

Commission on Unemployment Compensation  
December 16, 2008  
Richmond, Virginia

The Commission on Unemployment Compensation (UC Commission) held its second meeting of the 2008 interim on December 16. Though a quorum of members was not present, the Commission received information regarding the effect of the economic downturn on the solvency of the unemployment trust fund.

### State of the Economy

The weakness in the economy is directly affecting the status of Virginia's unemployment compensation system. Dolores Esser, Commissioner of the Virginia Employment Commission, reported that Virginia's unemployment rate in September 2008 was 4.2 percent; one year earlier, it was 3.0 percent. Each monthly unemployment rate in 2008 has exceeded last year's corresponding monthly rate. The August 2008 unemployment rate of 4.6 percent was the highest monthly rate since January 1997.

The national economy has officially been designated as being in recession since December 2007. Commissioner Esser reported that economists are projecting that the recession will last through 2009, and that a slow recovery will occur in 2010. The current recession is expected to be slightly worse than the 1991 recession, but not as bad as the 1982 recession. The national unemployment rate is expected to peak at 8.7 percent nationally, while Virginia's unemployment rate is expected to reach slightly over 6 percent. The Commonwealth's better employment projection was attributed to the fact that over half of Virginia's employment is in less recession-prone sectors, such as professional and business services, health care, education, and federal government and defense.

Data updated since the previous UC Commission meeting illustrates the rapidity of the deterioration in employment. At the September meeting, members were told that initial year-to-date claims for unemployment benefits through July 2008 were up 12 percent from the same period in 2007 and up 16.9 percent from the same period in 2006. At the December meeting, initial year-to-date claims for unemployment benefits through October 2008 were up 21.5 percent from the same period in 2007 and up 22.0 percent from the same period in 2006. Initial claims are projected to grow from slightly more than 260,000 in 2006 and 2007 to 307,511 in 2008, 514,652 in 2009, and 464,054 in 2010. In September, the VEC projected that initial claims would total 355,986 in 2008 and 414,607 in 2009.

First payments of unemployment insurance benefits from January through October 2008 are up 27.5 percent compared to the first 10 months of 2007 and up 32.2 percent from the corresponding period in 2006. The average duration for receipt of unemployment benefits in October, at 12.6 weeks, is unchanged from the same month in 2007. Final payments of benefits in the first 10 months of 2008 are up 21.7 percent from the same period in 2007 and up 25.1 percent from the same period in 2006. The exhaustion rate, which reflects the percentage of unemployment compensation recipients who use up all of the weeks that they are eligible to

receive benefits, was 37.1 percent in October 2008; in the same month of 2007, it was 33.1 percent.

Virginia's maximum weekly unemployment benefit of \$378 is near the median of the six jurisdictions within the area of the Fourth Circuit Court of Appeals, and is slightly less than the national average of \$382. Similarly, the ratio of Virginia's maximum weekly unemployment benefit to the state's average weekly wage (44 percent) is slightly less than the national average of 46 percent.

### Solvency of Unemployment Trust Fund

The solvency level of Virginia's unemployment trust fund is calculated based on the balance in the trust fund on June 30 of each year. The solvency level was 64.4 percent as of June 30, 2008; one year ago it was 70.4 percent. The solvency level is projected to be 38.5 percent in 2009, 20 percent in 2010, and 24 percent in 2011. The declining solvency level is a function of increased outlays from the trust fund as benefits payments increase (with rising unemployment and higher benefit amounts) and tax revenue declines (as the number of employed persons falls). By 2012, the solvency level is expected to rise to 40 percent. Part of this projected rebound is due to assessment of the fund builder tax of 0.2 percent of the first \$8,000 of each employee's wages, which is triggered when the solvency level falls below 50 percent. In addition, a partial Social Security benefit offset is instituted when the solvency level is below 50 percent.

The balance in the trust fund is projected to fall from \$708.2 million on January 1, 2008, to \$565.3 million on January 1, 2009, and to \$148.4 million on December 31, 2009. Much of the anticipated decline in the trust fund balance in 2009 is due to rising benefit payments, which are forecast to jump from \$493 million in calendar 2008 to \$760 million in the following year. The acceleration in payments is stark. In December 2007, weekly benefits payments totaled \$7.2 million. In July 2008, the VEC was paying \$8.6 million per week in benefits. The weekly average for the first half of December 2008 was \$14.2 million.

An issue of particular concern is the need to borrow federal funds to cover benefits payments when the trust fund balance is inadequate. The VEC estimated that if the current recession is similar to that experienced in 1990-1991, the Commonwealth will borrow \$232 million in total in 2010 and 2011. If the federal loans are not repaid by September 30 of the year in which the money is borrowed, the Commonwealth will be liable for interest payable from the general fund. In addition, employers would lose 0.3 percent of the existing federal credit on FUTA payments, which would increase employers' monthly FUTA liability from \$56 to \$77 per employee.

Commissioner Esser stated that based on current projections, the VEC should be able to repay any federal loans under this scenario within the period required to avoid payment of interest. Virginia last borrowed money from the federal government in 1981 and 1982. The Commonwealth has never been required to pay interest or penalties on account of such loans. A dozen states are expected to need to borrow to meet their unemployment benefits obligations in the first quarter of 2009.

However, if the current recession becomes as severe as that of 1981-1982, Virginia may need to borrow about \$800 million to pay benefits, all of which may not be repaid within the required period. In such event, the Commonwealth could be required to make interest payments of about \$25 million between 2010 and 2012.

As was reported at the UC Commission's September meeting, the average annual state unemployment tax paid by Virginia's employers is projected to be \$88 per employee in 2008. In 2009, the average tax per employee is expected to rise to \$98; in 2010, to \$159; in 2011, to \$191, and in 2012, to \$199. By contrast, in September, the VEC projected that the average tax per employee would peak in 2012 at \$163 per employee.

Virginia's average tax per employee for the year ending March 31, 2008, at \$98, was less than the corresponding figure of \$112 for the year ending September 30, 2007. Virginia's average annual per-employee tax remains the lowest, by \$50, among the six jurisdictions in the Fourth Appellate Circuit. The national average is \$258. The average tax per employee in Virginia reflects its average tax rate, which at approximately 1.2 percent of taxable wages is the lowest of the six jurisdictions in the Fourth Appellate Circuit, and its taxable wage base, which at \$8,000 is tied for second lowest among these jurisdictions. Virginia's taxable wage base has not changed since 1991, when it was increased from \$7,000.

#### House Joint Resolution 51 - Seasonal Employment

House Joint Resolution 51 (2008) directed the UC Commission to study the need to limit the eligibility of seasonal employees for unemployment compensation benefits. In its study, the Commission is directed to examine the impact on employers, employees, and the solvency of the trust fund of reinstating a seasonality provision in the Commonwealth's unemployment compensation laws, and whether a seasonality provision should be limited to specific categories of employment.

At the September meeting, the UC Commission was briefed on the topic and discussed the Court of Appeals' decision in Hutter, Inc. v. VEC, Va. Ct. App., No. 0537-07-2 (November 6, 2007), where the Court of Appeals affirmed a circuit court holding that a claimant who enters into an employment contract for a specific term does not leave employment voluntarily when that term expires, and thus is not per se ineligible for unemployment benefits. At that meeting several members expressed concerns that allowing employees to collect unemployment benefits, if they have agreed as part of an employment contract that their employment will end when the employer's season ends on a fixed date, contravenes the terms of their employment contract. Following the September meeting, the chairman requested an informal opinion of from the Attorney General on the issue. The Office of the Attorney General informed the chairman that the Court of Appeals' decision in the referenced case does not abrogate the rights of the employer under the employment contract, and that even if it did, any such impairment of contract would be subject to the Commonwealth's sovereign power to protect the welfare of the people.

Staff provided the Commission with additional information regarding the 1978 repeal of §§ 60.1-53 through 60.1-57, which had made certain seasonal employees ineligible for unemployment benefits. Staff also presented three possible legislative approaches, prepared at the request of the

chairman, to re-introducing a seasonal employment law. The first option would institute a seasonality law very similar to the measure repealed in 1978. The second option would be similar to the first option with one major broadening feature: Instead of making the seasonality provision apply only to those employers who requested and obtained designation as such from the VEC, all employees of employers that because of the seasonal nature of their operations customarily operated only during a regularly recurring period of between 13 and 40 weeks per year would be ineligible for benefits. The third option would make seasonal employees of tax return preparation establishments ineligible for unemployment benefits.

VEC's Chief Administrative Law Judge M. Coleman Walsh, Jr., reported that under the first option, about 7,300 employees, or 025 percent of covered employment, would be ineligible for benefits. Under the second option, it was estimated that about between 22,000 and 85,000 employees, or between 0.75 and three percent of covered employment, would be ineligible. Under the third option, about 3,000 employees would be ineligible, with a resulting annual change in benefits charges of about \$500,000.

A fourth option was offered by Delegate Morrissey, who expressed that the fairest approach would be the one with broadest applicability. His approach would disqualify an unemployed individual for unemployment benefits if he was provided with written notice, and signed an acknowledgment of receipt of such notice, by his employer stating that his employment is temporary or seasonal and will terminate by a date certain or upon the completion of seasonal work specified in the written notice.

Judge Walsh noted that implementation of any measure that automatically excluded seasonal workers would be difficult because the VEC does not currently collect any information on employees other than their name, social security number, and wages.

Several persons, including Becky Health of Becky's Bulbs in Gloucester and Russ Beyer of Jackson Hewitt Tax Services in Richmond spoke in favor of seasonal employment ineligibility measures. Thomas Hudson, who represented the VEC when the seasonality law was repealed in 1978, recalled that the law's unfairness, rather than its administrative burden, spurred the recommendation 30 years ago to repeal the measure. He cautioned that seasonality prohibitions were contrary to the purpose of unemployment compensation programs, which is to provide countercyclical help to the economy by giving aid to persons who become unemployed through no fault of their own.

## Conclusion

Without a quorum, the UC Commission took no action on any of the options presented. The chair indicated that seasonal employment ineligibility is a complex issue that may require additional work. Without a quorum, the UC Commission also deferred taking any position with respect to Delegate Byron's House Bill 1314, which had been referred to the this body for study.