

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

Interoffice Communication

Date: October 25, 2023

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

FROM: R. Glen Peterson, Chief Counsel

SUBJECT: DES Interpretation No. 274

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 the Division.

In accordance with DES Interpretation No. 252, the attached DES Interpretation No. 274 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 the DES’s Interpretations. All of the foregoing materials shall be incorporated into the official DES website section on Laws & Rules at <https://www.des.nc.gov/laws-rules/legal-information/interpretations-manual>

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. 274

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

FROM: R. Glen Peterson, Chief Counsel

SUBJECT: Whether the phrase “four or more employees” under 26 U.S.C. § 3309(c) includes employees outside the state of North Carolina for purposes of determining whether a non-profit organization is a covered “employer” under N.C. Gen. Stat. § 96-1(11)(c), and whether a claimant’s service for a non-profit is covered “employment” under N.C. Gen. Stat. § 96-1(12)(a), (b)

Preliminary Considerations

North Carolina’s Employment Security Law has defined the term “employer” to include a “nonprofit organization required to provide unemployment compensation to its employees under section 3309 of the Code.” N.C. Gen. Stat. § 96-1(11)(c). “Employment” under North Carolina law is defined under 26 U.S.C. § 3306, in part, as any service performed by an employee for the person employing him within the United States. N.C. Gen. Stat. § 96-1(12); 26 U.S.C. § 3306(c). While federal law excludes services performed in the employ of a religious, charitable, educational, or other organization described under 501(c)(3), North Carolina specifically covers those services under its Employment Security Law. N.C. Gen. Stat. § 96-1(12)(a); *see* 26 U.S.C. § 3306(c)(8). North Carolina, however, does limit coverage for services performed for non-profit organizations under 26 U.S.C. § 3309(b) and (c). N.C. Gen. Stat. § 96-1(12)(b)(2). Excluded from the definition of “employment” under the Employment Security Law are services performed for a non-profit under 26 U.S.C. § 3309(c), which states that § 3309 does not apply to services performed during any calendar year *unless* for twenty (20) weeks during the preceding or current calendar year the total number of individuals employed by the non-profit was four (4) or more. *See* N.C. Gen. Stat. § 96-1(12)(b)(2), 26 U.S.C. §§ 3304(a)(6), 3306(c)(8), 3309(a)(1)(A), 3309(c).

In determining the meaning of a statute, the legislative intent is controlling. *Midrex Technologies, Inc. v. N.C. Dep’t of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (citing *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998)). The intent of the General Assembly is found in the plain language of the statute, then its

legislative history, and the spirit of the act and what it seeks to accomplish. *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001). Where the statute is clear, the “court must implement the statute according to the plain meaning of its terms as long as it is reasonable to do so.” *Id.* See *In re Estate of Lunsford*, 359 N.C. 382, 391-92, 610 S.E.2d 366, 372 (2005) (noting it is well settled law that where the “language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning”). The court should not delete words or insert words not used in the relevant statutory language during the statutory construction process. *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014). However, if the literal reading of the statute “yields absurd results . . . or contravenes clearly expressed legislative intent, ‘the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.’” *Kaminsky v. Sebile*, 140 N.C. App. 71, 76, 535 S.E.2d 109, 112-13 (2000) (quoting *State v. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505, 507 (1921)).

The terms “employer” and “employment” were previously defined under the Employment Security Law under N.C. Gen. Stat. § 96-8 (2013), which also included localization rules within the section. Effective July 1, 2013, Session Law 2013-2, s. 2.(a), repealed N.C. Gen. Stat. § 96-8 and redefined “employer” and “employment” under N.C. Gen. Stat. § 96-1. Session Law 2013-2, s. 1.(b). The General Assembly removed the localization language from the definitions and defined “employer” and “employment” as otherwise defined under federal law.

Since North Carolina’s law defines “employer” as being consistent with federal law, we review the relevant federal law under 26 U.S.C. § 3309(c) to determine whether a non-profit is an employer under the Employment Security Law. The federal law under 26 U.S.C. § 3309(c) is as follows:

This section [§ 3309: State law coverage of services performed for nonprofit organizations or governmental entities] shall not apply to service performed during any calendar year in the employ of any organization unless on each of some 20 days during such calendar year or the preceding calendar year, each day being in a different calendar week, the total number of individuals who were employed by such organization in employment (determined without regard to section 3306(c)(8) and by excluding service to which this section does not apply by reason of subsection (b)) for some portion of the day (whether or not at the same moment of time) was 4 or more.

The federal statute does not place a geographic limitation on where the individuals employed by a non-profit perform their service, although it does place a time limitation (twenty (20) weeks) and a number limitation (four (4) or more employees)

Under the principles of statutory construction, a localization limitation, which does not appear in the federal law, or in North Carolina's statute, cannot be added or implied when the plain language of the statute is clear. If Congress or the North Carolina General Assembly intended to impose a geographic limitation, it would have done so, as other limitations were clearly enumerated.

Moreover, in removing the localization rules and redefining "employer" and "employment" to that of the federal law, where, again, there is no geographic limitation to where the four (4) or more employees can be located before the non-profit is a covered employer, it is clear the legislature intended that the Employment Security Law cover non-profits with four (4) or more employees over twenty (20) weeks in any location and not just North Carolina. To impose a localization limitation that is not specifically enumerated in the statute would mean "fewer non-profits would be covered [under the state law] than what is required by the federal minimum." *Phoenix v. Summer Institute of Linguistics*, 568 S.W.3d 39, 44-45 (Mo. App. E.D. 2019); see 26 U.S.C. § 3309(c). See also *Laub v. Industrial Claim Appeals Office of State of Colorado*, 983 P.2d 815 (Colo. App. 1999) (holding that the provision for services performed by individuals for non-profit organizations simply imposed a minimum size requirement of four (4) or more individuals in employment regardless of the location of those employees or the place of their performance of those services). Interpreting "four (4) or more employees" to mean that the employees can be located anywhere within the United States does not produce absurd results – conversely, limiting the location of the employees to only North Carolina would not provide the minimum coverage required by the federal law, which could jeopardize federal certification and defeat the purpose for which the federal law was enacted.

Taxation

For the purpose of assessing contributions, an "employer" is required to make contributions in each calendar year pursuant to N.C. Gen. Stat. § 96-9.2. The federal law also requires that non-profits, and other such entities, be given the option to elect to reimburse the unemployment fund in lieu of paying contributions. See 26 U.S.C. § 3309(a)(2); N.C. Gen. Stat. § 96-9.6. Under N.C. Gen. Stat. § 96-9.6, non-profit organizations "required by section 3309 of the Code to have a reimbursement option . . . must finance benefits under the contributions method imposed by [N.C. Gen. Stat. §] 96-9.2 unless the employer elects to finance benefits by making reimbursable payments. . . ." N.C. Gen. Stat. § 96-9.6(a).

Claims for Benefits

In order for a claimant to receive temporary unemployment insurance benefits as required under federal law, the individual must be unemployed through no fault of

their own, and must be able, available, and actively seeking work. N.C. Gen. Stat. § 96-14.1(a). Benefits are payable to a claimant on the basis of service performed for a governmental entity, a non-profit organization, and an Indian tribe to which 26 U.S.C. § 3309(a)(1) applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service. *Id.*; see also 26 U.S.C. § 3309.

In conclusion, where a non-profit employer has four (4) or more employees over twenty (20) weeks in such calendar year or the preceding calendar year, the four (4) or more employees can be located anywhere within the United States. However, the Division will still examine each non-profit employer's status in accordance with applicable law and determine whether it is required to pay contributions and whether said employer elects to pay contributions or reimburse the unemployment fund, and each claim for benefits will be evaluated in accordance with applicable law and a determination made of whether non-profit wages will be used for purposes of paying benefits.

Adopted as an official Interpretation by the North Carolina Department of Commerce, Division of Employment Security on October 25, 2023, and is applicable to claims for benefits and tax calculations pending as of that date and claims for benefits and tax calculations filed on or after that date.

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