U.S. Department of Labor

Employment and Training Administration
200 Constitution Avenue, N.W.
Washington, D.C. 20210

MAR 27 2015

The Honorable Tom Holland
Kansas State Senate
Room 134-E
State Capitol Building
300 SW 10th Street
Topeka, Kansas 66612

Dear Senator Holland:

This letter is in response to your inquiry. We have reviewed Kansas Senate Bill (SB) 154, as amended by the House Committee on Commerce, Labor, and Economic Activity, for conformity with Federal unemployment compensation (UC) law. This bill, at section 6(c), would amend Kansas employment security law by deleting provisions in it that require the Secretary of Labor to classify positions within the state merit system and eliminating requirements that personnel be appointed, and subject to discipline, on the basis of efficiency and fitness for the position. The bill also would delete a provision of the employment security law prohibiting employees who administer the employment security law from engaging in certain political activity. (We note that the provisions in question were included in House Bill 2357 but were added to SB 154 by the Committee.) As amended, SB 154 bill raises an issue with the requirements of Federal UC law that state UC laws must establish and maintain a merit system of personnel administration for individuals administering a state UC law. A detailed discussion follows.

As amended, SB 154 would delete a requirement in the state UC law that the Kansas Secretary of Labor classify as covered in the state merit system of personnel administration, agency staff who administer the employment security law. In the absence of such classification, these positions would not be included in the state merit system and would be placed in 'uncovered service' status which means such employment would have "at will" status. SB 154 would further amend the state UC law to provide that the Secretary would not be required to follow procedures established in the state merit system for appointment of individuals into positions on the basis of "efficiency and fitness" or to follow other merit standards of personnel administration regarding imposing discipline for such employees only on the basis of "efficiency and fitness and for terminations for cause." The bill also deletes a prohibition that forbids an employee administering the employment security law from engaging in certain political activity including soliciting for campaigns or political parties. As a result, this bill raises an issue with several provisions of Federal law requiring that employees administering the state UC and employment service (ES) programs be covered under a merit system.

Section 303(a)(1) of the Social Security Act (SSA) requires, as a condition of a state receiving administrative grants for the operation of the UC program, that state law include provision for:

> Such methods of administration (including after January 1, 1940, methods relating to **the establishment and maintenance of personnel standards on a merit**

basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; [Emphasis added.]

In Unemployment Insurance Program Letter (UIPL) 12-01, and UIPL 12-01, Change 1, the Department of Labor (Department) provided guidance to states regarding the merit-staffing requirement of Section 303(a)(1), SSA, and other provisions of Federal law concerning the requirement that individuals who were engaged in inherently governmental functions while administering the state UC law be covered by a state merit system of personnel administration. The merit-staffing requirement applies to individuals who exercise discretion in the administration of the state UC law (i.e. make decisions or take actions that directly affect the rights and interests of UC claimants or employers). This includes individuals who provide advice regarding the filing of claims, or who make decisions on claims, appeals, the determination of UC tax liability, and the administration and disbursement of trust funds or directly supervise those employees who do. First level supervisors, and/or those individuals exercising direct supervisory authority over individuals who perform inherently governmental functions on a day-to-day basis, must be subject to the merit-staffing requirement.

Further, since the beginning of the ES program, the Department has required, as a condition for receipt of Wagner-Peyser grants, that state employment services be administered by staff covered by a merit system of personnel administration. This requirement is codified in regulation at 20 CFR 652.215, which requires that Wagner-Peyser Act services be delivered by state agency employees covered by a merit system.

Interpretive authority for this merit system requirement was transferred to the U.S. Office of Personnel Management (OPM) by the Intergovernmental Personnel Act of 1970 (IPA), codified at 42 U.S.C. Section 4728. However, the enforcement authority for this merit system requirement remains with the Department and this requirement is a condition for receipt of UC administrative grants.

No specific merit system standards are contained in the SSA. Instead, Section 208(b) of the IPA assigns OPM responsibility for prescribing personnel standards that must be followed by states that must operate merit-based personnel systems as a condition of eligibility for Federal assistance or participation in an intergovernmental program. OPM has codified these standards at 5 CFR Section 900.603, which applies to the administration of the Federal-State UC program.

There are six merit system standards at 5 CFR Section 900.603. The four that appear to be relevant to this matter are: (1) recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointments; (2) retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (3) assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national

origin, sex, religious creed, age or handicap and with proper regard for their privacy and constitutional rights as citizens; and (4) assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interfering with or affecting the result of an election or nomination for office.

Because this bill would eliminate the requirement that employees of the state UC agency be appointed through an examination process to ascertain the "efficiency and fitness" of candidates, there would be no standard for the appointment of candidates. Since the positions would no longer be classified under the merit system, all UC employees would serve "at will" and the Secretary would no longer be required to appoint employees on the basis of knowledge, skills and abilities through an open, competitive process. Further, it raises an issue because the Secretary would no longer be required, as a matter of state law, to adopt reasonable rules and regulations for "promotions and demotions, based upon ratings of efficiency and fitness and for terminations for cause," or to retain employees on the basis of the adequacy of their performance. Without the requirement that employees be placed in a classified status, employees would serve "at will" and could be separated for any reason. This conflicts with the requirement that state law must provide for a merit system of personnel administration that ensures fair treatment of applicants and employees. Finally, the removal of the provision prohibiting employees administering the employment security law from engaging in political advocacy and the absence of any appellate remedy for employees serving on an "at will" basis means that employees would no longer be assured of being protected from coercion for political purposes, and would not be prohibited from "using their official authority for the purpose of interfering with or affecting the result of an election or nomination for office."

For the reasons cited above SB 154, if enacted, would mean that the Kansas UC law would no longer provide for the maintenance of a merit system for individuals administering the state UC and ES programs. As such, the state law would not meet the requirements of Federal law as required by Section 303(a)(1), SSA and 20 CFR 652.251.

If you have any questions regarding this letter, please contact Carrianna Suiter in the Office of Congressional and Intergovernmental Affairs at 202-693-4600 or by e-mail at Suiter.Carrianna@dol.gov.

Sincerely,

Gay M. Gilbert
Administrator
Office of Unemployment Insurance

cc: Rosaura Zibert
Acting Regional Administrator
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