

ATTORNEY GENERAL

January 23, 1976

JOSEPH A. HOFFMAN, *Commissioner*
Department of Labor and Industry
Room 1303-Labor and Industry Bldg.
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION NO. 4 – 1976

Dear Commissioner Hoffman:

You have requested an opinion as to the constitutionality of provisions of the New Jersey Unemployment Compensation Law which render pregnant women ineligible for unemployment benefits for a four-week period preceding the expected birth of the child and the four weeks following termination of the pregnancy. You ask in particular whether the statutory provisions in question are consistent with a recent decision of the Supreme Court of the United States invalidating a similar provision of the Utah unemployment compensation law. For the following reasons, you are advised that the statutory provisions in question, subject to the exceptions hereafter noted, appear to be consistent with federal constitutional requirements as set forth in applicable Supreme Court decisions respecting the eligibility of pregnant women for governmental benefits.

The New Jersey Unemployment Compensation Law (N.J.S.A. 43:21-1 *et. seq.*) provides that in order to qualify for unemployment benefits a claimant must, among other things, be "able to work" and "available for work". N.J.S.A. 43:21-4(c). The statute further states, however, that pregnant claimants shall be deemed unable to work and unavailable for work for the four weeks preceding the expected birth of the child and the four weeks following termination of the pregnancy, thereby rendering such claimants by definition ineligible for unemployment benefits. N.J.S.A. 43:21-4(c) (1). Your inquiry is directed to the validity of N.J.S.A. 43:21-4(c) (1) in light of the recent Supreme Court decision in *Turner v. Department of Employment Security*, 423 U.S. 44, 96 S. Ct. 249, 46 L. Ed. 2d 181 (Nov. 17, 1975).

In the *Turner* case, the Court concluded that a Utah statute which denied unemployment benefits to pregnant claimants for twelve weeks preceding the expected date of birth and six weeks after delivery created a "conclusive presumption" that such women were unable to work during the period in question, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution. The Court held that a presumption of inability to work for "so long a period before and after childbirth" was inconsistent with the Court's earlier decision in *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974). In that case, the Court struck down school board maternity leave rules requiring pregnant teachers to quit their jobs four or five months before the expected date of birth and prohibiting their return to work until three months after birth, saying "the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter." Similarly, with respect to the Utah unemployment compensation law, the Court noted in *Turner* that "a substantial number of women are fully capable of working well into their last trimester of pregnancy and of resuming employment shortly after childbirth."

The New Jersey Unemployment Compensation Law does, to be sure, differ from the Utah law invalidated in *Turner* with respect to the number of weeks in

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which pregnant women are deemed incapable of working and therefore ineligible for unemployment benefits, the period of presumed disability being eight weeks in New Jersey compared with eighteen weeks in Utah. Despite this distinction, however, we would—but for the presence of an additional provision to be referred to in a moment—have little hesitancy in concluding that the eight-week period under the New Jersey law would still be too long and therefore unconstitutional under the principles set forth in the *Turner* and *La Fleur* cases. The plain fact, readily perceivable as a matter of common experience, is that a substantial number of pregnant women are able to and do continue working until several days before delivery and are likewise able to return to work soon thereafter. Therefore, the eight-week presumption of incapacity to work contained in the New Jersey Unemployment Compensation Law would, without more, be subject to the same constitutional objections as the Utah eighteen-week presumption invalidated in the *Turner* case.

The New Jersey law, however, departs from the Utah statute and most other state provisions of this kind in one crucial respect. As discussed in our earlier opinion on the payment of disability benefits to pregnant claimants (Formal Opinion No. 1—1975), the Unemployment Compensation Law expressly states that although such claimants are ineligible for *unemployment* benefits for the eight-week period in question, a claimant who suffers a “disability due to pregnancy or resulting childbirth, miscarriage, or abortion” may, if she satisfies the eligibility requirements applicable to all claimants, obtain *disability* benefits, payable in the *same weekly amount*, for the same eight-week period, that is, “the 4 weeks immediately before the expected birth of the child, and the 4 weeks following the termination of the pregnancy.” N.J.S.A. 43:21-4(f) (1) (B).^{*} Disability benefits are payable under N.J. S.A. 43:21-4(f) (1) (B) and 43:21-39(e) for the eight-week period *whether or not* the claimant is *actually* disabled by reason of the pregnancy or its termination. The benefits are paid from the State Disability Benefits Fund rather than the Unemployment Trust Fund. And, as mentioned above, the amount of disability benefits payable for each of the eight weeks in question is identical to the weekly benefit rate under the unemployment compensation program.

Therefore, unlike the Utah provision invalidated by the Supreme Court in the *Turner* case in which female claimants were simply denied unemployment benefits for an eighteen-week period surrounding childbirth, New Jersey claimants *are* eligible for *disability benefits* for the eight weeks surrounding termination of pregnancy under either the Unemployment Compensation Law or the Temporary Disability Benefits Law. And since eligible claimants receive disability benefits for the eight-week period in the same weekly amount as that paid to unemployment compensation claimants, it is immaterial that there is no entitlement to *unemployment benefits* for the eight-week period in question. Consequently, the provisions of the Unemployment Compensation Law which deny unemployment benefits for eight-week period surrounding termination of pregnancy, but which allow disability benefits for the same period, are fully consistent with the requirements of the Fourteenth Amendment to the Constitution as set forth by the Supreme Court in the *Turner* and *La Fleur* cases. Moreover, the provisions in question also appear to be consistent with a new federal law, scheduled to go into effect next year, which explicitly states that “no person shall be denied compensation under [a state unemployment compensation law] solely on the basis of pregnancy or termination of pregnancy.” Unemployment Compensation Amendments of 1975, § 312(a). Female claimants are not “denied compensation” under the New Jersey statutes for the eight weeks surround-

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ing termination of pregnancy, since they are entitled to disability benefits for that period.

Thus far, we have been discussing claims for benefits based on pregnancy and its termination filed under the New Jersey Unemployment Compensation Law. We have concluded that even though claimants are not entitled to unemployment benefits under the statute for the eight weeks surrounding termination of pregnancy, the law is nevertheless constitutional in view of the fact that such claimants may collect disability benefits for that period either under § 4(f)(1)(B) of the Unemployment Compensation Law or under § 39(e) of the Temporary Disability Benefits Law. In addition to the regular unemployment benefits program set forth in the Unemployment Compensation Law, however, there are a number of other federally-funded unemployment compensation programs, including the Federal-State Extended Unemployment Compensation Act of 1970 (P.L. 91-373), the Emergency Unemployment Compensation Act of 1974 (P.L. 93-572), the Emergency Compensation and Special Unemployment Assistance Extension Act of 1974 (P.L. 94-45), the Emergency Jobs and Unemployment Assistance Act of 1974 (P.L. 93-567), and the unemployment benefits programs for federal employees (5 U.S.C. § 8502 *et. seq.*) and for ex-servicemen (5 U.S.C. § 8521 *et. seq.*). While each of these federal programs differs in particulars, they have in common the fact that the governing federal statutes do not themselves set forth the conditions of eligibility for benefits but rather look to the respective state unemployment compensation laws for eligibility criteria. In addition, the programs in question are strictly limited to the payment of *unemployment* benefits, and claimants may *not* apply for *disability* benefits. Therefore, a New Jersey claimant under one of these programs may not seek *disability* benefits under § 4(f)(1)(B) of the New Jersey Unemployment Compensation Law or § 39(e) of the Temporary Disability Benefits Law. At the same time, the Unemployment Compensation Law, as discussed earlier, prohibits the payment of *unemployment* benefits for the eight-week period surrounding termination of pregnancy. You have asked whether the Unemployment Compensation Law, insofar as it denies unemployment benefits under the federal programs in question for the eight-week period at issue, is constitutional.

We conclude that, as thus applied, the statute is inconsistent with the Supreme Court's holdings in the *Turner* and *La Fleur* cases as well as with the new federal law which prohibits the denial of unemployment benefits "solely on the basis of pregnancy or termination of pregnancy." The reasons for this conclusion, including the overlong duration of the eight-week conclusive presumption of incapacity to work embodied in N.J.S.A. 43:21-4(c)(1), have been discussed earlier in this opinion and need not be reiterated. In view of our conclusion that N.J.S.A. 43:21-4(c)(1) is unconstitutional as applied to the federal programs enumerated above, the Department should administer claims for unemployment benefits under these programs without reference to the provision in question. This means that the determination whether a pregnant claimant seeking unemployment benefits under these programs is "able to work" and "available for work" is required by § 4(c) of the Unemployment Compensation Law during the weeks immediately before and after termination of the pregnancy should, like any other claim, be made on an individual basis based on the appropriate medical and other evidence applicable to the particular case.

For these reasons, you are advised that the New Jersey statutory provisions which prohibit the payment of unemployment benefits for an eight-week period surrounding childbirth, miscarriage, or abortion but which allow disability benefits

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for the same period satisfy all federal constitutional requirements and are consistent with § 312(a) of the federal Unemployment Compensation Amendments of 1975. You are further advised that N.J.S.A. 43:21-4(c)(1) is unconstitutional and inconsistent with the foregoing federal statute as applied to claims for unemployment benefits filed under the non-regular federal programs enumerated earlier. Unemployment compensation claims filed under the federal programs in question should be determined without reference to N.J.S.A. 43:21-4(c)(1).

Very truly yours,

WILLIAM F. HYLAND

Attorney General of New Jersey

By: MICHAEL S. BOKAR

Deputy Attorney General

* We are advised that the Division of Unemployment and Disability Insurance has construed the quoted portion of § 4(1)(B) of the Unemployment Compensation Law, as well as identical provisions of the Temporary Disability Benefits Law (N.J.S.A. 43:21-29 and 43:21-39(e)), to permit the payment of disability benefits for the four weeks *preceding* termination of the pregnancy only where childbirth actually occurs. On the other hand, the Division allows disability benefit payments for the four weeks after termination of pregnancy irrespective of whether the termination is the result of childbirth, miscarriage, or abortion. In making this distinction between the four-week periods before and after termination of pregnancy, the Division has relied on the use of the words "expected birth" in the first part of the provisions in question, in contrast to the more general language "termination of the pregnancy" found in the last portion of the same provisions.

Although the language of the provisions in question is concededly ambiguous, we cannot concur in the restrictive interpretation accorded them by the Division, particularly in light of the legislative mandate in favor of the liberal construction of the Unemployment Compensation Law and of the Temporary Disability Benefits Law. N.J.S.A. 43:21-2 and 43:21-26. The Division's narrow interpretation of the basis for payment of benefits for the four weeks before termination of pregnancy pays insufficient homage to the broad reference at the outset of both N.J.S.A. 43:21-4(f)(1)(B) and 43:21-39(e) to "disability due to pregnancy or resulting childbirth, *miscarriage, or abortion.*" Furthermore, the Division's interpretation might well be open to constitutional challenge on grounds of arbitrariness, because no reason suggests itself why miscarriage or abortion should be treated differently from normal childbirth for the four weeks before termination of pregnancy when they are treated the same as childbirth for the four weeks after termination. Therefore, it would be more consonant with the purposes of the two statutes to construe the words "expected birth" to include termination of pregnancy by miscarriage or abortion as well as by childbirth.