

To: Commission
From: David Liston
Re: LLC Members' Eligibility for Unemployment Compensation
Date: November 5, 2012

MEMORANDUM

Commission Staff monitors case law in the State to identify decisions in which the court calls for Legislative review or action. This memorandum results from one such decision and seeks Commission authorization for a project modifying *N.J.S.A. 43:21-19(i)(7)* to clarify “whether a working member of a limited liability company (LLC) that opted to be treated as a partnership for tax purposes is [e]ligible to receive unemployment compensation after the LLC ceases doing business and the member’s work for the LLC ends.” *Trongone v. Bd. of Review, Dep’t of Labor*, No. 288,316, 2012 WL 2094079, *1 (N.J. Super. Ct. App. Div. June 12, 2012). The Appellate Division considered this question for the first time in *Trongone v. Board of Review, Department of Labor* and, in an unpublished per curiam opinion, concluded that a working member of an LLC that was taxed as a partnership is “ineligible for unemployment benefits.” *Id.* at *7-8.

In *Trongone*, appellant Trongone formed an LLC in 2007 with her then fiancé, and the two elected for the LLC “to be taxed as a partnership.” *Id.* at *1. The primary advantage of this kind of business arrangement is that it shields members from personal liability for the company’s debts, obligations, and other liabilities while allowing members to avoid the double-taxation to which members of a corporation are typically exposed. *Id.* at *6–7. Trongone worked full-time for the LLC, “directing delivery of home health care services.” *Id.* at *1. Despite her partner status for tax purposes, Trongone was on the LLC’s payroll as an employee for a period of one year, and during that time, “[u]nemployment taxes were withheld from her paycheck and, apparently, [the LLC] paid the employer portion of the unemployment taxes.” *Id.*

When the LLC dissolved in 2009, Trongone applied for unemployment benefits. *Id.* After initially being deemed eligible, and after “multiple administrative appeals,” Trongone was ultimately determined by the Department of Labor’s Board of Review to be ineligible to receive unemployment benefits on the basis of her work for the LLC. *Id.* at *1-3. The Appellate Division affirmed this determination as “consistent with the Limited Liability Company Act (LLC Act), *N.J.S.A. 42:2B-1 to -70*, the Unemployment Compensation Law (UCL), *N.J.S.A. 43:21-1 to -24.30*, and the agency’s reasonable interpretation of the UCL as reflected in its regulations.” *Trongone*, 2012 WL 2094079, at *1.

The *Trongone* court viewed the LLC’s tax status as dispositive, stating that “an LLC’s working members stand on equal footing with working partners of a partnership regarding their exposure to unemployment compensation taxes; they are exempt. And, because they are exempt from taxation, it is reasonable for the agency to determine they are exempt from benefits.” *Id.* at *6. Further, working partners are “exempt from the UCL . . . because the law does not recognize an employment relationship where the employer and employee are one and the same.” *Id.* at *6. Additionally, according to the court, the Department of Labor’s regulation stating that “[a]n LLC consisting of two or more members shall be classified as a partnership unless classified otherwise

for Federal income tax purposes,” *N.J.A.C.* 12:16-11.2, “is consistent with the plain language of the LLC Act that ‘[f]or all purposes of taxation,’ *N.J.S.A.* 42:2B-69(a), the LLC should be treated as a partnership, unless it opts for other treatment.” *Trongone*, 2012 WL 2094079, at *6.¹ For these reasons, the court found no error in the Department’s denial of unemployment benefits to Trongone.

In light of the court’s decision in *Trongone* and the fact that the UCL does not explicitly state that working LLC members are ineligible for unemployment benefits where the LLC is taxed as a partnership, Staff seeks guidance from the Commission regarding whether the Commission wishes to modify the UCL to clarify that service performed by such working LLC members does not qualify as employment entitling those members to unemployment benefits. Staff has prepared a draft revision of the relevant UCL subsection, *N.J.S.A.* 43:21-19(i)(7).

DRAFT

N.J.S.A. 43:21-19. Definitions

As used in this chapter (R.S. 43:21-1 et seq.), unless the context clearly requires otherwise:

....

(i)(1) “Employment” means:

....

(7) Provided that such services are also exempt under the Federal Unemployment Tax Act, as amended, or that contributions with respect to such services are not required to be paid into a state unemployment fund as a condition for a tax offset credit against the tax imposed by the Federal Unemployment Tax Act, as amended, the term “employment” shall not include:

....

(AA) Service performed by an individual in the employ of a limited liability company (LLC) while the LLC was classified as a partnership for tax purposes and while the individual was a member of the LLC.

COMMENT

The revision to *N.J.S.A.* 43:21-19(i)(7) clarifies that “a working member of a limited liability company (LLC) that opted to be treated as a partnership for tax purposes is ineligible to receive unemployment compensation after the LLC ceases doing business and the member’s work for the LLC ends.” *Trongone v. Bd. of Review, Dep’t of*

¹ The corresponding provision in the recently enacted Revised Uniform Limited Liability Company Act, P.L. 2012, c.50, § 92(a), retains the language cited.

Labor, No. 288,316, 2012 WL 2094079, *1 (N.J. Super. Ct. App. Div. June 12, 2012). The revision codifies the New Jersey Superior Court Appellate Division's determination of this issue in *Trongone v. Board of Review, Department of Labor*. *Id.*

In *Trongone*, an LLC member worked full-time for the LLC, which had elected to be taxed as a partnership. *Id.* She was included on the company's payroll and had unemployment taxes withheld from her paychecks. *Id.* When the LLC dissolved, the LLC member applied for unemployment benefits. *Id.* The Department initially approved but ultimately denied her application. *Id.* at *2-3. The Appellate Division affirmed this denial. *Id.* After reviewing the Limited Liability Company Act (LLC Act), *N.J.S.A.* 42:2B-1 to -70, the Unemployment Compensation Law (UCL), *N.J.S.A.* 43:21-1 to -24.30, and the Department of Labor's regulations relating to LLC's, *N.J.A.C.* 12:16-11.2, the court concluded that Trongone, being a working partner for tax purposes, was exempt from paying unemployment compensation taxes and was therefore reasonably determined to be exempt from receiving unemployment benefits for her work. *Id.* at *1-3. This revision to *N.J.S.A.* 43:21-19(i)(7) reflects the *Trongone* court's interpretation of the UCL in light of the LLC Act and the Department of Labor's regulations.