

## HOSPITALITY

# ALERT

## CHANGES TO NEW YORK UNEMPLOYMENT INSURANCE LAW

By: Glenn S. Grindlinger

Due to the great recession, employer contributions to the New York State Unemployment Insurance Fund have been insufficient to cover the benefits paid out to individuals. As a result, the Unemployment Insurance Fund is grossly underfunded, which has required New York to borrow \$3.5 billion from the federal government. In order to repay this loan and avoid significant interest charges, New York has recently enacted a number of “reforms” that are expected to save the state \$200 million. There are four significant “reforms” about which New York employers should be aware. These “reforms” or changes to the unemployment system are discussed below.

The first change to the New York Unemployment Insurance Fund goes into effect on October 1, 2013. The change penalizes employers who are tardy in responding to the DOL’s request for information. This change is required under new federal guidelines to state unemployment insurance funds.

When an individual files for unemployment benefits, the New York State Department of Labor (DOL) usually submits to the individual’s most recent employer a form requesting information about the individual. Typically, the employer must return the form within 10 days. Based on the information contained in the form as well as other information obtained by the DOL, a determination is made on whether the individual is entitled to benefits, as well as the amount of such benefits. Either the individual or the employer can challenge this determination by seeking a hearing before an administrative law judge. If the employer is the party that seeks a review by an administrative law judge, the DOL usually awards benefits to the individual on a temporary basis pending the outcome of the hearing. If it is later determined that the individual is deemed ineligible

for benefits or otherwise received a higher unemployment payment to which he or she is entitled, the DOL credits the employer’s account for the overpayment.

Commencing on October 1st, if an employer is late in responding to the DOL’s request for information or provides incomplete information, the DOL will no longer credit the employer’s account. That is, even if the DOL or an administrative law judge determines that the individual is not entitled to benefits or has been overpaid, the DOL will not credit the employer’s account; instead, the money will revert to the general Unemployment Insurance Fund. Exceptions will be made if the employer can show that its failure to timely respond was due to DOL error (e.g., sending the request to the wrong address) or due to a “disaster emergency as declared by the Governor . . . or the President.”

The second change concerns the Federal Unemployment Tax Act (FUTA). All New York employers pay a FUTA tax based on the number of individuals they employ within the state. The tax rate is based on the employer’s “experience rating” but is assessed only on the first \$8,500 of each employee’s earnings. Starting on January 1, 2014, the FUTA tax will be assessed on the first \$10,300 of each employee’s earnings. This figure gradually rises every year so that by 2026, the FUTA tax will be based on the first \$13,000 of each employee’s earnings.

The third change primarily affects individuals. If an individual is improperly awarded benefits or is overpaid benefits, the individual has 12 months to pay back the money. Beginning on October 1, 2013, if an individual fails to do so within the 12 months, the DOL will assess a 15% monthly penalty on the overpayment or \$100, whichever is higher, and the individual will forfeit 4 days of future

unemployment benefits for every week that he or she was overpaid.

The fourth significant change concerns those situations where the individual receives severance pay from his or her prior employer. Starting January 1, 2014, if the DOL determines that an individual receives severance within 30 days after the employment relationship ends and the severance pay is an amount that is greater than the maximum benefit rate, the individuals will not be able to collect unemployment benefits until the severance pay is exhausted.

As a result of these changes, employers should expect their costs to increase. Indeed, the revisions specifically increase the unemployment taxes that employers must pay. Further, if an employer is going to contest an

unemployment claim, the employer must ensure that it timely responds to the DOL's request for information. If the employer fails to do so, should an employer contest unemployment and prevail it may only be a pyrrhic victory as the DOL will not credit the employer's account. Finally, if an employer is going to give severance to a departing employee, it must now review the timing and amount of the severance as it could prevent the departing employee from collecting unemployment.

For more information about this Alert, please contact Glenn Grindlinger at [ggrindlinger@foxrothschild.com](mailto:ggrindlinger@foxrothschild.com), or another member of the Fox Rothschild LLP's New York Labor & Employment Department. Visit us on the web at [www.foxrothschild.com](http://www.foxrothschild.com).



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