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Document No. 4691
DEPARTMENT OF EMPLOYMENT AND WORKFORCE
CHAPTER 47
Statutory Authority: 1976 Code Sections 41-29-110 and 41-35-720

47-51. Appeals to Appeal Tribunal.

Preamble:

The South Carolina Department of Employment and Workforce proposes to amend Regulation 47-51 in order to clarify the procedure for employers and claimants in presenting unemployment insurance (UI) cases before the Department. The Notice of Drafting regarding this regulation was published in the *State Register* on August 26, 2016.

Section-by-Section Discussion:

47-51. This section will clarify the procedure for employers and claimants in presenting unemployment insurance (UI) cases before the Department.

Notice of Public Hearing and Opportunity for Public Comment:

Interested persons may submit written comments to Mark Hendrick, Director of Governmental Affairs, South Carolina Department of Employment and Workforce, P.O. Box 995, Columbia, South Carolina 29202 or by emailing RegulationComments@dew.sc.gov. To be considered, comments must be received no later than November 28, 2016 at 5:00 p.m.

A public hearing is scheduled for November 29, 2016, at 3:00 p.m., at the Administrative Law Court in the Edgar Brown Building, Second Floor, 1205 Pendleton Street, Columbia, South Carolina.

To review the regulation, visit the Department's website at: <http://dew.sc.gov/tools-resources/reports>.

Preliminary Fiscal Impact Statement:

There will be no increased costs to the State or its political subdivisions.

Statement of Need and Reasonableness:

DESCRIPTION OF REGULATION: 47-51. Appeals to Appeal Tribunal.

Purpose: The purpose of amending Regulation 47-51 is to clarify the procedure for employers and claimants in presenting UI cases before the Department.

Legal Authority: South Carolina Code Annotated Section 41-29-110 and Section 41-35-720.

Plan for Implementation: The proposed regulations will take effect upon approval by the General Assembly and publication in the *State Register*.

DETERMINATION OF NEED AND REASONABLENESS OF THE PROPOSED REGULATION
BASED ON ALL FACTORS HEREIN AND EXPECTED BENEFITS:

The current regulation refers to the South Carolina Administrative Procedures Act (APA), which is not required under S.C. Code Ann. §41-35-720 (Supp. 2015). Section 41-35-720 states that “rules of procedure are not required to conform to common law or statutory rules of evidence and other technical rules of procedure.” Reference to the APA in the current regulation creates confusion and inconsistency as to what evidence is acceptable at unemployment insurance benefits hearings.

The Department proposes to amend the regulation to conform with the intent of the statute.

Additionally, the Department proposes to insert language regarding hearsay evidence to provide guidance for employers and claimants.

DETERMINATION OF COSTS AND BENEFITS:

There will be no change in costs to the Department. The amendments contained in this proposed regulation seek to clarify what types of competent evidence can be accepted in a UI hearing.

UNCERTAINTIES OF ESTIMATES:

None.

EFFECT ON ENVIRONMENT AND PUBLIC HEALTH:

None.

DETRIMENTAL EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH IF THE REGULATION IS NOT IMPLEMENTED:

The regulation will have no detrimental effect on the environment of public health if the regulation is not implemented.

Statement of Rationale:

The purpose of amending Regulation 47-51 is to clarify the procedure for employers and claimants in presenting their cases. S.C. Code Ann. §41-35-720 states the Department must promulgate regulations establishing the rules of procedure for hearings and appeals before the Department, and specifically provides that the “rules of procedure are not required to conform to common law or statutory rules of evidence and other technical rules of procedure.”

Currently, the language states, “[a]ll Appeal Tribunal hearings shall be de novo in nature and conducted informally in conformity with the [APA] and in such manner as to ascertain the substantial rights of the parties.” This language creates confusion because (1) the APA does not expressly allow for an informal process; and (2) the regulation does not conform with Section 41-35-720.

Regulation 47-51 also contains references to mailings that are no longer applicable under the operations of the Department and current statute.

~~Indicates Matter Stricken~~

Indicates New Matter

Text:

47-51. Appeals to the Appeal Tribunal.

A. The Presentation of Appeals.

1. The party appealing from any ~~initial~~ determination of a claims adjudicator or special examiner shall file electronically, by fax, by mail, or otherwise deliver at the office where the claim was filed or at the office of the Department in Columbia, South Carolina, a Notice of Appeal ~~on the form provided,~~ setting forth the grounds for the appeal~~information required thereon~~. Copies of the Notice of Appeal shall be ~~mailed~~made available to the other interested parties ~~to the initial determination of the examiner which is being appealed.~~

~~2. The party appealing from a determination of an adjudicator rendered subsequent to the issuance of an initial determination shall file a Notice of Appeal in like manner and place as is provided for appeal from an initial determination in Appeal Regulation 47-51, A.1 above, which shall be treated in the same manner as is therein provided.~~

~~3. The party appealing from a re-determination shall file Notice of Appeal as provided for in Appeal Regulation 47-51, A.1 above, which shall be treated in the same manner as an appeal from an initial determination: Provided That, where there is pending an appeal from an initial determination, such appeal, unless withdrawn, shall likewise constitute an appeal from such re-determination.~~

~~4. In cases where Section 41-35-120(6) is involved, and initial determination in the case has been made by a special examiner designated therefor by the Department, the party appealing from the initial determination of such special examiner shall file a Notice of Appeal in like manner as provided for in Appeal Regulation 47-51, A.1 above, which shall be treated in the manner prescribed in that Regulation.~~

~~5. Upon the scheduling of a hearing for an appeal, a Notice of Hearing upon the form provided shall be mailed to all interested parties to the appealed claim at least seven (7) calendar days prior to the date of hearing, specifying the place and time of hearing, and the hearing official, to all interested parties to the appealed claim.~~

~~6. No additional hearings shall be allowed on the same appeal before the Appeal Tribunal except those subject to Appeal Rules 47-51, D.1, 47-51, D.2 and 47-51, C.1-3.~~

B. Disqualification of Members of Appeal Tribunals.

No person shall serve on an Appeal Tribunal in the hearing of any appeal in which he is interested. Challenges to the interest of any person serving on an Appeal Tribunal may be heard and decided by the Appeal Tribunal or its designee, ~~or in its discretion referred to the Appellate Panel.~~

C. Hearing of Appeals.

1. All Appeal Tribunal hearings shall be de novo in nature and conducted ~~informally in conformity with the South Carolina Administrative Procedures Act and~~ in such manner as to ascertain the substantial rights of the parties. The Appeal Tribunal shall include in the record and consider as evidence all Department records ~~of the Agency that are material to the appeal issues. All issues relevant to the appeal shall be considered and passed upon.~~ Any party to the appeal may present ~~such relevant testimony as may be pertinent to the appeal. Where a party appears in person,~~ the Appeal Tribunal shall examine and cross examine ~~such a~~ party and his witnesses, and may examine ~~and cross examine~~ the witnesses of any opposing party. The Appeal Tribunal, with or without notice to any of the parties, may take ~~such~~ additional evidence at the hearing as it deems necessary. After a hearing and prior to ~~actually~~ rendering ~~the~~ decision, the Appeal Tribunal, with notice to the interested parties as provided for in Appeal Regulation 47-51, A.5~~2~~, may call ~~the~~ parties and ~~any~~ witnesses to appear before it for the taking of ~~such~~ additional evidence as it deems necessary.

2. The parties to an appeal, with the consent of the Appeal Tribunal, may stipulate the facts involved in writing. Agreed upon stipulations ~~agreed upon~~ shall be included in the record ~~of the case~~. The Appeal Tribunal may decide the appeal on the basis of such stipulations, or, in its discretion, may set the appeal ~~down~~ for a hearing and take ~~such~~ further evidence or ~~hearing~~ arguments, as it deems necessary to determine the appealed claim.

3. Evidence will not be excluded solely because it may be hearsay. Hearsay, including information provided to the Department through telephone conversations and written statements, may be considered. However, findings of fact cannot be based exclusively on hearsay evidence unless that evidence is admissible under the South Carolina Rules of Evidence.

D. Adjournments of Hearings.

1. The Appeal Tribunal shall use its best judgment as to when adjournments of a hearing shall be granted, in order to secure all necessary evidence ~~that is necessary~~ and to ~~be ensure~~ fairness to all ~~the~~ parties ~~to the appeal~~.

2. If the appealing party fails to appear at the hearing, the Appeal Tribunal may dismiss the appeal or issue a decision on the basis of the Department records of the Agency.

E. The Determination of Appeals.

1. Following the conclusion of ~~an appeal hearing of an appeal~~, the Appeal Tribunal shall, within thirty (30) days ~~as soon as possible, announce~~ issue a written decision detailing its the findings of fact and decision conclusions of law with respect to matters or issues of the appeal. The decision shall be in writing. The Appeal Tribunal shall set forth its findings of fact, its decision, and the reasons therefor.

a. In addition to the issues raised by the appealed determination the Appeal Tribunal may consider all issues affecting claimant's rights to benefits from the beginning of the period covered by the determination to the date of the hearing.

b. The Appeal Tribunal may pass upon any offer of work complying with Regulation 41-23, separation, or question of availability arising between the filing of an appeal and the Appeal Tribunal hearing in those cases in which the ~~Benefit~~ Department has issued no determinations with respect to such subsequent issues.

c. The Appeal Tribunal may pass upon any issue framed prior to the filing of the appeal or the determination from which the appeal is taken, and with respect to which no determination has been issued by the ~~Benefit~~ Department.

d. The Appeal Tribunal at a hearing may receive and consider appeals from determinations issued subsequent to the determination and appeal giving rise to the hearing, provided such appeals are timely.

e. Sub-Items (a)(b)(c)(d) supra ~~will~~ apply only when the parties are identical or present at the Appeal Tribunal hearing or are properly notified of the issue or issues.

2. Copies of all decisions and the reasons therefore shall be mailed to all parties to the appeal, ~~to the Benefits Department, and to the local office at which the claimant filed.~~

F. Notice of Rights to Appeal from Appeal Tribunal Decisions.

Each ~~benefit appeal decision~~ Appeal Tribunal decision sent to the parties to an appeal shall include or be accompanied by a notice specifying the appeal rights of the parties. The notice of appeal rights shall state clearly the ~~place and manner~~ and time period for filing an appeal from the decision ~~and the period within which an appeal may be taken~~ filed.