

**BEFORE THE DELAWARE DEPARTMENT OF LABOR,
DIVISION OF UNEMPLOYMENT INSURANCE**

**NINETEENTH EMERGENCY RULES AMENDING THE DELAWARE
UNEMPLOYMENT INSURANCE CODE PURSUANT TO 29 DEL.C. § 8503**

WHEREAS, the Centers for Disease Control and Prevention determined that a novel coronavirus (“COVID-19”) presents a serious public health threat; and

WHEREAS, on March 12, 2020, Governor John Carney issued a State of Emergency in Delaware due to the public health threat of COVID-19, which became effective as of Friday, March 13, 2020 at 8:00 a.m. E.S.T., and continued until terminated as provided under state law (the “State of Emergency”); and

WHEREAS, thereafter, Governor Carney issued several orders extending the State of Emergency successive months; and

WHEREAS, on March 16, 2020, Governor Carney issued a First Modification of the Declaration of a State of Emergency for the State of Delaware due to a Public Health Threat, pursuant to Title 20, Chapter 31 of the Delaware Code, which modified the previously issued State of Emergency declaration and provided that:

“The Delaware Secretary of Labor is authorized to develop emergency rules, amending the Delaware Unemployment Insurance Code, effective Monday, March 16, 2020, such emergency rules to remain in effect until the State of Emergency declaration has been rescinded. These rules should enhance the flexibility of the unemployment insurance program in response to COVID-19, and alleviate some of the burden of temporary layoffs, isolation, and quarantine by ensuring unemployment benefits are available to individuals whose employment has been impacted directly by COVID-19.”; and

WHEREAS, the First Modification also limited public gatherings to 50 people, provided all restaurants, bars and taverns could only provide food and beverage service through take-out, drive through or off premises delivery, and required casinos to cease gaming operations; and

WHEREAS, on March 18, 2020, Governor Carney issued a Second Modification of the Declaration of a State of Emergency for the State of Delaware due to a Public Health Threat (the “Second Modification”), which reiterated the emergency rulemaking authorization to the Delaware Secretary of Labor that was in the First Modification, and also required bowling alleys, concert events, movie theaters, sports facilities, fitness centers, and health spas to cease operations; and

WHEREAS, through subsequent modifications of the State of Emergency, all non-essential businesses were required to cease operations; and

WHEREAS, on May 31, 2020, Governor Carney issued the Twentieth Modification of the Declaration of a State of Emergency for the State of Delaware due to a Public Health Threat (the “Twentieth Modification”), which extended the emergency rulemaking authorization granted to the Delaware Secretary of Labor that was in the First Modification through July 2, 2020; and

WHEREAS, on June 30, 2020, Governor Carney issued the Twenty-Third Modification of the Declaration of a State of Emergency for the State of Delaware due to a Public Health Threat (the “Twenty-Third Modification”), which extended the emergency rulemaking authorization granted to the Delaware Secretary of Labor that was in the First Modification until the State of Emergency was rescinded; and

WHEREAS, on March 19, 2020, President Trump signed into law the Families First Coronavirus Response Act, including the Emergency Unemployment Insurance Stabilization and Access Act of 2020, which granted the states broad flexibility to modify state unemployment laws and policies on an emergency temporary basis as needed to respond to COVID-19; and

WHEREAS, on March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief and Economic Security Act, which provided stimulus funds and extended and supplemental unemployment benefits to a variety of employees and other workers; and

WHEREAS, on July 16, 2020, the General Assembly modified 29 *Del.C.* § 8503 to codify the rulemaking authority of the Secretary of Labor contained in the Twenty-Third Modification of the

Declaration of a State of Emergency for the State of Delaware due to a Public Health Threat (the “Twenty-Third Modification”). Section 8503 as enacted stated:

“The Secretary is authorized to develop emergency rules amending the Delaware Unemployment Insurance Code which enhance the flexibility of the unemployment insurance program in response to COVID-19 and alleviate some of the burden of temporary layoffs, isolation and quarantine by ensuring unemployment benefits are available to individuals whose employment has been impacted directly by COVID-19.”

This section was effective until March 31, 2021; and

WHEREAS, on September 3, 2020, Governor Carney issued the Twenty-Seventh Modification of the Declaration of a State of Emergency for the State of Delaware due to a Public Health Threat (the “Twenty-Seventh Modification”), which rescinded all prior State of Emergency modifications regarding the emergency rulemaking authorization granted to the Delaware Secretary of Labor; and

WHEREAS, on December 27, 2020, President Trump signed into law the Continued Assistance Act, which extended the duration of the pandemic-related extended and supplemental unemployment benefits to a variety of employees and other workers, and altered the eligibility and documentation requirements for those benefits; and

WHEREAS, on February 8, 2021, the General Assembly extended the duration of the prior modification of 29 *Del.C.* § 8503 to codify the rulemaking authority of the Secretary of Labor. Section 8503 as enacted stated:

“The Secretary is authorized to develop emergency rules amending the Delaware Unemployment Insurance Code which enhance the flexibility of the unemployment insurance program in response to COVID-19 and alleviate some of the burden of temporary layoffs, isolation and quarantine by ensuring unemployment benefits are available to individuals whose employment has been impacted directly by COVID-19.”

This section was effective until March 31, 2022; and

WHEREAS, on January 27, 2022, the General Assembly extended the duration of the prior modification of 29 *Del.C.* § 8503 to codify the rulemaking authority of the Secretary of Labor. Section 8503 as enacted states:

“The Secretary is authorized to develop emergency rules amending the Delaware Unemployment Insurance Code which enhance the flexibility of the unemployment insurance program in response to COVID-19 and alleviate some of the burden of temporary layoffs, isolation and quarantine by ensuring unemployment benefits are available to individuals whose employment has been impacted directly by COVID-19.”

This section is currently effective until December 31, 2022; and

WHEREAS, on March 12, 2021, President Biden signed into law the American Rescue Plan Act, which further extended the duration of the pandemic-related extended and supplemental unemployment benefits to a variety of employees and other workers, and acknowledged the negative economic effects the pandemic had on the unemployed, underemployed and impacted industries and provided funds to address those negative impacts; and

WHEREAS, the Governor has continued to issue orders declaring a public health emergency in Delaware; and

WHEREAS, in the interest of assisting the citizens of Delaware whose employment has been impacted directly by COVID-19, and the self-employed and businesses in Delaware that have experienced loss of revenue and financial impacts from COVID-19, the Department of Labor (the “Department”) finds that the adoption of the following emergency rules is necessary to enhance the flexibility of Delaware’s unemployment insurance program.

NOW, THEREFORE, IT IS ORDERED:

1. The following rule from the Sixteenth Emergency Rules issued by the Secretary of Labor is hereby extended until December 31, 2022, unless modified or amended by additional emergency rules or by a subsequent act of the General Assembly:

“Effective as of the date of enactment of the Continued Assistance Act on December 27, 2020, if an individual qualifies under Section 2107(b)(4)(A) of the CARES Act (15 U.S.C. 9025(b)), as amended by Section 206 (c) of the Continued Assistance Act and any future amendments, 19 Del.C. § 3302(3) of the Delaware Unemployment Code is hereby amended as necessary to allow the Department to determine whether the individual is to be paid Pandemic Emergency Unemployment Compensation or regular compensation for a week of unemployment using the following method:

- a. The Department shall defer the establishment of a new benefit year and put on hold the base period wages currently available for use in establishing the new benefit year, until such time as the Pandemic Emergency Unemployment Compensation payable with respect to the current benefit year has been exhausted.”

2. The following emergency rules issued by the Secretary of Labor and the predecessor Secretary of Labor are not being extended beyond their March 31, 2022 expiration date, because either they are no longer necessary, or they are restatements of the current status of the unemployment laws in Delaware that were intended to inform claimants and employers of how those laws would be applied to pandemic factual circumstances:

- a. First Emergency Rules: “If the State of Emergency is concluded and a temporarily laid off individual does not return to the former employer when the worker is called to do so, the individual may not be eligible for continuing benefits.”
- b. First Emergency Rules: “Workers must have earned a minimum of \$966.00 in taxable wages during the base period to establish a monetarily eligible claim for benefits. Earnings that are not reported to the Division are not considered wages for the purpose of unemployment compensation.”
- c. Second Emergency Rules: “Individuals are expected to exhaust all available paid leave from their employer, or from Federal or state government prior to utilizing Unemployment Insurance benefits. However, individuals offered an advance or loan of future unearned paid leave or PTO by an employer do not need to exhaust the future unearned paid leave or PTO in order to be eligible for unemployment.”
- d. Third Emergency Rules: “Payments received by individuals from any loan or grant provided to their employer or themselves from the Small Business Administration’s Paycheck Protection Program (the “PPP”) are to be treated as “wages” under the Delaware Unemployment Code and should be reported when you file your weekly claim certification for any benefits administered by the Division, whether or not you are performing work during the weeks you receive PPP payments.”
- e. Eleventh Emergency Rules (amending Eighth Emergency Rules):
“EB – Added TUR/HUR trigger for high unemployment rate period (similar to 2009):
Section 3326 of Title 19 of the Delaware Unemployment Code is hereby amended as follows:
(a)(2)d. There is a state “on” indicator for a week beginning after August 29, 2020, if:
 1. The average rate of total unemployment (seasonally adjusted), as determined by

the United States Secretary of Labor, for the period consisting of the most recent 3 months for which data for all States are published before the close of such week equaled or exceeded 6.5 percent, and

2. The average rate of total unemployment in the State (seasonally adjusted), as determined by the United States Secretary of Labor, for the 3-month period referred to in paragraph (a)(2)d.1. of this section, equals or exceeds 110 percent of such average for either or both of the corresponding 3-month periods ending in the 2 preceding calendar years.

(a)(3)d. There is a state “off” indicator for a week beginning after August 29, 2020, if, for the period consisting of such week and the immediately preceding 12 weeks, either paragraph (a)(2)d.1. or paragraph (a)(2)d.2. of this section was not satisfied.

(f)(3) Effective with respect to the weeks beginning in a high unemployment period, section (e) of this section shall be applied by substituting:

a. “Eighty percent” for “fifty percent” in paragraph (e)(1) of this section, and

b. “Twenty” for “thirteen” in paragraph (e)(2) of this section.

(f)(4) For purposes of paragraph (f)(3) of this section, the term “high unemployment period” means any period during which an extended benefit period would be in effect if paragraph (a)(2)d.1. of this section were applied by substituting “8 percent” for “6.5 percent.””

f. Thirteenth Emergency Rules: ““In addition to the federal funding provided in section 2103(b) of the CARES Act, as amended, to state and local governmental entities, certain nonprofit organizations, and Federally-recognized Indian tribes, as described in section 3309(a) of the Internal Revenue Code of 1986, that opt to make reimbursement payments in lieu of assessments pursuant to title 19, section 3345 (“Reimbursable Employers”), the Division will also use funds received by the State pursuant to Section 5001 of the CARES Act to pay up to 50% of the amount required to be paid by each Reimbursable Employer in lieu of assessments for weeks of unemployment during the period that begins on March 1, 2020 and ends on December 30, 2020, only in the amount that each Reimbursable Employer is still required to pay after the application of section 2103(b) of the CARES Act, as amended, that is attributable to COVID-related claims that meet the eligibility requirements under Section 5001 of the CARES Act.”

g. Sixteenth Emergency Rules: “Section 3125(c)(1) of Title 19 of the Delaware Unemployment Code is hereby amended as follows (*deletions shown in strikethrough and additions shown in underline*):

(c) (1) If any employing unit neglects or refuses to file with the Department a required report with respect to persons employed by the employing unit within ~~5~~ 15 days after the report is due, the employing unit is subject to a penalty of 15% of the total amount of contributions paid or payable by the employing unit unless 1 of the following applies:

a. If the penalty calculated under this paragraph (c)(1) is less than \$100, the penalty is \$100.

b. If the penalty calculated under this paragraph (c)(1) is more than \$450, the penalty is \$450.

3. The following emergency rules in the Eighteenth Emergency Rules are hereby rescinded, because these emergency rules were superseded by the General Assembly in H.B. 285, enacted January 27, 2022:

“New Employer Unemployment Tax Rates for 2022:

Notwithstanding the required computation of the average employer assessment rate, the average industry assessment rate or the average construction industry assessment rate to be established by the Secretary of Labor on or before December 31, 2021 for the next succeeding calendar year pursuant to 19 *Del. C.* § 3348(a) through (c), for calendar year 2022, all employers assigned an assessment rate under 19 *Del. C.* § 3348(d) or (e) shall have the same rate as established by the Secretary of Labor for the calendar year 2020.”

“Merit Rated Employer Unemployment Tax Assessment Rates for 2022:

Notwithstanding the required computation of the employer assessment rate to be determined by the Division for the next succeeding calendar year pursuant to 19 *Del. C.* § 3350, for calendar year 2022, employers shall be assigned an assessment rate equal to the lowest of the rate determined by the Division pursuant to 19 *Del. C.* § 3350 for the calendar year 2020, 2021, or 2022; except that employers who are determined for calendar year 2022 to have the delinquency rate of assessment pursuant to 19 *Del. C.* § 3350(6) shall continue to be assigned the delinquency rate, subject to the administrative authority provided for in Paragraph 3 of this Eighteenth Emergency Rules.”

“Administrative Authority to Revise Default Tax Assessment Rates:

Notwithstanding 19 *Del. C.* § 3350(6), the Division shall have the authority in its sole discretion to make changes to the delinquency assessment rate of any employer to take effect on the date determined by the Division, and to provide assessment credits to any employer, as necessary to correct administrative errors or address fraudulent claims charged to employers, except with respect to employers who are charged the delinquency assessment rate because they have not filed any quarterly tax report owed to the Division.”

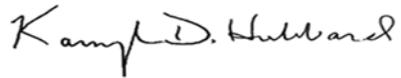
“Section 3302(19)(A) of Title 19 of the Delaware Unemployment Code is hereby amended as follows (*deletions shown in strikethrough and additions shown in underline*):

(ix) Notwithstanding any other provisions in this section, from January 1, 2022 to December 31, 2022, “wages” does not include that part of the remuneration which, after remuneration equal to \$14,500 (or such greater amount as may be specified as the taxable wage base in the Federal Unemployment Tax Act (26 U.S.C. § 3301 et seq.)) with respect to employment during any calendar year, is paid to an individual by an employer or the employer's predecessor during such calendar year.”

These emergency rules are promulgated by the Department of Labor pursuant to the authority granted to the Secretary of Labor by the General Assembly in 29 *Del.C.* § 8503. During the period of time the emergency rulemaking authority granted by the General Assembly in 29 *Del.C.* § 8503 is in effect, all existing laws, ordinances, rules or regulations that are inconsistent with these emergency rules shall be suspended, to the extent that a conflict exists. These emergency rules shall remain in effect until December 31, 2022, unless modified or amended by additional emergency rules. The Secretary of the

Department of Labor reserves the right to issue additional emergency rules and to modify or amend these emergency rules, pursuant to the rule-making authority granted in 29 *Del.C.* § 8503.

IT IS SO ORDERED, the 31 day of March, 2022.



Karryl Hubbard
The Secretary of the Delaware Department of Labor