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Pennsylvania Unemployment Compensation Newsletter

Thomson, Rhodes & Cowie, P.C. Two Chatham Center, 10th Floor, Pittsburgh, PA 15219 (412) 232-3400

APPELLATE CASE LAW REVIEW

INDEPENDENT CONTRACTOR vs. EMPLOYEE: STRONG PRESUMPTION EXISTS IN FAVOR OF EMPLOYEE/ EMPLOYER RELATIONSHIP

In employment cases, an individual receiving wages for his services is presumed to be an employee, and the employer bears a heavy burden to overcome that presumption. To overcome this statutory presumption of employment, the employer must show that the individual performed the work free from the employer's control and direction, and that the work could be done for others, not just the employer, as part of an independent trade. Unless the employer can show that the employee is not subject to his control and direction and is engaged in an independent trade, occupation or profession, then the worker is an employee. The fact that the employee signed a consulting contract is not dispositive of the work relationship. For an in depth discussion of the issue, please see the Commonwealth Court's decision in the case of Jai v. UCBR, No. 2459 D.C. 2011, Filed September 7, 2012, Reported November 27, 2012.

AN EMPLOYER MAY ONLY APPPEAL THE RESERVE RATIO AND BENEFIT RATIO FACTORS OF ITS EXPERICENE-BASED CONTRIBUTION RATE

Under the UC Law, in order to determine an employer's Experience, employers are classified into 3 groups based on the length and regularity of their contribution payments. Employers' Experience affects their basic rate, which is the aggregate of 3 factors: (1) reserve ratio; (2) benefit ratio; and (3) state adjustment, statutory formula. The reserve account balance represents the sum of the lifetime contributions paid by an employer subtracted by the lifetime benefits charged against the employer's account. In the case of Stratigos d/b/a Dairy Queen v. DLI, Office of Unemployment Compensation Tax Services, No. 694 C.D. 2012, Filed November 28, 2012, Stratigos ceased operations of his Dunkin' Donuts franchise. He then acquired a Dairy Queen franchise, but did not apply for the experience record and reserve account (Experience) of the preceding owner. His UC rate for 2009 was 1.8370%. In December of 2009, the Office of UC Tax Services (OUCTS) advised Stratigos that his UC rate for 2010 would be 8.4792% due to UC benefits collected by his former Dunkin' Donuts employees. Stratigos appealed, but the Court found that he neither applied to have the prior Dairy Queen owner's Experience transferred to him nor did he establish a commonality of ownership, control or management of the franchise with the prior owner. Moreover, the Court rejected Stratigos' argument that the benefits charged to his account by the OUCTS in the fiscal year 2009 should be exempted from the computation of the reserve ratio and benefit ratio factors. The UC Law includes no provision that would permit the OUCTS or the Department to exempt any benefit charges from the statutory formula used to calculate an experienced based contribution rate.

AN INCIDENT OF WILLFUL MISCONDUCT CANNOT BE TEMPORALLY REMOTE FROM THE DISMISSAL AND STILL BE THE BASIS FOR A DENIAL OF UC BENEFITS

This general rule was recently examined in the case of York v. UCBR, 142 C.D. 2012, Filed September 13, 2012, Reported November 28, 2012. In that case, the claimant, a police officer, used the emergency lights on his patrol car and disobeyed numerous traffic laws while driving to the video store, where he then rented or returned a video. The incident occurred on March 12, 2011. On March 24, 2011, claimant was notified of employer's intent to take disciplinary action. A pre-disciplinary conference was held on March 28, 2011. By letter dated April 13, 2011, claimant was notified

that a recommendation was being issued to the Borough Council calling for the claimant's termination. On May 5, 2011, the Borough Council officially terminated claimant's employment on the basis that his conduct constituted "Neglect or Violation of Duty" and "Conduct Unbecoming an Officer." Claimant appealed the denial of his application for UC benefits on a variety of bases, including the argument that his purported willful misconduct could not form the basis for the denial of benefits because it was too temporally remote from his dismissal. The Commonwealth Court was not persuaded, noting: "Where there is an unexplained substantial delay between the claimant's misconduct and the employer's act to terminate the claimant, the remoteness doctrine will preclude an employer from seeking a denial of benefits based on allegations of willful misconduct. However, where the record establishes an explanation for the delay, such as the lengthy nature of the employer's administrative process, and there is not action on the part of the employer indicating that it condoned the claimant's conduct, the remoteness doctrine does not apply to preclude a denial of benefits."

EMPLOYER BEARS THE BURDEN OF PROVING CLAIMANT IS AN INDEPENDENT CONTRACTOR AND NOT AN EMPLOYEE

As noted by the Court in Jai v. UCBR, *supra*, there is a strong presumption that an individual working for wages is an employee. The burden to overcome that presumption rests with the employer. In order to prevail, the employer must prove: (a) the worker performed his job free from the employer's control and direction and, (b) the worker, operating as an independent tradesman, professional or businessman, did or could perform the work for others, not just the employer. Both prongs must be satisfied in order for persons rendering services for wages to be considered "independent contractors." For a detailed analysis of the issue, please see the Commonwealth Court's decision in the case of Quality Care Options v. UCBR, No. 58 C.D. 2012, Filed December 14, 2012.

LONGSTANDING HOLDING THAT ACCEPTANCE OF EARLY RETIREMENT PACKAGE RENDERS EMPLOYEE INELIBIBLE FOR UC BENEFITS OVERRULED BY SUPREME COURT

The Supreme Court recently addressed the issue as to whether the "voluntary layoff option" proviso ("VLO Proviso") contained in §402(b) of the UC Law permits employees to receive unemployment compensation benefits when they accept an early retirement plan offered pursuant to an employer-initiated workforce reduction. The Court noted that the general rule provided in §402(b) is that an employee is ineligible for compensation for an week in which his employment is due to voluntarily leaving work without cause of a necessitous and compelling nature. Thus, under the general rule, an employee who voluntarily accepts a layoff offer would not be eligible for benefits. In 1980, however, the General Assembly added the VLO Proviso, stating: "Provided further, That no otherwise eligible claimant shall be denied benefits for any week in which his unemployment is due to exercising the option of accepting a layoff, from and available position pursuant to a labor-management contract agreement, or pursuant to an established employer plan, program or policy." The Court noted that the UC Law does not define "layoff," nor does it address the concept of retirement. As such, the question remains whether the option to accept an early retirement plan offered pursuant to an employer-initiated workforce reduction is the equivalent of "an option of accepting a layoff" as set forth in the VLO Proviso. In order to answer that question, the Court conducted an in depth survey of prior decisions of the Commonwealth Court. After doing so, the Supreme Court overruled the longstanding interpretation of the Commonwealth Court precluding employees who accept their employer's early retirement packages from receiving UC benefits. Instead, the Court concluded that the VLO Proviso applies to an "otherwise eligible claimant" who accepts an early retirement plan offered pursuant to an employer-initiated workforce reduction. To review the Court's complete opinion, please see: Diehl v. UCBR (ESAB Group, Inc.), No. 51 MAP 2011, Decided December 28, 2012.

WHOSE TESTIMONY IS NECESSARY TO ESTABLISH WILLFUL MISCONDUCT?

In the case of Doyle v. UCBR, No. 762 C.D. 2012, Filed January 4, 2013, the claimant argued that the employer failed to meet its burden of proving that he was terminated for willful misconduct because the only employer representative who testified did not make the ultimate decision to termination him and was thus not personally aware of the rationale for the termination, rendering the testimony inadmissible hearsay. The Commonwealth Court did not agree, stating that contrary to the claimant's assertion that

the employer's witness was not personally aware of the rationale for the claimant's termination, the witness testified that he was present when the claimant was advised of his termination and that the reason for termination presented by the employer at that time was the claimant's failure to comply with a Performance Improvement Plan, which was also admitted into evidence. Moreover, the Court noted that just because the witness was not the ultimate decision-maker does not mean that his testimony as to the reason for the claimant's discharge is not competent evidence. The Court likened the case to its decision in Yost v. UCBR, 42 A.3d 1158 (Pa.Cmwlth 2012) in which the police chief, who was claimant's supervisor, was permitted to testify as to the reason for the claimant's discharge despite the fact that the Borough Council was the ultimate decision-maker.

SELF-EMPLOYED OR SIDELINE BUSINESS?

Under §402(h) of the UC Law, an individual who engages in self-employment is ineligible for benefits unless: (1) the self-employment began prior to the termination of the individual's full-time employment; (2) the self-employment continued without substantial change after the termination; (3) the individual remained available for full-time employment; and (4) the self-employment was not the primary source of the individual's livelihood. The claimant bears the burden of proving that his activity is non-disqualifying under §402(h). In the case of Lello v. UCBR, Nos. 80 & 81 C.D. 2012, Filed January 22, 2013, the claimant spent a few hours each week submitting album reviews and interviews to a music website and a music publication while he was employed by Wilkes Barre Publishing Company. After his employment was terminated, he continued to work a few hours per week performing copy editing assignments for AOL as an independent contractor. His claim for UC benefits was initially denied. The Commonwealth Court reversed that denial inasmuch as the only evidence presented on the issue was claimant's testimony, which established that he devoted the same amount of time to his sideline activity after his separation from his employer as he did prior to that separation. Consequently, the ineligibility provisions of §402(h) did not apply.

SPECIFIC RULE AGAINST TARDINESS IS NOT NECESSARY TO ESTABLISH WILLFUL MISCONDUCT

The existence of a specific rule of conduct is not necessary where the employer has a right to expect a certain standard of behavior, that standard is obvious to the employee, and the employee's conduct is so inimical to the employer's interests that discharge is a natural result. One situation where a specific rule is unnecessary is when an employee fails to show up for work on time. It is well-settled that an employer has the right to expect that its employees will attend work when they are scheduled and that they will be on time; habitual tardiness is behavior that is "inimical to an employer's interest." The Commonwealth Court discussed this issue in detail in the case of Ellis v. UCBR, No. 97 C.D. 2012, Filed January 22, 2013. In that case, employer had a policy that employees will "start their shift on time, ready to work." Employer's handbook also provided that "excessive" tardiness is a ground for dismissal. In a two week period, claimant was late 6 times. She then received a written warning. Thereafter, she reported to work 45 minutes late and was discharged. Claimant argued that employer's policies were vague and arbitrary because a specific number of instances of tardiness is not mentioned. The Commonwealth Court was not persuaded, noting that chronic tardiness, particularly after a warning, exhibits a sufficient disregard of employer's interests to constitute willful misconduct.

WORKING FOR AN EMPLOYER WHICH OPERATES PRIMARILY FOR RELIGIOUS PURPOSES IS NOT "EMPLOYMENT" UNDER THE UC LAW

Judy Livny worked as a cook for Jewish Day School of the Lehigh Valley from August 2008 through June 2012. She then filed an application for UC benefits which was denied on the basis that she had no covered base-year employment. Livny appealed, but the Referee concluded that employer is a religious educational institution and, thus, claimant's work was not "employment" under §4(l)(4)(8)(a)(ii) of the UC Law. The Board of Review affirmed the Referee's determination. On appeal to the Commonwealth Court, claimant argued that employer failed to prove that it is operated primarily for religious purposes. The Court noted that employer presented testimony and evidence establishing that it is a tax-exempt religious organization under the Internal Revenue Code, that it was formed with the intent of being a religious organization providing a religious education in the Lehigh Valley, that one of its stated missions is to provide a "richly fortified Jewish education to its students," that religion and prayer are included throughout the school's curriculum and that employer receives its direction and control from a reli-

gious organization. Concluding that employer operates primarily for religious purposes, the denial of benefits was affirmed. For a complete copy of the Court's opinion, please see Livny v. UCBR, No. 1498 C.D. 2012, filed January 29, 2013.

BURDEN OF PROOF REQUIRED TO ESTABLISH CHANGE IN WORK CONDITIONS CREATES A NECESSITOUS AND COMPELLING REASON TO VOLUNTARILY QUIT

Section 402(b) of the U.C. Law provides, in relevant part, that "[a]n employee shall be ineligible for compensation for any week…[i]n which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature." David Whitlatch voluntarily quit his employment because his employer changed his pay structure from a 10% sales commission to a base salary of $385 per week plus a 5% commission. Whitlatch believed that employer substantially reduced his annual earnings—from $44,679 to $28,020. At the hearing before the Referee, though, employer presented extensive testimony establishing that claimant's salary would be about the same following the changes to the salary structure. Employer's testimony was deemed more credible and convincing than claimant's. Because substantial, credible evidence established that claimant was likely to earn approximately the same amount under the new salary structure as he did under the old, claimant failed to meet his burden of proof of showing that the changes to his work conditions created a necessitous and compelling reason for him to voluntarily quite his job. For a complete copy of the Commonwealth Court's reasoning, please see Whitlatch v. UCBR, No. 1268 C.D. 2012, Filed February 21, 2013.

SEVERANCE BENEFITS AGREED TO AFTER JANUARY 1, 2012 ARE DEDUCTIBLE

The Notes to Section 404 of the UC Law provide that the amendment of subsection (d)(1) and the addition of subsection (d)(1.1) of the Law, which make severance benefits deductible from an employee's UC benefits, do not apply to severance pay agreements that were agreed to by an employer and employee prior to January 1, 2012. In the case of Killian-McCombie v. UCBR, No. 1654 C.D. 2012, Filed March 4, 2013, employer discussed a separation of employment and possible severance agreement with claimant in December 2011. It was not until March 2012, however, that claimant's position was eliminated and the parties executed a severance agreement. The Commonwealth Court held that the discussion in December 2011 did not constitute a severance agreement and, thus, claimant's severance was deductible from her UC benefits.

TRADE ACT vs. UC LAW

The purpose of the UC Law and the objective of the Trade Act are different. The UC Law provides financial assistance to displaced employees due to lack of work caused by the employer, whereas the Trade Act furnishes support to workers separated from their employment due to foreign competition. The Commonwealth Court recently addressed these differences in the case of Showers v. UCBR, No. 651 C.D. 2012, Filed March 5, 2013. The Court addressed three specific issues: 1) a lockout is not a qualifying "lay off" or severance under the Trade Act; 2) "lack of work" under the Trade Act concerns work available at the plant; and 3) a union member forfeits Trade Act benefits when he offers to work under an expired union contract.

REFUSING TO RETURN TO WORK DUE TO MEDICAL REASONS MAY CONSITUTE RESIGNATION FOR "NECESSITOUS AND COMPELLING" REASON

Where claimant voluntarily leaves employment for medical reasons and is then unable or unwilling to return to work without additional accommodations, although claimant has not resigned, the situation is most analogous to cases where a claimant voluntarily resigns from employment for medical reasons. An employee seeking to obtain benefits on health-related grounds bears the burden to demonstrate through competent and credible evidence the following: 1) health reasons of sufficient dimension compelled the employee to quit; 2) the employee informed the employer of the health problems; and 3) the employee is able and available for work if the employer can make a reasonable accommodation. The burden then shifts to the employer to establish that it made a reasonable attempt to identify and propose possible accommodations for the employee's health problems. For a complete reading of the Commonwealth Court's opinion addressing the issue, please see Watkins v. UCBR, No. 14 C.D. 2012, Filed March 5, 2013.

NATIONAL LABOR RELATIONS ACT RULINGS NOT BINDING IN UC CASES

Remarks made during a labor dispute are protected union activity and, thus, picketing union members

are generally shielded from employer discipline. The U.S. Supreme Court has held that in balancing the rights of the employer and the employee, as long as the activities engaged in are lawful and the character of the conduct is not indefensible in context, the employees are protected under §7 of the National Labor Relations Act. The Court recognized that the language used in labor disputes is often vituperative, abusive and inexact. In the case of Arndt v. UCBR, No. 702 C.D. 2012, Filed March 15, 2013, claimant was denied UC benefits because the Board found that she threatened her supervisor on a picket line, which constituted willful misconduct. Specifically, claimant told a co-worker's pit bull to "have a piece of Puerto Rican meat" when the dog touched the claimant's supervisor. The Commonwealth Court reversed the Board's determination, noting that claimant's inexact remark, which contained an ethnic slur, was not a credible threat. The dog did not belong to claimant. The Board's critical finding that claimant made the threat was based on its erroneous belief that claimant made the slur while simultaneously ordering her dog to "have" the supervisor's leg. Because that finding was not supported by the record, there was no basis for the Board's finding that claimant engaged in willful misconduct. The Board's order was, thus, reversed.

SELF-EMPLOYED OR SIDELINE ACTIVITY?

In the case of Crocker v. UCBR, No. 202 C.D. 2012, Filed March 15, 2013, the Commonwealth Court revisited the issue as to when self-employment is actually a sideline activity that does not affect an individual's eligibility for unemployment compensation benefits when that individual loses his or her full-time job through no fault of his own. The Court noted that §402(h) of the Law applies where the self-employment began prior to termination from full-time employment; has continued without substantial change after the full-time employment was termination; and was not the primary source of the claimant's livelihood. Under those circumstances, the claimant is eligible for unemployment compensation so long as he or she is available for full-time work. In the Crocker case, claimant began her work in real estate sales prior to her termination from her full-time employer. Thereafter, she increased her hours in real estate by 5-10 hours per week. The Court held that there is no inflexible rule that a mere increase in hours or participation will per se constitute a substantial change in her sideline activity. Benefits were awarded.

RELIGIOUS BELIEF: NECESSITOUS AND COMPELLING REASON TO QUIT?

Paul Mathis sought benefits on the basis that he quit his employment for a necessitous and compelling reason, i.e., a violation of his religious freedom. His employer required all employees to wear badges, the reverse side of which set forth the employer's mission statement:

> "This company is not only a business, it is a ministry. It is set on standards that are higher than our own. Our goal is to run this company in a way most pleasing to the Lord."

Mathis objected to the badge on January 23, 2012, after working for employer for almost 2 years without complaint. Employer told him he could either wear the badge or he could leave. Mathis chose to leave. His application for benefits was subsequently denied by the Service Center because he voluntarily quit without a necessitous and compelling reason. In discussing his appeal, the Commonwealth Court stated that an actual conflict between a claimant's sincerely held religious beliefs and his employment may constitute cause of a necessitous and compelling nature for voluntarily terminating employment. Here, however, Mathis offered no evidence of a sincerely held religious belief, nor did he attempt to describe any actual conflict between a religious belief and the requirement that the badge bearing the mission statement be worn. The denial of benefits was affirmed. For a complete reading of the Court's decision, see Mathis v. UCBR, No. 1435 C.D. 2012, Filed April 9, 2013.

BURDEN OF PROOF UNDER THE LAW CANNOT BE CHANGED ON APPEAL

In the case of Turgeon v. UCBR, NO. 1408 C.D. 2012, Filed April 18, 2013, the claimant suffered from stress and anxiety. As a result, she was incapable of carrying out her duties and sought to transfer from her position as a vice president of lending to an assistant vice president. The only position her employer had available to offer to her was a part-time loan officer position, which she refused because it involved a substantial change in the terms of her employment, i.e., a reduced salary and less vacation time. Claimant then left work and filed a claim for UC benefits, which the local service center granted. The Referee reversed, finding that employer terminated claimant's employment due to her unapproved leave of absence. The UCBR also concluded that claimant was ineligible for benefits, but found that claimant voluntarily quit because she did not like the

way her position was structured and made no attempt to resolve her concerns before quitting. The Commonwealth Court found fault with the UCBR's decision in that it decided the case under §402(b) of the law (*voluntary quit*) when the service center and the Referee applied §402(e) (*willful misconduct*). The Court noted that a party is prejudiced when the Referee and the UCBR decide a claimant's eligibility under different sections of the Law carrying different burdens of proof with no notice to the parties. The case was remanded to the UCBR to consider the claimant's eligibility under §402(e) of the Law.

STRIKE = NO UC BENEFITS;
LOCK-OUT = BENEFITS PAYABLE

Section 402(d) of the Law provides that "[a]n employe shall be ineligible for compensation fro any week…[i]n which his unemployment is due to a stoppage of work, which exists because of a labor dispute (other than a lock-out) at the factory, establishment or other premises at which he is or was last employed…" The test of whether a work stoppage resulted from a strike or a lock-out requests a determination as to which side - union or management - first refused to continue operations under the status quo after the contract had technically expired, but while negotiations were continuing. In the case of Temple University Health System and Temple University Hospital v. UCBR, No. 1539 C.D. 20113, Filed June 4, 2013, the employer appealed the award of benefits to its employees who were unemployed due to a work stoppage caused by a labor dispute. The dispute arose as a result of changes employer made to its tuition remission/reimbursement program which applied to all bargaining unit and non-bargaining unit employees. The Court determined that the last actual peaceable and lawful, non-contested status between the parties was that which existed prior to employer's unilateral discontinuance of the tuition reimbursement program in violation of the express terms of the collective bargaining agreement. Employer refused to restore the program and, as such, employer breached the status quo. Thus, the resulting work stoppage was a lockout and the employees were eligible for benefits under §402(d) of the Law.

WHEN DOES UNAUTHORIZED LEAVE
CONSTITUTE JOB ABANDONMENT?

The Commonwealth Court addressed this issue in detail in the case of Dike v. UCBR, No. 1993 C.D. 2012, Filed June 18, 2013. There, the employer had a "return home" policy that allowed employees to return home for certain reasons, including attending a family member's funeral. In order for an employee to request "return home" leave, the employee was required to submit a completed application, a copy of his plane ticket or travel itinerary, and written documental of the death or funeral. On December 6, 2011, claimant requested leave to attend his grandfather's funeral in Nigeria. Claimant was provided with the application form and was informed that he would need to submit his plane ticket and a written record of his grandfather's death or funeral. He was also advised that taking unauthorized leave would result in termination. Claimant did not provide employer with the completed application or the requested documentation. He left for Nigeria on December 22, 2011. As a result, he did not appear for work as scheduled on December 24, 2011, or any date thereafter. By letter dated January 9, 2012, employer notified claimant that his employment was terminated due to job abandonment. Claimant subsequently appealed the denial of his claim for unemployment compensation benefits. The Commonwealth Court ultimately affirmed the denial, stating that claimant's conduct in taking unauthorized leave when he was aware that it would result in termination evidenced an intention to voluntarily leave his job. Therefore, claimant was found to be ineligible for benefits under §402(b) of the Law.

ALCOHOL IS A "SUBSTANCE"
SUBJECT TO ABUSE
WITHIN THE MEANING OF §402(e.1)

A comparison of §402(e) and §402(e.1) reveals that both provisions require an employer to establish a rule or policy and that the employee violated it. If the employer satisfies its initial burden, then the burden shifts to the employee under §402(e) to demonstrate good cause for violating the rule, i.e., that the violation was justifiable or reasonable under the circumstances. In contrast, if an employer satisfies its initial burden in a §402(e.1) case, the burden then shifts to the employee to show that the employer's substance abuse policy was in violation of the law or a collective bargaining agreement. The employer with a substance abuse policy need not establish general willful misconduct; it is sufficient for the employer to establish the substance abuse policy and its violation. In the case of Dillon v. UCBR, No. 786 C.D. 2012, Filed June 18, 2013, the claimant was discharged from employment for testing positive for alcohol in violation of employer's substance abuse policy. He was denied benefits by the service center

and the Referee under §402(e.1) of the Law. The UCBR, however, concluded that alcohol testing was outside the purview of §402(e.1) because there is no specific reference to alcohol in that provision. The UCBR thus analyzed claimant's eligibility for benefits under §402(e). The Commonwealth Court found that the UCBR erred, noting that alcohol use and/or abuse, like drug abuse, constitutes willful misconduct under certain circumstances and for the same reasons. The manifestations of excessive drinking deprives an employee of the clearness of intellect or muscular control necessary for the proper performance of work. To exclude alcohol when interpreting §402(e.1) would be unreasonable because many employers equate alcohol abuse with substance abuse when crafting their substance abuse policy. Claimant was therefore ineligible for benefits under §402 (e.1) of the Law.

UNDER CERTAIN CIRCUMSTANCES A CLAIMANT'S APPLICATION FOR BENEFITS MAY BE "BACKDATED"

In the case of Falcone v. UCBR, No. 2092 C.D 2012, Filed July 9, 2013, the Commonwealth Court discussed in detail the circumstances under which the Regulations provide that a claimant's application for UC benefits may be backdated. Specifically, under 34 Pa. Code §65.43a(e), the acceptable reasons for late filing of an application include sickness or death of an immediate family member. Under those circumstances, the application may be backdated by 2 weeks. The claimant need not establish that the sickness or death actually *prevented* the claimant from filing an application. In contrast, §65.43a(h) allows for a more generous backdating when two or more reasons for extended filing have *prevented* a claimant from filing a claim for compensation within the time allowed. Anthony Falcone applied for UC benefits, requesting that his claim be backdated for 6 weeks on the basis that he failed to make a timely application because 3 of his family members suffered from serious medical conditions. He asserted only one reason for extended filing, i.e., sickness or death of an immediate family member. No other reason enumerated under the Regulations was asserted. Although he noted that 3 of his family members were ill, Falcone did not show that the illnesses actually *prevented* him from submitting his application in a timely manner. Consequently, the Court found that Falcone was entitled to have his application for benefits backdated for only 2 weeks, not 6 weeks as he had requested.

"INDEPENDENT CONTRACTOR vs. EMPLOYEE" RE-VISTED

Under §4(*l*)(2)(B) of the Law there is a presumption that one who performs services for wages is an employee and not an independent contractor. This presumption is overcome and the claimant is not an employee if the person for whom the claimant worked shows (1) that the claimant was free from control and direction in performing the services and (2) that the services are of a type customarily performed in an independent trade or business. Whether the claimant was free from direction and control is determined from the facts of the working relationship: how the claimant was paid, how taxes were paid, who supplies tools or equipment necessary to perform the job, whether on the job training was provided, who set the time and location of the work, whether the claimant was required to attend meetings, whether the claimant's work was subject to supervision or review, the terms of any written contract, whether the claimant was free to refuse work without repercussions, etc. Whether the services are customarily performed in an independent trade or business is determined by 3 factors: 1) whether the claimant was also able to perform the services for others; 2) whether the nature of the business compelled claimant to perform services only for a single employer; and 3) whether the claimant worked on job-by-job basis and was free to accept or reject assignments. For an in depth discussion of the issue by the Commonwealth Court, see Stauffer v. UCBR, No. 198 C.D. 2013, Filed August 10, 2013.

EDUCATIONAL EMPLOYEES MAY BE ELIGIBLE FOR BENEFITS DESPITE REASONABLE ASSURANCE OF WORK

Section 402.1(s) of the Law precludes school employees from receiving benefits during breaks between terms; however, if a school employee is laid off and receiving benefits *prior* to the end of an academic term, he is eligible for benefits during the break even if he has a reasonable assurance of work in the next term. The rationale is to eliminate payments to claimants who are unemployed for predetermined periods of time, but not to employees who become unemployed for other reasons. For example, in the case of Chester Community Charter School v. UCBR, No. 60 C.D. 2013, Filed August 27, 2013, the Commonwealth Court found that, although the claimant had received reasonable assurance of returning to work in the fall, she was eligible for benefits because she had already been laid off in April, 2 months prior to the end of the school year.

Thomson, Rhodes & Cowie, P.C.
1010 Two Chatham Center
Pittsburgh, PA 15219

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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.