



Pennsylvania Unemployment Compensation Newsletter

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“Independent Contractor” or “Employee”?

On February 10, 2011, the Construction Workplace Misclassification Act (Act No. 72) took effect. While the Act specifies that it applies to individuals employed in the construction industry, it is not inconceivable that the Courts will look to the Legislature’s definition of an “independent contractor” found within that statute as guidance for determining the employment status of individuals working in other fields. In pertinent part, the Act provides:

§ 933.3. Independent contractors

(a) GENERAL RULE.-- For purposes of workers' compensation, unemployment compensation and improper classification of employees provided herein, an individual who performs services in the construction industry for remuneration is an independent contractor only if:

- (1) The individual has a written contract to perform such services.
- (2) The individual is free from control or direction over performance of such services both under the contract of service and in fact.
- (3) As to such services, the individual is customarily engaged in an independently established trade, occupation, profession or business.

(b) CRITERIA.-- An individual is customarily engaged in an independently established trade, occupation, profession or business with respect to services the individual performs in the commercial or residential building construction industry only if:

- (1) The individual possesses the essential tools, equipment and other assets necessary to perform the services independent of the person for whom the services are performed.
- (2) The individual's arrangement with the person for whom the services are performed is such that the individual shall realize a profit or suffer a loss as a result of performing the services.
- (3) The individual performs the services through a business in which the individual has a proprietary interest.
- (4) The individual maintains a business location that is separate from the location of the person for whom the services are being performed.
- (5) The individual:
 - (i) previously performed the same or similar services for another person in accordance with paragraphs (1), (2), (3) and (4) while free from direction or control over performance of the services, both under the contract of service and in fact; or
 - (ii) holds himself out to other persons as available and able, and in fact is available and able, to

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perform the same or similar services in accordance with paragraphs (1), (2), (3) and (4) while free from direction or control over performance of the services.

(6) The individual maintains liability insurance during the term of this contract of at least \$50,000.

(c) FACTORS NOT TO BE CONSIDERED.—The failure to withhold Federal or State income taxes or pay unemployment compensation contributions or workers' compensation premiums with respect to an individual's remuneration shall not be considered in determining whether the individual is an independent contractor for purposes of the Workers' Compensation Act or the Unemployment Compensation Law.

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(e) UNEMPLOYMENT COMPENSATION.--

- (1) For purposes of section 4(1)(2)(B) of the Unemployment Compensation Law, an individual is customarily engaged in an independently established trade, occupation, profession or business with respect to services the individual performs in the construction industry only if the criteria in subsection (b) are satisfied.
- (2) Except as provided in paragraph (1), nothing in this act shall be construed to affect any exclusion from "employment" as defined in the Unemployment Compensation Law.



RECENT DECISIONS OF NOTE

METHOD OF FILING APPEAL FROM SERVICE CENTER'S DETERMINATION MAY RENDER APPEAL UNTIMELY

Section 501(e) of the UC Law provides that an appeal from the UC Service Center's notice of eligibility determination must be filed within 15 days after the notice was delivered to the party personally, or was mailed to the party's last known post office address. An appeal may be filed by US mail, delivery by a common carrier, fax or other electronic transmission, or by personal delivery to a workforce investment office (also known as the "CareerLink" office) or the Board. The filing date for an appeal by personal delivery is "the date the appeal was personally delivered to the workforce investment office or the Board during its normal business hours." Delivery of an appeal to the UC Service Center after business hours will be deemed untimely. For a more detailed discussion as to the proper method of filing an appeal by personal delivery or other means, see the Commonwealth Court's opinion in the case of *Ann Russo v. Unemployment Compensation Board of Review*, No. 791 C.D. 2010, Filed December 10, 2010, Reported February 16, 2011.

CLAIMANT REQUIRED TO PAY BACK OVERPAYMENT OF BENEFITS MADE DUE TO NO FAULT OF CLAIMANT

The Commonwealth Court recently addressed the issue of whether a claimant should be responsible to pay back an

overpayment of benefits when the overpayment was made due to no fault of the claimant. In the case of *Shawna Stelter v. Unemployment Compensation Board of Review*, No. 1219 C.D. 2010, Filed February 16, 2011, the claimant qualified for regular UC benefits and, when those benefits were exhausted, the claimant started to receive EUC (Emergency Unemployment Compensation) benefits. However, claimant had qualified for a new benefit year of regular UC benefits. Consequently, claimant received both regular and emergency benefits when EUC benefits are only available to those who have exhausted all rights to regular UC under the State law. Although the payment of EUC benefits was not claimant's fault, the Court determined that repayment by claimant would be consistent with equity and good conscience.

EMPLOYER'S GENERAL STATEMENT AS TO LAYOFFS MAY BE NECESSITOUS AND COMPELLING REASON FOR CLAIMANT TO VOLUNTARILY QUIT

When an individual voluntarily terminates his or her employment, UC benefits are not available to that individual unless he or she has a "necessitous and compelling" reason to quit. What constitutes a "necessitous and compelling" reason has been the subject of many appellate decisions, including the recent decision issued by the Commonwealth Court in the case of *Deborah W. Wright-Swygert v. Unemployment Compensation Board of Review*, No. 930 C.D. 2010, Filed March 3, 2011. In that case, the claimant had been offered a voluntary early retirement package due to the employer's restructuring and downsizing. The claimant's director advised her that her division was going through a "big shake up" and he was not sure about his own job or hers. Although the director did not tell her directly, the claimant believed that he was indirectly or "in general" advising her that her job was going to be eliminated and that she should take the retirement

package. The Court found the claimant's belief to be reasonable. Where the circumstances are that the employer gives the claimant a reasonable belief that he or she is going to be laid off, as if specifically telling the claimant that he or she will lose his or her job, then the claimant is justified in believing that his or her job is threatened and has a necessitous and compelling reason to voluntarily terminate his or her employment. Benefits are thus available.

**AN INABILITY TO COPE WITH
CHILD'S DEATH MAY BE
NECESSITOUS AND COMPELLING
REASON TO TERMINATE EMPLOYMENT**

James Fiedler and his wife were residents of Pennsylvania for 13 years. Unable to find work in Pennsylvania, Mr. Fielder accepted a position in Oklahoma beginning on January 5, 2009. Mrs. Fielder, a teacher, intended to work for another 2 years in Pennsylvania before retiring. At that point, she intended to join her husband. Shortly before Mr. Fielder began work in Oklahoma, however, his 20-year old son was killed in an auto accident. After working for a year in Oklahoma, claimant gave his employer notice of his intent to resign. He resigned because he was having emotional difficulties due to his son's death and no longer wished to be separated from his wife and family. Upon returning to Pennsylvania, Mr. Fielder applied for unemployment compensation benefits. His application was denied. The Commonwealth Court, however, found that Mr. Fielder was entitled to benefits, stating: "...a reasonable person unable to cope with a tragic loss due to separation from his family would be compelled to act as Claimant did here, as would a person with ordinary common sense, by reuniting with his family." For a complete copy of the Court's opinion, see *James J. Fielder v. Unemployment Compensation Board of Review*, No. 1984 C.D. 2010, Filed April 18, 2011.

**FAILURE TO RECEIVE WAGES IN A TIMELY
MANNER AND ON AN ESTABLISHED PAYDAY
IS A NECESSITOUS AND COMPELLING REASON
TO QUIT, THEREBY ENTITLING
EMPLOYEE TO UC BENEFITS**

Section 4 of the Pennsylvania Wage Payment and Collection Law provides: "It shall be the duty of every employer to notify his employes at the time of hiring of the time and place of payment and the rate of pay and the amount of any fringe benefits or wage supplements to be paid to the employe...or...for the benefit of the employe..." Further, Section 3 of the Wage Payment and Collection Law explicitly states: "Every employer shall pay all wages...due to his employes on regular paydays designated in advance by the employer." Finally, Section 7 of the Wage Payment and Collection Law provides that no provision of that law shall be contravened or set aside by private agreement. Taking all of these provisions into consideration, the Courts have held that erratic and intermittently late payments are unacceptable as a matter of law and

constitute a necessitous and compelling reason to quit. Accordingly, the Courts have stated: "...several instances of tardy wage payments resulting in employee protest and refusal by the employer to guarantee timely payment of wages as demanded by the employee can constitute necessitous and compelling cause for that termination." For a detailed explanation of the Courts' rationale, please see the Commonwealth Court's recent decision in the case of *Amy Shupp v. Unemployment Compensation Board of Review*, No. 1933 C.D. 2010, Filed April 21, 2011.

**COURT REFUSES TO ADDRESS CLAIMANT'S
ARGUMENT THAT EMPLOYER'S ACCESS
TO FACEBOOK PAGE VIOLATED
FEDERAL CONSTITUTIONAL RIGHTS**

In the case of *Diane Chapman v. Unemployment Compensation Board of Review*, No. 1583 C.D. 2010, Filed April 25, 2011, the claimant was deemed to be ineligible for unemployment compensation benefits inasmuch as she was terminated due to willful misconduct. Ms. Chapman was a nurse who, while distributing medications to patients, used her cell phone to post comments on her Facebook page about a coworker who had accidentally soiled her pants. Her employer discharged her for engaging in conduct in violation of its rules against cell phone usage while on duty, which the employer argued could create a life threatening situation for its patients. The Court found that there was substantial evidence to support the Board's findings that employer had a policy prohibiting the use of cell phones while on duty, that the policy was reasonable, that claimant was aware of the policy and that claimant violated the policy. Consequently, the Court upheld the denial of benefits. One of the arguments raised by the claimant was that the employer's investigation and access to her Facebook page violated her federal constitutional rights. As such, claimant argued that any reliance upon the contents of her Facebook page in determining that she engaged in willful misconduct would constitute legal error. The Court sidestepped the issue, noting that the claimant failed to preserve that argument in the record before the Referee or the Board. Further, the claimant did not raise the issue in her petition for review filed with the Commonwealth Court. Consequently, the Court found that the claimant had waived the Constitutional issue and, therefore, did not address it. Given the increasing ease of use of the internet and social networks through personal cell phones as well as employer provided computers, this issue is one which will undoubtedly be raised again. In the meantime, however, the Court has not yet stated that an individual's constitutional rights are violated when his or her employer accesses the individual's social networking site. As such, employers may continue to use such evidence as evidence of willful misconduct until the Courts rule otherwise.



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ATTENTION READERS, the editors of Thomson, Rhodes & Cowie Pennsylvania Unemployment Compensation Newsletter invite you to submit questions you may have dealing with unemployment compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified unemployment compensation attorney.

Send questions to: Margaret M. Hock, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219.

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