

NORTH CAROLINA  
DEPARTMENT OF COMMERCE  
*Division of Employment Security*

Beverly Eaves Perdue, *Governor*  
J. Keith Crisco *Secretary*

Dempsey E. Benton  
*Assistant Secretary*

May 7, 2012

TO: David L. Clegg, Chief Operating Officer  
Thomas H. Hodges, Jr., Chief Counsel

FROM: Dempsey E. Benton, Assistant Secretary

SUBJECT: Partial Revocation of ESC Interpretation No. 231

Having thoroughly reviewed the attached legal opinion of Chief Counsel Thomas H. Hodges, Jr., and conferred with appropriate management personnel, under my authority as Assistant Secretary of Commerce for the Division of Employment Security (DES) as set forth in Chapter 96 of the North Carolina General Statutes, I hereby revoke ESC interpretation No. 231 (adopted by the former Employment Security Commission on December 21, 1971) in part. That is, said Interpretation is revoked to the extent it conflicts with the long-standing tax assessment practice that an Internal Revenue Code 501(c)(3) non-profit not meeting the test requirements to be a covered employer under N.C.G.S. § 96-8(5)k will not be determined to be an employer under G.S. § 96-8(5)a. This partial revocation shall be effective immediately. Any prior claims for unemployment insurance benefits established because of the application of this Interpretation shall not be affected.

This revocation shall be communicated to all appropriate personnel with responsibility in the area of taxation and assessment, as well as personnel responsible for determining and/or issuing decisions on the validity of unemployment insurance claims filed.

Attachments

NORTH CAROLINA  
DEPARTMENT OF COMMERCE

Beverly Eaves Perdue, *Governor*

J. Keith Crisco, *Secretary*

May 1, 2012

TO: Dempsey E. Benton, Assistant Secretary  
FROM: Thomas H. Hodges, Jr., Chief Counsel  
SUBJECT: ESC Interpretation No. 231

APPLICABLE LAW:

N.C.G.S. 96-4, in pertinent part, provides:

- (d) Rule Making. – Rules adopted to implement the Employment Security Laws in accordance with this Chapter shall be made pursuant to Article 2A of Chapter 150B of the General Statutes, the Administrative Procedures Act.

Section 1.10.(c) of Session Law 2011-401 states:

The Department of Commerce, Division of Employment Security, shall adopt all existing rules and regulations in accordance with Article 2A of Chapter 150B of the General Statutes. Any existing rule that has not been adopted by December 31, 2012, shall expire.

G.S. 150B-2(8a), in pertinent part, provides:

“Rule” means any agency regulation, standard, or statement or general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:

- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A(11) or 143B(6), including policies and procedures manuals, if the statement does not directly or

substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.

- c. Non-binding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
  
- g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.

In pertinent part, § 150B-19 states: “An agency may not adopt a rule that does one or more of the following: (1) implements or interprets a law unless that law or another law specifically authorizes the agency to do so.”

#### DISCUSSION:

The adoption of ESC Interpretations was “to assure effective, consistent and efficient application of the Law and the operation of the Employment Security Commission.” The interpretations had two (2) primary purposes. The first purpose was a reference source for use by ESC employees and to the public to familiarize themselves with the positions that ESC and the courts had taken on various issues arising under the Employment Security Law. ESC employees had to be familiar with these Interpretations before they could determine an individual’s rights to receive unemployment insurance benefits or an employer’s obligation to pay unemployment insurance taxes. The second purpose was to be an investigative and training aid for ESC employees because the Interpretations provides a detailed explanation of the ESC’s position on various issues arising under the Employment Security Law. Neither the Employment Security Law nor any other applicable law, before and after 2011, required ESC to adopt its Interpretations as regulation and/or rules.

#### CONCLUSION:

From the foregoing, it is concluded that the ESC Interpretations do not constitute “rules” under G.S. 150B. It follows therefrom that the procedures for repealing a rule under G.S. § 150B are not applicable to ESC Interpretations.

It is further concluded that ESC Interpretation No. 231 [stating that 501(c)(3), IRC non-profits not falling within the definition of employer as set forth in G.S. § 96-8(5)k shall be determined to be employers under G.S. § 96-8(5)a may be set aside by the Assistant Secretary of the Division of Employment Security (DES). This may be done by memorandum or order.