A Timely Analysis of Legal Developments

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New York, Unemployment, and Severance Agreements

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Before offering severance to a departing employee, New York employers should be aware of recent changes to the New York unemployment insurance law. These changes may affect both the timing and language of the severance agreement.

In 2011, the federal government passed the Unemployment Insurance Integrity Act, which required every state to make certain changes to its unemployment insurance law.[1] As a result, New York amended New York Labor Law § 581(e)(3) and 12 N.Y.C.R.R. § 472.12, effective October 1, 2013, to require companies to respond to certain New York Department of Labor (NYDOL) unemployment insurance correspondence within specified periods of time. Previously, Section 472.12(b)[2] had provided employers with a loophole so that they could ignore and disregard correspondence from the NYDOL if, for instance, they agreed, in a severance agreement with a particular employee, not to contest unemployment insurance. Under the new law and regulation, however, employers can no longer do so.

Specifically, Section 472.12(a)-(b) states that employers must respond to "notices of potential charges" within 10 calendar days of the date of the notice and all other requests for information "within the number of days specified in the written (including electronic transmission) or verbal request for information." Moreover, an employer's response to a request for information must contain "adequate information." To be considered adequate, "the response must: (1) specify the reason(s) for the separation, or other issue affecting the claimant's eligibility or entitlement for benefits; (2) answer, in good faith, all questions in detail; and (3) provide all relevant information and documentation for the Department of Labor to render a correct determination regarding the claimant's eligibility or entitlement for benefits."[3]

After the first untimely and/or inadequate response (which can be excused for good cause), the employer's unemployment insurance account "*shall not be relieved* of charges relating to overpayments" except if (1) the charges were due to a NYDOL error, or (2) the employer was "unable to respond due to a disaster emergency" as declared by the governor or the president.[4]

1 *See* GJ Stillson MacDonnell and William Hays Weissman, *Federal Unemployment Insurance Integrity Act Creates Tough New Standards for Employers Responding to State Unemployment Insurance Claim Notices*, Littler ASAP (Oct. 11, 2013).

2 The former version of 12 N.Y.C.R.R. § 472.12(b) stated: "If the commissioner determines that it is impossible or impracticable for any employer or group of employers to comply with subdivision (a) of this section with respect to all or a class of their employees, he may exempt such employer or group of employers from such compliance with respect to such employees . . . ."

3 12 N.Y.C.R.R. § 472.12(f).

4 Id. § 472.12(g)-(j).

This means that if the employer fails to respond, submits an untimely response, or submits an inadequate response, the employer's account will be charged for the benefits paid to the employee, even if he or she would have otherwise been deemed ineligible for unemployment benefits.

This is an important change. An employer now has to be diligent in responding to inquiries from the NYDOL, lest it find itself in the position where its experience rating is charged for unemployment insurance benefits to an individual who is ineligible or not entitled to those benefits.

This change in the law, however, also has broader implications. An employer who enters into a severance agreement with a former employee should no longer promise not to respond to the NYDOL's unemployment insurance inquiries, so that the employee is essentially guaranteed unemployment benefits. Furthermore, an employer should be extremely careful in entering into a severance agreement where the employer agrees not to contest the NYDOL's grant of unemployment benefits to an employee. If an employer does agree to such a provision, the language should make it exceedingly clear that nothing in the severance agreement interferes with the employer's obligation to respond adequately and truthfully to inquiries from the NYDOL.

Another recent change in New York's unemployment insurance law has further implications with respect to severance agreements. Effective January 1, 2014, the general rule is that employees will not be eligible to receive unemployment benefits for any week that they receive "dismissal pay"[5] "attributable to the [employee's] weekly earnings," if it "exceeds the maximum weekly benefit rate."[6] However, this rule does not apply "during any weeks in which the initial payment of dismissal pay is made more than thirty days from the last day of the [employee's] employment."[7] It also does not apply if the severance pay is small enough so that it does not exceed "the maximum weekly benefit rate" established by the NYDOL applicable to that employee."[8] However, this is a low threshold—the maximum weekly benefit rate is currently $405.00—and will likely not come into play.

In other words, under the newly revised Section 591(6), if an employer decides to time one or more of an employee's severance payments within the first 30 days following his or her termination, he or she will likely not be eligible to receive unemployment benefits until such time as his or her severance benefits have been paid in full. However, if an employer waits to start paying its former employee severance until after 30 days from his or her termination, then the severance payments will likely have no effect on the employee's eligibility for unemployment. Payment of a lump sum severance does not change the analysis because Section 591(6)(c) instructs that it should be treated as "allocated on a weekly basis" from the employee's termination date, based on the employee's actual weekly remuneration, until the lump sum is paid out. Thus, the employee will be ineligible to receive unemployment benefits during the time he or she is being paid severance benefits, whether paid in increments or in a lump sum.

Employers should think about how they should structure severance payments in light of this change in the law. If the employer wants to enable the former employee to receive unemployment benefits immediately after his or her termination date, then the employer may wish to state in the severance agreement that severance payments will not commence any earlier than 31 days after the employee's termination date.

As a final matter, employers should be aware that, effective January 1, 2014, the wage base for unemployment insurance contributions has increased from $8,500 to $10,300, and the six lowest contribution rates were eliminated. The wage base will continue to rise every year until 2026, when it will reach $13,000.

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5 Severance pay, termed "dismissal pay" in the statute, "does not include payments for pension, retirement, accrued leave, and health insurance or payments for supplemental unemployment benefits." New York Labor Law § 591(6)(b).

6 *Id.* § 591(6)(a), (c).

7 *Id.* § 591(6)(d).

8 *Id.* § 591(6)(a).