



**NEW JERSEY LAW REVISION COMMISSION**

**Revised Draft Tentative Report  
Regarding Unemployment Benefits  
For Individuals Who Were Wrongfully Incarcerated**

**February 06, 2023**

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **April 17, 2023**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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## Project Summary

The New Jersey Unemployment Compensation Law<sup>1</sup> (“UCL” or “Act”) provides that an individual who voluntarily leaves work “without good cause attributable to such work” is “disqualified for benefits” until certain conditions have been met.<sup>2</sup> An individual’s separation from work as a result of incarceration is reviewed, pursuant to the applicable regulations, as if the individual voluntarily left their employment.<sup>3</sup>

In *Haley v. Board of Review, Department of Labor*, the New Jersey Supreme Court examined “whether *pretrial detention* premised on charges that are subsequently dismissed is, automatically, a disqualifying separation from work within the meaning of the Act.”<sup>4</sup> The absence of statutory language to address the loss of employment due to wrongful incarceration leaves open the possibility that “one arm of the government can cause the loss of a person’s job by detaining him on charges later dismissed by a grand jury, and that another arm can find that the exonerated worker ‘voluntarily’ left his position without good cause and thus disabling him from receiving unemployment benefits.”<sup>5</sup>

Consistent with the New Jersey Supreme Court’s decision in *Haley* the Commission proposes modifications to N.J.S. 43:21-5 to clarify that separation from employment as a result of wrongful incarceration is reviewed as if the employee left work voluntarily.<sup>6</sup> The Commission recommends the inclusion of a statutory presumption that the dismissal of the individual’s charges, or the grand jury’s decision not to indict the individual, shall be presumptive evidence that the individual did not voluntarily leave work.<sup>7</sup> Finally, this presumption may be rebutted through an examination of the totality of the circumstances surrounding the individual’s separation from employment.<sup>8</sup>

## Statute Considered

N.J.S. 43:21-5, entitled “Disqualification for benefits” states, in relevant part that:

An individual shall be disqualified for benefits:

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<sup>1</sup> N.J. STAT. ANN. §§ 43:21-1 to – 71.

<sup>2</sup> N.J. STAT. ANN. § 43:21-5(a) (providing that the disqualification will continue until the individual: (1) becomes reemployed and works for eight weeks; and (2) has earned in employment at least ten times the individual’s weekly benefit rate).

<sup>3</sup> N.J.A.C. 12:17-9.1(e)(10).

<sup>4</sup> 245 N.J. 511, 515 (2021) (Emphasis added). *But cf.* N.J. STAT. ANN. § 52:4C-1 (providing legal and financial redress for “innocent persons who can demonstrate by clear and convincing evidence that they were mistakenly convicted and imprisoned...”); *cf.* N.J. STAT. ANN. §54:4C-5(a)(1)(a)-(b) (awarding damages not to exceed the greater of “(a) twice the amount of the claimant’s income in the year prior to [their] incarceration; or (b) \$50,000 for each year of incarceration...”).

<sup>5</sup> *Id.* at 525 (Albin, J., dissenting).

<sup>6</sup> *Id.* at 524. *See also* N.J.A.C. 12:17-9.1(e)(10).

<sup>7</sup> *See Appendix infra.*

<sup>8</sup> *Id.* *See also* N.J. L. Revision Comm’n, FINAL REPORT REGARDING UNEMPLOYMENT BENEFITS WHEN AN OFFER OF EMPLOYMENT IS RESCINDED (June 17, 2021) (proposing modification to N.J.S. 43:21-5(a) to address unemployment benefits when an offer of employment is rescinded).

(a) 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. 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.

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### **Background**

Clarence Haley was arrested for a serious criminal offense and incarcerated, pursuant to a court order, pending trial.<sup>9</sup> His mother contacted his employer and requested, on his behalf, that his job be preserved.<sup>10</sup> During the eight weeks that followed, Haley was terminated from his employment, a grand jury declined to indict him, and the prosecutor dismissed all of the charges against him.<sup>11</sup>

Haley filed an application for unemployment compensation after he was released from his pretrial detention.<sup>12</sup> His application was denied by the Department of Labor and Workforce Development (“Department”).<sup>13</sup> The reason given for the denial was that he had “voluntarily left his job... without good cause attributable to work.”<sup>14</sup> The decision of the Department was affirmed by the Appeal Tribunal, the Board of Review, and the Appellate Division.<sup>15</sup>

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<sup>9</sup> *Id.* at 515.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 515-16.

<sup>14</sup> *Id.* at 516.

<sup>15</sup> *Id.*

The Appellate Division affirmed the decision of the Appeal Tribunal and the Board of Review citing *Fennell v. Board of Review*.<sup>16</sup> The Court concluded that the UCL was “amended in 1961 to disqualify applicants who leave work for purely personal reasons, and that incarceration was a purely personal reason.”<sup>17</sup> Although the Court acknowledged that the Act does not automatically disqualify individuals from receiving benefits “who have quit or [have] been terminated for personal reasons not connected to work,” it reasoned that “the Legislature would not have created explicit exemptions from disqualification ... if benefits were payable for any non-work-related reason an employee is terminated from employment.”<sup>18</sup>

The New Jersey Supreme Court granted Haley’s petition for certification.<sup>19</sup>

### Analysis

The UCL is remedial legislation whose purpose is “to provide some income for the worker earning nothing, because he is out of work through no fault or act of his own.”<sup>20</sup> The remedial nature of the UCL requires that it “must be construed liberally in favor of allowance of benefits.”<sup>21</sup> The New Jersey Supreme Court has consistently recognized that the “public policy behind the Act is to afford protection against hazards of economic insecurity due to involuntary unemployment.”<sup>22</sup>

The Court examined the language of N.J.S. 43:21-5(a) in conjunction with N.J.A.C. 12:17-9.1(e). The Court noted that where incarceration is the underlying reason for an individual’s separation from work, the regulation indicates that the matter is to be reviewed as a “voluntarily leaving work issue” that necessitates a fact-sensitive analysis.<sup>23</sup> The Court said that in matters involving a claimant’s illness or lack of transportation, “our jurisprudence is consisted with the direction given by the Department” regarding the necessity of a fact-intensive review of “voluntary leaving” cases.<sup>24</sup>

The *Haley* Court determined that incarceration, like illness and lack of transportation, “is not an absolute bar to unemployment benefits.”<sup>25</sup> The Court reversed the judgment of the Appellate

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<sup>16</sup> *Id.* at 517.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 516.

<sup>19</sup> 242 N.J. 123 (2020).

<sup>20</sup> *Haley*, 245 N.J. at 520 citing *Utley v. Bd. of Review*, 194 N.J. 534, 543 (2008) (quoting *Battaglia v. Bd. of Review*, 14 N.J. Super. 24, 27 (App. Div. 1951)).

<sup>21</sup> *Id.* at 520.

<sup>22</sup> *Id.* citing *Yardville Supply Co. v. Bd. of Review*, 114 N.J. 371, 374 (1989) [emphasis in original].

<sup>23</sup> *Id.* citing 30 N.J.R. 2027(a) (June 1, 1998) (providing that a review of the relevant circumstances of the individual’s incarceration will be considered in deciding the voluntary or involuntary nature of the separation). See N.J.R. 263(a) (Jan. 5, 2009) (highlighting that the list of circumstances enumerated in N.J.A.C. 12:17-9.1(e) is reviewable as a voluntarily leaving work issue and that incarceration does not automatically necessitate a finding of disqualification rather requires a fact-sensitive analysis to determine whether the claimant’s separation from work was voluntary).

<sup>24</sup> *Id.* at 522-524 discussing *DeLorenzo v. Bd. of Rev. (DeLorenzo II)*, 54 N.J. 361, 364 (1969) (adopting the Board of Review’s holding on remand that “when an employee becomes ill and does those things reasonably calculated to protect the employment[, then] notwithstanding that she is not reinstated, there is no voluntary leaving of work.”) and *Utley v. Bd. of Review*, 194 N.J. 534, 550 (2008) (determining that whether the claimant left his job for good cause attributable to work called for a fact-sensitive analysis).

<sup>25</sup> *Id.* at 523-24.

Division and remanded for a fact-intensive review of the totality of the circumstances surrounding Haley’s detention and release to determine whether Haley “left work voluntarily.”<sup>26</sup> The Court indicated that the analysis would have to go beyond whether Haley was “falsely imprisoned” and consider “that authorities arrested Haley, the court ordered him to be detained pretrial, the grand jury declined to indict, and the charges against him were dismissed” and that he took steps to try to protect his employment.<sup>27</sup>

### The Dissent

Justice Albin noted that the statutory language regarding whether an employee “has left work voluntarily without good cause attributable to such work... is far from the model of clarity.”<sup>28</sup> In his dissent, he questioned whether the Legislature intended to permit “one arm of the government to ... cause the loss of a person’s job by detaining him on charges later dismissed ... and [allow] another arm of the government [to] find that the exonerated worker ‘voluntarily’ left his employment without good cause, thus disabling him from receiving unemployment benefits ....”<sup>29</sup>

The dissent rejected the majority’s fact-sensitive analysis because it relied upon a number of “undefined factors” and “certain defined factors”<sup>30</sup> According to the dissent, “all exonerated employees who lose their jobs because of pretrial detention are entitled to unemployment benefits under the UCL.”<sup>31</sup> Such a determination, the dissent continued, would “advance the socially remedial purposes of the UCL rather than leave the employees doubly victimized – first by a wrongful detention that causes their unemployment and then by a government indifferent to their financial distress.”<sup>32</sup>

Justice Albin concluded by stating that “[b]ecause this case is ultimately about the meaning of the UCL, the Legislature – by its silence or actions – will have the final word on whether... [the Court’s] decision is consistent with the law it enacted.”<sup>33</sup>

### Initial Outreach<sup>34</sup>

Preliminary outreach yielded support for the Commission’s work in this area. Allan Marain, a criminal defense attorney advised that he supported legislative change in this area.<sup>35</sup> He

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* See Appendix *infra* (a)(1)(C)(i) – (iii).

<sup>28</sup> *Id.* at 528.

<sup>29</sup> *Id.* at 525 (Albin, J., dissenting).

<sup>30</sup> *Id.* at 529 (noting defined factors to be whether the applicant engaged in voluntary acts resulting in absence from work, whether he actively tried to keep the job, and the length of absence from work).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 531. See also *Fennell v. Bd. of Rev.*, 297 N.J. Super. 319, 325 (citing *Self v. Bd. of Rev.*, 91 N.J. 453 (1982) and recognizing that unemployment compensation is a benefit conferred by the Legislature which has set limits on that benefit and that “if additional exceptions to the rule are created, this change must be made by the Legislature.”).

<sup>34</sup> *Minutes N.J. LAW REVISION COMM’N Meeting 20 Jan. 2022*, ‘Unemployment Benefits for the Wrongfully Incarcerated,’ at \*5, held virtually, (authorizing Staff to engage in further research and outreach on this subject), [www.njlrc.org](http://www.njlrc.org), (last visited Jan. 30, 2023).

<sup>35</sup> E-mail from Alan Marain, Esq. to Samuel M. Silver, Dep. Dir., N.J. Law Rev. Comm’n (Apr. 10, 2022, 9:02 AM) (on file with the NJLRC) (stating that legislative change would be appropriate and favoring the reasoning of the dissent for the reasons expressed therein).

recommended that N.J.S. 43:21-5(a) be modified “to specify categorically that an employee terminated because of an arrest and pretrial detention – followed by a dismissal of the criminal charges – has not ‘left work voluntarily’ and is therefore not disqualified from benefits solely on account of that arrest and pretrial detention.”<sup>36</sup>

Additionally, Professor Jenny Brooke Condon, Director of the Seton Hall University Equal Justice Clinic, thanked the Commission’s for addressing this issue.<sup>37</sup> She explained that as counsel for Haley, the Center for Social Justice agreed with Justice Albin’s dissent that where a person is detained pre-trial, and all charges are subsequently dismissed, there should never be a determination that the person left work voluntarily.<sup>38</sup> Professor Condon advised that upon remand, the Board did not consider any additional information that was not already part of the original record.<sup>39</sup> Ultimately, the Board found that Haley had not left work voluntarily and he was awarded benefits retroactively.<sup>40</sup>

### Presumption

At the January 2023 Commission meeting, Staff was asked to draft a proposed modification to N.J.S. 43:21-5 consistent with the statute’s legislative history and the *Haley* decision.<sup>41</sup> Staff considered the underlying policy that serves as the foundation for New Jersey’s unemployment benefits. In addition, Staff examined the unemployment compensation law to ascertain frequency with which presumptions are utilized in the Act.

The UCL was enacted to further the “public good” and to “protect the general welfare of the citizens of this State.”<sup>42</sup> The Legislature considered the economic insecurity that accompanies unemployment to be “a serious menace to the health, morals, and welfare of the people of this state.”<sup>43</sup> The Legislature found that “[i]nvoluntary unemployment... requires appropriate action by the legislature to prevent its spread and to lighten the burden which... falls with crushing force upon the unemployed worker and [their] family.”<sup>44</sup> As remedial legislation, the UCL “must be construed liberally in favor of allowance of benefits.”<sup>45</sup> A presumption that an exonerated employee who loses their job because of pretrial detention did not leave work voluntarily appears to advance the remedial purpose of the UCL.

The use of a presumption in the UCL is not unprecedented. To this time, the Act contains

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<sup>36</sup> *Id.*

<sup>37</sup> E-mail from Jenny-Brooke Condon, Dir. Equal Justice Clinic. to Samuel M. Silver, Dep. Dir., N.J. Law Rev. Comm’n (June 10, 2022, 9:20 AM) (on file with the NJLRC).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See E-mail from Comm’r Bernard W. Bell to Samuel M. Silver, Dep. Dir. and Laura C. Tharney, Exec. Dir., N.J. Law Rev. Comm’n (Jan. 26, 2023, 11:28 AM EST) (recommending the inclusion of a rebuttable presumption) (on file with the NJLRC) [hereinafter Bell E-mail], . See also *Minutes Jan. 2023*, at \* --, (authorizing Staff to revise the Appendix to include a rebuttable presumption that an individual who was wrongfully incarcerated did not leave work voluntarily).

<sup>42</sup> N.J. STAT. ANN. § 43:21-2 (West 2023). *Haley*, 245 N.J. at 527.

<sup>43</sup> N.J. STAT. ANN. § 43:21-2 (West 2023). *Haley*, 245 N.J. at 526-27.

<sup>44</sup> N.J. STAT. ANN. § 43:21-2 (West 2023). *Haley*, 245 N.J. at 527.

<sup>45</sup> *Haley*, 245 N.J. at 520.

two statutory presumptions. The first is found in N.J.S. 43:21-4(g)(9). That subsection of the “[b]enefit eligibility conditions” contains a rebuttable presumption that an employee of an educational institution does not have a reasonable assurance of employment in a subsequent academic year or term if the employee’s name appears on a list submitted by the institution to the Department of Labor.<sup>46</sup> Although the presumption “give[s] rise to an inference that the claimant does not have a reasonable assurance of employment” it does not conclusively demonstrate that fact.<sup>47</sup>

The second presumption is found in the statutory section that is the subject of this Memorandum, N.J.S. 43:21-5. In subsection (d)(4) the UCL provides that if unemployment is caused by a labor dispute “the claimant shall not be provided benefits for a period of 30 days following the commencement of the unemployment caused by the labor dispute.”<sup>48</sup> This period does not apply if the employer hires a permanent replacement worker for the claimant’s position.<sup>49</sup> The replacement worker “is *presumed* to be permanent unless the employer certifies in writing that the claimant will be permitted to return to his or her position upon conclusion of the dispute.”<sup>50</sup> Thus, the addition of a presumption to subsection (a) of N.J.S. 43:21-5 is consistent with the Legislature’s express intent to spare citizens from the economic, physical, and emotional instability that accompanies involuntary unemployment.<sup>51</sup>

The proposed language, set forth fully in the Appendix, reflects the remedial nature of the UCL and the principle that N.J.S. 12:17-9.1(e)(10) is not inflexible.<sup>52</sup> The proposed amendment provides that “the State’s dismissal of the charges against the individual, or the grand jury’s decision not to indict the individual shall be presumptive evidence that the individual did not voluntarily leave work.”<sup>53</sup> Further, “to rebut this presumption the Department of Labor and Workforce Development shall consider the totality of the circumstances surrounding the individual’s separation from employment, including: whether the applicant for benefits engaged in voluntary acts resulting in the absence from work; whether the applicant actively tried to keep the job; and the length of the absence from work.”<sup>54</sup>

### **Pending Bills**

There are no pending bills in New Jersey that concern the issue raised in this Report.

### **Conclusion**

The Appendix sets forth proposed modifications to N.J.S. 43:21-5(a) based upon the New Jersey Supreme Court’s determination in *Haley v. Board of Review, Department of Labor* to clarify

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<sup>46</sup> N.J. STAT. ANN. § 43:21-4 (West 2023).

<sup>47</sup> *Id.*

<sup>48</sup> N.J. STAT. ANN. § 43:21-5(d)(4) (West 2023).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (Emphasis added).

<sup>51</sup> N.J. STAT. ANN. § 43:21-2 (West 2023). *Haley*, 245 N.J. at 526-27.

<sup>52</sup> *Cf. Haley*, 245 N.J. 524 (finding that “Haley’s arrest and detention were ‘not the end, but only one important part of the inquiry’ . . .”).

<sup>53</sup> See Appendix *infra* Subsection (a)(1)(C).

<sup>54</sup> *Id.* See also *Haley*, 245 N.J. at 524.

that wrongful incarceration shall be treated as a voluntary leaving work issue that is to be examined based upon the totality of the circumstances surrounding the individual's separation from employment.



## Appendix

The relevant text of N.J.S. 43:21-5, including proposed modifications (proposed additions are shown with underlining, proposed deletions with ~~strikethrough~~, and language added since the January 26, 2023, Commission meeting with underlined italics), follows:

### **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. ~~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.~~<sup>55</sup>

(A) For purposes of this subsection, an individual's separation from employment shall be reviewed as a voluntarily leaving work issue where the separation was for the following reasons, including:

- (i) Lack of transportation;
- (ii) Care of children or other relatives;
- (iii) School attendance;
- (iv) Self-employment;
- (v) Lack of housing;
- (vi) Relocation to another area for personal reasons;

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<sup>55</sup> See modifications *infra* subsections (a)(2) – (4).

(vii) Relocation to another area to accompany a spouse, a civil union partner, or other relatives;

(viii) Voluntary retirement;

(ix) To accept other work; or

(x) Incarceration.<sup>56, 57</sup>

(B) To determine whether an individual left work voluntarily, for purposes of subsection (a)(1)(A)(i)-(x)(ix), the Department of Labor and Workforce Development shall consider the totality of the circumstances surrounding the individual's separation from employment, including:

(i) whether the applicant for benefits engaged in voluntary acts resulting in the absence from work;

(ii) whether the applicant actively tried to keep the job; and

(iii) the length of the absence from work.

(C) Presumptive Evidence.<sup>58</sup> For purposes of subsection (a)(1)(A)(x), the dismissal of the charges against the individual, or a grand jury's decision not to indict the individual shall be presumptive evidence in all courts and in all proceedings<sup>59</sup> that the individual did not voluntarily leave work. To rebut this presumption, the Department of Labor and Workforce Development shall consider the totality of the circumstances surrounding the individual's separation from employment, including:

(i) whether the applicant for benefits engaged in voluntary acts resulting in the absence from work;

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<sup>56</sup> N.J.A.C. 12:17-9.1(e)(1)-(10). See N.J. STAT. ANN. § 30:4-16.6, Provision of medications to incarcerated persons with preexisting chronic conditions (defining "incarcerated person" as "a person in the custody of the Department of Corrections.") (last modified in 2015). N.J.A.C. 12:17-9.1(e)(1)-(10) was last modified in 2015. See 46 N.J.R. 1796(a), 47 N.J.R. 1009(a) (2015).

<sup>57</sup> Staff confirmed, in response to Commissioner Rainone's inquiry, that the term "resignation" is not one of the ten circumstances included in N.J.A.C. 12:17-9.1(e)(1)-(10). *Minutes of N.J. LAW REVISION COMM'N Meeting 26 Jan. 2023*, at \* -- [hereinafter *Minutes Jan 2023*].

<sup>58</sup> See Bell E-mail (recommending the inclusion of a rebuttable presumption) (on file with the NJLRC). See also *Minutes Jan. 2023*, at \* --, (directing Staff to revise the Appendix to include a rebuttable presumption that an individual who was wrongfully incarcerated did not leave work voluntarily).

<sup>59</sup> See, e.g., N.J. STAT. ANN. § 54:5-52 (West 2023) (utilizing the language *in all courts and all proceedings* in conjunction with the presumption that the statements contained in certificates of sale are presumptively true) and N.J. STAT. ANN. § 52:27BBB-70 (West 2023) (providing that "[t]he certificate of sale shall be presumptive evidence *in all courts in all proceedings* by and against the corporation of the truth of the statements therein, of the title of the corporation in the transferred tax liens, and the regularity and validity of all proceedings had in reference to the sale.") (Emphasis added).

(ii) whether the applicant actively tried to keep the job; and

[(iii) the length of the absence from work.]<sup>60</sup><sup>61</sup>

(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.<sup>62</sup>

(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 whose 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.

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<sup>60</sup> *Haley*, 245 N.J. at 523 citing *Utley v. Bd. of Rev.*, 194 N.J. 534, 548 (2008).

<sup>61</sup> The provisions of subsections (a)(1)(C)(i), (ii) set forth circumstances surrounding the individual's separation from employment that are arguably within the individual's control. The length of the individual's absence from work set subsection (a)(1)(C)(iii), is within the control of a third party. Staff seeks the Commission's guidance regarding the inclusion of this subsection among the circumstances that the Department may consider to rebut the presumption that the applicant did not leave work voluntarily.

<sup>62</sup> The changes recommended in subsections (a)(2) – (a)(4) were the subject of the N.J. L. Revision Comm'n, FINAL REPORT REGARDING UNEMPLOYMENT BENEFITS WHEN AN OFFER OF EMPLOYMENT IS RESCINDED (June 17, 2021) (proposing modification to N.J.S. 43:21-5(a) to address unemployment benefits when an offer of employment is rescinded). Companion bills A1316 and S1606 were introduced in the current session of the New Jersey Legislature and A1316 was passed by the Assembly in June 2022.

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## COMMENTS

Consistent with contemporary legislative drafting practices, the proposed language divides the statute into subsections to improve accessibility. The proposed modifications divide subsection a. into four subsections.

### ***Subsection (a)(1)(A)***

The proposed modifications in subsection (a)(1) clarify that wrongful incarceration shall be treated as a voluntary leaving work issue as determined by the New Jersey Supreme Court in *Haley v. Board of Review, Department of Labor*.<sup>63</sup>

The ten reasons set forth in N.J.A.C. 12:17-9.1(e)(1)-(10) that are reviewed by the Board as a “voluntarily leaving work issue” are explicitly enumerated in the proposed modifications in subsection (a)(1)(A).

### ***Subsection (a)(1)(B)***

Consistent with the New Jersey Supreme Court decision in *Haley v. Board of Review, Department of Labor*, the language proposed in subsection (a)(1)(B) clarifies that the “voluntary leaving work issues” set forth in subsection (a)(1)(A)(i)-(ix) are to be examined based upon the totality of the circumstances.<sup>64</sup>

### ***Subsection (a)(1)(C)***

The proposed language in subsection (a)(1)(B) clarifies that for purposes of subsection (a)(1)(A)(x) – incarceration – there is a rebuttable presumption that the State’s dismissal of the charges against the individual, or the grand jury’s decision not to indict the individual shall be presumptive evidence in all courts and in all proceedings that the individual did not voluntarily leave work. In addition, the Department of Labor and Workforce Development shall consider the totality of the circumstances surrounding the individual’s separation from employment to rebut this presumption.<sup>65</sup>

### ***Subsection (a)(2) – (4)***<sup>66</sup>

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 amendatory 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. Board of Review, Department 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* or a “clarification” of an ambiguity, and because the Commission is uncertain about the ramifications of such substantive revisions, it left consideration of the proposal to the Legislature.

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<sup>63</sup> 245 N.J. 511 (2021).

<sup>64</sup> *Id.* at 523, 524 (noting that where a separation occurs under one of the circumstances listed in N.J.A.C. 12:17-9(e), it is reviewed as a voluntary leaving work issue and should be determined on a case-by-case basis in which all relevant factors must be considered) (*citing* 41 N.J.R. 263(a)). *See Utley v. Bd. of Rev.*, 194 N.J. 534, 548 (2008) (noting that the relevant factors to be considered include “whether the applicant for benefits engaged in voluntary acts resulting in the absence from work, whether [they] actively tried to keep the job, and the length of absence from work.”).

<sup>65</sup> *See supra* notes 34, 35 and accompanying text.

<sup>66</sup> *See also* N.J. L. Revision Comm’n, FINAL REPORT REGARDING UNEMPLOYMENT BENEFITS WHEN AN OFFER OF EMPLOYMENT IS RESCINDED (June 17, 2021).