



## Ohio Unemployment Insurance Reform Bill (H.B. 394) As Introduced by Rep. Barbara Sears

### ANALYSIS OF PRIMARY PROVISIONS

#### Introduction<sup>1</sup>

Representative Barbara Sears recently introduced legislation, House Bill 394 (HB 394), to reform Ohio's Unemployment Insurance (UI) law and address the solvency of the Ohio Unemployment Insurance Trust Fund. The bill includes a number of unemployment tax, benefit and integrity provisions that taken together will improve the solvency of the fund and build a significant positive balance, over time, sufficient to avoid the state being subject to increased federal provisions, taxes and penalties.

The following analysis refers to primary provisions of the bill as introduced on Nov. 9, 2015.

#### **ISSUE: Relationship Between Workers' Compensation, Social Security Disability and Unemployment Compensation**

In many states, individuals determined to be disabled for purposes of workers' compensation and/or social security disability (SSDI) are also deemed not able to work for purposes of unemployment compensation. This may result in a denial of unemployment compensation and/or a reduction of the amount of unemployment compensation based on workers' compensation or SSDI payments received for the duration of unemployment compensation.

Current Ohio law provides that when an employee is awarded compensation of temporary total disability for a period for which he or she has received unemployment compensation, the Ohio Bureau of Workers' Compensation shall pay an amount equal to the amount received from the award to the Director of the Ohio Department of Job and Family Services to the credit of the employers whose accounts the unemployment compensation benefits were charged or are chargeable. This provision is intended to make employers whole for amounts paid in unemployment compensation for which the individual also received a temporary total disability award.

Administration of this provision, however, is difficult – specifically, matching award time frames with weeks of unemployment compensation paid and also in allocating award amounts to multiple base-period employers.

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<sup>1</sup> In this document, FUTA = Federal Unemployment Tax Act; SUTA = State Unemployment Tax Act; and UI Trust Fund = Ohio Unemployment Insurance Trust Fund.

Current law also provides that unemployment compensation is to be reduced for any week for compensation for wage loss under workers' compensation law when an individual returns to work, after an injury, to a job that pays less than he or she was paid prior to injury.

- **PROVISION:** Under HB 394, no individual would be paid unemployment compensation for any week for which he or she received workers' compensation benefits under specific sections of Ohio law other than compensation for permanent partial disability for a work-related injury or illness. Additionally, the bill would delete the existing reduction in unemployment compensation for workers' compensation payments received for wage loss for individuals who return to work, after injury, to a job that pays less than he or she was paid prior to injury. HB 394 also would provide that unemployment compensation not be paid for a week for which the individual also receives SSDI benefit payment.
- **IMPACT:** HB 394 will eliminate double payment of wage replacement to individuals who have been determined not able to work, thereby reducing cost for the Trust Fund.

### **ISSUE: Requirement That Individuals Have Some Employment in Three Quarters to Qualify**

Current law requires an individual to have had employment that includes at least 20 qualifying weeks and a minimum dollar amount in base period earnings to establish unemployment compensation benefit rights. The required base period earnings increase in relation to the statewide average weekly wage; however, there is no requirement that the individual have worked in multiple quarters during the base period, and the definition of "qualifying week" includes any week for which an individual earned or was paid any amount. This definition minimizes the period of employment needed to qualify for benefits.

Many states combine an earnings or base period wage requirement with a requirement that individuals have a significant attachment to the workforce with employment in multiple quarters of the base period.

- **PROVISION:** HB 394 would add a requirement that an individual earned remuneration in at least three calendar quarters in his or her base period.
- **IMPACT:** This additional requirement will ensure a meaningful workforce attachment as part of the determination of whether an individual qualifies to establish a benefit year, thereby helping to improve the solvency of the UI Trust Fund.

### **ISSUE: New Employer Tax Rate**

Current law provides that an employer with insufficient experience shall be assigned a new employer rate of 2.7 percent or, if an employer in the construction industry, a rate of 2.7 percent or the average rate for employers in the construction industry, whichever is greater. This differential for the construction industry is common among states as a way to protect state-based construction companies that may be placed at a disadvantage with out-of-state companies seeking work in the state.

Federal law permits states to enact a new employer rate of as low as 1.0 percent, and some states have adopted the 1.0 percent rate as a way to attract new business to the state.

- **PROVISION:** HB 394 provides for a 1.0 percent new employer rate for employers other than those in the construction industry – but only once the state has reached the Minimum Safe Level (MSL) balance for the UI Trust Fund. The purpose of this limitation is to ensure that the UI Trust Fund does not lose the additional revenue from new employers until it is at or above the MSL.
- **IMPACT:** A lower 1.0 percent new employer rate will attract more business to Ohio and over the long term may increase revenue through increased taxable payroll.

**ISSUE: Trust Fund Solvency – Minimum Safe Level**

The U.S. Department of Labor recommends but does not require that states maintain a positive UI trust fund balance of 1.0 Average High Cost Model (AHCM), which is based on a review of claims over the most recent 20 years or last three recessionary periods and sets the solvency goal at the average of the three highest years of claims. This standard seeks to withstand a reasonable recession but not an historic deep recession.

Ohio and many other industrialized states are not able to compile a positive balance of 1.0 AHCM without significant increases in taxes and/or reductions in benefits. States adjoining Ohio and with which Ohio competes for business typically do not maintain such a high balance and are not likely to take measures that will achieve this level of funding.

State unemployment trust funds are maintained as part of the federal unified budget and may be relied upon as the basis for new spending unrelated to state unemployment compensation. Although there is a need to build a significant balance in preparation for the next recession, building excessive balances through state UI tax increases takes money away from investment by employers to create jobs.

- **PROVISION:** HB 394 would modify the definition of the MSL using the U.S. Department of Labor guideline that recommends a positive UI Trust Fund balance of 1.0 AHCM. HB 394 recognizes the need to avoid excess UI Trust Fund balances and provides for the automatic reduction in the tax base once the Minimum Safe Level (MSL) is reached.
- **IMPACT:** Adoption of the 1.0 AHCM sets a financing goal that will be recognized as sound by the U.S. Department of Labor and position Ohio to potentially qualify for interest-free federal cash-flow loans if Ohio's UI Trust Fund balance dips and there is a need for short-term financing.

**ISSUE: State Unemployment Tax Base Increase Effective After the FUTA Tax Reduction**

Ohio's current \$9,000 UI tax base is lower than the national average and slightly lower than most surrounding states and states with which Ohio competes. A temporary increase to \$11,000 would increase the state unemployment tax burden for Ohio employers but remain comparable to other states, some of which are relying on bonds financed with employer debt service payments or have recently increased tax bases themselves to address solvency. As long as the effective date of the temporary tax base increase is coordinated with the reduction in the FUTA rate, Ohio employers will not be placed at a competitive disadvantage with employers in other states, and the state unemployment tax burden on average will gradually increase until the UI Trust Fund reaches the Minimum Safe Level (MSL).

Ohio Department of Job and Family Services projections indicate that the additional FUTA revenue in 2016 and 2017, along with an improved economy, should be sufficient to retire Ohio's outstanding loan amount.

- **PROVISION:** HB 394 would increase the state unemployment insurance tax base from \$9,000 to \$11,000 to be effective when the UI Trust Fund balance is below 50 percent of the 1.0 Average High Cost Model (AHCM) solvency level and continues the increase until the UI Trust Fund reaches 1.0 AHCM. The first year for the tax increase is projected to begin January 1, 2018. The proposed state tax base increase would be reduced back to \$9,000 when the UI Trust Fund equals or exceeds the 1.0 AHCM solvency level. If the balance dips below 50 percent of the solvency level in future years, the tax base will automatically return to the \$11,000 level.
- **IMPACT:** The timing of the proposed temporary increase should avoid employers from paying the significantly higher FUTA taxes for the same period that higher SUTA taxes are imposed, thereby reducing the bottom-line cost increase related to unemployment compensation. This bill's "automatic solvency feature" will increase revenue earlier in the economic cycle when there are signs of recession and before the UI Trust Fund dips below zero balance.

#### **ISSUE: Waiting Week**

Individuals who otherwise qualify to establish a benefit year within which to claim unemployment compensation are required under current law to serve the first week claimed as a non-compensable "waiting week." This is common among nearly all states. There also is a waiting week requirement as a condition of receiving a 50 percent reimbursement from federal accounts for regular extended benefits that may be triggered during an economic downturn.

States have begun to consider the imposition of a waiting week not only for the first week claimed but also later in the benefit year when there may be a break in the continued claim series. Individuals typically continue to claim weeks of unemployment compensation, and a break in the claims series is often indicative of the individual going back to school, returning to work or choosing to discontinue claiming because of offsets from other sources.

- **PROVISION:** HB 394 would require a waiting week after employment during a week in the benefit year for which the individual was paid more than the amount that would be paid for total unemployment compensation. Individuals who take part time work for which they are paid amounts less than the total weekly benefit amount would not be affected in continuing to file partial unemployment claims.
- **IMPACT:** The bill would improve UI Trust Fund solvency and ensure that individuals who return to work and subsequently become unemployed serve an additional waiting week before being paid unemployment compensation.

#### **ISSUE: Labor Disputes**

Individuals who participate in labor disputes in which they withhold their labor pending the outcome of a dispute with their employer are generally disqualified from unemployment compensation because they have voluntarily made themselves unavailable for work. The labor

dispute disqualification typically is applied for any weeks for which the unemployment of the individual is due to the labor dispute.

Ohio is among a small number of states in which statute and case law provide a constructive “lock out” exception. Case law in Ohio has created the theory of constructive lockout in which courts review the negotiations between employers and unions to determine which party took steps to effectively cause the unemployment. For example: Did the employer insist on its final proposal and notify employees that they were permanently replaced? Did the union bargain in good faith and assure that bargaining unit members were at all times willing to return to work under the terms of employment pending final agreement?

- **PROVISION:** HB 394 would remove the specific “lock out” exception and special limitation language.
- **IMPACT:** This change would retain the general labor dispute provision that is common throughout the nation, bringing Ohio in line with the majority of other states.

### **ISSUE: Standard to Determine Just Cause for Termination and Quits Without Just Cause**

Ohio Supreme Court case law has established the precedent that if (a) an individual is not suitable for a position because the individual did not perform the work required, (b) the employer made known the employer’s expectations at the time of hiring, and (c) the expectations were reasonable and did not change since hiring, the individual is at fault and may be discharged for just cause and disqualified from benefits. This standard is not well known, resulting in inconsistent application of the law.

- **PROVISION:** HB 394 seeks to codify case law to provide a clear statement of this standard. Additionally, the bill would codify the generally accepted policy that individuals who violate the terms of an employee handbook provided to the individual may be terminated for just cause. The bill also provides that an individual who is absent from work for a period of three consecutive workdays without notifying the employer is considered to have quit work without just cause. This is consistent with general policy concerning job abandonment that in such circumstances, the individual is not available for work as required.
- **IMPACT:** Codification of all of these provisions will be helpful in providing notice to employers and employees about the standards to be applied to determine just cause for termination and quits without just cause.

### **ISSUE: Unreasonable Distance to Search for Work**

Claimants are required to be actively seeking work as a condition of being eligible for unemployment compensation and they must accept work offered – except that federal law prohibits an individual from being disqualified for refusal to accept new work if it is an unreasonable distance from the individual’s residence. The administration of this provision is difficult given the different travel expectations for jobs that are available to claimants.

- **PROVISION:** HB 394 provides direction to the Ohio Department of Job and Family Services to adopt rules to define “unreasonable distance.”

- **IMPACT:** Reemployment of claimants improves when work-search requirements, such as pay and distance to travel to work, are clearly stated, enforced and meet the needs of the claimants in effectively seeking work. The requirements also should be verifiable for purposes of proper claims administration.

### **ISSUE: Drug Testing**

Under current law, employers may discharge employees for failing required drug tests. In 2012, Congress enacted narrow authority under which state agencies administering unemployment insurance may (a) request information from claimants about the results of past tests for controlled substances, (b) conduct tests for controlled substances and (c) disqualify individuals who fail drug tests.

- **PROVISION:** HB 394 provides language under which the Ohio Department of Job and Family Services may request information of applicants for unemployment compensation, conduct drug tests for controlled substances, and disqualify individuals within the narrow limitations of federal law.
- **IMPACT:** This provision is designed to meet federal requirements and will assist in encouraging applicants not to use illegal controlled substances and to be drug-free when applying for unemployment compensation and seeking work.

### **ISSUE: Dependency**

Ohio is one of only 14 states that have some form of dependency provision that increases the weekly benefit amount provided to claimants with dependents. Unlike most of the 14 states, however, Ohio law only provides for higher maximum benefit amounts for those who have higher wages and dependents. A dependency provision is not required by federal law. No additional administrative funding is provided for the staff needed to determine the various classifications of dependency, and the time taken for dependency determinations makes it more difficult to determine eligibility within the expedited time frame expected for UI claims.

- **PROVISION:** HB 394 would repeal Ohio's current dependency provision.
- **IMPACT:** The repeal of this provision will save benefit payout, simplify administration and will not impact low-wage claimants.

### **ISSUE: Maximum Weekly Benefit Amount Temporary Freeze**

Limitations on increases in the Maximum Weekly Benefit Amount to be provided are commonly imposed as one of many possible solvency measures. Ohio enacted limitations as part of solvency measures in response to the recession of the late 1970s and early 1980s. Many states have automatic increases in maximum weekly benefit amounts tied to the statewide average weekly wage. Eighteen states, however, have specific dollar maximums that do not automatically go up with the state average weekly wage. The automatic increase in maximum weekly benefit amounts is a significant cost driver for the UI system and has contributed to Ohio's current insolvency.

- **PROVISION:** HB 394 would effectively freeze maximum weekly benefit dollar amounts at not to exceed 50 percent of the statewide average weekly wage for the first year that the UI Trust Fund was less than the Minimum Safe Level (MSL) and continue those maximums until the year after the UI Trust Fund was at or above the MSL. The maximum weekly benefit amount likely would increase the year after the fund reached MSL and then be automatically frozen at the increased levels if the MSL was not met the following year.
- **IMPACT:** Under HB 394, the maximum weekly benefit amount increases with the statewide weekly wage as long as the UI Trust Fund is healthy, but is automatically frozen when it is not. The automatic restraint on the maximum weekly benefit amount will assist in reducing benefit costs in a timely way and reduce the risk of insolvency during an economic downturn.

### **ISSUE: Reductions in Benefits for Governmental or Other Pensions or Retirement Plans**

Federal law and current state law require that there be a reduction in the weekly benefit amount of unemployment compensation payable to an individual based on a specific period of time also used to determine social security or other similar periodic retirement benefits (pension, retirement pay, annuity, etc.) paid to the same individual. The reduction of unemployment compensation in light of social security benefit payments is consistent with the UI program goal to provide temporary partial wage replacement for individuals who become unemployed. Individuals who receive unemployment compensation and social security and potentially other sources of wage replacement payments are less likely to return to work and more likely to exhaust unemployment compensation, increasing costs to the UI Trust Fund.

Current law also, however, provides that if a claimant made a contribution to social security and is receiving a retirement payment, the claimant's weekly benefit shall not be reduced by the amount of that retirement payment because the claimant contributed to social security. This limitation on reductions for social security retirement is permitted by federal law but not required. The cost to Ohio's UI Trust Fund of not reducing unemployment compensation for social security payments is significant. The current law results in some individuals receiving nearly as much or more in combined UI wage replacement and Social Security retirement benefits than their average weekly wage during the base period.

- **PROVISION:** HB 394 would remove Ohio's special limitation on reductions for Social Security retirement benefits.
- **IMPACT:** The cost to Ohio's UI Trust Fund of not reducing unemployment compensation for social security payments is significant. Removal of Ohio's special added limitation will improve solvency of the UI Trust Fund.

### **ISSUE: Reduction of Number of Potential Weeks of Unemployment Compensation**

In response to the Great Recession, many states enacted changes to the number of potential weeks of unemployment compensation that would be available to individuals filing for unemployment compensation. A number of states tied the number of potential weeks of benefits to the state unemployment rate.

Current Ohio law uses a sliding scale of the number of weeks based on the number of base period qualifying weeks from 20 to 26.

- **PROVISION:** HB 394 would change the determination of the total number of weeks potentially available twice a year based on Ohio's seasonally adjusted three-month total unemployment rate before January and July. The sliding scale sets the number as low as 12 weeks when the rate is 5.5 percent or below, and up to 20 weeks if the rate is 9 percent or higher.
- **IMPACT:** Experience in other states adopting sliding scales has been a significant reduction in benefit payout and a reduction in the average duration of unemployment. Such a provision would more quickly align benefit payments with contribution revenue and assist in building a positive balance in the UI Trust Fund.

### **ISSUE: Enhanced Fraud Penalties and Collection**

Current law requires that if an applicant for unemployment compensation is determined by the Ohio Department of Job and Family Services to have made fraudulent misrepresentation for the purpose of obtaining benefits to which he or she is not entitled, the applicant's entire weekly claim for benefits – or the entire benefit rights, if the fraud was in connection with the individual's application for determination of benefit rights – shall be rejected or canceled. The authority to make such determinations, however, is limited to four years after the end of the benefit year in which the fraudulent misrepresentation was made.

Current law also requires that if there is a determination of fraudulent misrepresentation in the determination of benefit rights, the applicant shall be penalized by having two weeks of unemployment compensation payment cancelled for each week of fraud. The penalty applies for six years after the discovery of the misrepresentation.

- **PROVISION:** HB 394 would remove the following provisions from current law:
  - The specific period within which the fraudulent determination may be made, while also giving broader discretion to the Ohio Department of Job and Family Services in making such determinations
  - The specific time limitation for the imposition of the penalty weeks
  - The six-year limitation on the period of time for administrative or legal proceedings for the collection of fraudulently claimed benefits or interest due on such benefits
  - The existing provision requiring that such amounts not be filed as liens and be canceled as uncollectible
- **IMPACT:** These integrity provisions will enable a more active and sustained collection effort, including greater coordination with the Internal Revenue Service through the Treasury Offset Program under which uncollected benefit amounts may be collected through offset against federal income tax refunds. These provisions also will enable the Ohio Department of Job and Family Services to be more aggressive in prosecution of fraud.



**ISSUE: Improved Non-Fraud Overpayment Collection**

Current law requires that non-fraud overpayment determinations must be made within three years after the end of the benefit year in which benefits were claimed – and that if non-fraud overpayment amounts are not repaid or recovered within three years from the date of the overpayment order becoming final, the agency shall initiate no further action to collect the overpaid benefits and cancel the amounts not recovered.

This three-year limitation unduly restricts overpayment collection, particularly when the Ohio Department of Job and Family Services is able to locate the individual and finds that he or she is once again claiming unemployment compensation and/or has significant resources with which to make repayment.

- **PROVISION:** HB 394 extends the period within which non-fraud overpayment determinations must be made from three years to six years after the end of the benefit year in which benefits were claimed. The bill also removes the artificial time frame for collection in favor of discretion by the Ohio Department of Job and Family Services to use best practices in collection.
- **IMPACT:** These propose changes will reduce the amount of overpayments that should not be written off and improve the solvency of the UI Trust Fund.

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