

**NORTH CAROLINA DEPARTMENT OF COMMERCE
DIVISION OF EMPLOYMENT SECURITY**

Interoffice Communication

Date: October 12, 2021

TO: Holders of Interpretation Manual, All Directors, Adjudicators and Appeals Referees

FROM: R. Glen Peterson, Chief Counsel

SUBJECT: DES Interpretation No. 273

Pursuant to 2011 N.C. Sess. Laws 401, the Employment Security Commission of North Carolina became the North Carolina Department of Commerce, Division of Employment Security (“DES”) on November 1, 2011. Interpretations adopted prior to the amendments made by 2011 N.C. Sess. Laws 401 which were effective on that date continue to apply and should be construed as Interpretations of DES.

In accordance with DES Interpretation No. 252, the attached DES Interpretation No. 273 has been adopted as an official interpretation by the North Carolina Department of Commerce, Division of Employment Security. “Interpretations issued by the Chief Counsel on behalf of [DES] will continue to be considered as a written interpretation or legal opinion of [DES] and shall be continued to be considered as a precedent in all issues considered in the written interpretation.” DES Interpretation No. 252. The attached material is relevant and suitable to be an interpretation of the Employment Security Law, and as such, it shall be distributed to all holders of interpretation manuals, all directors, all adjudicators, and all appeals referees. Also attached is a current index of DES’s Interpretations.

Any questions about this Interpretation should be directed to the office of the Chief Counsel at (984) 236-5987.

**NORTH CAROLINA DEPARTMENT OF COMMERCE
DIVISION OF EMPLOYMENT SECURITY**

DES INTERPRETATION NO. 273

TO: North Carolina Department of Commerce, Division of Employment Security

FROM: R. Glen Peterson, Chief Counsel

SUBJECT: Whether Unemployment Insurance (UI) benefits will be paid when an employee refuses to comply with the employer's policy mandating employees to have received a COVID-19 vaccine

Preliminary Considerations

Each claim for unemployment insurance benefits is determined upon its own specific facts and in accordance with the Employment Security Law¹ and applicable case law. Disqualification from receiving benefits may occur for being discharged due to misconduct, such as when violating an employer's reasonable policy without cause, or for leaving work without good cause attributable to the employer.

Before prescribing a mandatory vaccination program for its employees, an employer should have a written policy, which has been made known to its employees. Some employers may have a need or business interest in requiring employees to receive a COVID-19 vaccination. During a public health emergency such as the COVID-19 pandemic, all employers may reasonably require their employees to receive vaccination (including any booster shots that may be recommended by public health authorities). The federal Equal Employment Opportunity laws do not prevent an employer from requiring its employees to be vaccinated for COVID-19, subject to the reasonable accommodation provisions of Title VII of the Civil Rights Act and the Americans with Disabilities Act (ADA).²

Whether the individual was discharged or left work, preliminary considerations would include whether the employer's policy mandating COVID-19 vaccination contained medical and religious exemptions to receiving a vaccine. If the policy did not contain such exemptions and the individual's refusal to comply was for medical or religious reasons supported by appropriate documentation (such as a statement

¹ Chapter 96 of the North Carolina General Statutes.

² U.S. Equal Emp't Opportunity Comm'n, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws: Technical Assistance Questions and Answers K.1 (updated May 28, 2021).

from the individual's medical provider reflecting objections on medical grounds or, in the case of a refusal on religious grounds, a statement from the individual setting forth the sincerely held religious belief, practice, or observance that gives grounds for refusal and/or a statement from a religious official describing the religious tenet that precludes taking the COVID-19 vaccine), the individual would not be disqualified from receiving benefits. Under these circumstances, misconduct would not have been shown for a discharge, and in the case of a leaving, the leaving would have been for good cause attributable to the employer. Without such documentation or other competent, convincing, and credible evidence, the claimant would be disqualified for benefits.

Discharge

An individual who is unemployed due to misconduct connected with the work is disqualified for benefits.

Misconduct³ connected with the work is either of the following:

- (1) Conduct evincing a willful or wanton disregard of the employer's interest as is found in deliberate violation or disregard of standards of behavior that the employer has the right to expect of an employee or has explained orally or in writing to an employee.
- (2) Conduct evincing carelessness or negligence of such degree or recurrence as to manifest an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

N. C. Gen. Stat. § 96-14.6(b).

North Carolina does not have any unemployment insurance case law dealing with discharge for refusal to comply with an employer's vaccination policy.⁴ In the absence of controlling case law, North Carolina courts may examine cases from other states.

One such case was decided in South Carolina in the matter of *AnMED Health v. South Carolina Department of Employment and Workforce*, 404 S.C. 224, 743 S.E. 2d 854 (2013), which contains an analysis that is very similar to the one found in the North Carolina case of *In re Cantrell*, 44 N.C. App. 718, 263 S.E.2d 1 (1980) (which also

³ N.C. Gen. Stat. § 96-14.6(c) also contains examples of prima facie evidence of misconduct but this section will not be addressed in this memo. None of the examples are applicable.

⁴ Nevertheless, the State does require certain vaccinations before a child can attend a school or childcare facility. N.C. Gen. Stat. §§ 130A-152 through -158. In these cases, North Carolina permits medical and religious exemptions. See N.C. Gen. Stat. §§ 130A-156 and 130A-157. But an administrative rule regarding those vaccinations specifically states, "[T]here is no exception to these requirements for the case of a personal belief or philosophy ... not founded upon a religious belief." See 10A NCAC 41A .0403.

deals with an employee's refusal of an employer request, but not of a vaccination). *Cantrell* holds that in deciding whether a claimant's refusal amounts to misconduct, you must consider the reasonableness of the employer's request in the light of all the circumstances, and the employee's reason for noncompliance. The employee's behavior is not "willful misconduct," if it was justifiable or reasonable under the circumstances. *In re Cantrell*, 44 N.C. App. at 720.

In the *AnMed Health* case, the employer required flu vaccination of employees, but its policy allowed exemptions if certain Centers for Disease Control guidelines were met. The claimant did not meet these guidelines, was not granted an exemption, and was discharged for refusing to comply with the employer's vaccination policy. The Court, however, determined that the claimant was discharged without cause and was not disqualified for benefits. The claimant had unique circumstances, supported by credible medical documentation, that showed that submitting to the immunization would jeopardize her health. The claimant had provided the documentation to the employer prior to discharge, but she had been discharged anyway.

An employer's requirement that its employees be COVID-19-vaccinated in order to continue in employment may be a reasonable request in the light of all circumstances, but if the claimant has refused to comply based on credible medical documentation that has been provided to the employer prior to discharge, the claimant's refusal may be justifiable or reasonable under the circumstances and does not amount to misconduct.

The *AnMed Health* case dealt with a medical justification, but this is not the only justifiable or reasonable basis for refusal.

If an employee were to present evidence supporting his or her opposition to receiving a vaccine on religious grounds, this also may serve as a justifiable or reasonable basis for refusal.

In reviewing a claimant's medical or religious documentation in support of his or her refusal to comply with the employer's vaccine mandate, it is important to determine whether the documentation is compelling or comes from a dependable source. The medical notation should come from a medical doctor or other credible medical practitioner who has experience with the claimant and his or her medical conditions and can relate how a vaccination would negatively impact one or more of those conditions. For religious exceptions, the claimant's refusal should be based on a sincerely held religious belief, practice, or observance of the claimant, even if the employer is unfamiliar with such beliefs, practices, or observances. If there are "facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, [it] would be justified [to request] additional supporting information."⁵ This could, for example, take the form

⁵ U.S. Equal Emp't Opportunity Comm'n, *supra* note 2, at K.12.

of “1. A signed statement from a religious official describing the religious tenet that precludes taking a vaccine and/or 2. A personally written statement describing the religious basis for [the claimant’s] objection to taking [the COVID-19 vaccine].”⁶

An employee who does not get vaccinated due to a medical disability (covered by the ADA) or a sincerely held religious belief, practice, or observance (covered by Title VII) may be entitled to a reasonable accommodation that does not pose an undue hardship on the operation of the employer’s business.⁷

It should be noted that in the event a governmental mandate is imposed requiring vaccination, refusal could be considered misconduct under current case law. North Carolina case law has long upheld the authority of the government to require vaccinations. As stated in *State v. Hay*, 126 N.C. 999, 35 S.E. 459 (1900), where a defendant refused a smallpox vaccination ordered by the town of Burlington for all citizens pursuant to State law,

[T]he present rapid means of intercourse between most distant points would so spread the [smallpox] disease as to quickly paralyze commerce and all public business if the government could not at once stamp out the disease by compelling all alike, for the public good as much as for their own, to submit to vaccination.

Hay, 126 N.C. at 1001, 35 S.E. at 461. The *Hay* Court, while upholding the power of the State to order vaccinations, did recognize that there could be medical conditions where it would not be safe to submit to vaccination and that “would be a sufficient excuse for noncompliance[.]” *Hay*, 126 N.C. at 1003, 35 S.E. at 461.

In the unemployment insurance context, *In re Collingsworth*, 17 N.C. App. 340, 194 S.E.2d 210 (1973) recognized that failure to comply with a governmental safety mandate for which one is discharged would be considered misconduct (where an employee refused to wear ear protection devices mandated by the Occupational Safety and Health Act). A governmental employer will be treated as any other employer, however, for purposes of this Interpretation.

Leaving Work

Pursuant to N.C. Gen. Stat. § 96-14.5(a), an individual who has left work for a reason other than good cause attributable to the employer is disqualified to receive unemployment benefits.⁸ When an individual leaves work, the burden of showing

⁶ See *Harris v. Univ. of Mass.*, Lowell, No. 21-CV-11244-DJC, 2021 WL 3848012, at *4 (D. Mass. Aug. 27, 2021).

⁷ U.S. Equal Emp’t Opportunity Comm’n, *supra* note 2, at K.2.

⁸ N.C. Gen. Stat. § 96-14.8 allows for leaving work due to military spouse relocation and domestic violence reasons, but they do not apply here.

good cause attributable to the employer rests on the individual and the burden may not be shifted to the employer.

There are many North Carolina unemployment insurance cases that deal with leaving work after refusing to follow an employer's directive, even though they do not involve vaccination refusals. They offer guidance in this area.

In many cases, an employee's decision to leave work instead of following an employer's directive results in their disqualification for benefits. *E.g., King v. North Carolina Department of Commerce*, 228 N.C. App. 61, 743 S.E.2d 83 (2013) (disqualifying claimant when he left work due to change in employer policy and could not prove he left due to good cause attributable to employer).

In some circumstances, employees have been able to meet their burden of showing good cause attributable to the employer, even though they had left work. For example, in *In re Clark*, the employee social worker voluntarily⁹ left work after being instructed by her superiors to initiate custody proceedings to remove children from their parents' care in two cases. The social worker had previously promised the children's parents that she would not do so in accordance with her employer's policies and determined that initiating the proceeding would cause her to violate the ethical standards of her profession. Accordingly, she resigned. *In re Clark*, 47 N.C. App. 163, 167, 266 S.E.2d 854, 856 (1980). In that unique circumstance, which is unlikely to be present in the COVID-19 context, the employee was held to have shown good cause attributable to the employer.

In *Eason v. Gould, Inc.*, 66 N.C. App. 260, 311 S.E.2d 372 (1984), *aff'd*, 312 N.C. 618, 324 S.E.2d 223 (1985), an employee left work on March 10 after being told that she would be laid off as of March 19. The Court of Appeals held that the employee was voluntarily¹⁰ unemployed between March 10 and March 19, but that she was eligible for benefits after March 19, at which point it was undisputed that the employee would have been laid off.

In reaching this conclusion, the Court had to determine whether the claimant had left work with good cause attributable to the employer and opined that "a good cause within the meaning of N.C. Gen. Stat. § 96-14(1) (1981) [now 96-14.5(a)] includes a reaction to requests or policies of the employer which would be considered valid by 'reasonable minds.'" *Eason*, 66 N.C. App. at 262, 311 S.E.2d at 374.

The result of these cases is that in a few limited and fact-specific circumstances, employees have been able to show that, though the employee left work, there was still good cause attributable to the employer for the separation. In the context of a COVID-19 vaccination policy, it is unclear whether such circumstances would exist.

⁹ Note that the requirement that an employee must have left work "voluntarily" has been removed from the Employment Security Law. 1989 N.C. Sess. Laws 583 §§ 7, 8.

¹⁰ *Id.*

As noted above, an employee who would be eligible for a medical or religious exemption who properly requested an accommodation and was not granted one might be able to show good cause attributable to the employer. In addition, it is at least possible that some other unique factual circumstances would cause reasonable minds to conclude that the employee's separation was nonetheless caused by actions attributable to the employer. See *Clark* and *Eason, supra*. Close attention should be paid to the facts of all cases to determine whether the employee has shown such good cause attributable to the employer.

In the event that a claimant is separated from employment due to his or her refusal to comply with the employer's vaccine mandate due to reasons other than medical or religious objections, the claimant must prove by cogent, credible, and convincing evidence that a reasonable mind would find such refusal valid and thus carry his burden of proving his leaving was due to good cause attributable to the employer. See *Eason, supra*. Many factors may be considered, including the proven efficacy of the vaccine in reducing transmission of COVID-19, the vaccine's prevention of serious outcomes from COVID-19, and the vaccine's safety among those vaccinated, in determining whether refusal to receive the vaccine as mandated "would be considered valid by [a] 'reasonable mind[].'" *Eason*, 66 N.C. App. at 262, 311 S.E.2d at 374.

It would be wise to recall the words of Justice Douglas from 1900 in *State v. Hay, supra*, when the state was dealing with another epidemic:

Compulsory vaccination is not an unreasonable requirement, as experience has shown that it is, in times of epidemic, necessary for the protection of the community, and equally so of the individual. It is ordinarily less harsh than quarantine or isolation, and in the great majority of cases has no injurious effect beyond some slight temporary illness. But there may be cases where vaccination, owing to certain exceptional conditions of health, may be dangerous, or even fatal."

State v. Hay, 126 N.C. at 1004, 35 S.E. at 462 (Douglas, J., concurring).

In conclusion, the Division will examine each individual's claim for benefits in accordance with applicable law and make the determination of whether he or she is qualified to receive UI benefits based on the facts and circumstances of each case.

Adopted as an official Interpretation by the North Carolina Department of Commerce, Division of Employment Security on October 12, 2021.

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