

Regulatory Analysis Form

This space for use by IRRC

(1) Agency

Department of Labor & Industry
Unemployment Compensation Board of Review

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UNEMPLOYMENT COMPENSATION BOARD
REVIEW COMMISSION

(2) I.D. Number (Governor's Office Use)

12-59

IRRC Number: 2290

(3) Short Title

Appeals from Determinations of Department.

(4) PA Code Cite

34 Pa. Code §§ 101.2, 101.81,
101.82 and 101.102

(5) Agency Contacts & Telephone Numbers

Primary Contact: Kelly K. Smith; (717) 787-4186
Secondary Contact: James Holzman; (717) 787-4186

(6) Type of Rulemaking (Check One)

Proposed Rulemaking
 Final Order Adopting Regulation
 Final Order, Proposed Rulemaking
 Omitted

(7) Is a 120-Day Emergency Certification Attached? (Check One)

No
 Yes: By the Attorney General
 Yes: By the Governor

(8) Briefly explain the regulation in clear and nontechnical language.

The regulation revises the manner in which parties in unemployment compensation matters may file appeals and how the timeliness of such appeals will be determined.

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

The amendments are adopted under the authority provided in Sections 3(d) and 1 of the Unemployment Compensation Law (43 P.S. §§ 761(a) and 763(d)) and Section 2205 of the Administrative Code of 1929 (71 P.S. § 565).

Commonwealth Court has urged the Board to reconsider the effect of its regulations on parties who use common carriers in *Copyright, Inc. v. Unemployment Compensation Board of Review*, 739 A.2d 219 (Pa. Cmwlth. 1999) and parties who do not have an official U.S. postmark in *UGI Utilities, Inc. v. Unemployment Compensation Board of Review*, 776 A.2d 344 (Pa. Cmwlth. 2001). In response, the Board now seeks to amend its regulations to recognize modern methods of mailing and delivering appeals.

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(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case, or regulation, and any deadlines for action.

No.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

The regulation is designed to provide flexibility to appealing parties in unemployment matters. These litigants are frequently unrepresented and unemployed claimants or small businesses. These amendments will recognize increasingly common methods of filing appeals and will insure that the timeliness of such appeals is established in a consistent and reliable manner. In addition, the system will be more easily administered and parties will have a reasonable opportunity to demonstrate the timeliness of an appeal.

(12) State the public health, safety, environmental, or general welfare risks associated with non-regulation.

Although the Board currently accepts appeals delivered by various means, this regulation will provide the parties with a clear benchmark for determining timeliness. The current system has resulted in numerous hearings and litigation, including court appeals, regarding the timeliness of appeals. This regulation will eliminate the need for many of these hearings and much litigation. This regulation will help expedite the resolution of unemployment compensation matters.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

All parties in unemployment compensation matters who file appeals will benefit from a reliable benchmark for determining timeliness. Each year there are between 40,000 and 85,000 appeals filed to unemployment compensation referees and between 6,000 and 15,000 appeals filed to the Unemployment Compensation Board of Review. The proposed amendment has the potential to affect all parties by specifically providing for appeals filed by additional means, such as private carriers and facsimile transmission, and by establishing a clear benchmark for establishing the timeliness of an appeal. The regulation also impacts non-appealing parties by limiting the number of hearings and providing prompt resolution of claims, including fewer court appeals.

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(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effect as completely as possible and approximate the number of people who will be adversely affected.)

There is no adverse effect of the regulation.

(15) List the persons, groups, or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

No parties are required to use any particular method to file. The regulation merely provides parties with additional options for filing appeals.

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

The Board solicited comments from a cross-section of interested stakeholders during the drafting process in March 2002. These stakeholders include: Community Legal Services, Inc., John Stember, Esq., Widener University School of Law, Pennsylvania Chamber of Business and Industry, Pennsylvania Bar Association, Pennsylvania AFL-CIO, Employer's Unity, Inc., The Frick Company, University of Pennsylvania and Duquesne University. The Board received comments from four organizations: Employer's Unity, Inc., Community Legal Services, the Pennsylvania AFL-CIO and the Duquesne University Unemployment Compensation Clinic. In addition, the Board has consulted with other administrative agencies, including the Department of Public Welfare and the Department of Insurance regarding their appeal practices and with the Bureau of Unemployment Compensation Benefits and Allowances and the Office of U.C. Service Centers to insure that implementation can be accomplished upon enactment of the regulation.

The Board also received public comments when these regulations were published as proposed rulemaking. Public comments were received from Community Legal Services and the Pennsylvania Chamber of Business and Industry. In addition, the Board received comments from the Independent Regulatory Review Commission.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting, or consulting procedures which may be required.

Although the savings cannot be specifically quantified, the regulated community will incur savings by a reduction in the amount of hearings that they are required to attend in order to establish the timeliness of an appeal, as well as the savings associated with utilizing other means of delivering an appeal, such as fax, electronic filing, private courier services or express mail services.

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(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting, or consulting procedures which may be required.

None, except to the extent that a local government may be a party to an unemployment compensation case.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required.

There are no significant costs to state government. It is estimated that expedited appeals and the resulting decrease in hearings will lead to cost savings for the Department.

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(20) In the table below, provide an estimate of the fiscal savings and cost associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government						
Total Savings						
COSTS:	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government						
Total Costs						
REVENUE LOSSES:	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government						
Total Revenue Losses						

(20a) Explain how the cost estimates listed above were derived.

The savings associated with the amendment are not reasonably quantifiable, as they result from the reduction in the number of hearings that both the regulated community and the Department are required to attend, as well as reduced delivery costs, associated with demonstrating the timeliness of an appeal.

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(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3	FY -2	FY -1	Current FY
UCBR	\$8,694,525	\$9,282,597	\$10,528,475	\$3,766,979 (through 2/21/03)

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

By establishing requirements for timely filing appeals, the amount of hearings regarding the timeliness of appeals is reduced. This will result in appeals being processed more quickly and further enable the Board to continue to meet and exceed federal timeliness standards while providing prompt resolution of claims. This will also result in cost savings to the parties and the Department by reducing the amount of hearings they must attend. There are no known adverse effects or costs related to the regulation. The above figures reflect the most current and accurate available.

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

The proposed amendment is designed to avoid the current confusion caused by the lack of a clear regulation, resulting in the need for additional hearings in which parties attempt to establish timely filing. The result of nonregulation is increased cost for all parties and for the Board, as well as confusion regarding the standard used to determine timeliness. These amendments will expedite the consideration of unemployment compensation cases.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

Any alternative regulatory scheme would not result in additional costs or savings for either the Commonwealth or the regulated community.

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(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

None.

(25) How does the regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

The regulation will provide a competitive advantage for Pennsylvania businesses and employees by making it easier for all parties to appeal unfavorable unemployment compensation decisions, providing those parties with a clear indication of how the timeliness of those appeals will be determined and requiring fewer hearings and court appeals.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

The regulation will amend the existing regulations at 34 Pa. Code §§ 101.2, 101.81, 101.82 and 101.102. There is no other known effect on existing or proposed regulations.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

Although public meetings were not scheduled, the Board sought stakeholder input and received public comments as described in item 16. The Board also consulted with the Bureau of Unemployment Compensation Benefits and Allowances and the Office of U.C. Service Centers in crafting the proposed language, in order to insure that compliance can be easily accomplished.

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(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

The regulation will require minor changes to some common unemployment compensation forms, including the UCP-1 (Claimant Handbook) and UC-44 (Notice of Determination) as well as other forms containing appeal instructions. New forms are not yet available.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

These amendments should help smaller businesses and all claimants in unemployment compensation cases by providing more and less costly ways to appeal.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses, or other approvals must be obtained?

The regulation will be effective upon publication in the *Pennsylvania Bulletin*. It does not require the regulated community to obtain any permits, licenses or approvals.

(31) Provide the schedule for continual review of the regulation.

The Board will review the effectiveness of the proposed regulation on a continuing basis.

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**FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU
(Pursuant to Commonwealth Documents Law)**

2003 JUL -9 AM 11:33

LEGISLATIVE REFERENCE BUREAU
REVIEW COMMISSION

2290

Do Not Write In This Space

Copy below is hereby approved as to Form and legality. Attorney General.

By: _____
DEPUTY ATTORNEY GENERAL

DATE OF APPROVAL

Check if applicable.
Copy not approved.
Objections attached.

Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:

DEPARTMENT OF LABOR & INDUSTRY
(AGENCY)

Document/Fiscal Note No. 12-59

Date of Adoption: _____

By: Stephen M. Schmerin
STEPHEN M. SCHMERIN

Title: Secretary of Labor & Industry
(Executive Officer, Chairman or Secretary)

Copy below is hereby approved as to form and legality. Executive or independent Agencies.

By: [Signature]

DATE OF APPROVAL

General
(Deputy ~~Attorney~~ General)
(Chief Counsel, Independent Agency)
(Strike inapplicable title)

Check if applicable. No Attorney General approval or objection within 30 days after submission.

FINAL-FORM REGULATION

TITLE 34. LABOR AND INDUSTRY.

DEPARTMENT OF LABOR AND INDUSTRY

[34 PA. CODE CHAPTER 101]

APPEALS FROM DETERMINATIONS OF DEPARTMENT

RULES AND REGULATIONS
TITLE 34 – Labor and Industry
Part VI Unemployment Compensation Board of Review
Chapter 101
(34 Pa. Code Ch. 101)

The Department of Labor and Industry (Department), Unemployment Compensation Board of Review (Board), by this order adopts these final-form amendments to 34 Pa. Code Chapter 101 to read as set forth in Annex A.

In response to comments received, the Department made changes to the proposed rulemaking that was published at 32 Pa.B. 4720 (September 28, 2002).

Statutory Authority.

The final-form amendments are adopted under the authority provided in Section 3(d) of the Unemployment Compensation Law, Act of December 5, 1936, Second Ex. Sess. P.L. (1937) 2897, *as amended* (Law), 43 P.S. § 763(d), which provides that the Board has the duty to adopt, amend, or rescind rules of procedure. The Department has the power to make rules and regulations for carrying into effect the laws regulating the labor of persons within this Commonwealth under Section 2205 of the Administrative Code (71 P.S. § 565). Additionally, Section 1 of the Law (43 P.S. § 761(a)) gives the Department authority to adopt, amend and rescind rules and regulations that it deems necessary or suitable.

Background.

The Board is an administrative board that exercises its appellate duties independently of the Department. 43 P.S. § 763; 71 P.S. §§ 62, 183. A party in an unemployment compensation proceeding may appeal a determination of the Department to a Referee or a Referee decision to the Board within 15 days. 43 P.S. §§ 821(e) and 822. A party may file an appeal on a prescribed appeal form or through a written communication and notice advising the Department that the aggrieved party requests review of the decision. The existing regulation, 34 Pa. Code § 101.82(c), recognizes only actual delivery to the Department or the Board, or an official U.S. postmark as the filing date. The Department has accepted appeals or notice of appeals through various other methods, including fax transmission and common carrier. The Department frequently receives appeals bearing a private postage meter mark.

RULES AND REGULATIONS
TITLE 34 – Labor and Industry
Part VI Unemployment Compensation Board of Review
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RULES AND REGULATIONS
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Part VI Unemployment Compensation Board of Review
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Commonwealth Court recognized that the Board may interpret its regulations to allow delivery of appeals or notices of appeal by fax transmission under 34 Pa. Code § 101.82. However, the date of filing is the date that the faxed document is actually received by the Department or the Board. *George v. Unemployment Compensation Bd. of Review*, 767 A.2d 1124 (Pa. Cmwlth. 2001). This judicial interpretation could result in the rejection of an appeal that was faxed within the prescribed 15-day period but that was, nonetheless, received after the 15 days elapsed. Commonwealth Court has urged the Board to reconsider the effect of its regulations on parties who use common carriers and parties who do not place an official U.S. postmark on the envelope accompanying the appeal. *Copyright, Inc. v. Unemployment Compensation Bd. of Review*, 739 A.2d 219 (Pa. Cmwlth. 1999); *UGI Utilities, Inc. v. Unemployment Compensation Bd. of Review*, 776 A.2d 344 (Pa. Cmwlth. 2001).

Compliance with Executive Order 1996-1, Regulatory Review and Promulgation.

The Board solicited input from a cross-section of stakeholder organizations during the drafting process. It contacted the following individuals and groups for their suggestions: Community Legal Services, Inc., John Stember, Esq., Widener University School of Law, Pennsylvania Chamber of Business and Industry, Pennsylvania Bar Association, Pennsylvania AFL-CIO, Employer's Unity, Inc., The Frick Company, University of Pennsylvania and Duquesne University.

The Board received stakeholder comments to the proposed rulemaking from Employer's Unity, Inc., Community Legal Services, the Pennsylvania AFL-CIO and the Duquesne University Unemployment Compensation Clinic.

Community Legal Services requested that the Board consider specifying that a U.S. Postal Service certified mail receipt could be used as another means of establishing timely mailing of an appeal. The Board regulation will contain a provision that a U.S. Postal Service Form 3817 (Certificate of Mailing) or a U.S. Postal Service certified mail receipt can be used to establish timely mailing of an appeal.

Community Legal Services and the Duquesne University Unemployment Compensation Clinic expressed concern about the use of postage meter marks for determining timeliness, where there is no official U.S. Postal Service postmark. The Board considered the stakeholders' concerns regarding the potential for fraud. However, the interest in providing parties with additional methods for filing appeals outweighs the potential for fraud. Expedient resolution of unemployment compensation claims and development of an appeal system that assists claimants and businesses that often are not represented is important.

Additionally, there are laws and rules of professional conduct that would deter and punish fraudulent conduct.

The Duquesne University Unemployment Compensation Clinic also stated that the regulations do not address cases where a party alleges that an appeal was filed and the Department has no record of receiving the appeal. These regulations are designed to determine the timeliness of appeals that the Department actually receives. This factual situation is more appropriately considered on a case-by-case basis through the hearing process and the appellate cases concerning *nunc pro tunc* appeals to administrative agencies.

Purpose.

The amendments pertain to the administration of unemployment compensation appeals, revise the manner in which parties may file appeals and determine the timeliness of these appeals. The amendments reflect court decisions allowing various means of filing appeals and urging the Board to update its regulations for determining timeliness to reflect advances in technology. The proposed amendments codify the Board's existing and judicially accepted practice of allowing the filing of appeals by fax. They will provide additional means for parties to file appeals, including common carrier services and electronic transmission. The amendments will also set a uniform standard for determining the date of filing and timeliness of appeals or notices of appeal. This will result in a reduction in the number of hearings that the Board is required to conduct relating to timeliness of appeals and will assist the Board in meeting federal guidelines for timely issuance of unemployment compensation decisions.

Affected Persons.

The final-form regulation affects appealing parties, and their representatives, in unemployment compensation matters. These amendments provide these parties with increased flexibility in filing or delivering appeals and with an easily verifiable manner of determining whether an appeal was timely filed or delivered.

Fiscal Impact.

There is minimal fiscal impact associated with this final-form rulemaking. Parties will experience some potential savings, as these amendments will clarify the manner in which timeliness will be determined and therefore reduce the need for hearings and litigation regarding the timeliness of appeals.

Responses to Comments.

The following addresses the common areas of concerns found in the comments received from the public and the Independent Regulatory Review Commission (IRRC):

IRRC objected to the term "Department office responsible for unemployment compensation" as it appears in § 101.81(a) and (c). In response, the Department changed this term to "Department appeal office" and defined that term in § 101.2. Instructions accompanying each determination will provide the address of the Department appeal office, among other things. In response to IRRC's comment, the term "Department-provided" was also eliminated from § 101.81(a).

In response to a comment from IRRC, the Department made arrangements for the appeal form to be available on the Department's web site, where the form can be downloaded and printed. This is now enumerated in § 101.81(a).

Community Legal Services (CLS) urged that the regulation require that the Department mail an appeal form to any aggrieved party with the adverse determination. However, § 101.81(b) of the regulation will memorialize the Department's current practice of mailing instructions to the parties with each determination. The Department's current practice is to mail appeal forms to all parties with each determination, with appropriate instructions.

Concerning § 101.81 (b), IRRC asked whether appeal information is available from sources other than a Department office responsible for unemployment compensation or a Board office as enumerated in the proposed regulation. These locations represent the minimum number of locations where information can be obtained. The Department may provide this information at other locations that will be considered a *Department appeal office*. The Department also amended the subsection to reflect that appeal information is available on the Department's website. In addition, this subsection has been amended to provide that the Department will provide appeal instructions with each determination that is issued, including the address and fax number of the Department appeal office, Board office or workforce investment office where an appeal can be filed. This information on filing locations is much more extensive than the information concerning filing contained in the widely-used General Rules of Administrative Practice and Procedure, 1 Pa. Code §§ 31.5, 31.11, 33.31.

CLS objected to the removal of the appeal “assistance” requirements from § 101.81(b) and IRRC requested an explanation for this amendment. Parties in unemployment compensation proceedings are instructed to contact U.C. Service Centers by telephone for assistance related to their claim or assistance related to filing an appeal. IRRC also asked whether an individual may obtain information about filing an appeal from a workforce investment office. Subsection (b) reflects that workforce investment offices are responsible for job training and placement, among other programs, and not matters related to unemployment compensation. Workforce investment offices are not able to reliably provide assistance in unemployment compensation matters, because these offices do not have the expertise, funding or staff to provide assistance with unemployment compensation appeals. A workforce investment office may only accept appeal forms. A party seeking information from a workforce investment office will be referred to a U.C. Service Center for additional information by workforce investment office staff.

IRRC questioned the removal of the § 101.81(b)(7) requirement that a local employment office representative sign the appeal. However, “local employment offices” no longer accept and process unemployment compensation appeals. Further, this requirement does not assist with the docketing and processing of appeals and would only delay processing of unemployment compensation appeals.

CLS commented that the requirements for an appeal listed in § 101.81(c) should be discretionary rather than mandatory. However, the Department requires the inclusion of certain information in an appeal to allow proper docketing and identification of the parties and the determination being appealed. Without this minimum information, the Department may not be able to identify or properly process numerous appeals.

CLS also requested that § 101.81(d) be amended to set forth language concerning the specifics of a docketing system. The regulation, as drafted, provides reasonable docketing requirements and procedures to adjudicate timeliness issues consistent with appellate court decisions. *See Anderson v. Unemployment Compensation Bd. of Review*, 423 A.2d 1138 (Pa. Cmwlth. 1981). The system reasonably assures that parties can appropriately appeal adverse determinations by providing instructions and a clear system for filing appeals. This regulation will provide parties the opportunity to present evidence regarding timely filing.

CLS requested the revision of § 101.81(e) for clarity. However, the Board finds that this section is sufficiently clear. Under this section, the Board may accept appeals that are not on the Department-provided appeal form, if a party provides other written communication indicating that it disagrees with the determination.

IRRC suggested that the Department provide a definition of the term “personal delivery” as it appeared in § 101.82(b)(1), which has been moved to §101.82(b)(5). For clarification, this definition now appears in § 101.2, and clarifies that personal delivery is any type of on-site delivery to the Department not covered by the other subsections in § 101.82(b). This definition will also satisfy IRRC’s recommendation that a “private courier” may deliver appeals. The date of filing of an appeal filed in this manner is the date the Department received the appeal.

CLS again requested that the regulation enumerate the specifics of docketing appeals at workforce investment offices in § 101.82(b)(1). However, as stated, the regulations contain reasonable requirements pertaining to the docketing of appeals and the resolution of timeliness issues consistent with appellate cases.

CLS endorsed permitting parties to file appeals by common carrier in § 101.82(b)(3), and also suggested that the Department list acceptable common carriers. The Department declines to do this, as common carriers frequently change names or cease operations, which would quickly render the regulation inaccurate and outdated. Creating a complete and current list will continuously cause substantial logistical difficulties.

IRRC also questioned how an appealing party would know that a common carrier is subject to the authority of the Public Utilities Commission (PUC). The PUC does not register or certify common carriers. However, the PUC exercises authority over common carriers under Section 510(a) of the Public Utility Code, 66 Pa. C.S. § 510(a). Parties seeking to file appeals by use of a common carrier may need to inquire and insure that the common carrier is subject to the PUC’s authority and regulation. If an appeal is filed by a carrier that is not a common carrier, the appeal will be considered as properly filed by *personal delivery* under § 101.82(b)(5).

IRRC also expressed concerns with this section regarding the differences in documents used by common carriers to memorialize mailing dates. However, the regulation enumerates that the Board will consider a document regularly maintained in the course of business by the common carrier memorializing mailing or shipping dates. This provides parties with greater opportunity to submit reliable evidence concerning timeliness issues.

In response to another comment from IRRC, the Department amended § 101.82(b)(2) to provide that if the date of delivery to the common carrier cannot be determined by the documents in the record, the date of filing will be the date the Department received the appeal.

IRRC questioned the establishment of a filing date by the date of delivery to a third party in § 101.82(b)(3). However, the Board has long utilized this date by recognizing a U.S. Postal Service postmark as the date of filing. Further, the Board's approach is consistent with the Commonwealth Court's direction that the Board updates its regulations to recognize common carriers as a reliable method of filing appeals. *Copyright, Inc. v. Unemployment Compensation Bd. of Review*, 739 A.2d 219 (Pa. Cmwlth. 1999). This approach also presents greater ease for parties.

IRRC questioned how a discrepancy between a Department fax banner and a sender's fax banner would be resolved in § 101.82(b)(4). However, the regulation contains clear direction that a Department fax banner controls the determination of the time of filing. The sender's fax banner will be considered only when the Department banner is illegible or unavailable. IRRC also questioned whether faxes received after the close of business would be considered timely. Accordingly, this section was amended to reflect that the Department will accept faxes received up until midnight on the last day of the appeal period if the Department fax banner demonstrates that the appeal was received before the end of the day on the last day of the appeal period. If the Department's banner is unavailable, the sender's fax banner will demonstrate this information. CLS agreed that faxes should be accepted through 11:59 p.m. on the last day to appeal.

In response to another comment from IRRC, the Department added language to § 101.82(b)(4) that places the appealing party on notice that by using fax transmission as a method of filing, that party is assuming the risk that the appeal may not be properly or timely filed.

CLS requested that the Department maintain fax activity sheets and make those sheets available to parties without issuance of a subpoena. The Department declines to adopt this approach because the amendments contain reasonable requirements for docketing appeals and resolving timeliness disputes. Parties may keep fax logs or other business records. Parties may introduce these records into evidence before a referee in a hearing concerning the timeliness of an appeal.

The Pennsylvania Chamber of Business and Industry requested that the Department consider a fax confirmation sheet as proof of timely filing, even if the Department has no record of receiving the fax. The Department declines to adopt this approach because these regulations are designed to determine the timeliness of appeals that the Department actually receives. A fax confirmation sheet, alone, may not be adequate proof of timely filing. The factual situation raised by the commentator is more appropriately considered on a case-by-case basis, through

the hearing process and based upon appellate cases concerning *nunc pro tunc* appeals to administrative agencies.

With regard to § 101.82(b)(5) of the proposed rulemaking, IRRC commented that the term “information processing system” is vague and could be construed to include voice mail. To address this concern, the Department added the term “written” to § 101.82(b), to clarify that an appeal must be in writing. Further, § 101.82(b)(5) was amended to change the term “information processing system” to “electronic transmission system” to clarify that this subsection deals with electronic filing.

IRRC commented that the Department should also amend § 101.102, as it references the titles of the sections amended by these final-form regulations. The final-form regulation includes the necessary amendments to § 101.102 reflecting IRRC’s comments.

The workforce investment office was deleted from § 101.82(b)(4) as a potential repository for appeals filed by electronic transmission other than fax transmission because these offices do not have this capability.

Reporting, Recordkeeping and Paperwork Requirements.

The amendments will not increase paperwork for parties in unemployment compensation matters or the Department except that it may eliminate many hearings over the issue of timeliness. The amended regulation will provide recognition for the technological improvements in submission of documents and provide easier methods for transmitting appeals. The amended regulation acknowledges the acceptable means for filing appeals. It clarifies the date of filing for each of these methods. Parties who file an appeal without using the Department form will no longer be required to complete that form to perfect an appeal. The Department will still use its current forms, with updated instructions, and it will continue to ensure that an appeal is routed to the Board. Specifically, the Department will provide instructions on fax transmission and the appropriate format for electronic filing. The Department’s website will be expanded and updated. There are no significant costs associated with the proposed amendments for the Commonwealth or to parties in unemployment compensation cases.

Effective Date.

The amendments will be effective upon publication in the *Pennsylvania Bulletin* as a final-form regulation.

Sunset Date.

There is no Sunset Date for these amendments. The Department will continuously monitor the filing of appeals or notices of appeals and the amendments' effectiveness. The Department will also monitor the filing of appeals to ensure that appeals are filed timely under the amendments and that the date of filing is accurately recorded.

Contact Person.

The contact person is Kelly K. Smith, Assistant Counsel, Office of Chief Counsel, Department of Labor and Industry, 10th Floor, Labor and Industry Building, 7th & Forster Streets, Harrisburg, Pennsylvania, 17121, (717)787-4186; kellsmith@state.pa.us.

Regulatory Review.

Under Section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on September 12, 2002, the Department submitted a copy of proposed rulemaking, published at 32 Pa.B. 4720, to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate Labor and Industry Committee and the House Labor Relations Committee for review and comment.

The Department also provided the Committees and IRRC with copies of the comments received as well as other documentation in accordance with Section 5(c) of the Regulatory Review Act (71 P.S. § 745.5(c)). In preparing these final-form regulations, the Department considered the comments from IRRC, stakeholders and the public. The Department did not receive comments from the House or Senate Committees.

These final-form regulations were (deemed) approved by the House Committee on _____ and (deemed) approved by the Senate Committee on _____. The Commission met on _____ and approved the regulations in accordance with Section 5.1(d) and (e) of the Act, 71 P.S. § 745.5a(d) and (e).

Findings.

The Department finds that:

(1) Public notice of intention to promulgate administrative regulations by this Order has been given under Sections 201 and 202 of the Act of July 31, 1968

(P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and the related regulations at 1 Pa. Code §§ 7.1 and 7.2.

(2) The final-form regulations adopted by this Order are necessary and appropriate for the administration of the Law.

Order.


The Department, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 34 Pa. Code, are amended as set forth in Annex A.

(b) The Secretary of the Department shall submit this Order and Annex A to the Office of Attorney General and the Office of General Counsel for approval as required by law.

(c) The Secretary of the Department shall certify this Order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This Order shall take effect immediately upon publication.


Stephen M. Schmerin
Secretary

FISCAL NOTE: Fiscal Note 12-59 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 34. DEPARTMENT OF LABOR AND INDUSTRY

PART VI. UNEMPLOYMENT COMPENSATION

CHAPTER 101. GENERAL REQUIREMENTS – PART IV

Subchapter A. GENERAL PROVISIONS

§ 101.2. Definitions.

The following words and terms, when used in this part, have the following meanings, unless the context clearly indicates otherwise:

Board – The Unemployment Compensation Board of Review.

Day – A calendar day.

Department – The Department of Labor and Industry of the Commonwealth.

DEPARTMENT APPEAL OFFICE – A DEPARTMENT OFFICE RESPONSIBLE FOR UNEMPLOYMENT COMPENSATION WHERE AN APPEAL MAY BE FILED AND ACCEPTED, ACCORDING TO THE DEPARTMENT-PROVIDED INSTRUCTIONS ACCOMPANYING A DETERMINATION.

Employment office – A public employment office or branch thereof, operated by the Department or by another state or by the Federal Government under agreement with the Department.

Party – The Department, the claimant, the last employer of the claimant and another employer affected by the appeal proceedings.

PERSONAL DELIVERY – DELIVERY BY OR ON BEHALF OF A PARTY THAT IS NOT ENUMERATED IN § 101.82(b)(1)-(4) (RELATING TO TIME FOR FILING APPEAL FROM DETERMINATION OF DEPARTMENT) WHERE A PERSON PERSONALLY FILES THE APPEAL AT A BOARD OFFICE OR WORKFORCE INVESTMENT OFFICE.

Referee – A referee of the Board.

Tribunal – The Board or one of its referees.

Workforce investment office – An office where the Department provides employment services under the Wagner-Peyser Act (29 U.S.C. §§ 49-49m). A workforce investment office may be identified as a Team Pennsylvania CareerLink.

**Subchapter C. APPEALS FROM [DECISIONS] DETERMINATIONS
OF DEPARTMENT**

§ 101.81. Filing of appeal from [decision] determination of Department.

(a) ~~Department provided a~~ Appeal forms may be obtained from a Department APPEAL OFFICE office responsible for unemployment compensation, a workforce investment office or the Board's appeals system administrator in Harrisburg AND FROM THE DEPARTMENT WEB SITE (WWW.DLI.STATE.PA.US).

(b) Information about filing an appeal may be obtained from a Department APPEAL OFFICE, BOARD OFFICE AND THE DEPARTMENT'S

WEB SITE. office responsible for unemployment compensation or an office of the Board. THE DEPARTMENT WILL PROVIDE APPEAL INSTRUCTIONS WITH EACH DETERMINATION, INCLUDING THE ADDRESS AND FAX NUMBER OF A BOARD OFFICE, WORKFORCE INVESTMENT OFFICE OR A DEPARTMENT APPEAL OFFICE WHERE APPEALS MAY BE FILED.

[(a)] (c) An appeal from a [decision] determination of the Department shall be filed [in a local employment office] with a Department APPEAL OFFICE office responsible for unemployment compensation, a workforce investment office or a Board office and shall [include] contain the following information [furnished by appellant]:

- (1) The name and address of the claimant.
- (2) The social security number of the claimant, if known.
- (3) The date of the [decision] determination which is being appealed.
- (4) The reasons for appeal.
- (5) The [signature] name and address of the appellant.

[(b)] Assistance in completing the appeal form and perfecting the appeal may be obtained at a local employment office or at an office of the Board with the following information to be furnished by the local employment office representative:

- (1) The appeal number.
- (2) The nature of the decision from which appeal is being filed.

- (3) The date of the application of claimant for benefits or claim weeks.
- (4) The name and address of employers who have filed information in writing, and the date thereof, which might raise a question as to the eligibility of the claimant.
- (5) The name and address of the last employer of the claimant.
- (6) The date and number in which appeal was delivered by appellant, personally or by mail.
- (7) The signature of the local employment office representative.]

(d) Upon receipt of an appeal, the Department or the Board will docket and process the appeal form.

(e) The Board will consider a written objection to the Department's determination as an appeal and process it under subsection (c) if the appellant does not complete the Department-provided appeal form.

§ 101.82. [Filing of] Time for filing appeal from [decision] determination of Department.

[(a) Appeal forms approved by the Board may be obtained from a local employment office or the secretary of the Board at Harrisburg.]

[(b)] (a) [An appeal from a decision of the Department shall be filed within the prescribed time if it is filed] A party seeking to appeal a Department determination shall file an appeal in the form and manner [as] specified in §

101.81 (relating to filing of appeal from determination of Department) and this [part] section on or before the 15th day after the date on which notification of the decision of the Department was delivered personally to the appellant or mailed to him at his last known post office address.

(b) A party may file an A WRITTEN appeal by any of the following methods:

~~(1) Personal delivery to a workforce investment office or to the Board. The filing date will be the date the appeal was personally delivered to the workforce investment office or Board, during their normal business hours.~~

~~(2) 1) United States mail. The filing date will be determined as follows:~~

~~(i) The date of the official U.S. Postal Service postmark on the envelope containing the appeal, a U.S. Postal Service Form 3817 (Certificate of Mailing) or a U.S. Postal Service certified mail receipt.~~

~~(ii) If there is no official U.S. Postal Service postmark, U.S. Postal Service Form 3817 or U.S. Postal Service certified mail receipt, the date of a postage meter mark on the envelope containing the appeal.~~

~~(iii) If the filing date cannot be determined by any of the methods in subparagraph (i) or (ii), the filing date will~~

be the date recorded by the Department, the workforce investment office or the Board when it receives the appeal.

(3 2) Common carrier. An appeal may be delivered by a common carrier of property which is subject to the authority of the Pennsylvania Public Utility Commission or the United States National Surface Transportation Board. The date of filing is the date the document was delivered to the common carrier, as established by a document or other record prepared by the common carrier in the normal course of business. IF THE DATE OF DELIVERY TO THE COMMON CARRIER CANNOT BE DETERMINED BY THE DOCUMENTS IN THE RECORD, THE DATE OF FILING WILL BE THE DATE THE WORKFORCE INVESTMENT OFFICE, BOARD OR DEPARTMENT APPEAL OFFICE RECEIVED THE APPEAL.

(4 3) Fax transmission.

(A) The filing date will be determined as follows:

(i) The date of receipt imprinted by the

Department, the workforce investment office or the Board's fax machine.

(ii) If the Department, the workforce investment office or the Board's fax machine does not imprint a legible date, the date of transmission imprinted on the faxed appeal by the sender's fax machine.

(iii) If the faxed appeal is received without a legible date of transmission, the filing date will be the date recorded by the Department APPEAL OFFICE, the workforce investment office or the Board when it receives the appeal.

(B) A PARTY FILING AN APPEAL BY FAX TRANSMISSION IS RESPONSIBLE FOR DELAY, DISRUPTION, INTERRUPTION OF ELECTRONIC SIGNALS AND READABILITY OF THE DOCUMENT AND ACCEPTS THE RISK THAT THE APPEAL MAY NOT BE PROPERLY OR TIMELY FILED.

(C) A FAX TRANSMISSION IS TIMELY FILED IF IT IS RECEIVED BY THE DEPARTMENT APPEAL OFFICE, WORKFORCE INVESTMENT OFFICE OR BOARD BEFORE MIDNIGHT ON THE LAST

DAY OF THE APPEAL PERIOD IN

ACCORDANCE WITH THIS SUBSECTION.

(5 4) Electronic transmission other than fax transmission. The date of filing is the receipt date recorded by the Department APPEAL OFFICE, the workforce investment office or the Board's information processing ELECTRONIC TRANSMISSION system, if the electronic record is in a form capable of being processed by that system. A party filing by electronic transmission shall comply with Department instructions concerning format. A party filing an appeal by electronic transmission is responsible for using the proper format and for delay, disruption, interruption of electronic signals and readability of the document and accepts the risk that the appeal may not be properly or timely filed.

(5) PERSONAL DELIVERY TO A WORKFORCE INVESTMENT OFFICE OR THE BOARD. THE FILING DATE WILL BE THE DATE THE APPEAL WAS PERSONALLY DELIVERED TO THE WORKFORCE INVESTMENT OFFICE OR THE BOARD DURING ITS NORMAL BUSINESS HOURS.

§ 101.102. Form and filing of application for further appeal from decision of referee.

A PARTY SHALL FILE AN APPEAL FROM A REFEREE'S DECISION
IN ACCORDANCE WITH § 101.81 (RELATING TO FILING OF APPEAL
FROM DETERMINATION OF DEPARTMENT) AND § 101.82 (RELATING
TO TIME FOR FILING APPEAL FROM DETERMINATION OF
DEPARTMENT). [Information to be included in appeals from decisions of
referees and information to be furnished by the local employment office
representative to be used in completing the appeals shall conform to the provisions
of §§ 101.81 and 101.82 (relating to filing of appeal from decision of Department;
form of appeal from decision of Department).]



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
HARRISBURG, PENNSYLVANIA 17120

THE SECRETARY

July 9, 2003

The Honorable John R. McGinley
Independent Regulatory Review Committee
14th Floor, Harrisstown 2
333 Market Street
Harrisburg, PA 17120

**Re: Final-Form Regulations
Department of Labor & Industry
Unemployment Compensation Board of Review No. 12-59**

Dear Chairman McGinley:

Enclosed are final-form regulations consisting of a preamble, annex and regulatory analysis form. The regulations will amend the current provisions for filing appeals in unemployment compensation matters. Labor and Industry prepared amended regulations which recognize modern methods of filing appeals and provide straightforward rules for determining the timeliness of the appeal, based upon the method of filing used. The changes were drafted based upon, in part, Commonwealth Court cases.

These final-form regulations will amend the *Pennsylvania Code* (34 Pa. Code Chapter 101).

Questions should be directed to Kelly K. Smith, Assistant Counsel, Office of Chief Counsel, Department of Labor & Industry, 10th Floor, Labor & Industry Building, Seventh and Forster Streets, Harrisburg, Pennsylvania 17121 (Telephone 717-787-4186; Fax 717-787-5027; E-mail: kellsmith@state.pa.us).

The Department's staff will provide your staff with any assistance required to facilitate a thorough review of these final-form regulations.

Sincerely,

A handwritten signature in black ink that reads "Stephen M. Schmerin".

Stephen M. Schmerin
Secretary

Enclosures

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 12-059
 SUBJECT: Appeals from determinations of Department
 AGENCY: DEPARTMENT OF LABOR & INDUSTRY

2290

TYPE OF REGULATION

- Proposed Regulation
- X Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation
 - a. With Revisions
 - b. Without Revisions

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 REGULATORY REVIEW COMMISSION

2003 JUL -9 AM 11:33

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FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
7/9/03	<i>Barbara Dysert, AA</i>	HOUSE COMMITTEE ON LABOR RELATIONS
7/9/03	<i>Margaret Eckhart</i>	
7/9/03	<i>James J. Krue</i>	SENATE COMMITTEE ON LABOR & INDUSTRY
7/9/03	<i>Will [Signature]</i>	
7/9/03	<i>Steph J. Hoff</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL
		LEGISLATIVE REFERENCE BUREAU