 percent credit against the federal unemployment tax (FUTA) rate of 6.2 percent levied on employers. The reduction in the FUTA credit in 2011 will increase the employer's tax by $21 per employee. For each year beyond 2011 that Virginia has an outstanding loan balance, an additional 0.3 percent reduction in the FUTA tax credit will occur.

## UNEMPLOYMENT BENEFIT OVERPAYMENTS

Delegate Donald Merricks introduced House Bill 252 and House Joint Resolution 49 in an effort to address the issue of overpayments of unemployment compensation benefits occurring due to an administrative error by the VEC. These items of legislation were carried over to the 2011 Session, and were examined by the Auditor of Public Accounts (APA) as part of its audit of the VEC. Linda C. Wade, Audit Director at the APA, presented an overview of its report on the benefits overpayment issue. The full report is available on the APA's website at www.apa.virginia.gov.

Concerns over the rate of VEC overpayments were prompted by data generated through the Benefits Accuracy Measurement (BAM) Program conducted by the U.S. Department of Labor. The BAM Program requires the VEC to determine if benefits eligibility requirements are satisfied for a statistically valid sample of weekly benefits payments. The BAM statistics for 2009 indicate that Virginia had an overpayment error rate of 14.6 percent, which represents $165.8 million in overpayments.

An analysis of the BAM overpayments rate revealed that about two-thirds of the errors (9.7 percent of the state's 14.6 percent total overpayment error rate) reflected errors related to Virginia's work search requirements. Over half of the errors were attributed to cases where a claimant contacted a potential employer by telephone, in violation of Virginia's requirement that a claimant's contact be in person. Virginia is one of four states that requires in-person contacts by unemployment benefits claimants. Ms. Wade observed that work search requirements are inherently difficult to enforce and vary greatly among states.

The other leading sources of overpayment errors relate to the reasons for a claimant's separation from employment (accounting for 1.8 percent of overpayments) and to benefit year earnings issues (accounting for 1.5 percent of overpayments). A common benefit year earnings issue occurs when a claimant obtains new employment but does notify the VEC and thus improperly continues to receive benefit payments. The VEC has procedures in place to prevent and detect these types of overpayments.

The U.S. Department of Labor also calculates each state's operational overpayment rate, which excludes certain types of errors, including work search requirements, in order to allow a meaningful comparison of states' error rates. Virginia's operational overpayment rate for 2009 was 3.32 percent, which is notably lower than the national rate for 2009 of 4.91 percent. The amount of estimated overpayments in 2009, excluding errors related to the work search requirements, was $37.7 million.

Ms. Wade's summary included a discussion of the VEC's overpayment detection and recovery efforts. Despite being staffed to handle about half of its current caseload, the VEC's Benefit Payment Control Unit established $26 million of overpayments in 2009. In that year, the VEC recovered $7.4 million of the $26 million of established overpayments.

The APA's report concludes that the VEC has built into the eligibility determination process controls to prevent overpayments. However, inaccurate and untimely information from claimants and employers affects the effectiveness of these controls. The VEC's ability to address overpayments may be limited by funding issues, system limitations, and impacts on employers. Ms. Wade identified changes that the VEC may consider in order to reduce the BAM overpayment rate. These include reviewing procedures for verifying the weekly work search requirement, increasing the staff in its Benefit Payment Control Unit, and developing new methods for estimating and analyzing overpayments.

VEC Commissioner Broadway provided the agency's response to the APA's report. He has asked his staff to develop plans for a free-standing Benefits Division that could add emphasis to efforts addressing overpayments. Chairman Watkins asked the VEC to report back to the Commission on its implementation of responses to the APA's report in a meeting next year.

## CLAIMS ADJUDICATION BY DEPUTIES

M. Coleman Walsh, Jr., Chief Administrative Law Judge at the VEC, reported on the agency's review of its claims adjudication process. The VEC commenced a comprehensive self-study prior to Delegate Robert Marshall's introduction of House Joint Resolution 23 in the 2010 Session. The VEC's study involved 279 initial decisions by deputies between May and November 2010. One hundred twenty-nine, or 46 percent, of these decisions were reversed on appeal. Of the decisions reversed, employers or their agents participated in 51 (40 percent), and claimants participated in 76 (59 percent), of the fact-finding interviews. When appeals hearings were held in the appealed cases, the level of participation by employers or their agents rose to 67 percent, while the participation level by claimants fell to 53 percent. Of the 108 cases appealed by employers, 52 (48 percent) were reversed in their favor. Of the 171 cases appealed by claimants, 43 (25 percent) were reversed in their favor.

One of the factors Judge Walsh identified as contributing to reversals on appeal was the failure of a claimant, employer, or employer's agent to participate in the fact-finding interview conducted by a deputy. A related factor was the provision of incomplete explanations and documentation at the fact finding interview. Participation at the appeals hearings often provided explanations and documentation that were missing at the lower level hearing. In addition, some deputy-level determinations were found to result from inadequate fact finding, even when both parties participated.

A principal finding of the VEC's study on organizational design was the importance of implementing a comprehensive training program in ensuring consistency of hearing outcomes. Decentralized management and supervision of deputies has contributed to inconsistencies in training and performance oversight.

The VEC has been awarded a federal grant to study its adjudication and appeals processes. The grant funds have been used to retain a consultant who has been asked to make recommendations regarding the VEC's structure, business processes, and laws. Actions taken by the VEC to date that address the issue include the creation of a separate Unemployment Insurance Division within the agency. The Division is directed to provide a greater emphasis on overall agency performance. The VEC is also developing a comprehensive training program for all adjudicators and their supervisors.

## SOCIAL SECURITY OFFSET

Pursuant to amendments to Virginia Code § 60.2-604 enacted in 2005, Virginia has reduced the unemployment compensation benefits of claimants by 50 percent of the amount of their Social Security retirement benefits in any calendar year following a year when the solvency level of the Trust Fund falls below 50 percent. The solvency level of the Trust Fund fell below the 50 percent level in 2009. As a result, for the first time in over four years, in January 2010 the VEC began offsetting unemployment benefits by an amount, converted to a weekly amount, of 50 percent of the amount of a claimant's Social Security benefit payment. This automatic reinstitution of the Social Security offset, coupled with the fact that the offset is required with respect to extended and emergency unemployment benefits that are entirely federally funded, prompted the Commission to revisit the issue.

Staff provided the members with an overview of the current law, the history of the federal law that initially required the pensions benefit offset to include Social Security payments, and activities in other states. A report of the staff's report is available at the Commission's website at http://dls.state.va.us/groups/uncomp/meetings/121310/materials.htm.

The VEC reported that in the first nine months of 2010 the Social Security offset requirement resulted in 3,915 claimants receiving no unemployment benefits and 27,799 claimants receiving a reduced unemployment benefit. Eliminating the provision was projected to increase state unemployment taxes by $0.64 per employee per year.

David DeBiasi, Associate State Director for Advocacy with AARP-Virginia, told the Commission that his organization will ask the 2011 Session of the General Assembly to repeal the Social Security offset. He characterized the offset provision as unfairly discriminating against older workers. Delegate Morrissey asked if he would support a measure that would fund an elimination of the Social Security offset by reducing the benefits payable to every claimant by an amount that would neutralize the proposal's impact on the Trust Fund. It was estimated that the amount of such a benefits reduction would be $3 per week per claimant. Mr. DeBiasi replied that while such an approach resembled "robbing Peter to pay Paul," it would be preferable to the existing system.

W. Thomas Hudson commented that Virginia's approach to the Social Security offset issue should focus on the claimant's degree of attachment to the workforce. Some supporters of the enactment of the federal pension offset legislation in the 1970s believed that receipt of Social Security retirement benefits was evidence that the individual had withdrawn from the workforce. He also observed that without an offset, in some instances a retiree's total income could exceed his pre-retirement income. Finally, he asked the members to note that the economic climate when the offset requirement was enacted by Congress in the 1970s is similar to the current recessionary period, and that the offset serves a valuable purpose by protecting the solvency of the Trust Fund. In response to a question by the chairman regarding the fact that the offset applies to federally funded emergency and extended unemployment benefits, Mr. Hudson offered that it is time to stop living beyond our means at the federal level, and added that it may be time to revisit the entire unemployment compensation scheme. For example, he suggested that Virginia attempt to obtain federal approval for a pilot program that would provide any claimant who finds new employment prior to the end of their 26-week state benefit eligibility period with a bonus equal to one-half of the amount of the unemployment benefits they would have received if they had stayed unemployed over the remaining number of weeks of eligibility.

Keith D. Cheatham, Vice-President for Government Affairs at the Virginia Chamber of Commerce, echoed Mr. Hudson's concern that this is not the time to be adding additional expenses on employers. He cited reports that the requirement that employers pay higher unemployment taxes to replenish unemployment trust funds will discourage the hiring of new employees. He also reminded members that the 2005 legislation that called for the Social Security offset to be instituted when the solvency level of Virginia's Trust Fund falls below 50 percent reflected a compromise among various groups, and the groups should be held to their agreement.

NEXT MEETING

The meeting closed with a presentation by staff of several legislative proposals that may be considered during the 2011 Session. However, the lack of a quorum prevented the Commission from making any recommendations. The Commission scheduled a meeting for January 11, 2011, at 2:00 p.m. to complete its consideration of the legislative proposals.