

Minnesota Department of Employment and Economic Development

ORDER ADOPTING RULES

Adoption of Permanent Rules Relating to Unemployment Insurance; Modifying Appeals, Employer Records, and Worker Status Provisions, Minnesota Rules, Parts 3310 to 3310.2924 and Parts 3315.0555 to 3315.1010; Revisor's ID Number AR4207

BACKGROUND INFORMATION

1. The rules repealed by this order are obsolete and were identified in the Department of Employment and Economic Development's annual obsolete rules report dated November 7, 2013, under Minnesota Statutes section 14.05 subd. 5.

2. The Department of Employment and Economic Development has complied with all notice and procedural requirements in Minnesota Statutes, chapter 14, Minnesota Rules, chapter 1400, and other applicable law.

3. The agency received two written comments and submissions on the rules. No persons requested a public hearing. Therefore, there are not 25 or more requests for a public hearing. The agency received zero requests for notice of submission to the Office of Administrative Hearings.

4. The Department has made the following changes to the rules between the proposed rules and the adopted rules that are reasonable, do not make the rules substantially different, and are within the scope of the matter announced in the notice of intent to adopt rules:

a. Part 3310.2901 Scope and Purpose

Charles Thomas, attorney with Southern Minnesota Regional Legal Services, submitted comments regarding the proposed amendments. Mr. Thomas requested that the Department re-insert language in the Scope and Purpose of the rules to clarify what kind of Department determinations can be appealed and result in a hearing. In consideration of this comment, Part 3310.2901A has been amended to read:

"appeals of all department determinations including determinations on benefit accounts, eligibility or ineligibility for unemployment benefits, employers' tax rate, an employer's liability to pay taxes, and fraudulent payment of unemployment benefits;"

This change does not make the rule substantially different, as it is re-inserting the more descriptive language that has been in the rules since 1987, in order to provide clarification as to the types of determinations that can be appealed and result in a hearing. This change is within the scope of the matter announced in the notice of intent to adopt rules; namely, rules relating to unemployment insurance and modifying appeals provisions.

b. Part 3310.2902 Definitions

Subp. 4a. Electronic Transmission

Mr. Thomas also requested the inclusion of the statutory definition of "applicant" and "electronic transmission" in the rules, in order to make those terms clear and reference back to the statute. In consideration of that comment, Part 3310.2902, Subp. 3a. was amended to include the statutory definition of "applicant," as follows:

"'Applicant' means an individual who has filed an application for unemployment benefits and has established or is pursuing the establishment of a benefit account."

And Part 3310.2902, Subp. 4a. was amended to include the statutory definition of "electronic transmission" as follows:

"'Electronic transmission' means a communication that is sent online, by telephone, or by facsimile."

These changes are to promote understanding of the defined terms and to be consistent with the statute. The changes do not make the rules substantially different. It is also within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

Subp. 4b. Hearing

Administrative Law Judge LauraSue Schlatter issued a report on May 13, 2014, recommending that the department amend the language in Part 3310.2902, Subp. 4b, regarding the definition of a "hearing," in order to provide a clear and understandable definition. In consideration of that recommendation, Part 3310.2902, Subp. 4b was amended to remove the terms "de novo due process" from the definition of "hearing" to remove legal terms that parties may not understand.

This change does not make the rules substantially different and it is within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

c. Part 3310.2905 Notice of Hearing

Mr. Thomas also requested a change in the language in the rules referencing a "duly authorized representative," because the rules do not state how an individual becomes a "duly authorized" representative. In order to provide clarity, and in consideration of that comment, Part 3310.2905, Subp. 2(B) was amended to remove the word "duly" from "duly authorized representative."

This change is to promote clarity of who may represent a party in a hearing and it does not make the rules substantially different. It is also within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

d. Part 3310.2905 Notice of Hearing

Administrative Law Judge Schlatter recommended that the department amend the word "parties" in Part 3310.2905, Subp. 2(E), to "party's," in order to be grammatically correct. That change has been made. This change does not make the rules substantially different and it is within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

e. 3310.2908 Rescheduling and Continuances

Glenda Niemiec from the Minnesota Recruiting and Staffing Association Legislative Committee, and Mr. Thomas, both submitted comments on the removal of language in Part 3310.2908, Subp. 1, regarding rescheduling hearings due to a party's illness. In consideration of those comments, Part 3310.2908, Subp. 1, has been amended as follows to re-insert the language that a hearing must be rescheduled due to a party's illness:

"A hearing must be rescheduled based on a party's need for additional time to obtain necessary evidence or to obtain representation or adequately prepare, inability to participate due to illness, or other compelling reasons beyond the control of the party that prevent participation at the originally scheduled time..."

This change is reasonable, because it clarifies that a party's illness is a compelling reason that would require the hearing to be rescheduled. It does not make the rule substantially different, as the originally proposed language still included "other compelling reason," which can include illness of a party. Likewise, this change does not diminish the fair warning to persons who will be affected by the rule.

f. 3310.2912 Exhibits in Hearings

Administrative Law Judge Schlatter recommended that the department amend Part 3310.2912 to change "representative" to "representatives" in order to be grammatically correct. That change has been made.

Judge Schlatter also recommended that the department change the wording regarding the introduction of additional documents to make it more clear and understandable and to reflect that hearings may be held in person. In consideration of that comment, the following amendment was made:

"If a party requests to introduce additional documents during the course of the hearing, and the unemployment law judge rules that the documents should be considered, the requesting party must provide copies of the documents to the unemployment law judge and the other party."

These changes do not make the rules substantially different and they are within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

g. 3310.2914 Subpoenas and Discovery

Subp. 1 Subpoenas

Administrative Law Judge Schlatter recommended that the department amend Part 3310.2914, Subp. 1, to remove the language "upon the judge's own motion," in order to promote clarity and understanding. That part has been amended to read:

"The unemployment law judge may issue a subpoena even if a party has not requested one."

This change does not make the rules substantially different and it is within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

Subp. 2 Discovery

Administrative Law Judge Schlatter recommended that the department amend part 3310.2914, Subp. 2 to change the language allowing "three calendar days" to respond to a discovery request to "three week days," in order to alleviate concerns that a party receiving a discovery request on a Friday would only have until Monday to respond. In consideration of that comment, the department has amended that part to provide "five calendar days" to respond to a discovery request.

Judge Schlatter also recommended that the department amend the language about continuing the hearing upon a party's failure to comply with disclosure requirements to add clarity. In consideration of that comment, the department has made the following amendment:

"If a party fails to comply with the disclosure requirements, the unemployment law judge may, upon notice to the parties, continue the hearing."

These changes do not make the rules substantially different and they are within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

h. 3310.2915 Disqualification of Unemployment Law Judge

Administrative Law Judge Schlatter recommended that the department remove the terminology "personal relationship with the judge," from Part 3310.2915, regarding disqualification of an unemployment law judge, and use the Judicial Code of Conduct as

guidance for when an unemployment law judge may be disqualified. In consideration of that recommendation, the department has removed from part 3310.2915 the language "where any of the parties to the appeal are related to the judge or have a personal relationship with the judge" and replaced it with the following:

"The chief unemployment law judge must remove an unemployment law judge from any case where the unemployment law judge has a relationship that would disqualify the judge under Rule 2.11(A)(2) of the Judicial Code of Conduct, including the definitions provided in the terminology section."

This change does not make the rules substantially different and it is within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

i. Part 3310.2916 Representation Before Unemployment Law Judge

Administrative Law Judge Schlatter recommended that the department amend Part 3310.2916, in order to clarify that parties may represent themselves in unemployment hearings. The following change has been made in consideration of that comment:

"In a hearing before an unemployment law judge, a party may be self-represented or represented by an attorney or an authorized representative."

This change does not make the rules substantially different and it is within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

Mr. Thomas also requested a change in the language in the rules referencing a "duly authorized representative," because the rules do not state how an individual becomes a "duly authorized" representative. In order to provide clarity, and in consideration of that comment, Part 3310.2916 was amended to remove the word "duly" from "duly authorized representative."

This change is to promote clarity of who may represent a party in a hearing and it does not make the rules substantially different. It is also within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

j. Part 3310.2921 Conduct of Hearing

Administrative Law Judge Schlatter recommended that the department Part 3310.2921 to remove the language "on the judge's own motion." That change has been made to make the part more clear and understandable. This change does not make the rules substantially different and it is within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

k. Part 3310.2923 Official Notice

Administrative Law Judge Schlatter recommended that the department amend Part 3310.2923 to clarify the language regarding an unemployment law judge taking judicial notice on the record. In consideration of that recommendation, the department made the following amendment to make the part more readable:

"The unemployment law judge must state on the record any fact that is judicially noticed. The unemployment law judge must give the parties an opportunity to contest the noticed facts."

This change does not make the rules substantially different and it is within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

l. Part 3315.0555 Determining Worker Status

Subp. 1 Factors

Subp. 1, has been amended to remove "essential" from the heading, "Essential Factors," and from the term "five essential factors" that are used to determine worker status. This change was made in order to remove unnecessary language from the rule, which does not affect the meaning of the rule. This change does not make the rule substantially different, as it still uses the terms "factors and "five factors" to describe what is considered when determining whether an individual is an employee or an independent contractor.

Subp. 1(E). was amended to change the "a determination" to "the outcome" and to remove "essential" from factors and change it to "factors in items A to E." This subpart is clarifying what is considered when the factors listed in items A to E lead to an inconclusive outcome as to a worker's status. It is not referencing a formal determination, and so the term "determination" was changed to "outcome" in order to avoid confusion with the statutory term "determination," which references official decisions made by the Department on unemployment insurance matters. "Factors in items A to E" was added in place of "essential factors," in order to clarify what factors are considered when determining worker status.

These changes clarify what was already within the scope of the matter announced in the notice of intent to adopt rules. They are reasonable in order to promote better understanding of the rule, and they do not make the rule substantially different.

5. Part 3310.2917 Public Access to Hearings and Recordings of Hearings

Administrative Law Judge Schlatter found a defect in the rules at Part 3310.2917 Public Access to Hearings and Recordings of Hearings, Subp. 1, Public Access. Judge Schlatter

found that Subp. 1 violates Minnesota Statutes, section 268.19, which makes data gathered from any person under the administration of the Minnesota Unemployment Insurance Law" private data on individuals or nonpublic data not on individuals pursuant to the Minnesota Government Data Practices Act. Judge Schlatter recommended that the only way to cure the defect is to make unemployment compensation hearings not public.

In consideration of Judge Schlatter's findings, the department made the following amendment to part 3310.2917:

"Subpart 1. Public access not permitted. Hearings are not public. Only parties, their representatives and witnesses, and authorized department personnel are permitted to participate in or listen to hearings. If any other person wishes to listen to or sit in on a hearing, the parties must provide their consent as required by Minnesota Statutes, section 13.05, subdivision 4."

The department included "authorized department personnel" in the list of individuals who may participate in or listen to hearings, because supervising unemployment law judges and other department personnel must, on occasion, listen to and review hearings for accuracy and to review the unemployment law judges' compliance with state and federal hearing requirements.

This change is needed and reasonable. This change is a substantial change from the proposed rules. The department complied with all of the requirements set forth in Minn. R. 1400.2110 for adopting substantial changes to the proposed rules.

6. The rules are needed and reasonable.

ORDER

The above-named rules, in the form published in the State Register on February 24, 2014, with the modifications as indicated in the Revisor's draft, file number AR4207, dated May 21, 2014, are adopted under my authority in Minnesota Statutes, section 268.105, subdivision 1(b); and section 116J.035, subdivision 2.

July 10, 2014
Date

Katie Clark Sieben
Katie Clark Sieben, Commissioner
Department of Employment and Economic
Development