



NEW JERSEY LAW REVISION COMMISSION

Draft Final Report Regarding Unemployment Benefits When an Offer of Employment is Rescinded

June 07, 2021

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes in order to determine the law of the State.

Please send comments concerning this Report or direct any related inquiries, to:

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Project Summary¹

The grounds upon which an employee is disqualified from receiving unemployment benefits are governed by the Unemployment Compensation Law, specifically N.J.S. 43:21-5.² In 2015, subsection a. of that statute was amended to specify that disqualification does not extend to an employee who voluntarily leaves employment and begins new employment within seven days. The statute is silent on whether disqualification extends to an employee who was scheduled to start new employment but could not because the offer of new employment was rescinded.

Although N.J.S. 43:21-5(a) has been analyzed in several recent decisions, this question was not answered until the New Jersey Supreme Court examined this issue in *McClain v. Bd. of Review, Dep't of Labor*.³

Statute Considered

N.J.S. 43:21-5(a) provides, in pertinent part:

This subsection shall not apply to an individual who voluntarily leaves work with one employer to accept from another employer employment which commences **not more than seven days** after the individual leaves employment with the first employer, if the employment with the second employer has weekly hours or pay not less than the hours or pay of the employment of the first employer, except that if the individual gives notice to the first employer that the individual will leave employment on a specified date and the first employer terminates the individual before that date, the seven-day period will commence from the specified date.⁴

Background

McClain v. Bd. of Review, Dep't of Labor is a consolidated appeal involving two plaintiffs who voluntarily left their employment upon receipt of a better job offer, only to have the job offers rescinded before their scheduled start dates.⁵ McClain, a preschool teacher, resigned her position upon receipt of a new offer to begin seven days later, which was then rescinded the following day.⁶ Blake, a cook, also received an offer to begin a new job within seven days which was rescinded two days before her scheduled start date.⁷

¹ The initial work on this project was done by Christopher Mrakovcic when he was a Legislative Law Clerk with the Commission.

² N.J.S. 43:21-1.

³ *McClain v. Bd. of Review, Dep't of Labor*, 237 N.J. 445 (2019). See e.g. *Febles v. Bd. of Review, Dep't of Labor*, No. A-3230-16T2, 2019 WL 990864 (N.J. Super. Ct. App. Div. Feb. 28, 2019) (holding that *seven days* means days of the week, and not business days); *Ardan v. Bd. of Review*, 231 N.J. 589 (2018) (holding that the 2015 amendment does not apply retroactively).

⁴ N.J.S. 43:21-5(a) (emphasis added).

⁵ *McClain*, 237 N.J. at 453.

⁶ *Id.* at 452.

⁷ *Id.*

The plaintiffs applied for unemployment benefits.⁸ The Deputy Director of Unemployment Insurance denied both claims, relying on the wording of N.J.S. 43:21-5(a) to find that the plaintiffs were not entitled to unemployment benefits because they did not commence employment within seven days of leaving their prior employment.⁹ The administrative Appeals Tribunal and Board of Review (“Board”) affirmed.¹⁰

On appeal before two separate appellate panels, the plaintiffs’ fortunes diverged. In McClain’s case, the Court reversed the denial of benefits, holding that the plain language of the 2015 amendment indicates that the disqualification exception applies when new employment is scheduled to commence within seven days but does not.¹¹ The Court considered the amendment’s omission of an express condition that new employment actually begin within seven days, reading “commence” to include acceptance of employment.¹² Because the statute prior to amendment disqualified employees who voluntarily left employment, the Court viewed the remedial purpose of the amendment as supporting this interpretation.¹³

In Blake’s case, the Court affirmed the denial, agreeing with the requirement that an employee begin new employment within seven days.¹⁴ This Court cited the legislative history, noting that a Senate Labor Committee report indicated that the amendment was intended to help employees who voluntarily leave their employment only to be laid off from their new employment after commencing work.¹⁵ Both claims were consolidated on appeal to the New Jersey Supreme Court.

Analysis

Before the New Jersey Supreme Court, the Board argued that the plain language of the statute required the employees to begin work within seven days in order for the disqualification exception to apply.¹⁶ The plaintiffs argued that the acceptance of an offer of employment set to begin within seven days made them eligible for the protection set for in the statute.¹⁷

The Court found both the statutory language and legislative history ambiguous.¹⁸ Nevertheless, the Court noted that because the unemployment law is social legislation designed to provide relief to employees, it should be liberally construed for that purpose.¹⁹ Therefore, the Court held that each plaintiff was entitled to unemployment benefits because “(1) they qualified for UI benefits at their former employment at the time of their departure, (2) they were scheduled to

⁸ *Id.* at 453.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *McClain v. Bd. of Review, Dep't of Labor*, 451 N.J. Super. 461, 469-70 (App. Div. 2017), *aff'd*, 237 N.J. 447 (2019).

¹³ *McClain*, 237 N.J. at 454.

¹⁴ *Id.*

¹⁵ *Id.* at 455.

¹⁶ *Id.* at 458.

¹⁷ *Id.* at 459.

¹⁸ *Id.* at 461.

¹⁹ *Id.*

commence their new jobs within seven days of leaving their former employment, and (3) their new job offers were rescinded through no fault of their own before the start date.”²⁰

Outreach

In support of this project, comments were sought from knowledgeable individuals and organizations on two occasions: Once after Staff received approval to conduct further research and outreach and again after the release of the Tentative Report. The outreach included: the National Employment Lawyers’ Association – New Jersey; the New Jersey State Bar Association, Labor and Employment Law Section; the Employers Association of New Jersey; New Jersey Workforce Development; Professor Timothy Glynn of Seton Hall University School of Law; and the attorneys for the plaintiffs in *McClain v. Bd. of Review, Dep’t of Labor*.

Initial Responses

The Employers Association of New Jersey advised the Commission that it supports the modification of the existing statute to address the concerns raised by the Court in *McClain v. Bd. of Review, Dep’t of Labor* and that codification of the Court’s holding makes sense.²¹

The President and Legislative Liaison of the National Employment Lawyers’ Association also supported the clarification of the statute pursuant to the holding in *McClain v. Bd. of Review, Dep’t of Labor*.²² In addition, the Legislative Liaison suggested that the timeframe for benefit eligibility be raised from seven to ten days to allow an employee to end work with a prior employer on a Friday and accept work with a new employer set to begin the second Monday following.²³ He recommended that the statute expressly state that an employer’s unemployment account will not be charged if the employee leaves for a better job.²⁴

The New Jersey State Bar Association, Labor and Employment Law Section (NJSBA) similarly supported the codification of the holding in *McClain v. Bd. of Review, Dep’t of Labor*. Unlike the National Employment Lawyers’ Association – New Jersey, however, the NJSBA recommended the preservation of the seven-day time period set forth in the statute.²⁵ The NJSBA also proposed a modification to N.J.S. 43:21-7(c)(1) to make clear that neither the first nor the second employer’s unemployment accounts would be charged in the situation envisioned in *McClain v. Bd. of Review, Dep’t of Labor*.²⁶

²⁰ *Id.* at 462.

²¹ See E-mail from John J. Sarno, President, Emp’rs Ass’n of New Jersey, to the N.J. Law Rev. Comm’n (Nov. 16, 2020) (on file with the NJLRC).

²² See Letter from Alan H. Schorr, Leg. Liaison, Nat’l Emp’t Lawyers’ Ass’n – N.J., to the N.J. Law Rev. Comm’n *3 (Dec. 30, 2020) (on file with the NJLRC).

²³ *Id.*

²⁴ *Id.*

²⁵ See Legislative Statement from the N.J. State Bar Ass’n, Labor & Emp’t Law Section (Jan. 15, 2021) (on file with the NJLRC).

²⁶ *Id.* at *4.

Subsequent Responses

The Legislative Liaison of the National Employment Lawyers' Association advised that the Association supports virtually all the Commission's proposed revisions.²⁷ He raised a specific objection to limiting benefits only to claimants whose scheduled employment was rescinded by the employer.²⁸ Instead, he suggested that the exception should apply in any circumstance when an employee is scheduled to begin new employment, but does not.²⁹ In the absence of such a change, he recommended that the exception be extended to scheduled new employment rescinded or delayed by the employer through no fault of the employee.³⁰

The NJSBA observed that a number of the statutory modifications set forth in the Appendix were derived from the language contained in their prior submissions.³¹ The NJSBA recommended that the comments to N.J.S. 43:21-7 be amended to reflect that “*neither* the first nor the second employer's account will be charged for a claim.”

Conclusion

The Appendix contains proposed modifications to both N.J.S. 43:21-5(a) and N.J.S. 43:21-7(c)(1) based on the Court's determination in *McClain v. Bd. of Review, Dep't of Labor*, and the recommendations of interested stakeholders.

²⁷ See Letter from Alan H. Schorr, Leg. Liaison, Nat'l Emp't Lawyers' Ass'n – N.J., to the N.J. Law Rev. Comm'n *1 (Mar. 12, 2021) (on file with the NJLRC).

²⁸ *Id.* at *2.

²⁹ *Id.*

³⁰ *Id.* at *3.

³¹ See Response to the N.J. Law Rev. Comm'n Tentative Report of Feb. 18, 2021 from the New Jersey State Bar Association Labor and Employment Law Section (Mar. 15, 2021) (on file with the NJLRC).

Appendix

The proposed modifications to **N.J.S. 43:21-5(a)** and **N.J.S. 43:21-7(c)(1)** (shown with ~~strikethrough~~, or underlining), follow:

N.J.S. 43:21-5. Disqualification for benefits

An individual shall be disqualified for benefits:

(a) (1) For the week in which the individual has left work voluntarily without good cause attributable to such work, and for each week thereafter until the individual becomes reemployed and works eight weeks in employment, which may include employment for the federal government, and has earned in employment at least ten times the individual's weekly benefit rate, as determined in each case.

(2) This subsection shall apply to any individual seeking unemployment benefits on the basis of employment in the production and harvesting of agricultural crops, including any individual who was employed in the production and harvesting of agricultural crops on a contract basis and who has refused an offer of continuing work with that employer following the completion of the minimum period of work required to fulfill the contract. ~~This subsection shall not apply to an individual who voluntarily leaves work with one employer to accept from another employer employment which commences not more than seven days after the individual leaves employment with the first employer, if the employment with the second employer has weekly hours or pay not less than the hours or pay of the employment of the first employer, except that if the individual gives notice to the first employer that the individual will leave employment on a specified date and the first employer terminates the individual before that date, the seven-day period will commence from the specified date.~~

(3) This subsection shall not apply to an individual who voluntarily leaves work with one employer to accept employment from a second employer with weekly hours or pay that are not less than the hours or pay of the employment of the first employer and which

(A) commences not more than seven days after the individual leaves employment with the first employer; or,

(B) is scheduled to commence not more than seven days after the individual leaves employment with the first employer, but the offer of employment from the second employer is rescinded prior to the start date through no fault of the individual.

(4) If an individual gives notice to the first employer pursuant to the provisions of subsection a.(3) that the individual will leave employment on a specified date, and the first employer terminates the individual before that date, then the seven-day period will commence from the specified date.

* * * *

Comments

This proposed language is adapted primarily from the suggested language offered by the New Jersey State Bar Association, Labor and Employment Law Section. The proposed language adds a subsection to exempt from disqualification employees who leave their current job upon receipt of an offer of employment with a new employer, scheduled to begin within seven days, which is subsequently rescinded by the new employer through no fault of the employee, as held in *McClain v. Bd. of Review, Dep't of Labor*.

The National Employment Lawyers' Association – New Jersey suggested that the timeframe be expanded to ten days and the limiting condition be struck, but because these proposals represent an express change in the statute's substance and are not merely a codification of the New Jersey Supreme Court's holding in *McClain v. Bd. of Review, Dep't of Labor* or the clarification of an ambiguity, and because we are uncertain of the ramifications of such substantive revisions, we leave consideration of the proposals to the Legislature.

43:21–7. Contributions

(c) Future rates based on benefit experience.

(1) A separate account for each employer shall be maintained and this shall be credited with all the contributions which he has paid on his own behalf on or before January 31 of any calendar year with respect to employment occurring in the preceding calendar year; provided, however, that if January 31 of any calendar year falls on a Saturday or Sunday, an employer's account shall be credited as of January 31 of such calendar year with all the contributions which he has paid on or before the next succeeding day which is not a Saturday or Sunday. But nothing in this chapter (R.S.43:21–1 et seq.) shall be construed to grant any employer or individuals in his service prior claims or rights to the amounts paid by him into the fund either on his own behalf or on behalf of such individuals. Benefits paid with respect to benefit years commencing on and after January 1, 1953, to any individual on or before December 31 of any calendar year with respect to unemployment in such calendar year and in preceding calendar years shall be charged against the account or accounts of the employer or employers in whose employment such individual established base weeks constituting the basis of such benefits, except that, with respect to benefit years commencing after January 4, 1998, an employer's account shall not be charged for benefits paid to a claimant if the claimant's employment by that employer was ended in any way which, pursuant to subsection (a), (b), (c), (f), (g) or (h) of R.S.43:21–5, would have disqualified the claimant for benefits if the claimant had applied for benefits at the time when that employment ended. Benefits paid under a given benefit determination shall be charged against the account of the employer to whom such determination relates. Neither the first nor the second employer's account shall be charged for benefits paid to a claimant if the claimant's employment by the first or the second employer was ended in any way which, pursuant to subsection (a) of R.S. 43:21-5, would have disqualified the claimant for benefits if the claimant had not satisfied the conditions set forth in paragraph (3) of that subsection to qualify for benefits. When each benefit payment is made, notification shall be promptly provided to each employer included in the unemployment insurance monetary calculation of benefits. Such notification shall identify the employer against whose account the amount of such payment is being charged, shall show at least the name and social security account number of the claimant and shall specify the period of unemployment to which said benefit payment applies.

An annual summary statement of unemployment benefits charged to the employer's account shall be provided.

Comments

The New Jersey Supreme Court in *McClain v. Bd. of Review, Dep't of Labor* found that neither employer's Unemployment Insurance account should not be charged when an employee voluntarily leaves employment.

Both the New Jersey State Bar Association, Labor and Employment Law Section, and the National Employment Lawyers' Association – New Jersey observed that any amendatory language to this statute should include this clarification. The NJSBA's proposed language to 43:21-7 was adopted here because 43:21-7 is the statute governing contributions to unemployment accounts. The National Employment Lawyers' Association – New Jersey language proposed a similar amendment within 43:21-5(a).