



Virginia
Regulatory
Town Hall

Proposed Regulation Agency Background Document

Agency Name:	16 VAC 5, Virginia Employment Commission
VAC Chapter Number:	16 VAC 5-10, 60, 70, and 80
Regulation Title:	Regulation Governing Unemployment Benefits
Action Title:	Proposed
Date:	March 29, 2001

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary

Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The proposed amendments establish the regulatory framework to allow filing for benefits via telephone and the internet and for conducting adjudication via the telephone. In addition, the amendments conform existing regulations to changes in state and federal law and to changes in federal and commission policy that have been adopted since the last amendments made in 1994.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

The Virginia Employment Commission (VEC) is authorized to promulgate regulations in § 60.2-111.A of the Code of Virginia in order to administer the unemployment insurance program. This section provides broad-based authority for the commission to “adopt, amend, or rescind such rules and regulations...as it deems suitable to that end.” Written assurance from the Office of the Attorney General that the commission possesses, and has not exceeded, its statutory authority to promulgate the proposed regulation is attached.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

While the amendments are not essential to protect the health, safety, or welfare of the citizens of the Commonwealth, they are intended to make the unemployment claims and appeals processes more efficient for citizens, employers, and the agency. Currently, individuals must travel to the nearest VEC office in order to file a claim for unemployment insurance. The amendments pave the way to allow such claims to be filed via telephone or the Internet, thus eliminating travel time and expenses. Similarly, by taking unemployment claims via the telephone and Internet, VEC will achieve economies of scale by concentrating intake staff in regional call centers rather than having intake staff at each of 39 field offices. Filing appeals via the Internet or facsimile will reduce postage costs and speed the appeal process by reducing time in transit. Conducting appeals via telephone will reduce travel time and will allow the VEC to use its staff resources more efficiently by using that time to conduct hearings rather than traveling. The amendments also further the goals established by Executive Order 65(00), Part 2.B.

The administrative funding the VEC receives from the federal government decreases as the economy improves. However, the agency’s need to maintain job services and intake staff remains fairly constant if the agency is to render a consistent level of service and be prepared to respond to local economic downturns as well as an overall economic decline. By allowing the VEC to locate many of its employees at regional centers to take claims via the telephone and

Internet, the agency will be better positioned to dedicate its human resources to the greatest areas of need. This method also allows the agency greater flexibility to assign human resources in the event of a significant economic downturn.

The regulation is intended to reduce travel time and expenses for clients, employers, witnesses and the agency. It is also intended to allow the agency to concentrate resources to respond more rapidly and efficiently to local economic downturns than is possible by maintaining separate intake staff at each unemployment insurance field office.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.

The proposed amendments would make the following changes:

- Definitions in 16 VAC 5-10-10 have been altered to reflect changes proposed for the agency's other regulations. The definitions remove references to "full service unemployment insurance office" because the agency is proposing that most claims for unemployment insurance be made via telephone and the Internet. (p. 1) A definition of "field office" is included as a replacement for such full service offices. (p. 3) A definition of "ex parte communication" is included to support a prohibition on such communications in 16 VAC 5-80. (p. 3) A change in the name of the Interstate Conference of Employment Security Agencies is reflected in the definition of "Interstate Benefits Plan". (p. 3) The definition of "job service office" has been eliminated because such offices are now included in the proposed definition of "field office". (p.4) A definition of "liable employer" has been added to reflect a change in 16 VAC 5-80-10 making reference to the liable employer rather than the "last 30-day employing unit" in order to provide more detail on the circumstances in which employers may be determined liable. (p. 4) A definition of "regional adjudication center" has been added to support the agency's proposal to centralize adjudication staff. (p. 6) Finally, the definition of "unemployment insurance office" has been deleted in recognition of the proposal to take most unemployment claims via telephone or the Internet. (p. 8)
- The agency's public participation guidelines established in 16 VAC 5-10-20 have been amended to recognize the statutory changes eliminating the Employment Commission's Advisory Board. (pp. 9 and 10) The changes also establish that regulatory proposals will be published on the agency's Internet site and on the Virginia Regulatory Town Hall. (p. 10) The requirement to publish notice in a Richmond newspaper would be deleted, recognizing that this publication is no longer required by the Administrative Process Act (APA). (p. 10) A policy for the use of ad hoc advisory committees was included as required by the APA. (p. 9) Instead of requiring public hearings, the regulations provide that hearings may be held. (p. 11)

- Section 16 VAC 5-10-30 has been amended to remove a specific list of agency participants in the regulatory review process; as such internal agency matters are exempt from the APA. The proposal would require the agency to review its regulations every three years as required by current executive order. (p. 12)
- Amendments in 16 VAC 5-60-10 (p. 13) increase the allowable methods of filing claims to include telephone and Internet filing. The amendments also provide that when telephone claim filing is available, it shall become the preferred method for filing claims. The time allotted to employers to complete information forms regarding claims is increased from five to eight calendar days. (p. 14) Changes on page 15 allow employers to avoid filing individual reports in cases of mass separation if they provide a list of employees affected. This change also encourages reporting as soon as the details of the separation are known. Amendments would specify the procedure for claimants to cancel claims for benefits. (p. 16) A change on page 17 deletes language allowing individuals to report to unemployment offices other than where the claim is filed because claims will be filed via telephone and Internet. On page 19, language is proposed to specify the date of filing for claims filed by mail. On page 21, amendments would reduce the percentage of area unemployment from 20% to 15% in order for claimants to qualify for reduced work search requirements.
- A portion of 16 VAC 5-60-10 dealing with labor disputes is proposed for deletion. The paragraph deleted is obsolete and has been replaced by several pages of instructions in the VEC's field manual. In most instances, individuals engaged in a labor dispute are ineligible for unemployment benefits. The cases in which a labor dispute may cause unemployment through no fault of the claimant are infrequent and complicated. For this reason, the agency views these cases as better handled on an individual basis using applicable case law rather than by generally applicable regulation. (p.p. 14 and 15)
- The amendments to the catch line for 16 VAC 5-60-40 on page 25 change the reference "Job Training Partnership Act" to "Workforce Investment Act".
- Section 16 VAC 5-70-10 would be amended on page 32 to specify that interstate claims be submitted by mail or other means as specified by the Commission in order to allow for telephone and Internet filing.
- Section 16 VAC 5-70-20 on page 34 would specify a procedure for canceling combined-wage claims.
- An amendment to 16 VAC 5-80-10, page 38, substitutes the term "liable employer" for "last 30 day employing unit". This change is also made on page 39.
- Amendments to 16 VAC 5-80-20, pages 40 through 44, expand the means for filing appeals to include facsimile transmission and Internet filing. The amendments also specify that in most situations, hearings will be conducted by telephone, but provides that parties may request to appear in person. A requirement is added that notice of hearings be mailed at least 10 days in advance of the hearing. The Commission is permitted to call

a hearing to receive evidence with respect to a request to reopen a case. In addition, amendments delineate the filing date for appeals lacking a postmark, and, on page 46, state a time limit for requests to rescind a withdrawal of an appeal. Amendments on page 48 permit parties to request that documents be admitted, provided that they are relevant to the issues in dispute. Amendments on page 49 describe the process for challenging the impartiality of the hearing officer.

- Amendments to 16 VAC 5-80-30 on pages 51 and 52 specify means for filing an appeal to the Commission. Amendments on pages 54 and 55 provide that Commission level hearings shall be conducted in the agency's Richmond Office unless otherwise agreed upon, and that all parties have the right to submit a written argument in lieu of participating in an oral argument hearing. A transcript of the Appeals Examiner's hearing will be provided to parties upon request for a Commission level hearing. The amendments also specify on pages 57 and 58 the means to challenge the hearing officer if a party believes that the adjudicator is biased or has a conflict of interest.
- A provision would be added to 16 VAC 5-80-40 on page 60 to prohibit parties to a case from contacting the adjudicator to discuss the case without written notice to other parties and the opportunity to respond. Amendments on pages .60 and 61 address the Commission's approval of attorney fees, codifying current practice. One change to current practice is contained on page 61 that would allow the Commission to award interim fees in limited cases.

Issues

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.

The primary advantages and disadvantages of the regulations are discussed below:

1. The primary advantages to the public are the elimination of travel time and expense in order to file a claim for unemployment benefits or to appeal a commission decision. For businesses and witnesses involved in adjudication, the regulation will allow them to participate in hearings with greater convenience. Another advantage to parties to appeals is that greater convenience for those testifying will result in more cases being decided on the best information available and on the merits of the case and fewer cases being decided by default when one of the parties fails to appear.

Some individuals may feel that telephone hearings may not provide the hearing officer with the ability to evaluate the demeanor of witnesses who testify to determine their credibility.

However, witness demeanor is the least reliable of all credibility factors. The hearing officer will be better able to focus on the more reliable credibility factors such as inconsistent prior statements and the manner in which witnesses and parties answer questions.

In addition, there may be some concern that with telephone adjudication, the appellant may not have the same opportunity to confront witnesses. However, this issue has been raised and rejected by the courts on the basis that a physical confrontation is not necessary in a quasi-judicial setting such as an administrative hearing. Parties to hearings will still be able to hear others' testimony contemporaneously and to respond to that testimony.

2. The primary advantage to the agency and the Commonwealth is that the regulations will allow the agency greater flexibility to assign human resources to areas of greatest need and to address significant local economic events without having to physically relocate staff. In addition the regulations will allow the agency to take advantage of economies of scale in order to use existing resources in the event of a significant economic downturn. There are no disadvantages to the agency or the Commonwealth.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; and e) the projected cost of the regulation for affected individuals, businesses, or other entities.

- a. Projected cost to the state: The agency does not anticipate any cost to the state to implement the regulations. The agency receives its operating budget from Federal Unemployment Tax receipts from the federal government. Moreover, the agency has received a \$1.5 million grant from the U.S. Department of Labor in order to establish and implement regional Call Centers. It is anticipated that savings from implementing Call Centers will more than offset the initial investment in technology required.
- b. The regulations will impose no costs on localities.
- c. The entities affected by the regulations will be unemployment claimants and employers.
- d. Approximately 251,000 unemployment claimants the VEC serves each year will no longer be required to travel to a VEC office to file an unemployment claim. The regulation will also benefit the estimated 10,000 to 12,000 employers and individuals who are parties to unemployment hearings, since they will no longer be required to travel to hearings. The regulations may reduce the number of employees in VEC field offices, currently 624. However, many of these employees are expected to accept transfers to regional call centers and the remaining positions are likely to be reduced by attrition.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.

The proposed amendments would make the following changes:

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- A provision would be added to 16 VAC 5-80-40 on page 60 to prohibit parties to a case from contacting the adjudicator to discuss the case without written notice to other parties and the opportunity to respond. Amendments on pages 60 and 61 address the Commission's approval of attorney fees, codifying current practice. One change to current practice is contained on page 61 that would allow the Commission to award interim fees in limited cases.

Alternatives

Please describe the specific alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

The commission considered the alternative of making no changes to current regulations. This alternative was rejected because it is more burdensome than the proposed regulations, which allow individuals to file claims via the telephone or Internet. Current regulations are also more burdensome to parties and witnesses in appeal hearings because such parties and witnesses are now required to be physically present at such hearings, expending time and resources in the process. Current regulations also do not provide for the economies of scale or the human resource flexibility for the commission that the proposed regulations provide.

The commission also considered allowing any party to require other parties to appear in person at hearings. However, this alternative would allow parties to impose unnecessary burdens on other parties and would undermine the convenience of the proposed process for hearings. Instead, the agency decided to allow parties to request to appear in person themselves, but not to force others to appear in person.

The commission considered continuing in-person claims filing at field offices or filing via telephone or Internet at the choice of the claimant. However, this option would not allow the commission to centralize its human resources and would not provide the same degree of flexibility in responding to significant economic downturns or local events. Instead, the commission determined that field offices will accommodate individuals who lack access to telephones or the Internet by providing them with such access for the purpose of filing claims.

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

The agency received two letters in response to the NOIRA. One letter was simply an acknowledgement of having received notice. Another letter suggested establishing in regulation that the award of interim attorney fees is permissible. Provisions in 16 VAC 5-80-40 respond to this issue by establishing the situations in which interim fees may be awarded.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

In order to ensure that the regulation is clearly written and easily understandable, the commission had the regulations read and reviewed by an individual who has no expertise in the commission's operations. The individual then summarized the changes to ensure that the amendments are clearly understandable.

Once the commission had completed draft amendments after the NOIRA comment period, the agency called an informational meeting with representatives of business, labor, the Bar, and public interest groups to review the changes, answer questions, and receive suggestions. Based on the questions, comments and suggestions at this meeting, the commission further revised the regulations to enhance clarity and to adopt suggestions.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

The agency will convene an internal committee to review and re-evaluate these regulations within 3 years of their effective date to consider whether the regulations should be continued, amended, or terminated. The goals against which the regulations will be reviewed are as follows:

- a. 87% of all first payments will be made within the first 14 calendar days following the first compensable week claimed;
- b. 75% of all deputy determinations selected for review shall achieve a passing grade on the federal quality review mandated by the U.S. Department of Labor;

- c. 60% of all first level appeals decisions shall be mailed within 30 calendar days of the date of appeal, and 85% shall be issued within 45 calendar days;
- d. 90% of all first level appeals decisions selected for review shall achieve a passing grade on the federal quality review mandated by the U.S. Department of Labor; and
- e. 50% of all commission-level decisions shall be mailed within 45 calendar days of the date of appeal, and 80% shall be issued within 75 calendar days.
- f. Promote the prompt, effective, and efficient processing of benefit claims to ensure that benefits are paid when due by ensuring that 87% of all first payments are made within 14 calendar days from the first compensable week claimed.
- g. Promote the prompt and efficient processing of interstate liable claims by making 70% of first payments within 14 calendar days of the first compensable week claimed.
- h. Promote the prompt and efficient processing of combined wage claims by ensuring that 90% of all combined wage transfer requests are completed within 3 business days from when the request is received.
- i. Miles traveled by VEC staff to conduct hearings will be reduced by at least half. This can be measured by travel reimbursements to agency staff.
- j. The number of VEC local office intake staff is expected to decrease from its current level of 624.

Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The proposed regulation will support family stability among unemployed individuals by not requiring the use of scarce resources to travel to VEC field offices in order to submit unemployment claims or to participate in hearings. The regulation will have no impact on the authority and rights of parents. The regulation may encourage self-sufficiency among the unemployed to the extent that it does not require scarce family resources to be used in order to file an unemployment claim. The regulation will neither strengthen nor erode marital commitment. The regulation will prevent a decrease in disposable family income among the unemployed to the extent that resources need not be expended in travel to file claims or attend hearings.