



## Employment Security Commission of North Carolina

Post Office Box 25903, Raleigh, NC 27611-5903

**Beverly Eaves Perdue**  
Governor

October 12, 2011

**Lynn R. Holmes**  
Chairman

Honorable Thom Tillis  
Speaker of the House of Representatives  
North Carolina General Assembly  
16 West Jones Street, Room 2304  
Raleigh, North Carolina 27601-1096

Dear Speaker Tillis:

After consultation with, and direction from, the Governor—and pursuant to N.C.G.S. §96-19(b)—I am suspending certain provisions of Session Law 2011-40 (Senate Bill 532) because those provisions do not comply with federal law. Absent this suspension, these provisions will cause taxes to go up on North Carolina employers. As you may recall, I had asked the U.S. Department of Labor (USDOL) to review SB 532 before the General Assembly passed it and before Governor Perdue vetoed it. On both occasions, USDOL raised concerns about this bill; those concerns were shared with you and your members. The General Assembly overrode Governor Perdue's veto and now USDOL has confirmed that these provisions are non-compliant. As a result of the non-compliance, certain taxes on North Carolina employers will increase unless remedial action is taken. Additionally, failure to suspend these provisions would terminate payment of Unemployment Compensation (UC) administrative grants to the State of North Carolina. By separate letter, I have formally notified the Governor of my actions.

USDOL notified the Employment Security Commission (ESC) of non-conformity in a letter dated September 22, 2011, a copy of which is attached. USDOL requested that ESC exercise its authority under G.S. §96-19(b) to suspend enforcement of those sections/provisions that have been found to be out of conformity with federal law and rules. In that same letter, USDOL explained that unless the offending provisions were suspended, the U.S. Secretary of Labor would be unable to certify that North Carolina conforms to either the Federal Unemployment Tax Act (FUTA) or the Social Security Act (SSA). As you are aware, this certification enables employers in the state to receive credit against the FUTA tax. If such certification is not made, all employers in North Carolina who are required to pay the FUTA tax would no longer be able to take credit against the tax and would be required to pay the full 6.0% of the employee's FUTA taxable wages instead of the current effective rate that is available after the credit, which is below 1.0%. Certification is, among other things, a condition for payment of Unemployment Compensation (UC) administrative grants; therefore, noncompliance jeopardizes millions of dollars in federal funds that assist North Carolina employers and citizens.

Senate Bill 532 is set to go into effect on November 1, 2011. Thus, pursuant to N.C.G.S. §96-19(b), ESC will suspend the above referenced provisions as of that date; this suspension will remain in effect and await re-examination by the North Carolina General Assembly. I urge you to adopt new statutory provisions which will enable North Carolina to return to full compliance with federal laws and rules.



Unemployment Insurance



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Labor Market Information

The suspended sections/provisions are:

**Thirty Days For Employer's Response [N.C.G.S. §96-15(b)(2)]** Provided, any interested employer shall be allowed 30 days from the earlier of mailing or delivery of the notice of the filing of a claim against the employer's account to protest the claim and have the claim referred to an adjudicator for a decision on the question or issue raised."

**Inappropriate Expansion of Misconduct Definition and Total Disqualification for Conduct Not Rising to the Level of Misconduct [N.C.G.S. §96-14(2)]** "Discharge for misconduct with the work" as used in this section is defined to include being terminated or suspended from employment after arrest or conviction for an offense involving violence, sex crimes, illegal drugs, or other activities which could negatively affect the employer's reputation in the community or business dealings; any physical violence whatsoever related to an employee's work for an employer including, but not limited to, physical violence directed at supervisors, subordinates, coworkers, vendors, customers, or the general public; inappropriate comments or behavior towards supervisors, subordinates, coworkers, vendors, customers, or to the general public relating to any federally protected characteristic which creates a hostile work environment; theft in connection with the employment; forging or falsifying any document or data related to employment, including a previously submitted application for employment; violation of an employer's written absenteeism policy; refusing to perform reasonably assigned work tasks; and the failure to adequately perform any other employment duties as evidenced by no fewer than three written reprimands received in the 12 months immediately preceding the employee's termination."

**Waiver of Hearing by Parties [N.C.G.S. §96-15(f)]** "All testimony at any hearing before an appeals referee upon a disputed claim shall be recorded unless the recording is waived by all interested parties, the parties have waived the evidentiary hearing and entered into a stipulation resolving the issues pending before the appeals referee, hearing officer, or other employee assigned to make the decision."

Notwithstanding the potential FUTA tax increases which have been avoided by my suspension of these provisions of Senate Bill 532, there will likely be adverse FUTA tax implications associated with \$2.5 billion borrowed in connection with the Unemployment Insurance Trust Fund. The General Assembly has the primary authority to address how the State will repay the principal of that debt.

Since the General Assembly took no substantive action this past session to address the repayment of the debt, we expect North Carolina employers to see their effective FUTA tax rate increased by 0.30% in the near future. This increase, which will occur automatically, is significantly less than the one that would have resulted from the non-compliant provisions of SB 532, but is nevertheless an issue the General Assembly may wish to address promptly.

I am aware that the General Assembly passed Senate Bill 99, which directed the Secretary of Commerce to underwrite a study of the options available to the General Assembly to address repayment of this debt. It is my understanding that Secretary Crisco, under separate cover, has provided reports that outline the already-known options to address repayment. These reports should satisfy the requirements of Senate Bill 99 and enable the State to avoid using additional funds to prepare a redundant study.

I would be happy to work with the General Assembly as it examines the provisions that have been suspended. I am hopeful that I can assist with any efforts to amend these provisions to assist both North Carolina employers and workers.

Sincerely,



Lynn R. Holmes  
Chairman

Enclosure

CC: Honorable Phil Berger, Honorable Bob Rucho, Honorable Martin L. Nesbitt, Jr.  
Honorable Julia C. Howard, Honorable Joe Hackney