REPORT OF THE

COMMISSION ON UNEMPLOYMENT COMPENSATION

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

REPORT DOCUMENT NO. 14

COMMONWEALTH OF VIRGINIA
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EXECUTIVE SUMMARY

I. BACKGROUND

Chapter 33 of Title 30 of the Virginia Code (§§ 30-218 et seq.) establishes the Commission on Unemployment Compensation ("Commission"), authorizing its work through July 1, 2006. The Commission has the following responsibilities:

- Evaluate the impact of existing statutes and proposed legislation on unemployment compensation and the Unemployment Trust Fund;
- Assess the Commonwealth's unemployment compensation program and examine ways to enhance effectiveness;
- Monitor the current status and long-term projections for the Unemployment Trust Fund; and
- Report annually its findings and recommendations to the General Assembly and the Governor.

The Commission's members include Senator John C. Watkins (Powhatan) (Chairman), Delegate Harry R. Purkey (Virginia Beach) (Vice Chairman), Delegate Terry G. Kilgore (Scott); Senator Yvonne B. Miller (Norfolk), Delegate Samuel A. Nixon, Jr. (Chesterfield), Delegate Lionell Spruill, Sr. (Chesapeake), Senator Frank W. Wagner (Virginia Beach), and Delegate R. Lee Ware, Jr. (Powhatan).

The Commission met three times in the 2004 interim: July 19, 2004, December 15, 2004, and January 7, 2005. Meeting summaries are posted on the Commission's website at http://dls.state.va.us/SB889.htm. This executive summary of the interim activity and work of the Commission has been submitted to the Governor and General Assembly and posted on the General Assembly's Legislative Information System website as Report Document 14 (2005).

II. KEY ISSUES

1. Solvency of the Unemployment Trust Fund

For the years 1997 through 2001, the Trust Fund's solvency level was at least 100 percent. The solvency level dropped to 45.5 percent in 2003, and then to approximately 39.3 percent in 2004. The Fund is earning 5.4 percent on its investments. Projections show that in 2005, the fund will approach, but will not reach, 50 percent.

The average annual tax per employee, which ranged between $48 and $51 between 1998 and 2001, increased to $143 in 2004, and is projected to reach $159 in 2005. Part of the increase is due to the fund builder tax, which was activated January 1, 2004. The fund builder tax, which adds 0.2 percent to the tax rate of all chargeable employers, will remain in effect as long as the Trust Fund solvency level is below 50 percent. The solvency level is not expected to allow elimination of the fund builder tax through 2006. Employers will also be required to pay pool

cost charges in 2005. Despite these charges, employer taxes in Virginia remain the second lowest of all states.

2. SUTA Dumping

SUTA (state unemployment tax) dumping is an attempt by employers to artificially reduce their unemployment compensation tax rates. This is usually done by creating a shell corporation and filing for the state's new employer rate, or purchasing an existing employer account with a lower tax rate and transferring employees to that account. Congress passed legislation requiring all states to enact legislation addressing SUTA dumping. Virginia's proposed 2005 legislation takes a minimalist approach to meet federal requirements so as to ensure that legitimate economic development transfers among businesses are not penalized. The proposed legislation will include provisions for "safe harbor" assessments of proposed transfers by the Virginia Employment Commission (VEC). The Commission reviewed the proposed legislation in depth at the January 7, 2005, meeting.

3. Benefits Charging

There are two primary ways that benefit charges can be assessed. One is on a proportional basis, under which every taxable employer in the applicable wage period is charged for benefits in proportion to the wages paid an employee. Approximately 36 states use this approach. The other approach charges only the last taxable employer for benefits. This is the approach that Virginia and five other states use. Another approach is inverse proportional charging, under which the most recent taxable employers pay more than other employers in the claimant's base period. Commission members expressed concern over the fact that under a proportional approach, an employer that was not responsible for discharging an employee would be charged for unemployment benefits, and that proportional charging would be more expensive to administer. Benefits charging issues arise regularly before the Commission, and the Commission will continue to monitor the need for modifications to Virginia's approach.

4. Military Trailing Spouse

Legislation likely will be introduced in the 2005 regular session that would allow trailing military spouses to receive unemployment compensation benefits only if the spouse moves to a state that also permits trailing military spouses to receive benefits. A total of 17 states (AK, CA, FL, HI, IN, KS, ME, NV, NY, NC, OK, OR, PA, PR, RI, TX) have a similar provision. Key concerns with legislation in this area include cost, documenting permanent orders changes, and ensuring that the unemployment compensation program is implemented equitably.

5. Impact of 2004 Laws

Senate Bill 130 increases the penalty assessed against employers for filing a late report from $30 to $75. The percentage of late-filing employers has increased from 12 percent to 18 percent (in the first quarter of 2004) in the last two years. VEC expects this bill will have a significant impact in encouraging compliance with the deadline for report submission.

VEC prepared the procedures to implement the revenue impact statement required at Va. Code Ann. §30-19.03:1.2 (SB 664) with the assistance of the Department of Planning and Budget and the Department of Taxation. An overview of the approach is available on the Commission's website at http://dls.state.va.us/SB889.htm. Both Departments have approved the approach. The Commission reviewed the calculations in detail at the January 7, 2004, meeting. Concerns were expressed about the possibility of having unemployment compensation bills reviewed by the Appropriations or Finance Committees, and about the accuracy of the calculations in determining revenue losses to the Commonwealth.

III. ACTIONS

The Commission reviewed Virginia's proposed legislation addressing SUTA dumping and the proposed approach to development of revenue statements required by SB 664 at the January 2005 meeting. The Commission reviewed and approved a proposed work plan for the Commission in July 2004. The Commission heard public statements from Madge Bush, AARP Virginia (pension offsets) and Steven L. Myers, Virginia Poverty Law Center (part-time employment) in July 2004.

Report of the Commission on Unemployment Compensation

TO: The Honorable Mark Warner, Governor of Virginia
and
The General Assembly of Virginia

Richmond, Virginia
May 2005

I. INTRODUCTION

In 2003 the General Assembly enacted Chapter 33 (§§ 30-218 et seq.) of Title 30 of the Code of Virginia, which established the Commission on Unemployment Compensation. The Commission is the successor to the Joint Subcommittee Studying the Funding Requirements of the Virginia Unemployment Trust that was established by Senate Joint Resolution 133 of 1977. The Commission's purpose is to annually monitor and evaluate Virginia's unemployment compensation system relative to the economic health of the Commonwealth. The legislation establishing the Commission is scheduled to expire on July 1, 2006.

Pursuant to § 30-222, the Commission has the following powers and duties:

- Evaluate the impact of existing statutes and proposed legislation on unemployment compensation and the Unemployment Trust Fund;
- Assess the Commonwealth's unemployment compensation program and examine ways to enhance effectiveness;
- Monitor the current status and long-term projections for the Unemployment Trust Fund; and
- Report annually its findings and recommendations to the General Assembly and the Governor.

The members of the Commission are Senator John C. Watkins of Powhatan County, Delegate Harry R. Purkey of Virginia Beach, Delegate Terry G. Kilgore of Scott County, Senator Yvonne B. Miller of Norfolk, Delegate Samuel A. Nixon, Jr. of Chesterfield County, Delegate Lionell Spruill, Sr. of Chesapeake, Senator Frank W. Wagner of Virginia Beach, and Delegate R. Lee Ware, Jr. of Powhatan County. Senator Watkins serves as chairman, and Delegate Purkey as vice chairman, of the Commission.

Additional information about the Commission may be found at its website at http://dls.state.va.us/SB889.htm.

II. OVERVIEW OF UNEMPLOYMENT COMPENSATION PROGRAM

A. THE FEDERAL-STATE UNEMPLOYMENT INSURANCE SYSTEM

Virginia's unemployment compensation program provides temporary financial relief to Americans who are unemployed through no fault of their own and are looking for work. The insurance program is designed to ensure that at least a significant portion of basic living expenses can be paid while an employee searches for suitable work. Virginia's program, which is codified at Title 60.2 of the Virginia Code and administered by the Virginia Employment Commission (VEC), is established pursuant to the dual federal-state system initiated in the Social Security Act of 1935. State unemployment programs are compelled to conform to federal standards through the Federal Unemployment Tax Act, which provides for a payroll tax on virtually all employers but allows employers a credit against the federal tax for the taxes paid to a conforming state unemployment insurance program. Each state administers a separate unemployment insurance program within minimum guidelines established by federal statute. Eligibility and the amount and duration of benefits are determined by each state.

The VEC's duties include (i) collecting taxes to fund the program; (ii) processing and paying benefit claims; (iii) providing administrative adjudication of contested claims; (iv) ensuring that the Trust Fund is adequately funded; (v) operating a job service program; (vi) collecting and publishing labor market information and population projections; and (vii) implementing the federal Workforce Investment Act. The VEC's administrative funding level is based upon the U.S. Department of Labor's estimate of VEC's administrative expenses and the total funds appropriated by Congress to support the administration of the unemployment insurance, job service, and Workforce Investment Act program nationally.

B. UNEMPLOYMENT TAXES

Employers are required to pay a combination of federal and state taxes to fund unemployment benefits and program administration. Virginia employers with one or more employees pay state unemployment taxes on the first $8,000 of each employee's wages. The taxes are "experience rated," which means that those employers with higher levels of qualifying claims will pay higher tax rates, based on claims experience over the preceding four years. The proceeds from the unemployment taxes are deposited in the federally maintained Unemployment Trust Fund. Each state has a separate account in the Unemployment Trust Fund to which deposits are made. As used in this report, "Trust Fund" refers to Virginia's account in the Unemployment Trust Fund. If the Trust Fund's solvency level meets or exceeds 100 percent, the minimum tax rate for Virginia's employers is zero. The minimum tax for 2004 was 0.44 percent, or $35.20 per employee, and the maximum was 6.54 percent, or $523.20 per employee. For 2005 the minimum tax is 0.52 percent, or $41.60 per employee, and the maximum is 6.62 percent, or $529.60 per employee. If the Trust Fund is fully solvent, new employers are initially charged a tax rate of 2.5 percent.

In addition to the base Trust Fund tax, employers may be required to pay two related taxes, depending on the solvency level of the Trust Fund. First, employers may be charged a

"pool tax" to cover benefits paid out from the Trust Fund that cannot be charged to specific employers. Costs charged against the pool include (i) benefit payments made to employees of defunct employers and (ii) coverage of benefit payment costs that cannot be recovered from maximum-rated employers to whom they are attributable because of the 6.2 percent cap on the base Trust Fund tax. If the Trust Fund solvency level is at 50 percent or more, however, pool taxes are offset by interest earned on the Trust Fund. Second, employers may be required to pay a 0.2 percent "fund-building" tax whenever the Trust Fund's solvency level drops below 50 percent.

The VEC's administrative costs, as well as federal administrative costs, are paid from the proceeds of the separate Federal Unemployment Tax (FUTA), a payroll tax imposed at the rate of 0.8 percent of the first $7,000 of wages (or $56 per employee per year), and collected from Virginia employers by the Internal Revenue Service. Virginia employers paid over $191 million in FUTA taxes in fiscal year 2002, while the VEC received about $63 million from the federal Department of Labor.

C. TRUST FUND SOLVENCY

Since 1982, Virginia has measured Trust Fund adequacy by use of a statutorily prescribed high cost multiple approach. Section 60.2-533 of the Code of Virginia requires the VEC to determine as of July 1 of each year the "adequate balance" of the Trust Fund. The Trust Fund is solvent in any year that its June 30 balance is equal to the amount produced by multiplying (i) the high cost multiplier (which has been 1.38 since 1997) by (ii) the total wages paid by taxable employers in the 12 months preceding the computation date, and multiplying this product by (iii) the average of the cost of benefit payments in the three highest-cost years during the 20-year period ending July 1 of the year of the computation.

D. UNEMPLOYMENT COMPENSATION BENEFITS

State unemployment taxes collected from Virginia employers are deposited in the Trust Fund and used solely to pay unemployment compensation benefits to unemployed Virginians. The amount of benefits payable to an eligible unemployed worker is calculated to provide the person with wage replacement benefits equal to approximately 52 percent of the person's pre-unemployment wage. However, workers whose pre-unemployment weekly wages exceeded approximately $627 are subject to a statutory cap, currently $326 per week, and thus receive a lower percentage of their pre-unemployment wages.

An employee's weekly benefit is determined by the wages earned in the highest two of the last four quarters immediately preceding the quarter in which he became unemployed, which period is referred to as the employee's base period. However, if a claimant has earned insufficient wages in the first four of the last five completed calendar quarters to become eligible for benefits, then such claimant's base period is the four most recent completed calendar quarters immediately preceding the first day of the claimant's benefit year.

Prior to July 1, 2005, Virginia employees must have earned at least $2,500 in total wages in the two quarters of the base period in which earnings were highest in order to qualify for benefits. Eligible claimants are not paid for their first week of unemployment, which period is referred to as the "waiting week." The duration of benefits, which range from a minimum of 12 weeks to a maximum of 26 weeks, is determined based on the total amount of wages earned in the base period.

At the beginning of 2001, the minimum weekly benefit was $50 and the maximum weekly benefit was $268. However, all benefit levels were increased by 37.3 percent pursuant to Governor Gilmore's Executive Order 86, dated November 14, 2001. This increase applied to all persons receiving unemployment benefits for weeks beginning September 9, 2001, through March 9, 2002. The General Assembly addressed this issue during the 2002 Session pursuant to House Bill 1336, patroned by Delegate Armstrong, and Senate Bill 663, patroned by Senator Hawkins. These bills retroactively codified the executive order's increases in the weekly benefit amount for recipients of unemployment compensation by 37.3 percent for claims filed between September 9, 2001, and January 1, 2003. For claims filed between January 1, 2003, and January 1, 2004, the weekly benefit amount was increased by 18.65 percent above the levels in effect prior to September 9, 2001. For claims filed on or after January 1, 2004, the weekly benefit amounts revert to the levels in effect prior to September 9, 2001.

For claims filed between July 6, 2003, and July 4, 2004, an individual's benefit became 52 percent of his previous weekly wages during the two highest quarters in his base period, not to exceed the maximum weekly benefit amount of $316. For claims filed between July 4, 2004, and July 3, 2005, the maximum weekly benefit amount is $326.

III. COMMISSION ACTIVITIES

The Commission met three times during the 2004 interim: July 19, 2004, December 15, 2004, and January 7, 2005.

A. JULY 19, 2004, MEETING

The Commission held its first meeting of the 2004 interim on July 19, 2004. James N. Ellenberger, Deputy Commissioner of the VEC, briefed the Commission on the projected solvency of the Trust Fund. He reported that the Trust Fund's solvency rate is projected to be 34.3 percent as of June 30, 2004, compared to a solvency level of 45 percent on June 30, 2003. The final calculation of the solvency level, which is prepared annually in December, was presented at the December 15 meeting and is discussed in detail in Part IV of this report.

With respect to unemployment data, Mr. Ellenberger reported that since October 2003, unemployment rates for each month have been at or below rates for the same month of the preceding year. Total initial claims through May 2004 are down nearly 30.8 percent from last year, which was attributed to fewer temporary factory furloughs and better weather for construction work. In addition, first payments of unemployment benefits are down 28 percent

from last year. The average duration of benefit receipt in Virginia in May 2004 was 14.1 weeks, compared to a national average of 16.7 weeks. For the first five months of 2004, final payments are down 26.6 percent from 2003, and the exhaustion rate in May 2004 (36.1 percent) is lower than in May 2003 (41.8 percent).

In response to Senator Wagner's question regarding Reed Act monies, Mr. Ellenberger stated that the National Association of State Workforce Agencies is seeking $9 billion in additional Reed Act funds, to be distributed proportionally among the states. The proposed legislation has not yet been introduced given its expense, and the Bush administration opposes any such legislation.

In response to Delegate Purkey, Don Lillywhite of the VEC noted that the majority of jobs are being added in the general services sector in Northern Virginia. In response to Delegate Ware, VEC Commissioner Dolores A. Esser stated that nine to ten weeks is the usual duration for benefit payments; the average duration calculated for May 2004 of 14.1 weeks is relatively high for Virginia. That higher duration rate indicates that jobs are not readily available. Job seekers require more time to find work and more frequently are exhausting their unemployment benefits.

Virginia, unlike six other states, has no outstanding balances on loans from the federal account. In response to Delegate Purkey's query of why some states required federal loans for their programs while Virginia did not, Mr. Ellenberger noted that the six states requiring loans had to borrow because the recession affected them more severely given the types of industry in those states. The reasons necessitating the loans were not limited to departure of industry due to an onerous tax burden.

Mr. Ellenberger also briefed the Commission on the status of the following items of federal legislation:

- On July 15, 2004, the House Appropriations Committee approved appropriations for the Wagner-Peyser Act. Funding has been flat for the last decade, but the current appropriations bill would actually cut job service funding by approximately $91 million. The VEC estimates the impact on Virginia's program as ranging from $1.8 million to $2.4 million, which may force staff layoffs and office closings.
- The House of Representatives passed the SUTA Dumping Prevention Act of 2004, H.R. 3463, to address state unemployment tax dumping. As drafted, it will require all states to enact legislation addressing SUTA dumping. SUTA dumping is an attempt by employers to artificially reduce their unemployment compensation tax rates. This is usually done by creating a shell corporation and filing for the state's new employer rate, or purchasing an existing employer account with a lower tax rate and transferring employees to that account. Mr. Ellenberger stated that there is good reason to believe that this is a problem in Virginia. Senator Watkins asked that the VEC prepare a paper describing the extent of the problem in Virginia and offer models for approaches to address SUTA dumping. Senator Wagner requested that VEC examine the extent to which the taxes of law-abiding employers are increased as a result of SUTA dumping.

- Reauthorization of the Workforce Investment Act is stalled in Congress. The House and Senate versions of the bill differ, and a conference committee has not yet been appointed. The Act is funded at prior year levels.
- An unemployment insurance reform measure being floated by the Bush Administration.
- A possible Reed Act distribution.

Mr. Ellenberger also reviewed the following legislation enacted in the 2004 General Assembly Session:

- House Bill 288 (defining benefit disqualifying misconduct) and Senate Bill 665 (requiring that bills enhancing benefit payments must contain estimates of potential revenue losses) are not expected by the VEC to significantly affect the unemployment compensation program.
- Senate Bill 130, patroned by Senator Watkins, increases the penalty assessed against employers for filing a late report from $30 to $75. The percentage of late-filing employers has increased from 12 percent to 18 percent (in the first quarter of 2004) in the last two years. VEC expects this bill will have a significant impact in encouraging compliance with the deadline for report submission. In response to a question from Senator Watkins, Otis Dowdy, VEC's Director for Taxation, noted that it would be difficult to calculate the exact percentage of administrative funds dedicated to enforcement but that field staff had been increased by 20 percent.
- Senate Bill 3 (abolishing the Workforce Development Training Fund and other dormant programs), Senate Bill 9 (eliminating a redundant workforce plan requirement), and Senate Bill 363 (transferring the Migrant and Seasonal Farmworkers Board and the Interagency Migrant Worker Policy Committee from the Department of Labor and Industry to the Virginia Employment Commission) made needed technical corrections.

The first meeting also featured an overview by Lyn Coughlin, senior planner with the VEC, of regulations governing benefits charging. There are two primary ways that benefit charges can be assessed. One is on a proportional basis, under which every taxable employer in the applicable wage period is charged for benefits in proportion to the salary paid an employee. Approximately 36 states use this approach. The other approach charges only the last taxable employer for benefits. This is the approach that Virginia and five other states use. Another approach is inverse proportional charging, under which the most recent taxable employers pay more than other employers in the claimant's base period. Commission members expressed concern over the fact that under a proportional approach, an employer that was not responsible for discharging an employee would be charged for unemployment benefits, and that proportional charging would be more expensive to administer. The VEC confirmed that a proportional system would be more expensive to administer. Federal law requires that reimbursable employers be charged benefits for any claimant employed by them during the claimant's base period.

VEC Commissioner Esser gave the Commission an update on the Virginia Workforce Council. Senator Brandon Bell will replace Senator Charles Hawkins on the Council. At the Council's last meeting in 2003, it focused on the effective performance of workforce training programs. Demand plans, which structure individualized workforce training in accordance with

the needs of local employers, will be developed and implemented in Roanoke and Smyth County. The local workforce investment boards (WIBs) must demonstrate that any training they propose to provide is needed by local employers.

In June 2004, Governor Warner approved three marketing pilots for the WIBs to improve "one-stop shopping" by establishing coordinated economic relief centers. These are more intensive approaches that go beyond what the federal Workforce Investment Act (WIA) requires to help communities recover from economic hardship. Commissioner Esser also noted that Virginia's unemployment compensation program has a strong work search component that accounts in part for the program's relatively low costs and resilient trust fund.

The Commission also received briefings on House Bill 1288, which was carried over from the 2004 legislative session. The bill passed the House but was carried over in the Senate. The bill would have authorized payment of unemployment compensation to individuals who became unemployed when they followed their spouse to a new military posting. Any benefits paid would have been charged against the pool. Senator Watkins noted that the Commission must examine this issue very closely. The costs associated with implementing the change to the program must be considered in light of the potential benefits.

Mr. Ellenberger summarized the results of a VEC survey of 16 states with large military populations. The survey results are attached as Appendix A. Of the nine responding states, three (South Carolina, Kentucky, and Maryland) do not pay benefits to trailing spouses. Of the six that do, four were able to detail the methodology they use to estimate the costs associated with paying benefits to trailing spouses. Applying those methodologies to Virginia results in estimates for adding this benefit to Virginia's program that range from a low of $253,000 (using Oklahoma's methodology) to a high of $14.1 million (using Florida's methodology). Of the four states whose methodology Virginia applied, only Oklahoma's program was actually in operation; the other three states' methodologies came from recently-passed legislation. Mr. Ellenberger also noted that many states, while not specifically authorizing payments to trailing spouses, do not disqualify them from receiving benefits.

VEC staff also advised the Commission that a technical amendment is needed to Senate Bill 179, passed in the 2004 General Assembly Session, which provides that unemployment benefits paid because of temporary work closures due to natural disasters will be charged against the pool rather than against the employer. The problem is in the reference to the "temporary" work closure. Tracking whether a business reopened subsequent to the natural disaster would impose an enormous administrative burden on the VEC. An amendment will be prepared for consideration in the 2005 General Assembly Session.

Delegate Purkey questioned the VEC regarding the issue of seniors returning to the work force. Mr. Ellenberger noted that such returns often are motivated by economic necessity. Under current law, if a senior employee is laid off and receives unemployment compensation, those benefits may be reduced by up to 50 percent of any Social Security or Railroad Retirement benefits the senior employee may be receiving. Prior to 2003, benefits were offset by 100 percent. Supporters of legislation enacted in 2003 that reduced the offset to 50 percent of such

retirement benefits contended that it was fair because the employee's contributions constituted a portion of the benefits.

The meeting also featured public statements from Madge Bush of the AARP, who supported legislation (Senate Bill 128) that would completely eliminate the offset of unemployment benefits by any Social Security or Railroad Retirement benefits, and Steven L. Myers of the Virginia Poverty Law Center, who recommended modifying the unemployment compensation program to make workers who are unavailable for full-time work eligible for unemployment benefits under some circumstances. The comments of Ms. Bush and Mr. Myers are available on the Commission's website at http://dls.state.va.us/Groups/SB889/Meetings.htm.

B. DECEMBER 15, 2004, MEETING

The Commission's second meeting featured briefings by VEC staff on the solvency of the Trust Fund (see Part IV of this report), SUTA dumping (see Part V of this report), and presentations by VEC staff on legislation from the 2004 General Assembly Session.

1. Failed Bills from the 2004 Session

House Bill 505, introduced by Delegate Keister, would have increased the amount of wages that a recipient of unemployment benefits can earn, without having such benefits offset by the amount of wages, from $25 to $100. The bill was tabled in the House Commerce and Labor Committee with the understanding that the Committee chairman would ask the Commission to examine the issues raised by the bill. Mr. Ellenberger noted that the bill, by increasing the permissible earnings offset, could have beneficial impacts. If it had been adjusted for inflation since its initial enactment, the existing offset would be $45 rather than $25. Claimants who report earnings while unemployed spend 1.5 fewer weeks on unemployment compensation. Any higher earnings offset accordingly would be balanced by fewer unemployment compensation payments.

2. Carried Over Bills from the 2004 Session

Senate Bill 621, introduced by Senator Wagner, would have increased the amount that an employee must have earned in the two highest earnings quarters of his base period (the first four of the preceding five calendar quarters) from $2,500 to $3,500 in order to be eligible for unemployment compensation benefits. The measure would have affected 6,600 claimants, who are disproportionately minority, female, low-wage employees. The reduction in eligibility would have saved approximately $5 million annually and reduced employer taxes by $1.46 per employee per year, but would not have affected trust fund solvency and would have exacerbated the low first payment rate.

House Bill 1288, introduced by Delegate Tata, passed the House but was carried over to the 2005 Session in the Senate Commerce and Labor Committee. The legislation would provide unemployment benefits for trailing military spouses. VEC Commissioner Dolores Esser commented briefly, on behalf of Delegate Tata, on the bill. Delegate Tata already had prefiled

legislation for the 2005 Session that addresses the same issue, which would make benefits available only where the spouse moves to a state that also permits trailing military spouses to receive benefits. A total of 17 states have a similar provision. Senator Wagner asked how Virginia would track work search requirements when the employee moves to another state and Commissioner Esser clarified current requirements that claimants call the VEC to verify job searches. The Chairman noted that it should be confirmed that the military assignment in question was not an unaccompanied assignment and Senator Wagner noted that it would be important to have documentation reflecting a permanent change of orders.

Thomas A. Hinton, Department of Defense State Liaison Office in Support of Military Families, and Kathleen Moakler, Deputy Director of the Government Relations Department of the National Military Family Association, addressed the issue of military trailing spouse benefits. Asked whether the estimates of potential eligible spouses were accurate, Hinton noted that the transfer of an entire carrier out of state had not been calculated, and that about 54 percent of military spouses are in the work force. In response to a query about the basis for distinguishing between military transfer orders and those from other federal agencies, Mr. Hinton noted that military members are forced to move every two years. It was also noted that active military do not have the option to quit the military in order to avoid the move. Ms. Moakler stated that she agreed with the sunset provisions, and noted the difficulty of losing a spouse's income just as the order to move is received. The Chairman noted the need for additional data and added that there is a huge federal presence in the state and accurate counts must be prepared.

3. Bills that Passed During the 2004 Session

Lyn Hammond, senior planner with the VEC, briefly reviewed legislation passed in the 2004 Session. Senate Bill 664, patroned by Senator Wagner, provides that bills enhancing unemployment compensation benefits payable to a claimant must contain a statement prepared by the VEC, in consultation with the Department of Planning and Budget, estimating potential revenue losses, in the form of decreased tax revenues, to the Commonwealth. It provides that no bill enhancing unemployment compensation benefits can be considered by the General Assembly unless it contains the revenue loss statement in the second or final enactment clause. Ms. Hammond reported that the VEC has prepared the procedures to implement the new revenue impact statement requirement with the assistance of the Department of Planning and Budget and the Department of Taxation. A summary of the methodology is attached as Appendix B.

Senator Wagner asked about the accuracy of the figures, specifically whether only six percent of all Virginia businesses pay corporate or individual business taxes. The Chairman noted that an increase in benefits affects businesses' bottom lines. Danny LeBlanc, AFL-CIO, noted that there is another part of the equation, which is the revenue the Commonwealth gains from the expenditure of unemployment compensation benefits by recipients. Delegate Nixon queried whether having a revenue loss statement on a bill would require that the bill be sent to Appropriations. The Chairman noted both his concern in that respect and the difficulty in coming up with accurate data to determine revenue losses.

4. Other Business

Senator Wagner asked the Commission to recognize Eric Brown, an employer in his area who operates a courier service. Mr. Brown expressed the difficulties faced by a rapidly growing company that has fired one employee for cause, which employee subsequently qualified for unemployment compensation benefits. Mr. Ellenberger noted in response to questions from Senator Wagner that there have been national studies examining the issue of structuring the unemployment compensation system in the fairest manner so that taxes are assessed on the most responsible employer. Mr. Ellenberger also noted that the payments made under unemployment compensation are put back into the economy via purchases made by unemployed persons.

The Chairman asked that the VEC prepare a report comparing Virginia with the surrounding states in the Fourth Circuit. Mr. Ellenberger noted that VEC would use the data analysis system VELMA to prepare such an analysis.

C. JANUARY 7, 2005, MEETING

At its third meeting, the Commission conducted a lengthy discussion of SUTA Dumping legislation. It also received additional testimony on the procedures by which the VEC is implementing the requirement of Senate Bill 664 for an analysis of the revenue impact of bills increasing benefit amounts or benefit eligibility. Daniel LeBlanc of the AFL-CIO criticized the requirement, while John Layman of the Department of Taxation defended the methodology.

The Commission also reviewed several items of legislation:

- Senate Bill 128, patroned by Senator Watkins: This bill eliminates the offset for Social Security or Railroad Retirement Act benefits during periods when the Trust Fund has a solvency level of 50 percent or more. When the Trust Fund's solvency level is below 50 percent, weekly unemployment benefits will continue to be reduced by 50 percent of the amount of such retirement benefits.
- Senate Bill 772, patroned by Senator Bell: This bill provides that an individual earning at least $2,500 but less than $3,500.01 in his base period shall be eligible to qualify for unemployment compensation benefits only if he had earnings of at least $1,250 in each of two quarters in his base period.
- House Bill 1700, patroned by Delegate Tata, provides that a person has good cause for leaving employment if the person voluntarily left a job to accompany his spouse, who is an enlisted person on active duty in military or naval service, to a new military assignment (i) from which the employee's place of employment is not reasonably accessible, and (ii) which is located in a state that does not deem a person accompanying a military spouse as a person leaving work voluntarily without good cause. Benefits paid to qualifying claimants will be charged against the pool rather than against the claimant's employer. The provisions of this bill expire on July 1, 2007.

Senator Watkins also reported that he would introduce legislation to remove extraneous benefits tables from Code § 60.2-602. Other expected bills will remove obsolete references and

amend Senate Bill 179 from the 2004 Session addressing unemployment benefits paid because of temporary work closures due to natural disasters.

IV. STATUS OF THE UNEMPLOYMENT TRUST FUND

At the Commission's December 15, 2004, meeting, Mr. Ellenberger provided a report on the status of the Trust Fund as of June 30, 2004. A copy of his complete presentation may be found at the Commission's website at http://dls.state.va.us/SB889.htm, and is attached, along with a summary prepared by the VEC of several key indicators, as Appendix C.

On June 30, 2004, the solvency level of the Trust Fund was 39.3 percent, compared to a level of 45.4 percent in the previous year. From 1997 through 2001, the Trust Fund's solvency level was at least 100 percent. The solvency level is projected to rise to 48 percent in 2005, 67 percent in 2006, and 82 percent in 2007. The Chairman noted projections show that in 2005, the fund will approach, but will not reach, the 50 percent level at which the fund builder tax would be removed.

The balance in the Trust Fund declined from $528 million on January 1, 2003, to $200.3 million on January 1, 2004. Tax revenues are expected to increase as employers' rates rise in response to the higher benefits paid during the recession, while interest revenue decreases because of the overall lower Fund balances. Increases in unemployment benefits and the recession were blamed for the decline in the Trust Fund's solvency level, which in turn has increased the average tax per employee paid by employers from $51 in 2002 to $82 in 2003.

The average annual tax per employee, which ranged between $48 and $51 between 1998 and 2001, increased to $143 in 2004, and is projected to reach $159 in 2005, and $172 in 2006, before dropping to $136 in 2007. Part of the increase is due to the fund builder tax, which, in response to trust fund solvency levels, was activated January 1, 2004, and is expected to continue through 2006. Despite the additional 0.2 percent charge from the fund builder tax, employer taxes in Virginia remain the second lowest of all states. The Trust Fund is earning interest at an annual rate of 5.4 percent.

Virginia's average tax per employee for calendar year 2003 of $82 was the lowest of the six jurisdictions within the boundaries of the Fourth Circuit Court of Appeals, while the highest ($270) was in North Carolina. The 2003 maximum weekly unemployment benefit in Virginia of $285 was reported to be the lowest among these six jurisdictions, where the highest weekly benefit ($416) was provided by North Carolina.

Trust Fund solvency is affected by the unemployment rate as well as by benefit levels. Virginia's unemployment rates in all months since October 2003 have been at or below year-ago rates. Total initial unemployment claims in the first ten months of 2004 are down 31 percent from last year, which was credited to fewer temporary factory furloughs and a generally improving economy. The rate of first payments through October 2004 was down by almost 25 percent from last year, and the average duration of benefits in October 2004 was 13.3 weeks,

compared to 13.9 weeks on October 2003. The exhaustion rate, or percentage of claimants who cannot qualify to receive further assistance, fell from 40.1 percent in October 2003 to 35.1 percent in October 2004.

V. SUTA DUMPING

A. BACKGROUND

State unemployment tax (SUTA) dumping usually occurs when a company reorganizes or acquires another company in order to obtain a lower tax rate. An employer's state unemployment tax (SUTA) rate is based in part on its experience in discharging workers. An employer may transfer its business to a new, successor corporation who will pay the lower SUTA rate assessed against new employers, thereby avoiding the higher SUTA liability. SUTA dumping refers to attempts by employers to artificially reduce their unemployment compensation tax rates. This is usually done by creating a shell corporation and filing for the state's new employer rate, or purchasing an existing employer account with a lower tax rate and transferring employees to that account. When this occurs, that employer's claims experience is "dumped" on the trust fund and becomes a cost that must ultimately be shared by all taxable employers.

The Commission's major work in the 2004 interim involved developing a response to the SUTA dumping issue. The Commission first received a preliminary briefing on this issue by the VEC at its November 17, 2004, meeting. SUTA dumping was addressed at each of its three meetings in the 2004 interim.

B. FEDERAL LEGISLATION

Congress addressed the issue of SUTA dumping by enacting H.R. 3463, known as the SUTA Dumping Prevention Act of 2004 (P.L. 108-295). The bill was signed into law in August 2004. This measure amends the Social Security Act with respect to administration of unemployment taxes and benefits under state unemployment tax acts. A copy is attached as Appendix D.

Section 2 of the federal law requires, as a condition of state eligibility for grants for unemployment compensation administration, that a state's unemployment compensation laws provide that "if an employer transfers its business to another employer, and both employers are (at the time of the transfer) under substantially common ownership, management, or control, then the unemployment experience attributable to the transferred business shall also be transferred to (and combined with the unemployment experience attributable to) the employer to whom such business if so transferred." The transfer of unemployment experience is prohibited if a person becomes an employer by acquiring an existing employer and the sole or primary purpose of the transfer is obtaining a lower tax rate. States must impose "meaningful civil and criminal penalties" where a transfer or acquisition is knowingly made "solely or primarily" for the purpose of obtaining a lower SUTA rate, or where a person knowingly gives advice that leads to a violation of the SUTA dumping provisions. Finally, states must develop procedures to identify SUTA dumping activities.

Conforming state legislation is required to be enacted within 26 weeks of the first day of the next regularly scheduled legislative session. Failure to adopt state legislation could result in the loss of federal tax offsets, thereby greatly increasing employers' federal unemployment taxes. It also requires the Secretary of Labor to study and report to the Congress no later than July 15, 2007, on the status and appropriateness of state actions to meet the requirements.

To assist states in their obligation to include such a provision in their unemployment compensation statutes, the Department of Labor prepared draft legislative language as well as a conformity checklist to assure all necessary changes are made. Copies of the model legislation and checklist are attached as Appendix E.

C. VEC LEGISLATIVE PROPOSAL

The VEC, meeting with the Chamber of Commerce, Virginia Association of Manufacturers, AFL-CIO, representatives of the accounting industry, and other public and private groups, crafted legislation to comply with the federal law. The proposal sought to meet the minimum requirements of the federal law while ensuring that there were no unintended consequences that would adversely impede legitimate business transactions. A copy of the legislative proposal is attached as Appendix F. A chart linking the federal act requirements to specific provisions in the VEC's draft legislation is attached as Appendix G.

The VEC also recommended that the legislation include two provisions not addressed in the federal act. The first would assist employers in voluntarily complying with the requirements of the act by giving "safe harbor" immunity from civil and criminal penalties to an employer that receives an advisory opinion from the VEC stating that a proposed transaction, as fully disclosed, would not violate the SUTA dumping prohibitions. The second addresses administrative adjudication and judicial review. These procedures are consistent with those currently applicable to other tax issues adjudicated by the Commission.

D. COMMISSION DELIBERATIONS

At the December 15, 2004, meeting, Mr. Ellenberger reported on the VEC's efforts to develop legislation to address the federal mandate. The proposed legislation would be a minimalist approach that would meet federal requirements. The VEC stated its desire to ensure that legitimate economic development transfers among businesses are not penalized. The Chairman supported VEC's suggestion that the statute include provisions for "safe harbor" assessments of proposed transfers, and recommended that the legislation include a definition of a rate year. Delegate Nixon expressed concerns about enforcement impeding legitimate transfers. Mr. Ellenberger noted that the VEC is cognizant of the limitations of enforcement and is seeking to fashion legislation that will fit within the existing framework of Virginia law. Use of the existing, known structures, plus the safe harbor provisions, will help avoid improper implementation.

The Commission did not act on the draft SUTA dumping legislation at its December meeting, and reconvened to consider the bill at its January 7 meeting. The Commission received comments expressing concerns that the bill would make illegal certain transactions that had been made to rescue troubled businesses. An unintended consequence of the bill may be to reduce the incentive to acquire troubled firms. It was noted that the bill would allow the VEC to block certain entity transfers, rather than only ensuring that the appropriate SUTA rate is established. The Commission agreed to recommend the measure, with several minor modifications.

E. FUTURE STUDY

The VEC and stakeholders, in developing their legislative proposal, identified shortcomings in the federal legislation. They asked the Commission to implement a two-year study of Virginia's unemployment insurance transfer and acquisition statutes.

VI. LEGISLATION IN THE 2005 SESSION

Several bills affecting Virginia's unemployment compensation system were introduced in the 2005 General Assembly Session.

A. LEGISLATION ENACTED IN THE 2005 SESSION

1. House Bill 2050: Minimum earnings requirement and maximum weekly benefit

As introduced, this bill, patroned by Delegate Nixon, would have increased the wages an employee must have earned in the two highest earnings quarters of his base period (the first four of the five calendar quarters preceding application for benefits) in order to be eligible for unemployment compensation benefits from $2,500 to $3,500. The bill was amended in the House Commerce and Labor Committee to increase the minimum earnings requirement from $2,500 to $2,700. As amended, the measure was enacted unanimously. The bill also increases the maximum weekly benefit from $326 to $330.

2. House Bill 2137 and Senate Bill 1201: SUTA Dumping

Delegate Purkey and Senator Miller introduced identical bills on behalf of the Warner Administration that comported with the SUTA dumping legislation reviewed by the Commission at its January 7 meeting. The bills establish civil and criminal penalties to be assessed against, and the unemployment compensation tax rates that shall apply to, persons who transfer any trade or business to another where at the time of transfer there is substantially common ownership, management, or control of the trade or business and the sole or primary purpose of the transfer is to obtain a lower unemployment tax rate.

Two substantive amendments to the bills were made in committee. The first defines the term "rate year" as the 12 consecutive calendar month period ending June 30 for which the employer's benefit charges are divided by the total of his payroll for the same period to determine

his benefit ratio for the succeeding calendar year, though the Commission is authorized to apply tax rates on a calendar year basis. The second provides that the provisions of §§ 60.2-536.1 and 60.2-536.3, which prohibit conduct relating to transfers for the purpose of obtaining a lower unemployment compensation tax rate and the assignment of SUTA rates, shall become effective in the first rate year as set forth in section 2 (c) of the federal SUTA Dumping Prevention Act of 2004, which states that such amendments shall apply in rate years beginning after the end of the 26-week period beginning on the first day of the regularly scheduled session of the State legislature beginning on or after the date of enactment of the federal act.

3. House Bill 2371: Chronic absenteeism as misconduct

Delegate Bryant introduced legislation to provide that chronic absenteeism is one form of misconduct that may result in disqualification for unemployment compensation benefits. Amendments by the House Commerce and Labor Committee clarified that chronic absenteeism or tardiness in deliberate violation of a known policy of the employer, or unapproved absence following written reprimand or warning, constitutes such misconduct, and that the VEC may consider evidence of mitigating circumstances in determining whether misconduct occurred. As amended, the bill was enacted unanimously.

4. House Bill 2416: Obsolete references

This bill, carried by Delegate Armstrong at the request of the Warner Administration, replaces obsolete references to Operation Desert Shield and Operation Desert Storm with a broad reference to "international conflict," and removes a reference to a repealed Code section. The clean-up bill was reviewed at the Commission's January 7 meeting and passed unanimously.

5. House Bill 2840: Benefits offset for wages

House Bill 2840, as introduced by Delegate Keister, was identical House Bill 505 of the 2004 Session, which was discussed by the Commission at its December 15, 2004, meeting. The introduced bill would have increased the amount of wages an eligible individual can earn, without having his unemployment benefits offset by the amount of wages, from $25 to $100. The bill was amended in the House Commerce and Labor Committee to reduce the proposed limit from $100 to $50 per week, and with this amendment the bill was enacted unanimously.

6. Senate Bill 128: Benefits offset for social security payments

Senator Watkins introduced Senate Bill 128 in the 2004 Session, where it was rereferred to the House Commerce and Labor Committee from the House floor pursuant to House Rule 22 on a 52-46 vote, and was carried over to the 2005 Session. The Commission heard testimony on this bill at its June and January meetings. The measure eliminates the offset for Social Security or Railroad Retirement Act benefits during periods when the Trust Fund has a solvency level of 50 percent or more. When the Trust Fund's solvency level is below 50 percent, weekly unemployment benefits will continue to be reduced by 50 percent of the amount of such retirement benefits. The bill was reported out by the House Commerce and Labor Committee at

its meeting in December 2004, and was unanimously approved by the House of Delegates in the 2005 Session.

7. Senate Bill 799: Obsolete benefit tables

Senator Watkins patroned Senate Bill 799, which removes extraneous benefit tables from Code § 60.2-602. The measure was enacted unanimously.

8. Senate Bill 1047: Criteria for determining when a person is an employee

Senator Wagner patroned Senate Bill 1047, which requires the VEC to use the 20-factor test set forth in an Internal Revenue Service Revenue Ruling in determining whether an individual is an employee for purposes of the Unemployment Compensation Act. Prior to the enactment of this bill, services performed by an individual for remuneration were deemed to be "employment" for purposes of the Unemployment Compensation Act unless (i) the individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and (ii) the service is either outside the usual course of the business for which such service is performed, or such service is performed outside of all the places of business of the enterprise for which such service is performed; or such individual, in the performance of such service, is engaged in an independently established trade, occupation, profession or business.

Advocates of this bill contended that the existing test resulted in persons being designated as independent contractors under tax laws but designated as employees under the Unemployment Compensation Act. In an effort to address this concern, the legislation provides that services performed by an individual for remuneration were deemed to be "employment" for purposes of the Unemployment Compensation Act unless the Commission determines that such individual is not an employee for purposes of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, based upon an application of the 20 factors set forth in Internal Revenue Service Revenue Ruling 87-41, issued pursuant to unemployment tax regulations. A request to postpone enactment of the bill until the Commission had studied the issue was not adopted. The bill passed by margins of 28-12 in the Senate and 87-11 in the House.

9. Senate Bill 1112: Benefits charging for disaster-related business closures

Senator Blevins carried legislation at the request of the Warner Administration that amended a perceived flaw in Senate Bill 179 from the 2004 Session. The 2004 bill provides that unemployment benefits paid because of temporary work closures due to natural disasters will be charged against the pool rather than against the employer. The VEC expressed concerns that tracking whether a business' closure was temporary, and determining whether the business reopened subsequent to the natural disaster, would impose an enormous administrative burden on the agency. Senate Bill 1112 addressed this concern by striking the requirement, for the purposes of assigning to the pool the charges associated with a claimant who qualifies for unemployment compensation due to a disaster-related business closure, that the claimant return to his job once the business reopened. The legislation was enacted unanimously.

10. Senate Bill 1276: Disclosure of wage information to consumer reporting agencies

Senate Bill 1276 authorizes the Virginia Employment Commission to release individual wage information, provided in employers' quarterly wage reports, to consumer reporting agencies. The individual must consent in writing to the release of his wage information. The released information is to be used only to verify the accuracy of wage or employment information provided by the individual in connection with a specific transaction. Fees received by the Commission from a credit reporting agency will be deposited in the Special Unemployment Compensation Administration Fund. The measure, patroned by Senator Watkins, passed the General Assembly with one negative vote. It was amended at the Governor's recommendation to postpone its effective date until January 1, 2007.

B. LEGISLATION NOT ENACTED IN THE 2005 SESSION

1. House Bill 1700: Benefits to a trailing military spouse

Delegate Tata carried House Bill 1288 in the 2004 Session, which passed the House on a vote of 51-43, but was carried over to the 2005 Session in the Senate Commerce and Labor Committee. The measure was reintroduced by Delegate Tata as House Bills 1491, 1495, and 1700. House Bills 1491 and 1495, which were identical, were not acted on. House Bill 1700 provides that good cause for leaving employment exists if an employee voluntarily leaves a job to accompany his spouse, who is an enlisted person on active duty in the military or naval services of the United States, to a new military assignment (i) from which the employee's place of employment is not reasonably accessible, and (ii) which is located in a state that, pursuant to statute, does not deem a person accompanying a military spouse as a person leaving work voluntarily without good cause. Benefits paid to qualifying claimants shall be charged against the pool rather than against the claimant's employer. The measure would sunset on July 1, 2007. The bill was amended in the House Commerce and Labor Committee to strike the requirement that the military spouse be in the enlisted ranks, to limit its applicability to periods when the United States is at war or otherwise engaged in armed conflict on foreign soil, and to clarify that the new military assignment must be established pursuant to a permanent change of duty order. As amended, the bill was reported by the House Commerce and Labor Committee on a 14-7 vote. Following a vote by the House of Delegates to engross the bill by a margin of 51-43, it was stricken from the House calendar at the patron's request.

2. House Bill 1908: Employment training and unemployment benefits for military personnel, spouses and dependents

Delegate Baskerville introduced legislation to benefit military personnel and their families by making job training and unemployment compensation programs and resources more accessible. One facet of the bill provides, as does House Bill 1700, that spouses of military personnel are not disqualified from unemployment compensation benefits if they quit a job in order to follow their military spouse to a new military assignment resulting from a permanent change of station orders, activation orders, or unit deployment orders. In addition, the bill would

require the Virginia Workforce Council to establish an employment advocacy and assistance program to assist spouses and dependents of active duty military personnel, Virginia National Guard members, and military reservists. Assistance shall be delivered through military family employment advocates located at selected one-stop centers. Local workforce investment boards (WIBs) shall include one representative from any military base having more than 100 military personnel that is located within the WIB's service area. The bill was left in the House Commerce and Labor Committee.

3. House Bill 2693: Termination by reimbursable employer

House Bill 2693 sought to address the situation where a reimbursable employer terminates a claimant for misconduct in relation to his work, the claimant then works for another employer for over 30 days before being laid off, and the claimant then seeks unemployment benefits based in part on service provided to the reimbursable employer. Reimbursable employers are the Commonwealth, political subdivisions, educational institutions, and other entities that do not pay taxes into the Trust Fund but instead reimburse the Trust Fund in the total amount of the claim that was paid out on their behalf. Currently, only the last 30-day employer may contest claims for benefits. House Bill 2693, introduced by Delegate Pollard, provides that benefits based on service with a reimbursable employer shall not be paid to a claimant where the claimant was terminated for and allows a reimbursable employer to contest the claim for benefits even though it does not qualify as the last 30-day employer. These provisions are not applicable to reimbursable employers who also are the last 30-day employer, because they have the ability under current law to contest claims for unemployment compensation on the basis of claimant misconduct. The measure passed the House of Delegates unanimously but failed in the Senate Commerce and Labor Committee, on lack of a motion, when it was noted that in some circumstances the measure could increase the burden on taxable employers.

4. Senate Bill 772: Minimum earnings requirement in each quarter

Senator Bell introduced this measure, which provides that an individual earning at least $2,500 but less than $3,500.01 in his base period shall be eligible for unemployment compensation benefits only if he had earnings of at least $1,250 in each of two quarters in his base period. The base period is the first four of the five calendar quarters preceding application for unemployment benefits. The measure was referred by the Senate Commerce and Labor Committee to this Commission for further study.

5. Senate Bill 1055: Minimum earnings requirement

This measure, patroned by Senator Wagner, contains the same provisions increasing the minimum that a person must earn in order to be eligible for unemployment benefits that was included in the introduced version of House Bill 2050. The bill would have increased, from $2,500 to $3,500, the wages an employee must have earned in the two highest earnings quarters of his base period in order to be eligible for unemployment compensation benefits. The measure was left in the Senate Commerce and Labor Committee.

6. Senate Bill 1283: Furnishing unemployment compensation reports

Senator Saslaw introduced Senate Bill 1283, which would have required the VEC, upon written request, to furnish any agency or political subdivision of the Commonwealth, or its designated agent, such information as it may require for the purpose of collecting any monetary obligations owed to the Commonwealth or its political subdivisions. Currently, the VEC is required to release such information for the purpose of collecting only fines, penalties, and costs. The bill was stricken from the docket in the Senate Commerce and Labor Committee.

VII. CONCLUSION

The members of the Unemployment Compensation Commission appreciate the valuable assistance provided by Dee Esser, Jim Ellenberger, Lyn Coughlin, and Coleman Walsh of the Virginia Employment Commission and by Ellen Bowyer, formerly of the Division of Legislative Services. The Commission members also would like to thank all participants for the energy and attention they have invested in the issues before the Commission.

Respectfully submitted,

Senator John C. Watkins, Chairman
Delegate Harry R. Purkey, Vice Chairman
Delegate Terry G. Kilgore
Senator Yvonne B. Miller
Delegate Samuel A. Nixon, Jr.
Delegate Lionell Spruill, Sr.
Senator Frank W. Wagner
Delegate R. Lee Ware, Jr.

Summary of Survey Results

1. Sixteen states with large military populations were surveyed regarding their UI payments to trailing spouse claimants.
2. In order of military population, the seven non-responders were, North Carolina, Washington (state), Hawaii, Illinois, Arizona, New York, and Alaska.
3. Nine states responded. In order of military population, they were California, Texas, Georgia, Florida, South Carolina, Kentucky, Colorado, Maryland, and Oklahoma.
4. Three responding states, South Carolina, Kentucky, and Maryland, do not pay UI benefits to trailing spouses and provided no estimates on the potential cost.
5. California pays trailing spouse benefits and Texas reduces the number of weeks of eligibility for trailing spouse claimants, but neither state was able to provide an estimate of the cost for military trailing spouses.
6. The information provided by the four remaining states results in a wide range of estimates when projecting the Virginia cost of paying UI benefits to military spouses. The projections for Virginia are: $253,000 (using Oklahoma data), $412,000 (Colorado), $5.1 million (Georgia), and $14.1 million (Florida).
7. Only Oklahoma currently pays these benefits. The other states' data are based on estimates developed for legislation, which passed in Florida this year.

Estimated Benefit Cost of Paying Military Trailing Spouses
based on Information Provided by Four States

Colorado

Co. Total Cost	$136,619			
Co. Cost per Military employee	$136,619/31,386=	$	4.35	
Va. Cost per Military employee adjusted for average benefit and duration	$4.35 x $230 [Va. AWBA] / $308 [Co.AWBA] x 14.0 wks. [Va. Avg. Dur.] / 15.2 wks. [Co. Avg. Dur.] =			$ 2.99
Va. Total Cost	$2.99*137,683 =	**$**	**411,672**	

Georgia

Ga. Total Cost	$2-$5 million (use average of $3.5 million)			
Ga. Cost per Military employee	$3,500,000/100,000=	$	35.00	
Va. Cost per Military employee adjusted for average benefit and duration	$35.00 x $230 [Va. AWBA] / $243 [Ga.AWBA] x 14.0 wks. [Va. Avg. Dur.] / 12.6 wks. [Ga. Avg. Dur.] =			$ 36.81
Va. Total Cost	$36.81*137,683 =	**$**	**5,068,111**	using average Georgia cost--$3.5 million
		$	**2,895,939**	using low Georgia cost--$2 million
		$	**7,239,847**	using high Georgia cost--$5 million

Oklahoma

Ok. Total Cost	$50,000			
Ok. Cost per Military employee	$50,000/23,508 =	$	2.13	
Va. Cost per Military employee adjusted for average benefit and duration	$2.13 x $230 [Va. AWBA] / $229 [Ok.AWBA] x 14.0 wks. [Va. Avg. Dur.] / 16.3 wks. [Ok. Avg. Dur.] =			$ 1.84
Va. Total Cost	$1.84*137,683 =	**$**	**253,337**	

Estimated Benefit Cost of Paying Military Trailing Spouses
based on Information Provided by Four States

Florida			Source
military personnel are relocated every 2.9 years			*DoD*
55% of active duty military are married			*DoD*
70% of military spouses are in the labor force			*DoD*
24% of military spouse labor force participants are unemployed			*DoD*
Va. Military personnel		137,683	
Va. Military personnel relocating each year	137,683/2.9 =	47,477	
Va. Married Military personnel relocating each year	47,477 x 55% =	26,112	
Va. Relocated military spouses in the labor force	26,112 x 70% =	18,278	
Va. Relocated military spouses unemployed	18,278 x 24% =	4,387	
Va. AWBA		$ 230	
Va Avg. Duration		14.0 weeks	
Va. Total Cost	4,387 x $230 x 14.0 =	**$ 14,126,140**	

METHODOLOGY FOR DETERMINING STATE REVENUE IMPACT OF UNEMPLOYMENT INSURANCE BENEFIT BILLS

Pursuant to Chapter 895 of the 2004 Acts of Assembly

During the 2004 Session, Senator Wagner introduced SB 664 to require that when legislation would increase benefit amounts or benefit eligibility, the Virginia Employment Commission is required to determine the impact of the legislation on General Fund Revenues and the impact must be included in a bill's second enactment clause. The stated rationale for the legislation is that since employers' unemployment insurance taxes are deductible as business expenses, increased benefit costs would increase unemployment insurance taxes, thus increasing tax deductions and reducing general fund tax receipts.

The Virginia Employment Commission consulted with the Department of Planning and Budget and the Department of Taxation to develop a methodology for determining the impact of unemployment benefit increases.

Steps in Determining General Revenue Impact

1. The VEC runs a standard projection of the cost of the bill and the impact on employer taxes. This is the same projection that we would run to determine the cost to the trust fund of a given measure. That process also results in an estimated impact on employer taxes averaged over a five-year period. As a general rule, it takes up to three years before benefit increases translate into increased taxes, so the five-year average uses the five years starting the first year the tax impact is seen. This period would be reduced for bills with sunset clauses of less than 8 years.
2. Using the average tax increase for five years, we apply a blended average of corporate and individual tax rates of 5%. The blended rate is used because some businesses pay corporate tax rates and others pay at the individual rate. So we take 5% of the average tax increase.
3. According to Mr. John Layman of the Department of Taxation, the percentage of businesses that pay corporate or individual taxes is approximately 6% of all businesses. The figure derived for step two above is multiplied by .06 to determine the average annual cost in terms of general fund revenue.
4. The Department of Taxation's standard for reporting tax revenue impact does not include estimates of less than $100,000, reasoning that less than $100,000 could be a rounding error when applied to the scale of total state revenue. The VEC will be reporting figures below $100,000 when they occur in order to meet the requirements of Ch. 895.

Sample Calculation

The unemployment insurance bill with the highest cost in recent years is the most recent benefit increase bill from 2003. That bill was expected to increase unemployment insurance taxes by $49.5 million over a five-year period.

$49,500,000 / 5 = $9,900,000. $9,900,000 x .05 x .06= $29,700 reduction in general fund revenues.

Virginia Employment Commission *report to*

The Commission on Unemployment Compensation

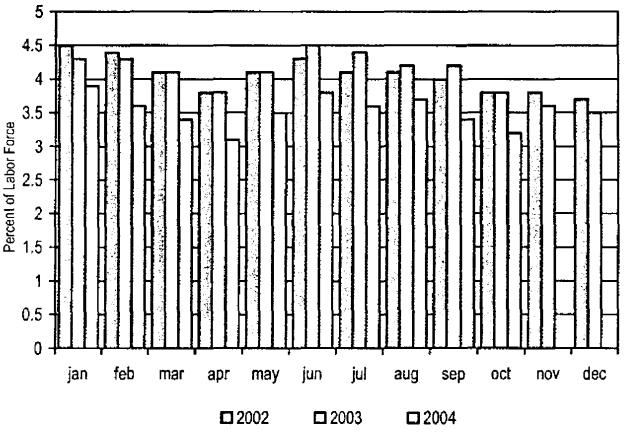
James Ellenberger, *Deputy Commissioner*
Virginia Employment Commission

December 15, 2004

VEC Trust Fund

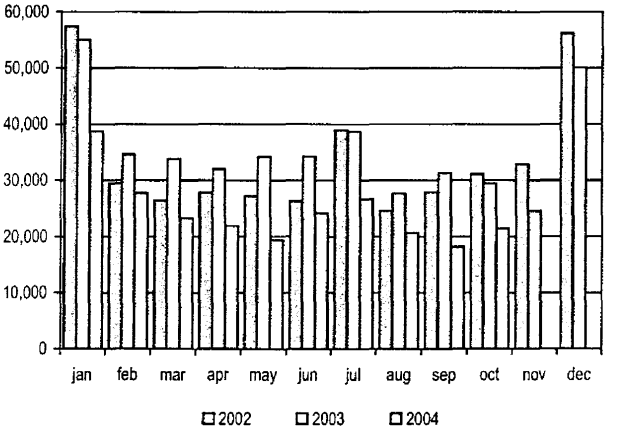
Virginia's Unemployment Rates 2002 - 2004 *(year to date)*

➔ Since October 2003, all unemployment rates have been at or below year-ago rates.



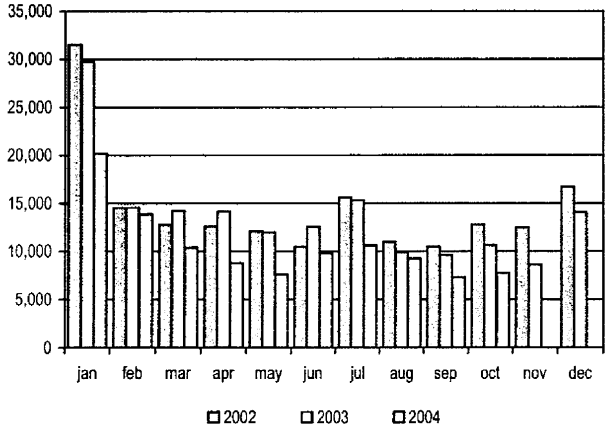
UI Initial Claims 2002 - 2004 *(year to date)*

➔ Total initial claims through October this year are down 31% because of fewer temporary factory furloughs and a generally improving economy.



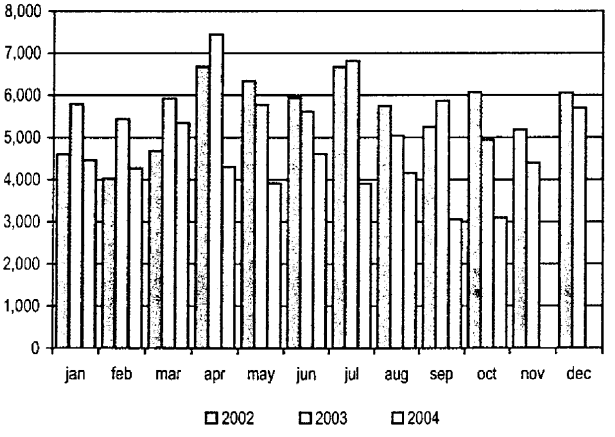
UI First Payments
2002 - 2004 *(year to date)*

- A claimant can receive only one first payment in his benefit year; so first payments are a good proxy for the number of claimants receiving unemployment benefits.
- Through October, first payments are down 25.9% from last year.
- The average duration in October was 13.3 weeks, below last October's 13.9 weeks.



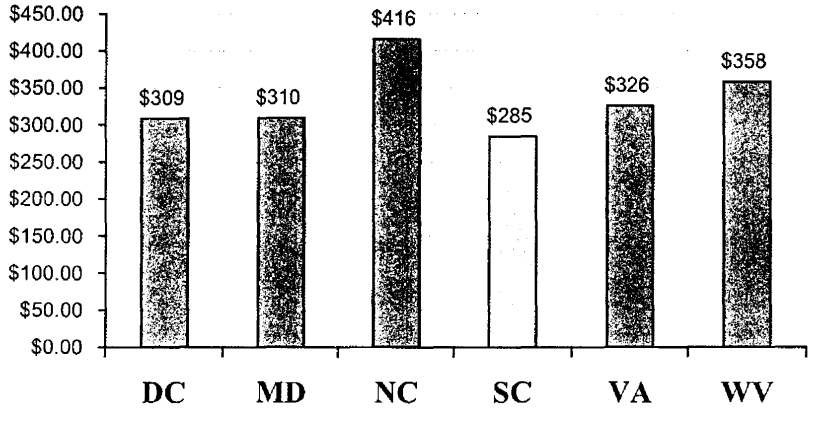
UI Final Payments
2002 - 2004 *(year to date)*

- For the first ten months of 2004, final payments are down 29.9% from 2003.
- The exhaustion rate in October was 35.1%, down from last October's 40.1%.



2004 Maximum Weekly Benefit

Fourth Circuit



Trust Fund Data

(Millions of Dollars)

(Projections will be updated in December)

	2003	2004
January 1 Balance	$528.0	$200.3
Tax Revenue	$255.3	$452.8
Interest Revenue	$23.4	$14.3
Benefits	$606.4	$376.5
December 31 Balance	$200.3	$281.8*
Solvency Level (6/30)	45.5%	39.3%

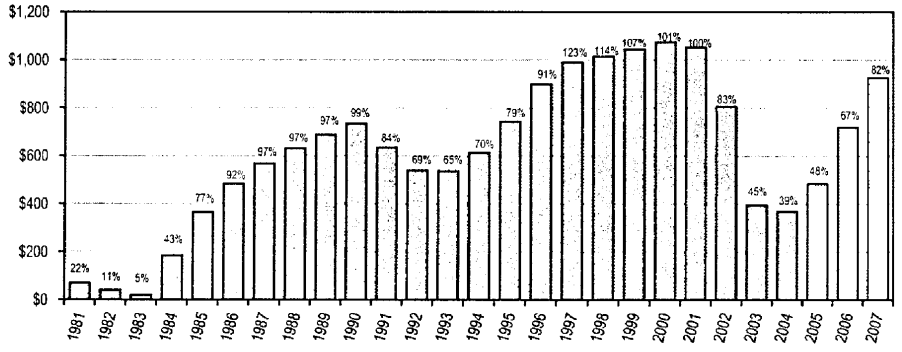
*$9 million in Reed Act money deducted from Trust Fund balance for FY05 and FY06 appropriations for Job Service and UI administration.

Actual Projected

June 30 Balances and Solvency Level

→When solvency drops below 50%, Fund Builder Tax is triggered the following year.

(Projections will be updated in December)



→2005 – 2007 projected.

U.I. Taxes

→Taxes are paid by employers to the VEC on the first $8,000 of each employee's wages.

→Tax rates:

→Minimum tax for 2005 is 0.52% or $41.60 per employee

⇨104,965 employers, or 61.4% of employers

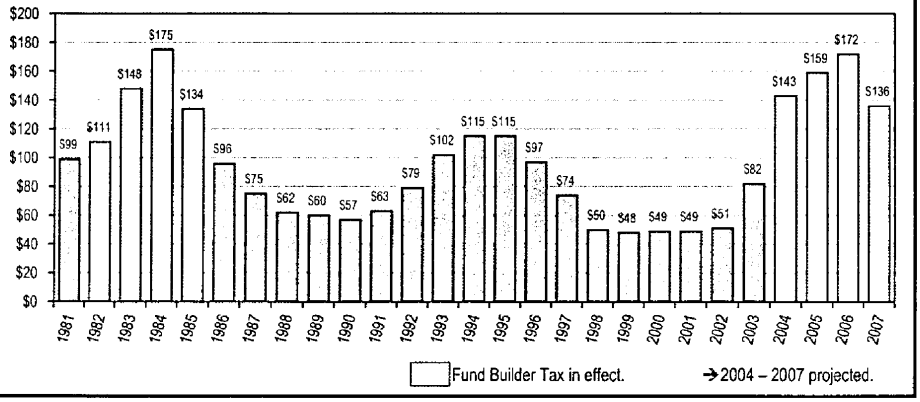
→Maximum tax for 2005 is 6.62% or $529.60 per employee

⇨8,949 employers, or 5.2% of employers

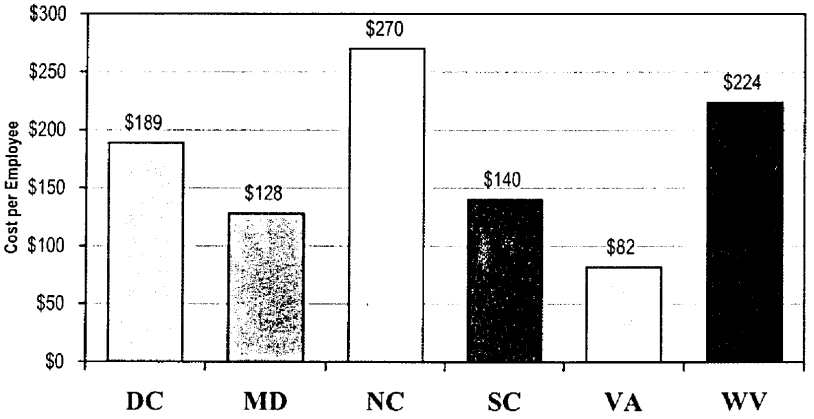
Average Tax per Employee

→ The increases from 2003 through 2007 are the result of higher benefit schedules and the recession.

(Projections will be updated in December)



Average Tax per Employee
Fourth Circuit – Year ending 12/31/03



SB 128
Social Security Offset

Year	FY Taxes*	FY Benefits*	June 30 Accrued Bal.*	CY Average Tax**	CY Solvency Level in Effect	Effect on FY General Fund Revenues
2004	$ —	$ —	$ —	$ —	0%	$ —
2005	$ —	$ —	$ —	$ —	0%	$ —
2006	$ —	$ —	$ —	$ —	0%	$ —
2007	$ —	$ 0.8	$ (0.8)	$ —	0%	$ —
2008	$ 0.1	$ 1.4	$ (2.2)	$ 0.04	0%	$ (300)
2009	$ 0.1	$ 1.4	$ (3.7)	$ 0.04	0%	$ (300)
2010	$ 1.5	$ 1.4	$ (3.9)	$ 0.63	0%	$ (4,500)
2011	$ 3.2	$ 1.5	$ (2.3)	$ 0.94	0%	$ (9,600)
2012	$ 2.0	$ 1.6	$ (2.1)	$ 0.23	0%	$ (6,000)
Total	**$ 6.9**	**$ 8.1**				**$ (20,700)**
		5-year Average (08 – 12)		**$ 0.38**		**$ (4,140)**

* millions
** cost per employee

HB 505
Earned Income Offset

➔ The VEC has run projections on the cost of increasing the allowable earning before offset to $50, $75, and $100. The cost in FY 04 would have been as follows:

$ 50	$ 6.3 million	$1.22 increase in average per employee tax
$ 75	$12.1 million	$2.79 increase in average per employee tax
$100	$17.5 million	$4.35 increase in average per employee tax

HB 505
Earned Income Offset

Effect on this Fund

Year	FY Taxes*	FY Benefits*	June 30 Accrued Bal.*	CY Average Tax**	CY Solvency Level in Effect	Effect on FY General Fund Revenues
2004	$ —	$ —	$ —	$ —	0%	$ —
2005	$ —	$ —	$ —	$ —	0%	$ —
2006	$ —	$ 4.9	$ (4.9)	$ —	0%	$ —
2007	$ 2.0	$ 4.8	$ (6.9)	$ 0.40	0%	$ (6,000)
2008	$ 4.1	$ 5.0	$ (8.2)	$ 1.66	0%	$ (12,300)
2009	$ 5.0	$ 5.1	$ (9.1)	$ 1.14	0%	$ (15,000)
2010	$ 5.1	$ 5.2	$ (9.9)	$ 1.51	0%	$ (15,300)
2011	$ 6.7	$ 5.4	$ (9.3)	$ 1.86	0%	$ (20,100)
2012	$ 4.7	$ 5.5	$ (11.0)	$ 0.76	0%	$ (14,100)
Total	**$ 27.6**	**$ 35.9**				**$ (82,800)**
		6-year Average (07 – 12)		**$ 1.22**		**$ (13,800)**

* millions
** cost per employee

HB 505
Earned Income Offset

Effect on this Fund

Year	FY Taxes*	FY Benefits*	June 30 Accrued Bal.*	CY Average Tax**	CY Solvency Level in Effect	Effect on FY General Fund Revenues
2004	$ —	$ —	$ —	$ —	0%	$ —
2005	$ —	$ —	$ —	$ —	0%	$ —
2006	$ —	$ 9.6	$ (9.6)	$ —	0%	$ —
2007	$ 3.3	$ 9.4	$ (15.5)	$ 0.98	0%	$ (9,900)
2008	$ 12.5	$ 9.7	$ (13.2)	$ 5.17	-5%	$ (37,500)
2009	$ 13.2	$ 9.9	$ (11.4)	$ 2.47	0%	$ (39,600)
2010	$ 8.0	$ 10.1	$ (14.8)	$ 1.90	0%	$ (24,000)
2011	$ 14.8	$ 10.5	$ (11.0)	$ 5.10	-5%	$ (44,400)
2012	$ 10.6	$ 10.7	$ (12.7)	$ 1.09	0%	$ (31,800)
Total	**$ 62.4**	**$ 69.9**				**$ (187,200)**
		6-year Average (07 – 12)		**$ 2.79**		**$ (31,200)**

* millions
** cost per employee

HB 505
Earned Income Offset

Effect on Trust Fund

Year	FY Taxes*	FY Benefits*	June 30 Accrued Bal.*	CY Average Tax**	CY Solvency Level in Effect	Effect on FY General Fund Revenues
2004	$ —	$ —	$ —	$ —	0%	$ —
2005	$ —	$ —	$ —	$ —	0%	$ —
2006	$ —	$ 13.7	$ (13.7)	$ —	0%	$ —
2007	$ 4.9	$ 13.5	$ (22.7)	$ 1.67	0%	$ (14,700)
2008	$ 15.1	$ 13.9	$ (22.6)	$ 5.88	-5%	$ (45,300)
2009	$ 17.1	$ 14.2	$ (21.9)	$ 3.77	0%	$ (51,300)
2010	$ 26.5	$ 14.6	$ (10.6)	$ 9.17	-5%	$ (79,500)
2011	$ 21.4	$ 15.0	$ (6.2)	$ 3.08	0%	$ (64,200)
2012	$ 10.8	$ 15.3	$ (11.9)	$ 2.53	0%	$ (32,400)
Total	**$ 95.8**	**$ 100.2**				**$ (287,400)**
		6-year Average (07 – 12)		**$ 4.35**		**$ (47,900)**

* millions
** cost per employee

SB 621
Increase Minimum Earnings Requirement

➔Current law requires claimants to earn at least $2,500 during two calendar quarters in order to be eligible for unemployment insurance benefits. Senator Wagner's bill would increase minimum earnings to $3,500.

SB 621
Increase Minimum Earnings Requirement

➔ Based on claims filed between November '03 and October '04, this measure would have eliminated UI eligibility for 6,594 claimants, or 3.3% of new claimants.

SB 621
Increase Minimum Earnings Requirement

➔ Those who would lose their eligibility are disproportionately black and female. These claimants work predominately in retail, food preparation, office and administrative support, and manufacturing.

SB 621
Increase Minimum Earnings Requirement

➔ The reduction in eligibility would save an average of $5.1 million per year, but would be insufficient to affect the Trust Fund solvency level 5 out of 6 years. It would decrease per employee taxes by an average of $1.46 annually.

SB 621
Increase Minimum Earnings Requirement

➔ Eliminating eligibility for low-wage workers would exacerbate Virginia's low first payment rate, already one of the worst in the nation.

SB 621
Increase Minimum Earnings Requirement

Year	FY Taxes*	FY Benefits*	June 30 Accrued Bal.*	CY Average Tax**	CY Solvency Level in Effect	Effect on FY General Fund Revenues
2004	$ —	$ —	$ —	$ —	0%	$ —
2005	$ —	$ —	$ —	$ —	0%	$ —
2006	$ —	$ (4.8)	$ 4.8	$ —	0%	$ —
2007	$ (2.5)	$ (4.8)	$ 7.3	$ (0.86)	0%	$ 7,500
2008	$ (1.8)	$ (4.9)	$ 11.2	$ (0.24)	0%	$ 5,400
2009	$ (8.2)	$ (5.1)	$ 8.2	$ (3.56)	5%	$ 24,600
2010	$ (8.5)	$ (5.2)	$ 5.7	$ (1.33)	0%	$ 25,500
2011	$ (4.4)	$ (5.3)	$ 7.2	$ (1.00)	0%	$ 13,200
2012	$ (5.8)	$ (5.5)	$ 7.4	$ (1.79)	0%	$ 17,400
Total	**$ (31.2)**	**$ (35.6)**				**$ 93,600**
			6-year Average (07 – 12)	**$ (1.46)**		**$ 15,600**

* millions
** cost per employee

HB 1288
UI Eligibility for Military Trailing Military Spouses

Year	FY Taxes*	FY Benefits*	June 30 Accrued Bal.*	CY Average Tax**	CY Solvency Level in Effect	Effect on FY General Fund Revenues
2004	$ —	$ —	$ —	$ —	0%	$ —
2005	$ —	$ —	$ —	$ —	0%	$ —
2006	$ —	$ 6.6	$ (6.6)	$ —	0%	$ —
2007	$ 1.7	$ 6.4	$ (11.3)	$ 0.80	0%	$ (5,033)
2008	$ 4.6	$ —	$ (6.7)	$ 1.60	0%	$ (13,889)
2009	$ 5.9	$ —	$ (0.8)	$ 1.60	0%	$ (17,810)
2010	$ 4.3	$ —	$ 3.5	$ 0.80	0%	$ (12,759)
2011	$ 1.2	$ —	$ 4.7	$ —	0%	$ (3,715)
2012	$ —	$ —	$ 4.7	$ —	0%	$ —
Total	**$ 17.7**	**$ 13.0**				**$ (53,206)**
			4-year Average (07–10)	**$ 1.20**	**5-year Average (07–11)**	**$ (10,641)**

* millions
** cost per employee

HB 1288
UI Eligibility for Military Trailing Military Spouses

Effect on Trust Fund

Year	FY Taxes*	FY Benefits*	June 30 Accrued Bal.*	CY Average Tax**	CY Solvency Level in Effect	Effect on FY General Fund Revenues
2004	$ —	$ —	$ —	$ —	0%	$ —
2005	$ —	$ —	$ —	$ —	0%	$ —
2006	$ —	$ 3.3	$ (3.3)	$ —	0%	$ —
2007	$ —	$ 3.2	$ (6.5)	$ —	0%	$ —
2008	$ 1.7	$ —	$ (4.8)	$ 0.80	0%	$ (5,162)
2009	$ 3.0	$ —	$ (1.8)	$ 0.80	0%	$ (8,905)
2010	$ 1.2	$ —	$ (0.6)	$ —	0%	$ (3,658)
2011	$ —	$ —	$ (0.6)	$ —	0%	$ —
2012	$ —	$ —	$ (0.6)	$ —	0%	$ —
Total	**$ 5.9**	**$ 6.5**				**$ (17,725)**
		2-year Average (08–09)		**$ 0.80**	**3-year Average (08–10)**	**$ (5,908)**

* millions
** cost per employee

Virginia Employment Commission
report to

The Commission on Unemployment Compensation

James Ellenberger, *Deputy Commissioner*
Virginia Employment Commission

December 15, 2004

Unemployment Insurance
Fact Sheet

	October 2004	October 2003	Percent Change
Trust Fund Balance	$285 million	$248 million	+15%
Regular UI Benefits (year to date)	$325 million	$528 million	-38%
TEUC Benefits (year to date)	$14 million	$136 million	*
Tax Revenue (year to date)	$409 million	$229 million	+79%
Interest Revenue (year to date)	$12 million	$27 million	-56%
Average Weekly Benefit (year to date)	$230	$265	-13%
Unemployment Rate (year to date)	3.5%	4.2%	-17%
Initial Claims (regular UI, year to date)	242,515	351,306	-31%
Final Payments (regular UI, year to date)	41,176	58,716	-30%
Exhaustion Rate (regular UI)	35.1%	40.1%	-12%
Average Duration (regular UI)	13.3 weeks	13.9 weeks	-4%

* The last day to file a new TEUC claim was December 27, 2003.

Trust Fund Standard Forecast (2004 – 2008)

Projections will be updated in December.

Calendar Year	Average Tax (cost per employee)	Tax Revenue (millions)	Benefits (millions)	Dec. 31 Balances (millions)	Solvency Level in Effect
1999	$ 48	$146	$179	$1,018	110%
2000	49	155	197	1,042	105%
2001	49	155	394	873	100%
2002	51	159	744	528	100%
2003	82	255	606	200	80%
2004	143	453	377	282	45%*
2005	159	541	393	465	35%*
2006	172	597	364	725	45%*
2007	136	500	374	896	65%
2008	104	392	383	955	80%

* 50% tax table in effect; 0.2% fund builder tax levied; interest offset of pool costs not in effect

Highest years after 2003 highlighted.

TEXT OF P.L. 108-295

An Act

To amend titles III and IV of the Social Security Act to improve the administration of unemployment taxes and benefits.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `SUTA Dumping Prevention Act of 2004'.

SEC. 2. TRANSFER OF UNEMPLOYMENT EXPERIENCE UPON TRANSFER OR ACQUISITION OF A BUSINESS.

(a) IN GENERAL- Section 303 of the Social Security Act (42 U.S.C. 503) is amended by adding at the end the following:

`(k)(1) For purposes of subsection (a), the unemployment compensation law of a State must provide--

`(A) that if an employer transfers its business to another employer, and both employers are (at the time of transfer) under substantially common ownership, management, or control, then the unemployment experience attributable to the transferred business shall also be transferred to (and combined with the unemployment experience attributable to) the employer to whom such business is so transferred,

`(B) that unemployment experience shall not, by virtue of the transfer of a business, be transferred to the person acquiring such business if--

`(i) such person is not otherwise an employer at the time of such acquisition, and

`(ii) the State agency finds that such person acquired the business solely or primarily for the purpose of obtaining a lower rate of contributions,

`(C) that unemployment experience shall (or shall not) be transferred in accordance with such regulations as the Secretary of Labor may prescribe to ensure that higher rates of contributions are not avoided through the transfer or acquisition of a business,

`(D) that meaningful civil and criminal penalties are imposed with respect to--

`(i) persons that knowingly violate or attempt to violate those provisions of the State law which implement subparagraph (A) or (B) or regulations under subparagraph (C), and

`(ii) persons that knowingly advise another person to violate those provisions of the State law which implement subparagraph (A) or (B) or regulations under subparagraph (C), and

`(E) for the establishment of procedures to identify the transfer or acquisition of a

business for purposes of this subsection.

`(2) For purposes of this subsection--

`(A) the term `unemployment experience', with respect to any person, refers to such person's experience with respect to unemployment or other factors bearing a direct relation to such person's unemployment risk;

`(B) the term `employer' means an employer as defined under the State law;

`(C) the term `business' means a trade or business (or a part thereof);

`(D) the term `contributions' has the meaning given such term by section 3306(g) of the Internal Revenue Code of 1986;

`(E) the term `knowingly' means having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibition involved; and

`(F) the term `person' has the meaning given such term by section 7701(a)(1) of the Internal Revenue Code of 1986.'.

(b) STUDY AND REPORTING REQUIREMENTS-

(1) STUDY- The Secretary of Labor shall conduct a study of the implementation of the provisions of section 303(k) of the Social Security Act (as added by subsection (a)) to assess the status and appropriateness of State actions to meet the requirements of such provisions.

(2) REPORT- Not later than July 15, 2007, the Secretary of Labor shall submit to the Congress a report that contains the findings of the study required by paragraph (1) and recommendations for any Congressional action that the Secretary considers necessary to improve the effectiveness of section 303(k) of the Social Security Act.

(c) EFFECTIVE DATE- The amendment made by subsection (a) shall, with respect to a State, apply to certifications for payments (under section 302(a) of the Social Security Act) in rate years beginning after the end of the 26-week period beginning on the first day of the first regularly scheduled session of the State legislature beginning on or after the date of the enactment of this Act.

(d) DEFINITIONS- For purposes of this section--

(1) the term `State' includes the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands;

(2) the term `rate year' means the rate year as defined in the applicable State law; and

(3) the term `State law' means the unemployment compensation law of the State, approved by the Secretary of Labor under section 3304 of the Internal Revenue Code of 1986.

SEC. 3. USE OF NEW HIRE INFORMATION TO ASSIST IN ADMINISTRATION OF UNEMPLOYMENT COMPENSATION PROGRAMS.

Section 453(j) of the Social Security Act (42 U.S.C. 653(j)) is amended by adding at the end the following:

`(8) INFORMATION COMPARISONS AND DISCLOSURE TO ASSIST IN ADMINISTRATION OF UNEMPLOYMENT COMPENSATION PROGRAMS-

`(A) IN GENERAL- If, for purposes of administering an unemployment compensation program under Federal or State law, a State agency responsible for the administration of such program transmits to the Secretary the names and social security account numbers of individuals, the Secretary shall disclose to such State agency information on such individuals and their employers maintained in the National Directory of New Hires, subject to this paragraph.

`(B) CONDITION ON DISCLOSURE BY THE SECRETARY- The Secretary shall make a disclosure under subparagraph (A) only to the extent that the Secretary determines that the disclosure would not interfere with the effective operation of the program under this part.

`(C) USE AND DISCLOSURE OF INFORMATION BY STATE AGENCIES-

> `(i) IN GENERAL- A State agency may not use or disclose information provided under this paragraph except for purposes of administering a program referred to in subparagraph (A).
>
> `(ii) INFORMATION SECURITY- The State agency shall have in effect data security and control policies that the Secretary finds adequate to ensure the security of information obtained under this paragraph and to ensure that access to such information is restricted to authorized persons for purposes of authorized uses and disclosures.
>
> `(iii) PENALTY FOR MISUSE OF INFORMATION- An officer or employee of the State agency who fails to comply with this subparagraph shall be subject to the sanctions under subsection (l)(2) to the same extent as if such officer or employee was an officer or employee of the United States.

`(D) PROCEDURAL REQUIREMENTS- State agencies requesting information under this paragraph shall adhere to uniform procedures established by the Secretary governing information requests and data matching under this paragraph.

`(E) REIMBURSEMENT OF COSTS- The State agency shall reimburse the Secretary, in accordance with subsection (k)(3), for the costs incurred by the Secretary in furnishing the information requested under this paragraph.'.

DRAFT LEGISLATIVE LANGUAGE

The following language is provided for state use in developing language that meets the requirements of Section 303(k), SSA, as added by P.L. 108-295, on SUTA dumping.

States will need to modify the language to accord with state usage. For example, "Commissioner" should be changed to the name of the agency administering the state's UC program if that is the state convention. Similarly, legal usages, such as "Chapter" to refer to the state's UC law, should be changed to accord with state convention.

The following language assumes the state wishes to add a separate section addressing SUTA dumping. States may chose instead to integrate the following provisions into existing state law. If this is the case, states should use this language in conjunction with the Checklist in Attachment III to assure all necessary amendments are made. Similarly, states modifying the language should test such modifications against the Checklist.

Section _____. Special Rules Regarding Transfers of Experience and Assignment of Rates. Notwithstanding any other provision of law, the following shall apply regarding assignment of rates and transfers of experience:

(a) If an employer transfers its trade or business, or a portion thereof, to another employer and, at the time of the transfer, there is substantially common ownership, management or control of the two employers, then the unemployment experience attributable to the transferred trade or business shall be transferred to the employer to whom such business is so transferred. The rates of both employers shall be recalculated and made effective immediately upon the date of the transfer of trade or business. [1]

(b) Whenever a person[2] who is not an employer[3] under this Chapter at the time it acquires the trade or business of an employer, the unemployment experience of the acquired business shall not be transferred to such person if the Commissioner finds that such person acquired the business solely or primarily for the purpose of obtaining a lower rate of

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[1] See Question and Answer 8, which contains the Department's recommendation that rates be recomputed immediately.

[2] The term "person" is used consistent with the usage in Section (k)(1)(B), SSA. It encompasses a broad range of entities who are not "employers." It includes both entities who are not "employers" because they have no payroll or insufficient payroll. Note the definition of "person" given in subsection (e)(1) of the draft language.

[3] States should determine if "employer" is the appropriate term here and in other appearances in this draft language. For example, a state may use the term "employing unit, "subject employer," or "employer liable for contributions" to describe an entity that is subject to taxation under the state's UC law.

contributions. Instead, such person shall be assigned the [applicable][4] new employer rate under section [*insert section of state law*]. In determining whether the business was acquired solely or primarily for the purpose of obtaining a lower rate of contributions, the Commissioner shall use objective factors which may include the cost of acquiring the business, whether the person continued the business enterprise of the acquired business, how long such business enterprise was continued, or whether a substantial number of new employees were hired for performance of duties unrelated to the business activity conducted prior to acquisition.

(c)(1) If a person knowingly violates or attempts to violate subsections (a) and (b) or any other provision of this Chapter related to determining the assignment of a contribution rate,[5] or if a person knowingly advises another person in a way that results in a violation of such provision, the person shall be subject to the following penalties:

(A) If the person is an employer, then such employer shall be assigned the highest rate assignable under this Chapter for the rate year during which such violation or attempted violation occurred and the three rate years immediately following this rate year. However, if the person's business is already at such highest rate for any year, or if the amount of increase in the person's rate would be less than 2 percent for such year, then a penalty rate of contributions of 2 percent of taxable wages shall be imposed for such year.

(B) If the person is not an employer, such person shall be subject to a civil money penalty of not more than $5,000. Any such fine shall be deposited in the penalty and interest account established under [*insert appropriate section of state law*].[6]

(2) For purposes of this section, the term "knowingly" means having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.

(3) For purposes of this section, the term "violates or attempts to violate" includes, but is not limited to, intent to evade, misrepresentation or willful nondisclosure.[7]

(4) In addition to the penalty imposed by paragraph (1), any violation of this section may be prosecuted as a [*insert appropriate language; for example "a class A felony" or "a Class B misdemeanor"*] under Section [*insert appropriate section*] of the Criminal

---

[4] The word "applicable" is intended to address situations where not all "new" employers receive the same rate. For example, many states assign new employer rates by industry code.

[5] See Question and Answer 24 regarding payrolling.

[6] This provision permits a penalty to be applied to self-employed financial advisors and individual employees of businesses. See Question and Answer 23 regarding the deposit of the fines in the penalty and interest account.

[7] This provision – paragraph (3) - is optional. An actual listing of violations may help to deter these violations.

Code.[8]

(d) The Commissioner shall establish procedures to identify the transfer or acquisition of a business for purposes of this section.

(e) For purposes of this section—
(1) "Person" has the meaning given such term by section 7701(a)(1) of the Internal Revenue Code of 1986, and
(2) "Trade of business" shall include the employer's workforce.[9]

(f) This section shall be interpreted and applied in such a manner as to meet the minimum requirements contained in any guidance or regulations issued by the United States Department of Labor.[10]

---

[8] States should assure that the criminal penalties cited are applicable to both individuals and corporations.

[9] See Question and Answer 5 regarding whether workforce is part of the employer's "trade or business." This definition assures that questions will not arise about whether an employer's workforce is included in "trade or business."

[10] Subsection (f) is optional. States are encouraged to include such language to avoid potential conflicts with any Federal regulations finalized after enactment of state law. The language is written in terms of *minimum* Federal requirements to assure states are free to adopt more stringent protections to avoid SUTA dumping.

CONFORMITY CHECKLIST FOR STATE SUTA DUMPING LAWS	
QUESTIONS	**YES OR NO**
1. **Mandatory Transfers.** If Employer A transfers its trade or business (including its workforce) to Employer B, does the state law mandate the transfer of experience from Employer A to Employer B when there is "substantially common" ownership, management *or* control?	
Does this mandate apply to *both total* and *partial* transfers?	
2. **Prohibited Transfer**. Does state law prohibit the transfer of experience (that is, does it require a new employer rate be assigned) when a person becomes an employer by acquiring an existing employer *if* the purpose of the acquisition was to obtain a lower rate?	
Does this prohibition apply to a "person" who, prior to the acquisition of the employer, had (a) no individuals in its employ and (b) some employment, but not enough to be an "employer" for purposes of state law?	
3. **Penalties**. Does state law impose "meaningful civil penalties" for "knowingly" violating and *attempting to violate* the above?	
Why is the penalty "meaningful?"	
Does state law impose meaningful criminal penalties for the same?	
Are these penalties applicable to both the person who commits the violation and any person (including the employer of the advice-giver) who knowingly gives advice leading to such a violation?	
Does state law address the situation where the person giving the advice may not be an employer? (E.g., self-employed financial advisors?)	
Does the definition of "knowingly" at a minimum mean "having actual knowledge of or acting with deliberate ignorance of or reckless disregard of the law"?	
4. **Procedures**. Does the law require the establishment of procedures to identify SUTA dumping?	
5. **Additional Procedures/Mandates**. Optional. Does state law require/prohibit the transfer of experience in accordance with any regulations the Secretary of Labor may prescribe? (If not, future amendments to state laws may be necessary.)	

05 - 4311108 01/07/2005 11:39 AM Ellen Bowyer

SENATE BILL NO. _____ HOUSE BILL NO. _____

A BILL to amend and reenact §§ 60.2-500 and 60.2-622 of the Code of Virginia, and to amend the Code of Virginia by adding sections numbered 18.2-204.3 and 60.2-536.1 through 60.2-536.5, relating to unemployment compensation; state unemployment tax dumping; penalties.

Be it enacted by the General Assembly of Virginia:

1. That §§ 60.2-500 and 60.2-622 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding sections numbered 18.2-204.3 and 60.2-536.1 through 60.2-536.5, as follows:

§ 18.2-204.3. Transfers for the sole or primary purpose of obtaining a lower unemployment tax rate; penalty.

A. Any person who transfers or attempts to transfer any trade or business to another person, where the sole or primary purpose of the transfer is to obtain a lower unemployment tax rate, is guilty of a Class 1 misdemeanor.

B. Any person who knowingly advises another person to transfer any trade or business to another person where the sole or primary purpose of the transfer is to obtain a lower unemployment tax rate, is guilty of a Class 1 misdemeanor.

C. Any person who is found guilty of more than two such actions under subsections A or B is guilty of a Class 6 felony.

D. It shall be the duty of the attorney for the Commonwealth to whom the Commission shall report, pursuant to subsection B of § 60.2-500, any violation of this section to determine whether to proceed with prosecution.

§ 60.2-500. Determination with respect to whether employing unit is employer; whether services constitute employment; or whether business transfer is illegal.

A. The Commission may, upon its own motion or upon application of an employing unit, and after not less than ~~ten~~ 30 days' notice in writing mailed to the last known address of such employing unit and an opportunity for hearing, make findings of fact, and on that basis, determine ~~(i)~~ whether ~~an~~:

1. An employing unit constitutes an employer ~~and (ii) whether services~~;

2. Services performed for or in connection with the business of an employing unit constitute employment for such employing unit; or

3. There has been a transfer as defined in § 60.2-536.1.

B. All testimony at any hearing pursuant to this section shall be recorded but need not be transcribed unless a petition for judicial review from such determination is filed in the manner herein prescribed. At such hearing the interests of the Commonwealth shall be represented by the Office of the Attorney General. The Commissioner shall have the power to designate a special examiner to hold such hearings, and may authorize and empower such special examiner to decide any matter so heard, in which event the decision of such special examiner shall be the final decision of the Commission under this section, subject to judicial review under subsection ~~B of this section~~ C. The Commissioner or his designee shall inform the appropriate attorney for the Commonwealth of any determination of a violation of § 60.2-536.1 made pursuant to this section within 30 days of such determination.

~~B. 1.~~ C. Judicial review of any such determination made in subsection ~~A of this section~~ B may be initiated within ~~thirty~~ 30 days after mailing notice of such findings and determination to the employing unit or, in the absence of mailing, within ~~thirty~~ 30 days after delivering such notice and determination, in the Circuit Court of the City of Richmond. Such judicial review shall be commenced by the filing of a petition, which need not be verified but which shall state the grounds upon which a review is sought. Service of two copies of such petition upon the Commissioner shall be deemed completed service and such petition shall be filed with the clerk of the court within five days after service thereof. With its answer the Commission shall certify and file with the court all documents and papers and a transcript of all testimony taken

in the matter, together with its findings of fact and decision therein. In any judicial proceedings under this article, the Commission's findings of facts, if supported by the evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. Such actions shall be given preference on the docket over all other cases except cases to which the Commonwealth is a party.

~~2.~~ D. An appeal may be taken from the decision of such court to the Court of Appeals, in conformity with Part Five A of the Rules of Supreme Court and other applicable laws. In any such proceedings for judicial review, the Commission shall be represented by the Office of the Attorney General. A determination by the Commission from which no judicial review has been commenced shall be conclusive in any subsequent judicial proceeding involving liability for taxes against the employing unit or its successor under the provisions of subdivision B 1 ~~of subsection B~~ of § 60.2-210 and of subsection B of § 60.2-523.

§ 60.2-536.1. Transfers for the purpose of obtaining a lower unemployment compensation tax rate; assignment of rates.

A. If an employer shall transfer any trade or business to another employer where, at the time of transfer, there is substantially common ownership, management, or control of the trade or business, then the unemployment experience attributable to the transferred business shall also be transferred to, and combined with the unemployment experience attributable to, the employer to whom such business is transferred. If the sole or primary purpose of such transfer is to obtain a lower unemployment tax rate, that employer shall be subject to the penalties established by § 60.2-536.3.

B. If an employer shall transfer any trade or business to a person who is not otherwise an employer at the time of such transfer, and the sole or primary purpose of such transfer is to obtain a lower unemployment tax rate:

1. The unemployment experience of the acquired business shall not be transferred to such person; instead, such person shall be assigned the higher of the transferred business's calculated rate or the new employer rate under § 60.2-526; and

2. Such person shall be subject to the penalties established by § 60.2-536.3.

C. Any person who shall knowingly advise another person to engage in a transfer of any trade or business, where the sole or primary purpose of such transfer is to obtain a lower unemployment tax rate, shall be subject to the penalties established by § 60.2-536.3.

D. The Commission shall establish methods to identify and investigate the transfer or acquisition of a business for purposes of this section.

1. For the purposes of determining whether there is "substantially common ownership, management, or control of two or more employers," the Commission shall consider all relevant facts and circumstances, including the extent of commonality or similarity of: (i) ownership, (ii) any familial relationships, (iii) principals or corporate officers, (iv) organizational structure, (v) day-to-day operations, (vi) assets and liabilities, and (vii) stated business purpose.

2. For the purposes of determining whether a business was transferred solely or primarily to obtain a lower unemployment tax rate, the Commission shall consider the facts and circumstances of the transfer, including: (i) the cost of acquiring the business, (ii) how long such business was continued, and (iii) whether a substantial number of new employees was hired to perform duties unrelated to the business activity conducted prior to the acquisition.

§ 60.2-536.2. Advisory opinion by the Commission.

Upon application by an employer who is a party to a transfer or potential transfer of any trade or business, the Commission shall issue an advisory opinion as to whether such transfer constitutes a transfer pursuant to § 60.2-536.1, or is solely or primarily for the purpose of obtaining a lower unemployment tax rate. The application shall be under oath or affirmation, in a form prescribed by the Commission, and shall fully set forth all relevant facts regarding the proposed transfer. The Commission may require such additional information and documentary evidence as deemed necessary for a fair and informed opinion. Such opinion shall be issued within 60 days after the Commission has received all of the information and evidence requested. An employer who proceeds with the transfer of a trade or business in reliance upon a favorable advisory opinion issued under this subsection shall not subsequently be found to

have violated the provisions of §18.2-204.3, and shall not be subject to the penalties of § 60.2-536.3, provided such employer has made full disclosure of all relevant facts to the Commission. If an employer disagrees with the Commission's advisory opinion, it shall have the right to a hearing and decision pursuant to § 60.2-500, provided that an application for a hearing is filed with the Commission within 30 days from the date the advisory opinion was mailed.

§ 60.2-536.3. Violations; penalties.

A. If a person knowingly engages, or attempts to engage, in a transfer where the sole or primary purpose is to obtain a lower unemployment tax rate, or if a person knowingly advises another person to engage, or attempt to engage, in such transfer, such person shall be subject, in addition to the criminal penalties set forth in § 18.2-204.3, to the following civil penalties, which shall be paid into the Unemployment Compensation Fund pursuant to § 60.2-301:

1. If the person is an employer, he shall be assigned the highest rate assignable under this chapter for the calendar year during which such violation or attempted violation occurred, and for the next calendar year immediately following such year. However, if the employer is already at such highest rate for that year, or if the amount of increase in the employer's rate would be less than two percent for any such year, then a penalty rate of contributions of two percent of taxable wages shall be imposed for such year.

2. If the person is not an employer, he shall be subject to a civil penalty of $5,000.

B. Final orders of the Commission with respect to the provisions of § 60.2-536.1 may be recorded, enforced, and satisfied as orders or decrees of a circuit court upon certification of such orders by the Clerk of the Commission. Such orders may be appealed pursuant to § 60.2-500.

§ 60.2-536.4. Interpretation.

The provisions of §§ 60.2-536.1 through 60.2-536.3 shall be interpreted and applied in such a manner as to meet the requirements contained in Public Law 108-295.

§ 60.2-536.5. Definitions.

As used in §§ 60.2-536.1 through 60.2-536.3, unless the context requires a different meaning:

"Knowingly" means having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.

"Person" shall have the meaning given such term by § 7701 (a) (1) of the Internal Revenue Code of 1986.

"Trade" or "business" includes the employer's workforce.

"Violates" or "attempts to violate" includes intent to evade, misrepresentation, or willful nondisclosure.

§ 60.2-622. Commission review.

A. The Commission (i) may on its own motion affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence by an appeal tribunal, or receive such evidence itself, or (ii) shall permit any of the parties to such decision to initiate further appeals before it. The Commission may remove to itself or transfer to another appeal tribunal the proceedings on any claim pending before an appeal tribunal. Any proceeding so removed to the Commission shall be heard in accordance with the requirements of § 60.2-620. The Commission shall promptly notify the interested parties of its findings and decision.

B. 1. Any decision of the Commission, upon a hearing on appeal, shall become final ~~ten~~ 10 days after the date of notification or mailing, and judicial review shall be permitted the claimant or any interested party claiming to be aggrieved. The Commission shall be deemed to be a party to any judicial action involving any such decision, and shall be represented in any such judicial action by the Office of the Attorney General.

2. Any such decision by the Commission involving (i) whether an employing unit constitutes an employer or (ii) whether services performed for or in connection with business of an employing unit constitute employment for such employing unit, from which no judicial review

is had pursuant to ~~subsection B~~ subsections C and D of § 60.2-500, shall be conclusive in any subsequent judicial proceedings involving liability for taxes by the Commission against any employing unit which was a party to the proceedings held before the Commission.

C. The Commissioner shall have the power to designate a special examiner to hear appeals to the Commission under this section. The Commissioner may authorize and empower such special examiner to decide any appeal so heard, in which event the decision of the special examiner shall be the final decision of the Commission under this section, subject to judicial review under § 60.2-625.

2. That an emergency exists and the provisions of this act contained in §§ 18.2-204.3 and 60.2-536.1 are in force from its passage, and the remaining provisions of this act shall become effective January 1, 2006.

3. That the provisions of this act may result in a net increase in periods of imprisonment or commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is _____ for periods of imprisonment in state adult correctional facilities and _____ for periods of commitment to the custody of the Department of Juvenile Justice.

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SUTA DUMPING CONFORMITY LEGISLATION

FEDERAL REQUIREMENT	P.L. 108-295 REFERENCE	STATE LAW REFERENCE
Mandated Transfers: State law must provide that where there is substantially common ownership or control among employers involved in a transfer, the state must transfer the unemployment experience.	Sec. 2, (k)(1)(A)	60.2-536.1, p.2, lines 69-74
Prohibited Transfers: The transfer of unemployment experience is prohibited in cases in which a person becomes an employer by acquiring an existing employer and the sole or primary purpose of the transfer is to obtain a lower tax rate.	Sec. 2, (k)(1)(B)	60.2-536.1, p.2, lines 69-77, and 75-81
Meaningful Criminal and Civil Penalties: State law must provide for "meaningful civil and criminal penalties" in cases where a transfer or acquisition is knowingly made "solely or primarily" for the purpose of obtaining a lower tax rate. These penalties must also apply to any person who knowingly gives advice that leads to violation of the prohibition against SUTA dumping transfers.	Sec. 2, (k)(1)(D)	60.2-536.3, p.2, lines 112-120, p.3, lines 121-129 18.2-204.3, p.1, lines 15-27
Procedures: State administrative agency must develop procedures to identify SUTA dumping.	Sec. 2(k)(1)(E)	60.2-536.1D, p.2, lines 85-86