EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 264, SUPPLEMENT I

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Attached Unemployment; N.C. Gen. Stat. § 96-8(10).

Interpretation No. 264 prohibits the use of wages from an incentive pay plan in adding to the computation of the number of days or hours worked or paid for the unemployment threshold test as set out in N.C. Gen. Stat. § 96-8(10). Although that Interpretation specifically is limited to incentive pay plans, some questions have arisen. An incentive pay plan contemplated under that Interpretation is one in which an employer adds an amount in terms of a portion or percentage of the base hourly wage to the employee's pay due to the employee's meeting or exceeding a certain production or performance standard. The situation then under study involved an employer's request to divide the total wages paid, including the incentive pay, by the base hourly wage to determine the number of hours "effectively" paid during the week in question. All that Interpretation intended as to prohibit an employer's attempt to raise the number of hours for the unemployment threshold test by using such plan.

For example, an employee who actually had worked twenty hours had been paid more than the sum determined by multiplying the twenty hours worked by the base hourly wage because of incentive or production pay. The amount actually paid might have been equal to 24 hours times the base hourly wage, and the employer was attempting to have 24 hours used as the number of hours for determining "unemployment" for purposes of N.C. Gen. Stat. § 96-8(10). Interpretation No. 264 holds to the contrary. It does not address or hold that other pay should be ignored.

N.C. Gen. Stat. § 96-8(10)a.1. and b.2. limit unemployment for attached individuals to instances in which an individual works or is paid "less than three customary scheduled full-time days" or 60% of the customary scheduled full-time hours. See, Interpretation No. 256. Some have concluded from Interpretation No. 264 that unless an attached individual actually works at least the three days or 60% threshold, that individual is unemployed even if paid for more than the regular or customary amount of wages for three days or 60%. The thrust behind Interpretation 264, however, is that an employer cannot use an incentive or production pay plan in adding to the total used for determining the threshold. Any other wages or pay including bonus, vacation pay, etc., however, must be applied in determining whether the three days or 60% has been met.

N.C. Gen. Stat. § 96-8(6)a. provides in pertinent part that "an employee who is on paid vacation or is on paid leave of absence due to illness or other reason shall be deemed to be in employment irrespective of the failure of such individual to perform services for the employing unit during such period." A "leave of absence" is not defined in the Employment Security Law and must therefore be given its customary meaning; that is, leave or permission to the employee from the employer to be absent from work. If the employer pays the employee the regular or customary wages for that period of absence, then that employee is "in employment" and therefore not "unemployed". For example, an employee who works three days (or 60%), is paid vacation or holiday pay for these three days (or 60%), or any combination thereof equaling three days (or 60%), is not within the threshold test for "unemployment."

In determining what wages count, the first consideration is what wage rate the employer customarily uses when it pays its employees for sick leave, holiday pay, vacation pay, etc. This rate must be at least the applicable minimum wage; if not, that applicable minimum wage rate will be used. Next and only for purposes of the three days or 60% test, any incentive or production pay is subtracted from the total pay for the week. It is immaterial what the employer calls the incentive or production pay. For purposes of this Interpretation and Supplement, incentive or production pay means additional wages due to meeting or exceeding any production standard during the period in which the employer calculates the earnings for that period for the employee. Vacation, bonus or any other pay is <u>not subtracted</u>. That sum then is divided by the customary hourly wage rate or applicable minimum wage. If the quotient is at least the equivalent of "three customary full-time days" or 60% of the customary scheduled full-time hours, the employee does not meet the threshold test for "unemployment."

In determining what wages count, the first consideration is what wage rate the employer customarily uses when it pays its employees for sick leave, holiday pay, vacation pay, etc. This rate must be at least the applicable minimum wage; if not, that applicable minimum wage rate will be used. Next and only for purposes of the three days or 60% test, any incentive or production pay is subtracted from the total pay for the week. It is immaterial what the employer calls the incentive or production pay. For purposes of this Interpretation and Supplement, incentive or production pay means additional wages due to meeting or exceeding any production standard during the period in which the employer calculates the earnings for that period for the employee. Vacation, bonus, or any other pay is <u>not subtracted</u>. That sum then is divided by the customary hourly wage rate or applicable minimum wage. If the quotient is at least the equivalent of "three customary full-time days" or 60% of the customary scheduled full-time hours, the employee does not meet the threshold test for "unemployment."

Vacation wages already paid prior to the week in question but attributed by the employer to the week in question also must be used in this determination, unless those wages already have been considered as wages in a test for "unemployment" in a prior week or used as earnings for purposes of N.C. Gen. Stat. § 96-12(c). For example, if vacation pay for two days had been paid several months prior to the week under consideration, but that vacation pay had been used either by the employer or the Commission in determining whether or not the employee then met the test for "unemployment", that vacation pay or wages again cannot be considered or used.

Adopted as an official Interpretation by the Commission on June 9, 1987.