CHAPTER 16
NON-CONTROLLING EMPLOYERS

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2.16.1 INTRODUCTION

A “non-controlling” employer is an employer for whom the claimant worked in his or her base period before having had other employment and earning at least ten times his or her weekly benefit rate. This employer does not “control” the claimant’s eligibility for benefits because the claimant has already broken any potential disqualification related to the way they separated from employment.

Prior to 2014, the Commissioner of Labor only issued determinations on protests to a claimant’s eligibility for benefits that were filed by the claimant’s last, or controlling, employer. Labor Law § 593 was amended, effective January 2014, by subsection (6) which requires the Commissioner of Labor to issue determinations on timely and adequate protests filed by any base period employers on the basis of misconduct or voluntary separation from employment.

When these protests are filed by non-controlling employers, the issue is whether an employer’s account will be relieved of charges if the claimant is found to have been separated from that employment due to misconduct or a voluntary quit without good cause. In cases of a protest based on a separation due to misconduct, it may also impact the claimant’s ability to file a valid original claim.

2.16.2 TIMELY RESPONSE

Labor Law § 597 provides that an employer’s account will not be relieved of charges based on an overpayment that results from the employer’s failure to file a timely or adequate response to a notice of potential charges. The regulations promulgated by the Commissioner of Labor provide that the employer’s notice of protest must be received by the Department of Labor within ten days of the date on which the notice of potential charges was mailed to the employer.[1]

The ten-day time frame has been strictly construed. The Board has declined to extend the deadline where the employer argued that it received the notice of potential charges later than usual and a Monday holiday gave it less time to obtain information[2]; where the employer’s initial

[1] 12 NYCRR § 472 (12) (a)

[2] Appeal Board No. 579271 (the Board also rejected the employer’s argument that the provisions of 12 NYCRR § 461 (1) [which makes a hearing request timely if it is filed within 30 days of the party’s receipt of the initial determination] should apply to a notice of protest filed later than ten days, writing “that regulation concerns initial determinations, only, and is related to Labor Law § 620, which provides that a hearing request on an initial determination must be made within thirty days of the mailing or personal delivery of the determination. Neither Labor Law § 593 (6) nor the Commissioner's regulation relating to that statue, has any such similar provision”).

notice of protest was received one day after the deadline[3]; where the employer contended that the ten-day limit was too short a time period in which to complete and return the notice of protest and that the time period should be measured from the date the employer received the Notice of Charges[4]; where the employer had been out of town for a few weeks[5]; and where the employer tried unsuccessfully to fax the notice of protest and then sent the response by regular mail, rather than by overnight mail and, as a result, missed the deadline.[6]

When the tenth day falls on a Saturday, Sunday, or legal holiday, the deadline becomes the next business day.[7]

The Board has created a narrow exception where the employer credibly testifies that the notice of potential charges was not received until after the ten-day deadline and as a result they could not comply with the statute or regulations.[8] The regulations also provide that the Department of Labor may excuse a late or inadequate Notice of Protest in certain limited circumstances.[9]

NATURE OF PROOF

Evidence of the date of receipt by the Department of Labor may consist of a fax date stamp on the notice of protest, the date state on paper documents, or the date an electronic submission is received.[10] If no fax or date stamp exists, the receipt date will be deemed to be two days prior to the date the document is entered into the Department of Labor's imaging system. The date the document was scanned into the Department's system is the Julian calendar date stamped onto the right hand side of the document.[11] Where there is no indication of the date of receipt on the document and the employer contends that the notice of protest must have been received by the

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[3] Appeal Board No. 585618

[4] Appeal Board No. 579672 (employer's witness testified that the general manager had been too busy to return the notice of protest on time).

[5] Appeal Board No. 580544

[6] Appeal Board No. 582385

[7] General Construction Law § 25-A

[8] Appeal Board No. 584714 (employer testified that the notice of potential charges, mailed on December 10, 2014, was not received until December 22, 2014, and that it typically experienced slow mail delivery during the holiday season)

[9] 12 NYCRR § 472 (12) (h) (a one-time excuse where the employer shows good cause for its failure to provide a timely and adequate response); 12 NYCRR § 472 (12) (i) (where the employer could not respond due to a state of emergency as declared by the Governor of their state or the President of the United States).

[10] Appeal Board No. 585619

[11] *See* Appeal Board 582358

Department of Labor within the ten-day time frame, the burden is on the employer to prove that fact by producing corroborating documentary evidence. That burden may be met by documentation such as a confirmation of delivery, a stamped receipt by an agent of the Commissioner, or an affidavit of personal service on the Commissioner or the Commissioner's agent.[12]

Testimony, without corroborating evidence, that a Notice of Protest would have been received at an earlier date is insufficient to meet the burden of proof required by the regulation.[13] Similarly, testimony regarding an employer's normal business practices for mailing such forms does not constitute corroborating evidence of timely receipt.[14] No presumption may be made regarding the date of receipt by use of the Board's "mailbox rule," encompassed in the regulation as 12 NYCRR 461 (1).[15] And, mailing the Notice of Protest within the 10-day time frame is not compliance with the regulation, which is based on receipt by the Department, not mailing by the employer.[16]

2.16.3 ADEQUATE RESPONSE

In addition to being timely, the employer's response to the Notice of Potential Charges must be adequate. An adequate Notice of Protest is one that provides the reason for separation from

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[12] 12 NYCRR § 472 (12) (e)

[13] Appeal Board No. 580985 (Board held employer's response was untimely where notice of potential charges was mailed April 8 and response was received on April 26 despite employer's testimony that he must have received the notice late because he normally responds to such documentation within two days, stating "we find that the employer has offered no convincing testimony as to the actual date of receipt of the Notice of Protest"); Appeal Board No. 588778 (Board rejected employer's contention that they must have received the documents late and that they sometimes have trouble with the mail since they did not provide proof of the date of actual receipt); Appeal Board No. 579975 (office manager's testimony that she tried to fax the notice of protest and assumed it had gone through was insufficient as she did not have any documentary evidence confirming the fax); see also Appeal Board No. 586324 (employer did not have a fax confirmation and the notice of protest was missing a fax date stamp), Appeal Board No. 585619 (employer's testimony that notice of protest was faxed on January 29, 2015 (within the ten-day time frame) was rejected as the notice of protest reflected a fax date of February 18, 2015).

[14] Appeal Board No. 582857 (notice of protest was drafted and signed February 10, 2014 but not received by the Department of Labor until shortly after July 16, 2015; testimony from the employer's witness that such notices were normally mailed the same day they were drafted was not "not akin or equivalent to, for example, a confirmation of delivery, a stamped receipt by an agent of the Commissioner, or an affidavit of personal service on the Commissioner or his/her agent");

[15] Appeal Board No. 597209, in which the Board wrote that its decision in Appeal Board No. 586139, which had used the regulation, should no longer be followed (see, also, NB No. 125).

[16] Appeal Board No. 585153 ("Even though the employer mailed the Notice of Protest on January 13, 2015, the Notice of Protest is required to be received by the Department within ten (10) calendar days, not mailed within ten (10) calendar days, pursuant to 12 NYCRR Part 472.12").

employment, or other issue affecting the claimant's eligibility or entitlement for benefits; provides good faith, detailed responses to all questions; and provides all relevant information and documentation for the Department of Labor to render a correct determination regarding the claimant's eligibility or entitlement for benefits.[17]

A Notice of Protest that is timely but inadequate does not meet the regulatory requirements.[18]

2.16.4 RELIEF OF CHARGES

Labor Law § 581 (1) (e) (3)[19] provides that a non-controlling base period employer's account will not be charged for benefits paid to a claimant if it is determined that his or her employment ended with that employer for actions rising to the level of misconduct or because of a voluntary separation without good cause. Instead, the benefits are charged to the general account.

The issue in these cases is not whether the claimant should be disqualified from receiving benefits; rather, whether the employer's account is chargeable. A finding that the claimant voluntarily quit employment with a non-controlling employer without good cause will not impact the claimant's eligibility for benefits. This is because the claimant has already broken any potential disqualification through earning at least ten times his or her weekly benefit rate in subsequent employment and the claimant is still able to use the wages earned in that employment to establish his or her claim for benefits.[20]

A finding that the claimant's employment with a non-controlling employer ended due to misconduct would also not disqualify the claimant from receiving benefits since he or she has already broken any potential disqualification through subsequent earnings. However, as the

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[17] 12 NYCRR § 472 (12) (f)

[18] Appeal Board No. 585618 (none of the boxes on the notice of protest, used to identify the nature of the separation, were checked, and in the space for the specific incident, the employer's third-party agent had only written the following: "Separation Information Not Available - Please render a decision based on available information." The following day the third-party agent sent a complete response, but the deadline has passed the day before). *See also* NB No. 85 on assessing the adequacy of the employer's response.

[19] An employer's account shall not be charged, and the charges shall instead be made to the general account, for benefits paid to a claimant after the expiration of a period of disqualification from benefits following a final determination that the claimant lost employment with the employer through misconduct or voluntary separation of employment without good cause within the meaning of section five hundred ninety-three of this article and the charges are attributable to remuneration paid during the claimant's base period of employment with such employer prior to the claimant's loss of employment with such employer through misconduct or voluntary separation of employment without good cause, provided, however, that an employer shall not be relieved of charges pursuant to this subparagraph if an employer or its agent fails to submit information resulting in an overpayment pursuant to section five hundred ninety-seven of this article.

[20] See also NB No.67.

claimant is not able to use the wages earned in that employment to establish a subsequent claim, it may result in the claimant not having sufficient remuneration in his or her base period to file a valid original claim.[21]

Practice Tip(s):

Record Development:

The record in a non-controlling employer case is developed in the same manner as a voluntary quit or misconduct case except that there must also be evidence of claimant's wages in his or her base period. This is because it must be established that the claimant has made ten times his weekly benefit rate in subsequent employment prior to filing his claim for benefits.

Decision Writing:

Keep in mind that the decision should not state that the claimant is "disqualified from receiving benefits;" rather, it should state that the employer's account should not be charged and the charges with regard to the claimant's benefits should be made to the general account. Additionally, if the claimant had good cause to quit or did not engage in misconduct, the decision should contain language stating, "there is no basis to relieve the employer of unemployment insurance charges pursuant to Labor Law § 581 (1) (e) (3)."

[21] When the issue is an employer's objection to the chargeability of its account on the basis of a loss of employment due to misconduct, the ALJ simply rules on the misconduct issue. There is no need to refer the matter back to the Commissioner of Labor on the issue of whether the claimant can still file a valid original claim.

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