

1976 Draft Language

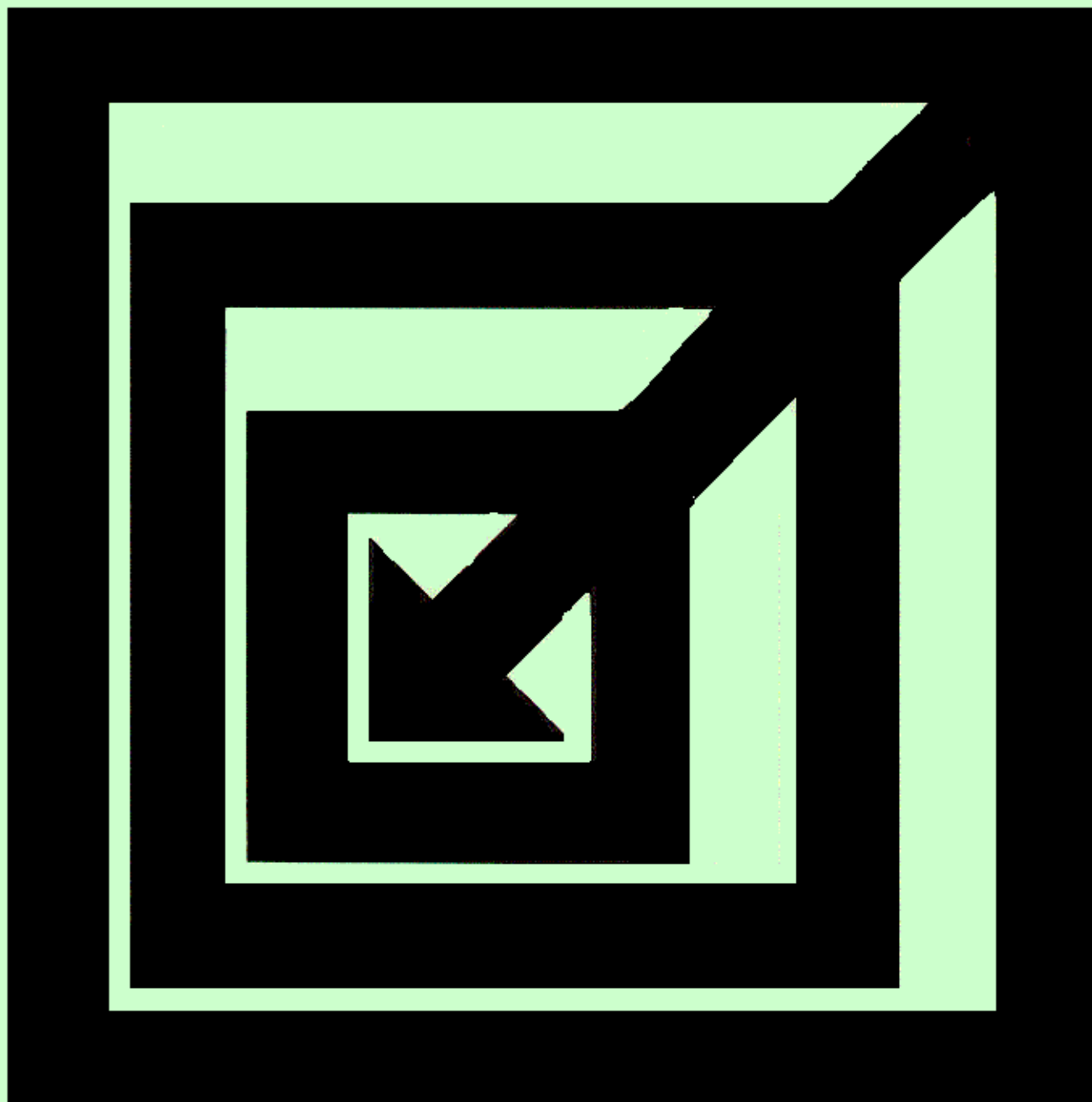
The Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976- P.L. 94-566 (1976 Draft Language), its five supplements and an errata sheet were originally issued from 1976 through 1978. Except as noted, these documents are presented here as originally issued. As underlying Federal law may have changed, the positions stated in these documents should be checked with subsequent Departmental issuances. Note the following:

- Although page and paragraph breaks will agree with the original documents, line breaks may not.
- The errata sheet is included at the end of the 1976 Draft Language.
- Although the page numbering in Supplement #2 is non-consecutive, no pages are missing.
- The last six pages of Supplement #3 have been omitted. These pages reproduced Immigration and Naturalization Service forms current in the 1970's.
- An index to the 1976 Amendments and its five supplements is included as a separate document.

Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976-P.L. 94-566



U. S. Department of Labor
Employment and Training Administration
Unemployment Insurance Service



PREFACE

This is a compilation of draft legislation for State use in implementing the provisions of the "Unemployment Compensation Amendments of 1976" (Public Law 94-566 hereafter referred to as the 1976 Amendments) into the Federal-State unemployment insurance system. Also included is commentary explaining the suggested draft language. This document is intended as an aid to States in making appropriate and necessary amendments to their unemployment insurance laws.

The text draft provisions and commentary are keyed to Draft Legislation to Implement the Employment Security Amendments of 1970 (hereafter referred to as 1970 Draft Legislation) which in turn is keyed to the Manual of State Employment Security Legislation, Revised September 1950 (hereafter referred to as 1950 Manual). In many instances the draft provisions are modifications of provisions appearing in the 1970 Draft Legislation. In using this compilation reference should be made to the 1970 Draft Legislation for full understanding of the draft provisions and commentary.

The section on Extended Benefits has not been assigned a number because no number was assigned the comparable section in the 1970 Draft Legislation.

Not all of the provisions of P.L. 94-566 (the 1976 Amendments) are reflected in this compilation since a number of them relate to Federal action and do not involve or are not susceptible to implementation by State legislation. Among them are such provisions as those relating to Federal reimbursement for the cost of benefits to newly covered workers on or after January 1, 1978, based on wages earned in previously uncovered work prior to that date; extension of SUA (with some modifications) until December 31, 1977, and termination of the program for all claimants on June 30, 1978; increase in new FUTA tax from 0.5 percent to 0.7 percent effective January 1, 1977; authority to request Federal Unemployment Trust Fund loans for a 3-month period instead of on a month-to-month basis; change in Federal reimbursement formula for UCFE-X benefit costs from added cost to proportionate method; and repeal of the UCFE finality provision.

PREFACE

The provisions in Title III of the 1976 Amendments relating to denial of benefits solely on the basis of pregnancy or termination of pregnancy, and directing denial of benefits to professional athletes between seasons and to certain aliens, are requirements for certification of the States on October 31, 1978. Accordingly, State laws should make these requirements effective January 1, 1978. For those States whose legislatures do not meet in 1977, the provisions may be effective January 1, 1979, to permit legislative action in 1978.

Title III also contains an FUTA requirement that retirement pensions and annuities be deducted from unemployment benefits. This requirement applies to weeks which begin after September 30, 1979, to allow time for the National Commission on Unemployment Compensation, established by Title IV, to study the issue and the Congress to act in the light of the Commission's findings and recommendations. For this reason, only commentary, but no draft language, has been provided.

Section 507 requires that AFDC payments be denied for any week with respect to which a child's father qualifies for unemployment insurance but refuses to apply for or to accept such unemployment insurance. It also requires that AFDC otherwise payable be reduced by the amount of any payment under "an unemployment compensation law of a State or of the United States." Provision is further made, where possible, for a joint agreement between the Secretaries of HEW and Labor with each State for a single registration for work that will meet the requirements of AFDC, WIN, and UI.

Section 508 amends the Wagner-Peyser Act to require that State employment offices furnish to public agencies administering aid for dependent children and child support programs, upon request, information as to (1) whether an individual has applied for, is receiving or has received unemployment insurance and the amount; (2) the individual's current address; and (3) whether the individual has refused employment and if so a description of the job including the terms, conditions and rate of pay. Such information is compiled and maintained by the unemployment insurance agency and under current interpretations of section 303 (a) (1), Social Security Act, could be furnished to the employment service or to the public agencies directly since it would be a disclosure of information to a public

PREFACE

official in the performance of public duties. State agencies should review their provisions concerning disclosure of unemployment insurance information to assure that their laws permit such disclosure. If the statute does not permit such information to be furnished to the employment service for such purposes, the law should be appropriately amended to include such permission so that the employment service can meet its obligation under the new requirement.

There are other provisions in Title V concerning the supplemental security income and aid to dependent children programs which are not related to the unemployment insurance program. These provisions are not part of the "Unemployment Compensation Amendments of 1976" and do not need implementation in State unemployment insurance statutes.

In using this compilation to aid in amending their laws to meet the new FUTA requirements of the 1976 Amendments, States should recognize that despite the effort to make the compilation comprehensive, not all the variations in State laws can have been taken into account. The provisions of State laws are too diverse to permit this. States need to consider all aspects of their laws and both the direct and indirect implications of provisions designed to implement the 1976 Amendments.

The Federal fiscal year has been changed from July 1/June 30 to October 1 /September 30. As a result, the draft language for Reed Act enabling legislation and appropriation bills will need to be revised. Such revised provisions and commentary will be issued as soon as possible.

Following is a summary of the provisions of the 1976 Amendments. It should be used as an informal summary only. In preparing needed amendments to the State law, the draft provisions herein and the actual text of the provisions in P.L. 94-566 should be used to the maximum extent possible within the context of the structure of the State law.

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SUMMARY AND ANALYSIS
Public Law 94-566
Unemployment Compensation Amendments of 1976
Approved October 20, 1976

TITLE I - EXTENSION OF COVERAGE
Agricultural Workers

Public Law 94-566 extends coverage to agricultural workers of employers with 10 or more workers in 20 weeks or who paid \$20,000 or more in wages for such service in any calendar quarter. However, it permits exclusion from coverage for 2 years of nonresident aliens admitted temporarily to the United States to perform contract agricultural work under section 214 (c) and 101 (a) (15) (H) of the Immigration and Nationality Act. Under P.L. 94-566, the farm operator would be deemed the employer if farm labor is supplied by a crew leader, unless:

- (1) crew leader is registered under the Farm Labor Contractor Registration Act; or
- (2) substantially all the workers supplied by the crew leader operate or maintain tractors, harvesting equipment, crop-dusting equipment or other mechanized equipment.

EFFECTIVE DATE: January 1, 1978

PRIOR LAW. Services performed in agricultural labor were not subject to Federal law. Accordingly, there were no relevant requirements relating to nonresident aliens or crew leaders. As to crew leaders, they were deemed to be employers for social security purposes and are thereby responsible for collecting and reporting OASDI taxes. Agricultural workers were covered under the UI laws of the District of Columbia, Minnesota, Hawaii, Puerto Rico, and California (effective on expiration of SUA program).

Of the 1,159,000 hired agricultural employees in the United States, 755,000 were excluded from coverage under State UI laws. P.L. 94-566 brings 220,000 into state UI coverage and 459,000 into coverage under the Federal Unemployment Tax Act (FUTA). P.L. 94-566 makes only 2 percent of farm employers (17,400) subject to the FUTA.

Summary and Analysis

Domestic Workers

P.L. 94-566 extends coverage to domestic workers of employers who paid \$1,000 or more cash remuneration for such services in any calendar quarter.

EFFECTIVE DATE: January 1, 1978

PRIOR LAW. Services performed by domestic workers were not subject to Federal law. Domestic workers were covered in the District of Columbia and New York if the employer's quarterly payroll for domestic service is at least \$500; Hawaii, if the employer's quarterly payroll is at least \$225; and Arkansas, if the employer's quarterly payroll is \$500 or he employs three or more domestic workers.

Unemployment insurance protection is extended to about 130,000 workers, about 11 percent of all employment in domestic service. The domestic workers covered by this provision have demonstrated substantial labor force attachment in the States which now cover such employment. They include chauffeurs, social secretaries, cooks, maintenance workers and others who would be covered under present law if they worked in commercial or nonprofit establishments. The calendar quarter payroll criterion was set at \$1,000 in order to exclude the household which employs a single-day worker each week.

Employees of State and Local Governments, and Nonprofit Elementary and Secondary Schools

P.L. 94-566 requires, as a condition for tax credit, State extension of coverage to State and local government employees. The following exceptions are permitted:

- (1) elected officials or officials in nontenured major policy-making and advisory positions and policy-making and advisory positions which require less than 8 hours of work a week;
- (2) members of a legislative body or the judiciary;
- (3) members of the State National Guard or Air National Guard;
- (4) emergency employees hired in case of disaster; and
- (5) inmates in custodial or penal institutions.

Summary and Analysis

P.L. 94-566 also requires, as a condition for tax credit, State extension of coverage to employees of nonprofit elementary and secondary schools.

Between terms denial of benefits to school employees.

The bill prohibits payment of benefits based on services performed for educational institutions in instructional, research, or principal administrative capacities during periods between academic years or terms if an individual has either a contract or a reasonable assurance of employment for both the prior and forthcoming academic terms. It permits States to deny benefits based on services performed for educational institutions during periods between school terms to nonprofessional employees of primary and secondary educational institutions if an individual was employed at the end of the prior term and there is a reasonable assurance he or she will be so employed during the forthcoming term.

EFFECTIVE: January 1, 1978

PRIOR LAW. Only coverage of employees of State hospitals and institutions of higher education was mandatory. Coverage of other State and local government employees was left to the option of the States. Twenty nine States covered substantially all State government employees and eight States covered most local government employees. Federal law requiring State coverage of employees in higher education provided for denial of benefits based on services performed for such institutions during periods between terms to employees in instructional, research or principal administrative capacities, if the individual has a contract for the prior and forthcoming terms. Coverage of nonprofit elementary and secondary school employees was not mandatory under prior Federal law. Coverage was required for certain other nonprofit organizations (including institutions of higher education) which employ 4 or more workers in 20 weeks.

Unemployment compensation protection is extended to approximately 600,000 jobs in State government and some 7.7 million jobs in local governments. The prior limitations on the payment of benefits between school terms to certain categories of college and university employees is extended to instances

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where there is no contract, but there is a reasonable assurance of reemployment. These provisions prohibit the payment of benefits based on services performed for an institution of higher education in an instructional, research, or principal administrative capacity during the period between academic years or terms, if an individual has either a contract or a reasonable assurance to perform similar services for both such year or terms for any institution of higher education. This section extends these provisions to instructors, researchers, and administrators in all educational institutions. Thus, a teacher in a secondary school with a contract for both terms or a reasonable assurance of being rehired will be treated during periods between such terms the same as a college instructor.

Financing of Coverage for Governmental Entities

P.L. 94-566 permits governmental entities at their option (rather than at State option) to reimburse the State fund for the actual cost of benefits paid to their employees rather than paying taxes to the State.

EFFECTIVE DATE: For 1978 certification for services performed after December 31, 1977.

PRIOR LAW. Where coverage was provided under State law to its own employees and those of its political subdivisions, the State determined how benefits were to be financed.

This amendment extends to governmental entities an option already provide to private, nonprofit organizations in the 1970 Employment Security Amendments.

Summary and Analysis

Virgin Islands

P.L. 94-566 permits the Virgin Islands to become part of the Federal-State unemployment insurance system.

EFFECTIVE DATE: One day after the Secretary of Labor approves the Virgin Islands' law.

PRIOR LAW. The territory of the Virgin Islands was not considered a "State" for purposes of participating in the Federal-State unemployment insurance system.

The territory does have its own unemployment compensation program and participates in the Special Unemployment Assistance (SUA) program. Also, the Secretary of Labor is authorized to loan up to \$15 million to the Virgin Islands to enable it to continue paying benefits under its unemployment compensation program. These loans are interest free until January 1, 1979. After that date, interest will be charged on any outstanding loan. If the Virgin Islands is incorporated into the Federal-State unemployment insurance system, any outstanding loans at that point will be treated as though the Virgin Islands had been in the system. This means that, if the time for repayment has elapsed and any part of the loan remains outstanding, the increased Federal unemployment tax rates provided for in existing law for the purpose of recapturing overdue loans would immediately go into effect. As of October 1, 1976, the Virgin Islands had borrowed \$7.1 million.

Summary and Analysis

Effective Dates and Transition Provisions for Extending Unemployment Compensation Coverage

P.L. 94-566 makes provision for extending coverage to farm, domestic, nonprofit elementary and secondary school, and State and local government employees, effective January 1, 1978. If a State agrees to pay benefits to qualified, newly covered workers as of January 1, 1978, benefits paid would be reimbursed under certain circumstances from general Federal revenues.

Previously uncovered services will be treated as reimbursable:

- (1) if such services were performed –
 - (A) before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978; or
 - (B) before January 1, 1978, in the case of a week of unemployment beginning after July 1, 1978, and
- (2) To the extent that assistance under title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (SUA) was not paid to such individual on the basis of such service.

A State may, by law, provide:

- (1) The experience rating account of any employer will not be charged with respect to such reimbursable payments based on previously uncovered employment.
- (2) Similarly, a nonprofit organization which makes payments to the State unemployment fund in lieu of contributions will not be liable to the extent that such compensation would not have been payable had the State not provided for payment on the basis of previously uncovered services which are reimbursable.

Special Unemployment Assistance (SUA) is extended until December 31, 1977, for new claims and the program will terminate for all claimants on June 30, 1978.

Summary and Analysis

P.L. 94-566 provides that benefits will be based on the State's own base period and no benefits to school employees will be payable between successive terms to instructors, researchers and principal administrators who have contracts for both terms, or to other school employees if there is a reasonable assurance of reemployment in the next academic term.

EFFECTIVE DATE: Weeks of unemployment after October 20, 1976.

PRIOR LAW. SUA covered those workers not covered by the permanent Federal-State unemployment insurance program. All program costs are reimbursed from general Federal revenues. SUA was due to expire December 31, 1976, for new claims.

Transition Provisions for Nonprofit Employers

P.L. 94-566 permits newly covered nonprofit employers who had already covered their employees and financed the benefit costs by the contribution method to transfer any accumulated balance to their accounts if they choose to switch to the reimbursement method of financing after enactment of the bill.

EFFECTIVE DATE: Date of enactment of State law provision.

PRIOR LAW. A similar transition provision was enacted in the 1970 Employment Security Amendments.

TITLE II - PROVISIONS RELATING TO FINANCING

Increasing the FUTA Taxable Wage Base

P.L. 94-566 increases the taxable wage base from \$4,200 to \$6,000.

EFFECTIVE DATE: January 1, 1978

PRIOR LAW. The FUTA tax base was the first \$4,200 of wages paid to an employee in a calendar year.

Increasing the New FUTA Tax Rate and the Proportion of FUTA Revenues Allocated to the Federal Extended Unemployment Compensation Account (EUCA)

P.L. 94-566 increases the net Federal tax rate from 0.5 percent to 0.7 percent and reduces it back to 0.5 percent

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after all advances to the Federal extended unemployment compensation account have been repaid. The proportion of FUTA revenues allocated to the Federal extended unemployment compensation account is increased from 1/10th to 5/14ths as long as the net Federal tax rate is 0.7 percent.

EFFECTIVE DATE: January 1, 1977.

PRIOR LAW. The net FUTA tax rate was 0.5 percent. The proportion of revenues allocated to the EUCA account was 1/10th.

The unemployment compensation program is not now self supporting. The financial structure of the system is seriously threatened.

Twenty-one States have depleted their unemployment compensation funds (this will increase to as many as 24 by the end of calendar year 1976) and are now forced to borrow from the Federal loan fund. As of October 1, 1976, the 21 States with depleted funds have borrowed \$3.1 billion from the loan funds.

The Federal Unemployment Account (from which the States with depleted trust funds borrow money) and the Extended Unemployment Compensation Account (which finances the Federal share of the extended benefits program and the entire payment of Federal Supplemental Benefits) are both depleted and have borrowed from Federal general revenues. Under the existing tax base (\$4,200) and net Federal tax rate (0.5 percent), the Federal unemployment compensation trust funds will have a deficit of \$10.1 billion at the end of 1978.

Under P.L. 94-566 the Federal accounts will have a deficit of \$9.5 billion at the end of 1978, decreasing to \$5.1 billion at the end of 1981. The State accounts will be less significantly affected, because a number of States have taken action to raise the taxable wage base beyond \$4,200.

Summary and Analysis

The increase in the taxable wage base to \$6,000 will be effective only from January 1, 1978. This lag is necessary in order for those States with a lower base to increase their state wage base to \$6,000 and thereby assure their employers a full offset credit against the Federal (FUTA) base. (Thirty-nine States provide for an automatic increase in the State unemployment compensation wage base when the Federal wage base is increased.) The increase in the Federal tax rate, which does not require implementing State legislative action, will be effective at the earliest possible date, January 1, 1977. These changes will raise an additional \$3.3 billion (\$1.3 billion in Federal revenue and \$2.0 billion in State revenues) in Fiscal Year 1979, the first full year in which the change is effective.

Financing of Extended Benefit Costs Attributable to State and Local Governments

P.L. 94-566. Revises the definition of "shareable benefits" under the Federal-State extended benefits program to eliminate any sharing of extended benefit payments by the Federal Government based upon services performed by workers in State and local government.

EFFECTIVE DATE: Weeks of unemployment after January 1, 1979.

PRIOR LAW. The cost of benefits paid under the Federal extended benefits program (benefit weeks 27-39) was shared 50 percent from State unemployment insurance funds and 50 percent from the Federal Extended Unemployment Compensation Account.

The Federal share of benefits paid under the extended benefit program are financed out of revenues raised under FUTA. State and local governments, including those that currently provide unemployment compensation protection for their employees, do not pay this tax and are not now required to do so. Therefore, the Federal share of extended benefits attributable to their employees will not be financed out of the Federal unemployment compensation tax revenues. States, or State and local governments, will have to absorb these costs.

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Change in Procedure for Federal Unemployment Compensation Advances to States

P.L. 94-566 requires that States request loans from the Federal Unemployment Trust Fund to pay benefits for a 3-month period, rather than a 1-month period, but funds will continue to be made available on a month-to-month basis.

EFFECTIVE DATE: October 20, 1976.

PRIOR LAW. Under prior Federal law, a State must apply for Federal unemployment compensation loans on a month-to-month basis.

Change in Reimbursement Method of Unemployment Compensation Benefits Paid to Federal Civilian Employees and Ex-servicemen

P.L. 94-566 provides prorata sharing of benefit costs when an individual's unemployment benefits are based on both Federal and non-Federal employment. The Federal share of the cost would be based on the ratio of Federal wages to total base period wages.

EFFECTIVE DATE: For new claims filed after July 1, 1977.

PRIOR LAW. The Federal Government reimbursed the State for "added cost" when an individual's unemployment compensation payments were based in part on Federal employment.

TITLE III - BENEFIT PROVISIONS

Modification of Trigger Provisions in the Extended Benefits Program

P.L. 94-566 modifies the triggers in the extended benefits program to provide for the payment of extended

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benefits (benefit weeks 27-39) in a State when either of the following conditions is met:

- (1) there is a seasonally adjusted national insured unemployment rate of 4.5 percent, based on the most recent 13-week period; or
- (2) the unadjusted State insured unemployment rate is 4.0 percent, and the rate is 20 percent higher than the State's average insured unemployment rate for the corresponding 13-week period in the two preceding years. However, this latter condition may be waived by State law whenever the unadjusted insured unemployment rate is 5 percent or more.

EFFECTIVE DATE: Weeks of unemployment after December 31, 1976, for national trigger and March 30, 1977, for State trigger.

PRIOR LAW. The extended benefits program provided for the payment of extended benefits (benefit weeks 27-39) in a State when either of the following conditions was met:

- (1) there is a seasonally adjusted national insured unemployment rate of 4.5 percent for 3 consecutive months (4.0 percent at State option until December 31, 1976); or
- (2) the unadjusted State insured unemployment rate has averaged 4.0 percent for 13 consecutive weeks; and the rate is 20 percent higher than the State's average insured unemployment rate for the corresponding 13-week period in the two preceding years. (The 120 percent factor may be waived by a State until March 31, 1977.)

The intent of the trigger mechanism contained in the 1970 Amendments was to establish an extended benefit program which would provide early response to adverse economic conditions and end when the need had passed. The triggers have been unsatisfactory, particularly during periods when high unemployment has continued over a protracted period. Specifically, the 120-percent factor would have prevented payment of extended benefits on several occasions in States

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where the unemployment rate was high and payment of extended benefits appeared appropriate. For example, if the national trigger was not on, a State with a 10 percent unemployment rate for 2 successive years would trigger off extended benefits at the beginning of the third year unless the rate increased to 12 percent, or 20 percent higher than the preceding 2 years. Since enactment in 1970, Congress has legislated on seven different occasions to waive the 120 percent factor in order to permit payment of extended benefits. P.L. 94-566 allows a State to waive this requirement whenever the insured unemployment rate is 5 percent or more.

Prohibition of Disqualification for Pregnancy

P.L. 94-566 prohibits disqualification for unemployment compensation benefits solely on the basis of pregnancy.

EFFECTIVE DATE; Certification of State laws for 1978 (January 1, 1978).

PRIOR LAW. Thirteen States have special disqualification provisions pertaining to pregnancy. Several of these provisions hold pregnant women unable to work and unavailable for work; the remainder disqualify a claimant because she left work on account of her condition or because her unemployment is a result of pregnancy.

Under eligibility provisions applicable to all claimants, including pregnant women, anyone who is physically unable to work or who is unavailable for work is ineligible for benefits. These determinations are made on the basis of the facts of each individual case and make special disqualifications because of pregnancy discriminatory and unnecessary.

Modification of Appellate Rights of Federal Employees

P.L. 94-566 affords Federal employees the same unemployment compensation appeal procedures available to other unemployment compensation claimants in contesting the determination of the employing agency on the issue of cause of separation from work and work history.

EFFECTIVE DATE: October 20, 1976.

Summary and Analysis

PRIOR LAW. With respect to claims for benefits under Unemployment Compensation for Federal Employees (UCFE), the findings of the Federal employing agency regarding performance and periods of Federal service, amount of Federal wages, and reasons for termination of service were final.

Title III of the Social Security Act, section 303 (a), sets forth the requirements a State unemployment compensation law must meet in order to qualify for administrative grants. It requires that the State law must provide:

"(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment are denied;"

In this context, fair hearing has been understood to mean that decisions on benefit appeals must be based on facts found by an impartial tribunal at a hearing on the appeal at which all interested parties have an opportunity to appear and be heard. With respect to Federal employees, the "finality" provision required that facts critical to the disposition of the case, particularly the employing agency's reasons for separation from employment, must be accepted by the tribunal.

P.L. 94-566 gives Federal employees the same fundamental right to fair hearing and adjudication of contested claims required for all other covered employees, including the right to challenge an employer's version of the facts and have the tribunal itself find the facts on the basis of the testimony presented at the hearing.

Denial of Benefits to Professional Athletes, Illegal Aliens, and Retirees

P.L. 94-566 requires that State UI laws prohibit payment of benefits:

(1) to a professional athlete between successive seasons who has "a reasonable assurance" of reemployment;

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- (2) to an alien not lawfully admitted to the United States for permanent residence;
- (3) to a retiree whose weekly pension exceeds his weekly benefit amount. The weekly benefit amount shall be reduced by amount of weekly pension.

EFFECTIVE DATE: The restriction on payments to professional athletes and illegal aliens is effective January 1, 1978. If the State legislature does not meet in 1977, the effective the effective date is January 1, 1997. Restrictions on payments to retirees are effective for weeks beginning after September 30, 1979.

PRIOR LAW. No Federal requirements. The Wisconsin unemployment insurance law specifically prohibits payment of benefits to a professional athlete during the periods of a contract. Other States make a similar finding by regulation or administrative policy. In general, States apply, as appropriate, the universal requirements that a claimant be unemployed, able to work, available for and seeking work. Thirty-five State laws provide for a reduced benefit payment to pension recipients. Most States, however, limit the deduction to pension plans financed by a base period employer. Twelve States also consider social security payments in determining the weekly benefit amount.

According to the Federal law provision, any data or evidence of citizenship or permanent residence would have to be uniformly required of all applicants for unemployment insurance. A determination of whether an individual is an illegal alien would be based on a preponderance of evidence.

Summary and Analysis

TITLE IV - NATIONAL COMMISSION ON UNEMPLOYMENT INSURANCE

P.L. 94-566 establishes a 13-member commission to study and report on the unemployment insurance program, with an interim report by March 31, 1979. Members to be appointed: 7 by the President who designates the Chairman, and 3 each by the President Pro Tempore of the Senate and Speaker of the House of Representatives. Commission is directed to study and evaluate the present unemployment compensation programs in order to assess the long-range needs of the programs, to consider alternatives and to recommend any appropriate changes.

The unemployment compensation program is now 40 years old. There is general agreement on the desirability of a comprehensive review and the development of a set of recommendations on the future of its mission.

TITLE V - MISCELLANEOUS PROVISIONS

Aid to Families with Dependent Children--Unemployed Fathers

P.L. 94-566 requires an unemployed father who is eligible for both unemployment insurance and AFDC-UF to collect any unemployment insurance to which he is entitled before receiving any AFDC-UF. Also authorizes the Secretaries of Labor and Health Education and Welfare to enter into agreements under which a single registration for work would satisfy the requirements of the Work Incentive Program and the unemployment insurance program.

EFFECTIVE DATE: Weeks beginning in months after the date of enactment.

PRIOR LAW. No provision.

Prior to a decision of the Supreme Court in 1975. States generally required individuals eligible for both unemployment insurance and public assistance to seek benefits under the unemployment insurance system first. The Supreme Court, however, ruled that an unemployed father should be given the right to choose which program would be of most benefit to him. This change would allow States to require unemployed fathers to exercise their unemployment insurance rights first and to have their benefits supplemented by public assistance, if that amount would be greater.

Summary and Analysis

State Employment Offices to Supply Data on Aid of Administration of AFDC and Child Support Programs

P.L. 94-566 requires State employment offices to furnish, upon request of any public agency administering the AFDC and child support programs, any information in their possession relating to individuals: (1) who are receiving, have received, or have applied for unemployment insurance; (2) the amount of benefits being received; (3) the current home address of such individuals; and (4) whether any offer of work has been refused and, if so, a description of the job and the terms, conditions, and rate of pay therefor. Also, P.L. 94-566 authorizes the reimbursement of State employment offices for the cost of furnishing such information.

PRIOR LAW. No Federal requirement. Most State laws, however, provide for cooperation with public welfare agencies, but generally, there are no details on the extent of that cooperation or provisions for reimbursement.

NOTE

An asterisk (*) beside any statutory provision indicates the provision has been changed from the version appearing in the 1950 Manual, or the 1970 Draft Legislation, or is new.

Section 2 (i)

Definitions: "Employer"

(Section 3306 (a) (1), 3306 (a) (2) and (3), FUTA)

(Second Definition)

(i) "Employer" means:

(1)

* (2) Any employing unit for which service in employment as defined in section 2 (k) (1) (B)¹ is performed, except as provided in paragraph (5) of this subsection.

* (3) Any employing unit for which service in employment as defined in section 2 (k) (1) (C)² is performed after December 31, 1971, except as provided in paragraph (5) of this subsection.

* (4) (A) Any employing unit for which agricultural labor as defined in section 2 (k) (1) (E)³ is performed after December 31, 1977.

(B) Any employing unit for which domestic service in employment as defined in section 2 (k) (1) (F)⁴ is performed after December 31, 1977.

¹ State and local coverage.

² Nonprofit coverage.

³ Agricultural labor coverage.

⁴ Domestic service coverage.

Section 2 (i) (5) (A)
Definitions: "Employer"

* (5) (A) In determining whether or not an employing unit for which service other than domestic service is also performed is an employer under paragraphs (2), (3), or (4) (A) of this subsection, the wages earned or the employment of an employee performing domestic service after December 31, 1977, shall not be taken into account.

(B) In determining whether or not an employing unit for which service other than agricultural labor is also performed is an employer under paragraphs (3) and (4) (B) of this subsection, the wages earned or the employment of an employee performing service in agricultural labor after December 31, 1977, shall not be taken into account. If an employing unit is determined an employer of agricultural labor, such employing unit shall be determined an employer for the purposes of paragraph (2) of this subsection.

Note: Current sections 2 (i) (4) through 2 (i) (11) in the 1970 Draft Legislation are redesignated as sections 2 (i) (6) through 2 (i) (13).

Summary and Analysis

Commentary – Section 2 (i)

Definitions: “Employer”

(i) Employer.--The 1976 Amendments broadened coverage under FUTA to include:

1. Employing units paying \$20,000 or more in cash to workers for agricultural labor in any quarter in the current or preceding calendar year, or who employ 10 or more workers in agricultural labor on 20 days in 20 different weeks during the current or preceding calendar year; and
2. Employing units paying \$1,000 or more in cash or domestic service in any quarter during the current or preceding calendar year.

Coverage required under State laws as a condition for tax offset credit has also been extended by the 1976 Amendments to include:

1. State and local governmental units, including elementary and secondary schools (with specified services which may be excluded at the State's option).
2. Nonprofit elementary and secondary schools (with certain permitted exclusions to coverage of nonprofit organizations at the State's option).

Paragraph (5) in section 2 (i) reflects the amendment to section 3306 (a), FUTA, excluding wages and employment in domestic service and agricultural labor (unless covered separately) from the general determination of whether an employing unit meets the \$1,500 or employment in 20 weeks test of an "employer." See page 32.

Section 2 (i) (2), the definition of employer with respect to State and local governments, differs from that in the 1970 Draft Legislation in that the phrase "after December 31, 1971" has been deleted. The definition of "employment" to which it refers distinguishes between the pre-1978 coverage and that required after December 31, 1977.

Summary and Analysis

Commentary -- Section 2 (i) (3)

Definitions: "Employer"

The definition of a nonprofit employer in section 2 (i) (3) remains the same as in the 1970 Draft Legislation. The change in coverage to include elementary and secondary schools is incorporated by the change in section 2 (k) (1) (D) (iii).

Section 2 (i) (4) (A), the definition of employer for purposes of agricultural coverage, is new and refers to the definition of agricultural labor in section 2 (k) (1) (E).

Section 2 (i) (4) (B), the definition of employer with respect to domestic service, refers to the definition of domestic service in section 2 (k) (1) (F).

The definition of domestic service is included in the definition of employment, rather than a modified exclusion as in section 3306 (c) (2), FUTA, so that domestic service is excluded only if cash remuneration of less than \$1,000 is paid in a calendar quarter of the current or preceding calendar year.

The Federal unemployment tax will be imposed on wages paid for domestic service, but only with respect to cash remuneration. Once this coverage requirement is met solely on the basis of cash, the federal tax applies to both cash and other remuneration. A State may choose to include remuneration other than cash for coverage, contributions and benefit purposes. If a State chooses to include remuneration other than cash, an employer of domestic service would become subject to the State tax sooner than to the Federal tax. This is unlike the provisions concerning agricultural labor in which only cash remuneration is considered subject for Federal tax purposes.

It should be noted that State law provisions on termination of coverage may need revision to reflect the 1976 Amendments. These provisions usually require termination of coverage of employers either upon their application or upon the initiative of the agency when certain findings are made with

Commentary -- Section 2 (i) (5)

Definitions: "Employer"

respect to the number of workers employed or the amount of wages paid, depending upon the applicable coverage provisions. These provisions should be carefully reviewed to determine whether they are adequate to prevent improper termination of employer status in view of changed provisions for coverage effective January 1, 1978.

A State law or regulation may, for example, provide essentially for termination if an employer has not in the current or preceding calendar year paid for service in employment wages of \$1,500 or more, or had in employment at least one individual in each of 20 different weeks in such period. Such a condition for termination does not take into account the new FUTA coverage of domestic service. Appropriate alternative conditions for termination of coverage should be included.

Section 2 (k) (1)

Definitions: "Employment"

(Section 3306 (c), 3306 (o), FUTA)

(Short Form)

(k) (l) "Employment" means:

* (A) Any service performed prior to January 1, 1978, which was employment as defined in this subsection prior to such date and, subject to the other provisions of this subsection, service performed after December 31, 1977, by an employee, as defined in subsections (i)¹ and (o)² of section 3306 of the Federal Unemployment Tax Act, including service in interstate commerce.

(Long Form)

(k) (l) "Employment" means:

* (A) Any service performed prior to January 1, 1978, which was employment as defined in this subsection prior to such date and, subject to the other provisions of this subsection, service performed after December 31, 1977, including service in interstate commerce, by

(i) any officer of a corporation; or

(ii) any individual who, under the usual common law rules applicable in determining the employer- employee relationship, has the status of an employee; or

¹ Definition of employee.

² Crew leader provisions.

Section 2 (k) (1) (A) (iii)

Definitions: " Employment"

(iii) any individual other than an individual who is an employee under subdivision (i) or (ii) who performs services for remuneration for any person –

(I) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk) , or laundry or dry-cleaning services, for his principal;

(II) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations;

Provided, That for purposes of subparagraph (A) (iii) the term "employment" shall include services described in (I) and (II) above performed after December 31, 1971, only if:

1. The contract of service contemplates that substantially all of the services are to be performed personally by such individual;

Section 2 (k) (1) (B) (i)

Definitions: “ Employment”

2. The individual does not have a substantial investment in facilities used in connection with the performance of the services (other than in facilities for transportation); and

3. The services are not in the nature of a single transaction that is not part of a continuing relationship with the person for whom the services are performed.

(B) (i) service performed after December 31, 1971, by an individual in the employ of this State or any of its instrumentalities (or in the employ of this State and one or more other States or their instrumentalities) for a hospital or institution of higher education located in this State, provided that such service is excluded from "employment" as defined in the Federal Unemployment Tax Act solely by reason of section 3306 (c) (7)¹ of that Act and is not excluded from "employment" under section 2 (k) (1) (D)² of this Act; and

(ii) service performed after December 31, 1977, in the employ of this State or any political subdivision thereof or any instrumentality of any one or more of the

¹ Exclusion of State and local government service.

² Permitted exclusion from required coverage of State and local government service and nonprofit organizations.

Section 2 (k) (1) (C)

Definitions: "Employment"

foregoing which is wholly owned by this State and one or more other States or political subdivisions, or any service performed in the employ of any instrumentality of this State or of any political subdivision thereof, and one or more other States or political subdivisions, provided that such service is excluded from "employment" as defined in the Federal Unemployment Tax Act by section 3306 (c) (7)¹ of that Act and is not excluded from "employment" under section 2 (k) (1) (D)² of this Act.

(Alternative 1 for Subparagraph (C))

(C) service performed after December 31, 1971, by an individual in the employ of a religious, charitable, educational or other organization which is excluded from the term "employment" as defined in the Federal Unemployment Tax Act solely by reason of section 3306 (c) (8)³ of that Act, except as provided in section 2 (k) (1) (D)² of this Act.

¹ Exclusion of State and local government service.

² Permitted exclusion from required coverage of State and local government service and nonprofit organizations.

³ Exclusion of nonprofit organizations.

Section 2 (k) (1) (C)

Definitions: "Employment"

(Alternative 2 for Subparagraph (C))

(C) Service performed after December 31, 1971, by an individual in the employ of a religious, charitable, educational or other organization but only if the following conditions are met:

(i) the service is excluded from "employment" as defined in the Federal Unemployment Tax Act solely by reason of section 3306 (c) (8)¹ of that Act; and

(ii) the organization had four or more individuals in employment for some portion of a day in each of 20 different weeks, whether or not such weeks were consecutive, within either the current or preceding calendar year, regardless of whether they were employed at the same moment of time.

(D) For the purposes of subparagraphs (B) and (C) the term "employment" does not apply to service performed—

(i) in the employ of (I) a church or convention or association of churches, or (II) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches; or

¹ Exclusion of nonprofit organizations.

Section 2 (k) (1) (D) (ii)

Definitions: Employment

(ii) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order: or

* (iii) prior to January 1, 1978, in the employ of school which is not an institution of higher education; after December 31, 1977, in the employ of a governmental entity referred to in section 2 (k) (1) (B)¹ if such service is performed by an individual in the exercise of duties—

(I) as an elected official;

(II) as a member of a legislative body, or a member of the judiciary, of a State or political subdivision;

(III) as a member of the State National Guard or Air National Guard;

(IV) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency;

* (V) in a position which, under or pursuant to the laws of this State, is designated as (i) a major nontenured policy-making or advisory position, or (ii) a policymaking position

¹ Service for State and local governments.

Section 2 (k) (1) (D) (iv)

Definitions: "Employment"

the performance of the duties of which ordinarily does not require more than 8 hours per week;

(iv) in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market, by an individual receiving such rehabilitation or remunerative work; or

(v) as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any Federal agency or an agency of a State or political subdivision thereof, by an individual receiving such work relief or work training; or

* (vi) prior to January 1, 1978, for a hospital in State prison or other State correctional institution by an inmate of the prison or correctional institution and after December 31, 1977, by an inmate of a custodial or penal institution.

Section 2 (k)-(l) (E)

Definitions: "Employment"

(E) Service performed after December 31, 1977, by an individual in agricultural labor as defined in paragraph (6) (A) of this subsection when:

- * (i) such service is performed for a person who–
 - (I) during any calendar quarter in either the current or the preceding calendar year paid remuneration in cash of \$20,000 or more to individuals employed in agricultural labor (not taking into account service in agricultural labor performed before January 1, 1980, by an alien referred to in division (ii) of this subparagraph)¹,or
 - (II) for some portion of a day in each of 20 different calendar weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year,

¹ If a State wishes to cover the services of an alien admitted to the United States to perform agricultural labor pursuant to sections 214 (c) and 101 (a) (15) (H), Immigration and Nationality Act, the provisions in subdivisions (i) (I) and (II) in parentheses and the optional provision in subdivision (ii) should not be adopted.

NOTE. Present sections 2 (k) (1) (E) through 2 (k) (1) (G) in the 1970 Draft Legislation are redesignated as sections 2 (k) (1) (G) through 2 (k) (1) (I).

Section 2 (k) (1) (E) (ii)

Definitions: "Employment"

employed in agricultural labor (not taking into account service in agricultural labor performed before January 1, 1980, by an alien referred to in division (ii) of this subparagraph)¹ 10 or more individuals, regardless of whether they were employed at the same moment of time.

(Optional)¹

* (ii) such service is not performed in agricultural labor if performed before January 1, 1980, by an individual who is an alien admitted to the United States to perform service in agricultural labor pursuant to sections 214 (c) and 101 (a) (15) (H) of the Immigration and Nationality Act.

* (iii) for the purposes of this subsection any individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for any other person shall be treated as an employee of such crew leader-

¹ If a State wishes to cover the services of an alien admitted to the United States to perform agricultural labor pursuant to sections 214 (c) and 101 (a) (15) (H), Immigration and Nationality Act, the provisions in subdivisions (i) (I) and (II) in parentheses and the optional provision in subdivision (ii) should not be adopted.

Section 2 (k) (1) (E) (iv)

Definitions: "Employment"

- (I) if such crew leader holds a valid certificate of registration under the Farm Labor Contractor Registration Act of 1963; or substantially all the members of such crew operate or maintain tractors, mechanized harvesting or crop-dusting equipment, or any other mechanized equipment, which is provided by such crew leader; and
- (II) if such individual is not an employee of such other person within the meaning of subparagraph (A) of subsection (k) (1).

* (iv) for the purposes of this subparagraph (E), in the case of any individual who is furnished by a crew leader to perform service in agricultural labor for any other person and who is not treated as an employee of such crew leader under division (iii)-

- (I) such other person and not the crew leader shall be treated as the employer of such individual; and
- (II) such other person shall be treated as having paid cash remuneration to such individual in an amount equal to the amount

Section 2 (k) (1) (F)

Definitions: "Employment"

of cash remuneration paid to such individual by the crew leader (either on his own behalf or on behalf of such other person) for the service in agricultural labor performed for such other person.

* (v) for the purposes of this subparagraph (E), the term "crew leader" means an individual who--

- (I) furnishes individuals to perform service in agricultural labor for any other person,
- (II) pays (either on his own behalf or on behalf of such other person) the individuals so furnished by him for the service in agricultural labor performed by them, and
- (III) has not entered into a written agreement with such other person¹ under which such individual² is designated as an employee of such other person.¹

* (F) The term "employment" shall include domestic service after December 31, 1977, in a private home, local college club or local chapter of a college fraternity or sorority performed for a person who paid cash remuneration of \$1,000 or more after December 31, 1977, in the current calendar year or the preceding calendar year to individuals employed in such domestic service in any calendar quarter.

¹ Farm operator.

² Crew leader.

Section 2 (k) (1) (G)

Definitions: "Employment"

* (G) The term "employment" shall include the service of an individual who is a citizen of the United States, performed outside the United States (except in Canada), after December 31, 1971, or after December 31, 19__¹ in the case of the Virgin Islands, in the employ of an American employer (other than service which is deemed "employment" under the provisions of paragraphs (2) or (3) of this subsection or the parallel provisions of another State's law), if:

(i) the employer's principal place of business in the United States is located in this State; or

(ii) the employer has no place of business in the United States, but

(I) the employer is an individual who is a resident of this State; or

(II) the employer is a corporation which is organized under the laws of this State; or

(III) the employer is a partnership or a trust and the number of the partners or trustees who are residents of this State is greater than the number who are residents of any one other State; or

¹ Insert year in which the Secretary of Labor approves the Virgin Islands' unemployment compensation law.

Section 2 (k) (1) (G) (iii)

Definitions: "Employment"

(iii) none of the criteria of divisions (i) and (ii) of this subparagraph is met but the employer has elected coverage in this State or, the employer having failed to elect coverage in any State, the individual has filed a claim for benefits, based on such service, under the law of this State.

(iv) an "American employer," for purposes of this paragraph, means a person who is

- (I) an individual who is a resident of the United States; or
- (II) a partnership if two-thirds or more of the partners are residents of the United States; or
- (III) a trust, if all of the trustees are residents of the United States; or
- (IV) a corporation organized under the laws of the United States or of any State.

NOTE. Subparagraphs (F) and (G) from the 1970 Draft are changed to (H) and (I), respectively.

Section 2 (k) (6)

Definitions: "Agricultural Labor"

(Section 3306 (k), FUTA)

(6) The term "employment" shall not include—

(Short Form)

* (A) Service performed by an individual in agricultural labor, except as provided in subsection (k) (i) (E) of this section. For purposes of this subparagraph, the term "agricultural labor" means

(i) any service performed prior to January 1, 1972, which was agricultural labor as defined in this subparagraph prior to such date, and

(ii) remunerated service performed after December 31, 1971, in agricultural labor as defined in section 3306 (k), Federal Unemployment Tax Act.

(Long Form)

* (A) Service performed by an individual in agricultural labor, except as provided in subsection (k) (l) (E) of this section. For purposes of this subparagraph, the term "agricultural labor" means any service performed prior to January 1, 1972, which was agricultural labor as defined in this subparagraph prior to such date, and remunerated service performed after December 31, 1971:

Section 2 (k) (6) (A) (i)

Definitions: “Agricultural Labor”

(i) on a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(ii) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(iii) in connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15 (g) of the Agricultural Marketing Act, as amended (46 Stat. 1550, sec.3; 12 U.S.C. 1141j) or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

Section 2 (k) (6) (A) (iv) (I)

Definitions: “Agricultural Labor”

(iv) (I) in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(II) in the employ of a group of operators of farms (or a cooperative organization of which such operators are members) in the performance of service described in subdivision (I), but only if such operators produced more than one-half of the commodity with respect to which such service is performed;

(III) the provisions of subdivisions (I) and (II) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

Section 2 (k) (6) (A) (v)

Definitions: "Agricultural Labor"

(v) on a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

(B) As used in subparagraph (A), the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

Commentary - Section 2 (k)

Definitions: "Employment"

The 1970 Amendments added sections 3304 (a) (6) and 3309 to the Federal Unemployment Tax Act (FUTA). Those sections made State coverage of services for certain nonprofit organizations and of services performed by employees of State hospitals and State institutions of higher education a condition for certification of State laws. Section 3309 (b) described certain services which States were permitted to exclude when performed for the above entities. Section 3304 (a) (12) required that States permit political subdivisions to elect coverage of the services performed for their hospitals and institutions of higher education.

The 1976 Amendments have the effect of extending coverage to some domestic service and agricultural labor by making these services subject to the FUTA. State coverage of services performed by most State and local government employees and by individuals for nonprofit elementary and secondary schools is a condition for certification under the 1976 amendments:

1. Section 3309 (a) (1) (B) of the FUTA is now amended to require coverage of service excluded solely by reason of section 3306(c)(7) of the FUTA, rather than only requiring coverage of service for State hospitals and institutions of higher education. Section 3306 (c) (7) relates to exclusion of services for a State, its political subdivisions or their instrumentalities. The provisions in section 3304 (a) (12) requiring that political subdivisions be permitted to elect coverage have been superseded by section 3304 (a) (6). The effect of these changes is to establish, as a condition for certification, State coverage of services performed for the State, its political subdivisions or instrumentalities of the foregoing, with certain permitted exceptions.

Commentary- Section 2 (k) (2)

Definitions: "Employment"

2. Section 3309 (b) (3) formerly permitted exclusion of services in the employ of a school which is not an institution of higher education. The amendments deleted this exclusion.

The effect of this change is to mandate coverage of elementary and secondary schools operated by the State and its political subdivisions or by nonprofit organizations.

3. Section 3306 (c) (1) was amended to delete the exclusion of agricultural labor performed for a person who, during the current or preceding calendar year, paid cash remuneration of \$20,000 or more or employed 10 or more individuals in agricultural labor in each of 20 weeks during the current or preceding calendar year.
4. Section 3306 (c) (2) was amended to delete the exclusion of domestic service when performed for a person who paid cash remuneration of \$1,000 or more for such service in a calendar quarter in the current or preceding calendar year.

Short form definition.--See the commentary on definitions of "employment" on pages 20-22, 1970 Draft Legislation. The 1976 Amendments include special rules for determining the employer of an individual who is a member of a crew furnished by a crew leader to perform agricultural labor, as defined on page 30, for a farm operator.

Long form definition.--The "long form" definition specifically includes the services covered by the 1976 Amendments to subsections (c) and (o) of section 3306 and avoids the necessity for reference to another statute to determine the services covered after December 31, 1977. It is recommended for States using primarily common law tests of master and servant.

Commentary - Section 2 (k) (1) (B)

Definitions: "Employment"

Section 2 (k) (1) (B) in the 1970 Draft Legislation offered alternative provisions. Alternative 1 covered all services for the State, its political subdivisions and their instrumentalities. Alternative 2 followed the FUTA and covered only State hospitals and State institutions of higher education.

Because the 1976 Amendments require State coverage of services for the State, its political subdivisions and the instrumentalities of States and political subdivisions, as conditions for certification, alternative provisions are no longer appropriate. Accordingly, section 2 (k) (1) (B) has been modified to provide for the transition from the old to the new coverage. Division (i) contains the coverage provided for the 1970 version of section 3309 (a) (1) (B). Division (ii) includes the coverage requirements in section 3309 (a) (1) (B) as added by the 1976 Amendments.

Section 2 (K) (1) (C) remains the same as in the 1970 Draft Legislation. As noted above, coverage of secondary and elementary schools is accomplished simply by the deletion of the exclusion in section 2 (K) (1) (D) (iii).

The only changes in section 2 (k) (1) (D) are in divisions (iii) and (vi). Division (iii) has been revised to reflect the repeal of the exclusion of elementary and secondary schools and the inclusion of coverage of the State and political subdivisions with specified optional exclusions.

Subdivision (I) excludes from the coverage of State and political subdivisions an official who has been elected to the office which he holds. This exclusion, as well as the other exclusions, is not required as a condition of certification of State laws but is optional with each State. If the exclusion is adopted, such an individual would not be entitled to benefits based on his earnings as an elected official. He may, however, be eligible for benefits on the basis of other service and earnings.

Commentary - Section 2 (k) (1) (D)

Definitions: "Employment"

An individual who, for example, is employed as a doctor by a State hospital and who is also elected to a term on a board or commission, would be entitled to benefits based on wages earned as an employee of the hospital, but not on the basis of remuneration, if any, for his service in his elective capacity. Such service would be excluded.

Subdivision (II) excludes services performed by the members of legislative bodies or the judiciary of the State and its political subdivisions. These include the legislators in the upper and lower houses of the State legislature and the members of city councils, commissioners on the board of county commissioners, etc., for legislative bodies below the State legislature level. The exclusion also applies to all of the judges in the entire court system of the State and its political subdivisions. The term "member of the judiciary" includes a "court master" when the judicial organization has such officers.

Subdivision (III) excludes services as a member of the State National Guard or Air National Guard. These services are usually performed on a part-time basis, most commonly on week-ends and during annual training exercises or when units are called up for active duty. Guardsmen would not be entitled to benefits based on remuneration for such service. However, they may be entitled to benefits based on covered service with other than the State or Air National Guard, including service in a civilian capacity with, rather than as a member of, the Guard.

The exclusion in subdivision (IV) applies only to those individuals who are hired or impressed into service to assist in emergencies and includes such temporary tasks as fire-fighting, removal of storm debris, restoration of public facilities, snow removal and road clearance, etc. The exclusion does not apply to permanent employees whose usual responsibilities include emergency situations.

Commentary- Section 2 (k) (1) (D)

Definitions: "Employment"

Information on this is contained in the Congressional Record, October 1, 1976, page H 12169:

"A similarly worded exclusion is also contained in the Social Security Act and in the unemployment compensation program for Federal employees. This exclusion has the purpose of excluding only those individuals hired or impressed into service to deal directly with an emergency or urgent distress associated with an emergency. It is not, on the one hand, limited to individuals hired for the duration of the emergency, or on the other hand, applicable to individuals hired as regular employees even though hired as temporaries for a limited time or the duration of the emergency."

In other words, the exclusion applies to individuals who are hired or impressed to assist in emergencies and includes such tasks as fire-fighting, removal of storm debris, restoration of public facilities, snow removal, road clearance, etc. It does not apply to regular employees whose usual responsibilities include such emergency situations.

Subdivision (V) follows section 3309 (b) (3) (E), which permits exclusion from the required coverage of service for the State and its political subdivisions service by an individual,

"in a position which, under or pursuant to the State law, is designated as (i) a major nontenured policy-making or advisory position, or (ii) a policy-making or advisory position the performance of the duties of which ordinarily does not require more than 8 hours per week."

For the exclusion to be effective, the position must be designated under or pursuant to the law of the State as a policy-making or advisory position. Political subdivisions which have authority to enact ordinances without recourse to the State legislature but under authority of the State law may contain reference to such positions. The exclusion may apply if the political subdivision has enacted an ordinance creating or designating one of its positions as policy-making or advisory, provided the ordinance is under authority of the laws of the State. If the State law or local ordinance designates the position as policy-making or advisory the

Commentary - Section 2 (k) (1) (D)

Definitions: "Employment"

exclusion is applicable. In instances in which the law or ordinance does not clearly and specifically so categorize or label the position, other pertinent factors such as job descriptions, the qualifications of individuals considered for and appointed to the position and the responsibilities involved, should be taken into account in determining the character of the position for purposes of applying the exclusion.

While the term "policy-making" cannot be precisely defined, generally it refers to determination of the direction, emphasis and scope of action in the development of and the administration of governmental programs. Most often such responsibilities are confined to and inherent in jobs at the higher echelons of government. In contrast, an "advisory" position is one which "advises" established governmental agencies and officers with respect to policy, program and administration without having authority to implement its recommendations. These are the responsibilities of, for example, members of various advisory councils.

The word "major" in the phrase "major nontenured policy-making or advisory position" most reasonably refers to high level governmental positions usually filled by appointment by the chief executive of the political entity (Governor, Mayor, etc.) and which involve responsibilities affecting the entire political entity, whether it be the State, county or city.

The term "nontenured" is used in its usual meaning to mean that the position is not covered by merit system or civil service law or rules with respect to duration of service or appointment.

There is no requirement with respect to the number of hours per week involved in a major nontenured policy-making or advisory position. Accordingly, the services performed by an individual in such a position are excluded, regardless of the number of hours worked per week.

Commentary - Section 2 (k) (1) (D)

Definitions: "Employment"

The exclusion also applies to services in "a policymaking or advisory position the performance of the duties of which ordinarily does not require more than 8 hours per week." Under this exclusion, it makes no difference whether the position is tenured or not. If it is a policymaking or advisory position and does not require more than 8 hours a week, it is excluded. If the position ordinarily requires more than 8 hours per week, this exclusion does not apply. The number of hours required should be determined by reference to the law establishing the position and the actual time spent by incumbents. Note that the word "ordinarily" means that generally no more than 8 hours per week is required. There may be instances when more than 8 hours per week is necessary. However, if as a common practice, the individual is obliged to spend no more than 8 hours a week on his responsibilities, the service is excluded.

Note that subdivision (I) excludes services by elected officials, in their elective capacities, regardless of the type of position (policymaking, advisory or other) they occupy. It is expected, therefore, that subdivision (V) will mainly apply to appointees.

Division (vi).-- P.L. 91-373 (1970 Amendments) excluded the services performed for a hospital in a State prison or State correctional institution by an inmate of the prison or correctional institution. Effective with respect to service performed after December 31, 1977, this exclusion has been broadened to exclude services by an inmate of a custodial or penal institution.

Custodial institutions operate in a variety of contexts and are not limited to those operated by governmental units. Conversely, penal institutions are always governmental facilities.

These provisions relate to the exclusion of described services from the coverage otherwise required of service for the State, its political subdivisions and for nonprofit organizations. Accordingly, services by an inmate of a custodial institution, whether a governmental or a nonprofit institution, or an inmate of a penal institution for the State, its political subdivisions or a nonprofit organization, may be excluded. The same services performed for a private, for profit employer, as in a prison work release program, would be covered services under FUTA.

Commentary - Section 2 (k) (1) (E)

Definitions: "Agricultural labor"

Subparagraph (E) is designed to conform with the amendments to FUTA to cover farm workers who perform service after December 31, 1977, in agricultural labor. Under one amendment, agricultural labor (as defined without change in section 3306 (k) , FUTA) is treated as employment if performed for an employer who, during any calendar quarter in the current calendar year or the preceding calendar year, paid cash remuneration of \$20,000 or more for individuals employed in agricultural labor, or who on each of some 20 days in 20 different weeks during the current calendar year or the preceding calendar year employed at least 10 individuals in agricultural labor, whether or not at the same moment of time. The amendment also provides that service performed in agricultural labor before January 1, 1980, by aliens who are admitted to the States pursuant to sections 214 (c) and 101 (a) (15) (H) of the Immigration and Nationality Act will not be treated as employment for purposes of the Federal unemployment tax. Subparagraph (E) (ii) contains an optional exemption of agricultural labor performed by the specified aliens before January 1, 1980.

Section 214 (c) and 101 (a) (15) (H) of the Immigration and Nationality Act relate to residents of foreign countries who do not intend to abandon such residency and who are admitted to work in the United States for a temporary period in agriculture.

The Federal unemployment tax will be imposed on wages paid for agricultural labor which is treated as employment, but only with respect to cash remuneration. This applies with respect to "wages" for Federal tax purposes only. A State may choose to include remuneration other than cash for coverage, contributions and benefit purposes. See also the limitation on the use of wages and employment for domestic and other service in determining whether an employing unit employing agricultural labor is an "employer." See page 4.

Another amendment of FUTA added a new subsection (o) to section 3306 which contains special rules for determining who will be treated as the employer, and therefore liable for the Federal unemployment tax, in the case of agricultural workers who are members of a crew furnished by a crew leader to perform services in agricultural labor for a farm operator.

Commentary - Section 2 (k) (1) (E) (iii)

Definitions: "Agricultural Labor"

Under subparagraph (E) (iii), individuals who are members of a crew furnished by a crew leader to perform service in agricultural labor for a farm operator are treated as employees of the crew leader if the crew leader is registered under the Farm Labor Contractor Registration Act of 1963, or if substantially all the members of such crew operate or maintain mechanized equipment furnished by the crew leader. A member of a crew furnished by a crew leader to perform service in agricultural labor for a farm operator will not, under subparagraph (E)(iii), be treated as an employee of the crew leader if the individual is an employee of the farm operator within the meaning of subparagraph (E)(iv).

Under subparagraph (E) (iv), any worker who is furnished by a crew leader to perform service in agricultural labor for a farm operator and such worker is not treated as an employee of the crew leader under subparagraph (E) (iii) is treated as an employee of the farm operator. In such a case, the farm operator is treated as having paid wages to the worker in an amount equal to the amount of wages paid to such individual by the crew leader.

Subparagraph (E) (v) defines crew leader to mean any individual who furnishes farm workers to perform service in agricultural labor for a farm operator, who pays the farm workers so furnished by him for the service in agricultural labor, and the crew leader has not entered into a written agreement with such farm operator under which the crew leader is designated as an employee of such farm operator.

Commentary - Section 2 (k) (1) (E) (v)

Definitions: "Agricultural Labor"

Agricultural Employer: 10 or more workers in 20 weeks or \$20,000 in quarterly wages

Farm operator is employer
if:

1. If the individual is an employee of the farm operator under common law rules of master and servant.
2. If the worker is furnished by the crew leader but is not treated as an employee of the crew leader; e.g., the crew leader acting on behalf of the farm rather than as an employer.
3. The crew leader has entered into a written agreement with the farm operator under which the crew leader is designated as an employee of the farm operator.

Crew leader is employer
if:

1. Crew leader holds valid certification of registration under Farm Labor Contractor Registration Act of 1963;
- or
2. Substantially all crew members operate or maintain tractors, mechanized harvesting or crop-dusting equipment or any other mechanized equipment provided by the crew leader;
- and
3. If the individual is not an employee of any other person under common law rules of master and servant.

Commentary - Section 2 (k) (1) (F)

Definitions: "Domestic Service"

Prior to the enactment of the 1976 Amendments, section 3306 (c) (2) excluded from the definition of employment "domestic service in a private home, local college club or local chapter of a college fraternity or sorority." The 1976 Amendments continue the exclusion only if the employing unit pays cash remuneration of less than \$1,000 in any calendar quarter in the current or preceding calendar year. Accordingly, any person who pays cash remuneration of \$1,000 or more during a calendar quarter for domestic service after December 31, 1977, becomes an employer subject to FUTA. It makes no difference that the amount was paid to more than one employee.

Living quarters, meals and other benefits are often part of the domestic employment situation. The statutory restriction to cash remuneration of \$1,000 or more means that the cash value of such perquisites is not included in the determination of whether or not \$1,000 has been paid. For purposes of FUTA coverage, only the cash remuneration is considered in determining if the employer is subject. Once this determination is made, however, all "wages" paid by such subject employer are subject to tax, not only cash remuneration.

The amendment to section 3306 (a) (1), the definition of employer, provides that in determining whether a person has paid \$1,500 or more in a calendar quarter in the current or preceding calendar year or had employment in each of 20 weeks [the test of subjectivity under FUTA] "there shall not be taken into account any wages paid to, or the employment of, an employee performing domestic services. . ." Section 3306 (a) (4) provides that "A person treated as an employer under paragraph (3) [employer with respect to domestic service] shall not be treated as an employer with respect to wages paid for any service other than domestic service referred to in paragraph (3) unless such person is treated as an employer under paragraph (1) [employer with respect to nondomestic service or nonagricultural labor] or (2) [employer with respect to agricultural labor] with respect to such other service." The effect of these provisions is that, for FUTA purposes, an employing unit having a combination of domestic, agricultural labor and other service must qualify as an

Commentary - Section 2 (k) (1) (F)

Definitions: “Domestic Services”

employer solely on the basis of domestic service, or agricultural labor and other service. The three types of service cannot be combined with each other to qualify the person as an employer. This is illustrated below in the case of four different employers providing employment in each of the three services:

Employer	Coverage Requirement			Subject to FUTA taxes
	Agriculture \$20,000 cash in any Qtr. or 10 in 20 weeks	Domestic \$1,000 cash in any Qtr.	General \$1,500 in any Qtr. or 1 in 20 weeks	
Employer A	\$10,000 - 5 in 10 weeks	\$1,500	\$1,000- in 1 in 4 weeks	Domestic coverage only
Employer B	\$30,000 - 25 in 20 weeks	\$2,000	\$1,500- 1 in 15 weeks	Coverage for all three types of services
Employer C	\$25,000 - 18 in 20 weeks	\$500	\$1,000- 1 in 15 weeks	Agriculture and general coverage only
Employer D	\$5,000 - 2 in 10 weeks	\$200	\$10,000- 4 in 10 weeks	General coverage only

Commentary - Section 2 (k) (1) (F)

Definitions: "Domestic Service"

The particular dollar and weeks of work tests of coverage for agricultural and domestic service are not requirements for certification. Coverage can be established on broader terms.

The several States that now cover domestic workers need not amend their laws since wider coverage than that in FUTA is provided.

The 1976 Amendments did not include a definition of "domestic services." If a State wishes to define the term in the statute or in a regulation, a definition substantially as follows is recommended:

"Domestic service' includes all service for a person in the operation and maintenance of a private household, local college club or local chapter of a college fraternity or sorority as distinguished from service as an employee in the pursuit of an employer's trade, occupation, profession, enterprise, or vocation."

Commentary - Section 2 (k) (1) (g)

Definitions: "American Employer"

The 1976 Amendments bring the Virgin Islands into the Federal-State unemployment insurance program by amending FUTA and the Social Security Act to treat the Virgin Islands as a State for purposes of the Program. As a result of this amendment employers in the Virgin Islands will be liable for the Federal unemployment tax.

The Virgin Islands will become a part of the Federal-State system on the day after the day on which the Secretary of Labor approves under section 3304 (a) of the FUTA an unemployment insurance law submitted to him by the Virgin Islands for approval. Remuneration for service performed by an American citizen (defined to include citizens of the Virgin Islands) for an American employer outside the United States will become subject to the Federal tax on the December 31 of the year in which the Secretary of Labor approves for the first time an unemployment law submitted by the Virgin Islands for approval, for services performed after December 31. The Secretary may not approve any unemployment law submitted to him by the Virgin Islands until the Governor of the Virgin Islands has approved the transfer to the Federal Unemployment Trust Fund established by section 904 of the Social Security Act any amount in the unemployment sub-fund of the Virgin Islands established under section 310 of title 24 of the Virgin Islands Code.

In addition, the Wagner-Peyser Act, the Federal-State Extended Unemployment Compensation Act of 1970, the Emergency Unemployment Compensation Act of 1974, and title 5 of the U.S. Code relating to benefits for ex-servicemen and Federal employees have been amended to include the Virgin Islands in the definition of "State."

Prior to the inclusion of the Virgin Islands in the Federal-State system, it was not a Federal requirement that States have an interstate benefit payment plan or a wage combining arrangement with the Virgin Islands. However, upon approval of the insular law by the Secretary, Federal requirements with respect to these matters will also apply to the Virgin Islands. Accordingly, all States will need to review their interstate claims and wage combining agreements to assure that the Virgin Islands is included as a State.

Section 2 (p) (1) and (2)

Definitions: "State" and "United States"

(Section 3306 (j) (1) and (2), FUTA)

* (p) (1) "State" includes the States of the United States, the District of Columbia, The Commonwealth of Puerto Rico and the Virgin Islands.

* (p) (2) The term "United States" when used in a geographical sense includes the States, the District of Columbia, the Commonwealth of Puerto Rico and the Virgin Islands.

Commentary - Section 2 (u)

Definitions: "Institution of Higher Education"

(u) The 1976 Amendments to the FUTA require the extension of coverage under the State law to employees of State and local governments, including primary and secondary schools, and employees of nonprofit primary and secondary educational institutions. The optional exceptions to the required coverage are noted in section 2 (k) (1) (D). This coverage contrasts with 1970 Amendments which limited required coverage of educational institutions under the State law to service for institutions of higher education of the State and its instrumentalities and to nonprofit institutions of higher education, with the optional exceptions noted in section 2 (k) (1) (D).

The definition of an institution of higher education, which now appears in section 3304 (f), has not been altered by the 1976 Amendments. See the commentary on the definition on pages 42 and 43 of the 1970 Draft Legislation. The reason this definition has been retained, while coverage has been extended beyond institutions of higher education to all educational institutions, is that a State which chooses the second option under section 4 (a) (3), benefit payments for service with nonprofit institutions and State and local governments, may not extend the between-terms denial of benefits to nonprofessional employees of an institution of higher education. This means that guards, cafeteria workers, secretaries, and other nonprofessional employees of institutions of higher education, as defined, may not be denied benefits between terms as may employees who perform similar work for an elementary or secondary school.

There is no definition of an "educational institution" in the Federal law other than that for an institution of higher education. For States which want to adopt a definition of educational institution other than an institution of higher education, however, we suggest language similar to the following:

Commentary - Section 2 (u) (a)

Definitions: "Institution of Higher Education"

(a) It is an education institution (except an institution of higher education as defined in section 3304 (f) of the FUTA) in which participants, trainees, or students are offered an organized course of study or training designed to transfer to them knowledge, skills, information, doctrines, attitudes or abilities from, by or under the guidance of an instructor(s) or teacher(s).

(b) It is approved, licensed or issued a permit to operate as a school by the State Department of Education or other government agency that is authorized within the State to approve, license or issue a permit for the operation of a school.

(c) The courses of study or training which it offers may be academic, technical, trade, or preparation for gainful employment in a recognized occupation.

In any particular case, the question of whether or not an institution is an educational institution (other than an institution of higher education) within the meaning of the criteria described above will depend on what that particular institution actually does.

Section 3 (b) (2)

Qualifying wages for regular benefits of
newly-covered workers during transition period
on the basis of previously uncovered services

(Section 121, P. L. 94-566)

(Optional)

* 3 (b) (2)¹ with respect to weeks of unemployment beginning on or after January 1, 1978, wages for insured work shall include wages paid for previously uncovered services. For the purposes of this subsection, the term "previously uncovered services" means services--

(A) Which were not employment as defined in section 2 (k) (1),² and were not services covered pursuant to section 2 (k) (4),³ at any time during the one-year period ending December 31, 1975; and

(B) Which--

(I) are agricultural labor (as defined in section 2 (k) (1) (E)) or domestic service (as defined in section 2 (k) (1) (F)), or

(II) are services performed by an employee of this State or a political subdivision thereof, as provided in section 29 (k) (1) (B),

¹ Current section 3 (b) of the 1950 Manual is renumbered as section 3 (b) (1).

² Definition of "employment."

³ Election of coverage provision.

Section 3 (b) (2)

Qualifying wages for regular benefits of newly- covered workers during transition period on the basis of previously uncovered services

or by an employee of a nonprofit educational institution which is not an institution of higher education, as provided in section 2 (k) (1) (D) (iii);

except to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 was paid on the basis of such services.

Commentary Section 3 (b) (2)

Qualifying wages for regular benefits of newly-covered workers during transition period on the basis of previously uncovered services.

The 1976 Amendments provide for a transition, without a gap in protection, from temporary protection under the Special Unemployment Assistance (SUA) program to coverage under the permanent Federal-State unemployment insurance program for newly-covered workers. Section 121 provides for Federal reimbursement to States for the cost of regular and 50 percent of extended benefits paid to newly-covered workers from January 1, 1978, through June 30, 1978, and also after June 30, 1978, in cases where the States paid benefits on the basis of newly-covered wages earned prior to January 1, 1978.

Thus, a State may, by amendment of the State law, permit newly-covered workers to become eligible for regular benefits on the basis of wages earned prior to January 1, 1978, thereby authorizing the payment of benefits for weeks of unemployment beginning on and after the first week in 1978. Without these transition provisions, workers performing services in the newly-covered categories (agricultural labor, domestic service, employees of nonprofit schools and of State and local governments) would not be eligible for either SUA (other than continued claims) or regular benefits after December 31, 1977. They would begin to accumulate covered wages or employment for benefit purposes as of January 1, 1978.

In most States, however, those workers would not qualify for any benefits on the basis of the newly-covered wages or employment until the third or fourth quarter of 1978, and would not acquire four full quarters of wage credits until the first or second quarter of 1979. There would, therefore, be a hiatus of up to nine months between the expiration of the SUA program for new claims and the earliest date most claimants could qualify for regular benefits on the basis of newly-covered services, and a gap of up to 15 months between SUA protection and the acquisition of four full quarters of wage credits for regular benefit purposes.

Commentary – Section 3 (b) (2)

Qualifying wages for regular benefits of newly-covered workers during transition period on the basis of previously uncovered services.

By July 1, 1978, benefits paid to newly-covered workers in most States will be based on service performed both before and after January 1, 1978. After July 1, 1978, Federal reimbursement provided under these transition provisions will apply only to benefits based on newly-covered services performed before January 1, 1978. Federal reimbursement will be phased out in most States with benefit years beginning after March 31, 1979, because by that time base periods established by most States will no longer include services performed before January 1, 1978. In a few States, however, the base periods at that time will still include 1977 wages. In addition, there are a few States which extend base periods in individual cases of disability or receipt of workers' compensation.

The following examples illustrate how Federal reimbursement for benefits paid on the basis of wages earned for "previously uncovered services" will be applied, to the extent that benefits have not been paid under SUA.

Example 1

State A has back-to-back base periods and benefit years (i.e., the base period is the 52 weeks immediately preceding the week in which a new claim is filed). Wage credits may be earned until almost the end of June, 1978 for benefit years in which one or more weeks of benefits may be paid prior to July 1, 1978. The base period may include wage credits earned both before July 1, 1978, and before January 1, 1978. If, for example, an individual files a new claim in May 1978, the Federal Government will reimburse State A for benefits paid for weeks of unemployment beginning before July 1, 1978, on the basis of all wage credits earned prior to July 1, 1978 (including the period prior to January 1, 1978). For weeks of unemployment beginning after June 30, 1978, the Federal Government will reimburse State A for benefits paid only in the proportion that wage credits earned prior to January 1, 1978, constitute a percentage of total base period wages.

Commentary – Section 3 (b) (2)

Qualifying wages for regular benefits of newly-covered workers during transition period on the basis of previously uncovered services.

Example 2

In State A an individual files a claim on October 1, 1978. The base period may include wages paid prior to January 1, 1978. The Federal Government will reimburse State A for benefits paid only in the proportion that wage credits earned prior to January 1, 1978, constitute a percentage of total base period wages.

Example 3

State B has a base period consisting of the first four of the last five completed calendar quarters. The base period for a benefit year established in May 1978 will consist of the four quarters of calendar year 1977. Since the wage credits were earned entirely prior to January 1, 1978, the Federal Government will reimburse State B for the entire cost of benefits paid.

Example 4

In State B an individual files a claim in October 1978. The base period consists of the last two quarters of 1977 and the first two quarters of 1978. The Federal Government will reimburse State B for benefits paid only in the proportion that wage credits earned in 1977 (prior to January 1, 1978) constitute a percentage of total base period wages.

Federal reimbursement will apply only to the extent that benefits are based on services that were not covered, on a mandatory or an elective basis, at any time during 1975. This includes election under section 3304 (a) (12), FUTA. This will prevent States from qualifying for Federal reimbursement by revoking coverage (or prohibiting the use of wage credits, the establishment of a valid claim or the payment of benefits) where there had been coverage of farm workers and domestic service and of employees of nonprofit schools and State and local governments before these amendments.

Commentary – Section 3 (b) (2)

Qualifying wages for regular benefits of newly-covered workers during transition period on the basis of previously uncovered services.

If a portion of a category of services was previously covered and a portion was previously uncovered, Federal reimbursement will apply only to the portion that was previously uncovered. If, for example, the services of certain categories of State government employees were covered (in addition to employees of State hospitals and institutions of higher education), such-as those having permanent State civil service status, and other categories were uncovered, such as temporary, probational, and intermittent employees, Federal reimbursement would apply only to the newly-covered services of the categories of employees that were previously uncovered. Similarly, if the services of employees of some political subdivisions (or certain categories thereof) were previously covered and the services of other political subdivisions (or certain categories thereof) were previously uncovered, Federal reimbursement would apply only to the newly-covered services that were not covered at any time during 1975.

When benefits are based on both newly-covered and previously covered services, the reimbursable benefits will bear the same proportion to total benefits paid to the individual as wages attributable to newly-covered service bear to the individual's total base period wages. In the case of an individual who has received SUA payments on the basis of previously uncovered services, the amount of reimbursement is limited "to the extent" that SUA payments were not made on the basis of those services. This provision is interpreted to mean that only wages actually used as the basis for SUA payment would not be reimbursable. Therefore, in the case of an individual who qualified for 20 weeks of SUA payments but actually drew only 10 weeks under the SUA program, proportionately half of the benefits based on the same wage credits would be reimbursable and half not reimbursable. For example, an individual entitled to 20 weeks of SUA, after having received 10 weeks of benefits, returns to work and thereafter become unemployed. The State would be entitled

Commentary – Section 3 (b) (2)

Qualifying wages for regular benefits of newly-covered workers during transition period on the basis of previously uncovered services.

to reimbursement for only 50 percent of the benefits paid him, i.e., the remaining 10 weeks which constitute 50 percent of his original entitlement. This example illustrates the application the "to the extent" clause at the end of section 3 (b) (2). Federal reimbursement is not only limited to benefits based on wages in newly covered employment that were not previously used as a basis for SUA entitlement, but also to benefits not reimbursable under any other Federal law, e.g., Federal-State extended benefits.

States are permitted to provide under the State law for noncharging contributing employers to the extent that benefits are payable on the basis of newly-covered services performed before January 1, 1978, and are reimbursable under the transition provisions. The States are also permitted to provide for relieving reimbursing nonprofit employers of the costs of such benefits to the same extent. No language is suggested for noncharging contributing employers, because of the variety of systems and provisions, in State laws, but language to effectuate this authorization in the case of nonprofit reimbursing employers is included in section 8 (f) (1) (G).

The reimbursements provided for in this section await congressional appropriation.

Section 4(a)(3)

Benefit eligibility based on service with nonprofit organizations and educational institutions and State and local governments

(Section 3304 (a) (6) (A), FUTA)

(Alternative 1 to paragraph (3))

* (3) Benefits based on service in employment defined in section 2 (k) (1) (B)¹ and (C)² shall be payable in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to this Act; except that, with respect to service performed after December 31, 1977, in an instructional, research, or principal administrative capacity for an educational institution, benefits shall not be paid based on such services for any week of unemployment commencing during the period between two successive academic years, or during a similar period between two regular but not successive terms, or during a period of paid sabbatical leave provided for in the individual's contract, to any individual if such individual performs such services in the first of such academic years (or terms) and if there is a

¹ Coverage of State and Local government employment.

² Coverage of nonprofit organizations.

Section 4 (a) (3)

Benefit eligibility based on service with nonprofit organizations and educational institutions and State and local governments

contract or a reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms. Section 4 (a) (2) shall apply with respect to such services prior to January 1, 1978.

(Alternative 2 to paragraph (3))

* (3) Benefits based on service in employment defined in section 2 (k) (1) (B)¹ and (C)² shall be payable in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to this Act; except that

(A) With respect to service performed after December 31, 1977, in an instructional, research, or principal administrative capacity for an educational institution, benefits shall not be paid based on such services for any week of unemployment commencing during the period between two successive academic years, or during a similar period

¹ Coverage of State and Local government employment.

² Coverage of nonprofit organizations.

Section 4 (a) (3)

Benefit eligibility based on service with nonprofit organizations and educational institutions and State and local governments

between two regular but not successive terms, or during a period of paid sabbatical leave provided for in the individual's contract, to any individual if such individual performs such services in the first of such academic years (or terms) and if there is a contract or a reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms, and

Provided, That Section 4 (a) (2) shall apply with respect to such services prior to January 1, 1978.

(Optional)

(B) With respect to services performed after December 31, 1977, in any other capacity for an educational institution (other than an institution of higher education as defined in section 2(u)) benefits shall not be paid on the basis of such services to any individual for any week which commences during a period between two successive academic years or terms if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms.

Section 4 (a) (4)

Benefit payments to athletes

(Section 3304 (a) (13), FUTA)

* 4 (a) (4) Benefits shall not be paid to any individual on the basis of any services, substantially all of which consist of participating in sports or athletic events or training or preparing to so participate, for any week which commences during the period between two successive sport seasons (or similar periods) if such individual performed such services in the first of such seasons (or similar periods) and there is a reasonable assurance that such individual will perform such services in the later of such seasons (or similar periods).

Section 4 (a) (5)

Benefit payments to illegal aliens

(Section 3304 (a) (14), FUTA)

* 4 (a) (5) (A) Benefits shall not be paid on the basis of services performed by an alien unless such alien is an individual who has been lawfully admitted for permanent residence or otherwise is permanently residing in the United States under color of law (including an alien who is lawfully present in the United States as a result of the application of the provisions of section 203 (a) (7) or section 212 (d) (5) of the Immigration and Nationality Act).

(B) Any data or information required of individuals applying for benefits to determine whether benefits are not payable to them because of their alien status shall be uniformly required from all applicants for benefits.

(C) In the case of an individual whose application for benefits would otherwise be approved, no determination that benefits to such individual are not payable because of his alien status shall be made except upon a preponderance of the evidence.

Commentary - Section 4 (a) (3)

(3) Between terms denial of benefits to school employees.--The first option draft provision follows amended paragraph (6) (A) of section 3304 (a), Federal Unemployment Tax Act, which is a condition for certification of State laws. That paragraph requires, with one exception, that all State law conditions for the payment of benefits in all or part of their base period wages in employment with nonprofit organizations or in State and local government employment. Accordingly, the same qualifying and eligibility requirements, disqualifications, etc., apply to such workers as apply to claimants whose benefit rights are based on covered work with private employers for profit. The one required exception to the identical treatment requirement relates to individuals who are employed by an educational institution in an instructional, research or principal administrative capacity. It prohibits the payment of benefits during specified periods of time to those individuals on the basis of such service.

Effective for services performed after December 31, 1977, the exception for teachers and other professional school employees applies when the individual has a contract covering two successive academic years or two regular nonsuccessive terms or has a reasonable assurance of employment in a professional capacity for an educational institution in the second of such when the individual is on sabbatical leave. With respect to services performed prior to January 1, 1978, the "between terms" denial applies to professional employees in institutions of higher education who have contracts for successive years or nonsuccessive academic terms. It does not apply to those who have only a reasonable assurance of employment in the second year or term.

Individuals employed in an "instructional" capacity include not only persons engaged in teaching students in formal classroom and seminar situations but also individuals who teach in less formal arrangements, such as tutorial relationships and direction of students in independent research and learning.

Commentary - Section 4 (a) (3)

Individuals employed in a "research" capacity are those who direct a research project and the professional or the research staff who are directly engaged in gathering, correlating, and evaluating information and making findings. The individuals who provide supportive services for the research, such as typists, clerks and electricians engaged in wiring the information processing equipment under the direction of the research staff, are not affected by the prohibition against payment of benefits "between terms."

Individuals employed in a "principal administrative" capacity are officials of the institution, such as the president, superintendent or principal, the board of directors, business managers, deans, associate deans, public relations directors, comptrollers, development officers, chief librarians, registrars and any individuals who, although they may lack official titles, actually serve in a principal administrative capacity. The duties performed by the individual rather than the title held should determine whether the prohibition applies. Neither providing a title nor withholding it should be controlling in itself.

The second option draft provision, also effective for services performed after December 31, 1977, includes, in addition to the "equal treatment" requirement of the first option, provision for the State, if it so desires, to deny benefits to employees of elementary and secondary schools in capacities other than the three professional capacities defined above. If the State chooses this option, the denial must apply between successive academic years or terms only if the individual performed such nonprofessional services for a school in the first of those terms and has a reasonable assurance of performing those nonprofessional services in the second of those years or terms.

It should be noted that this optional provision for denial of benefits between terms to nonprofessional employees applies to employees of only elementary and secondary schools. The between terms denial to individuals engaged in an instructional, research, or principal administrative capacity applies to employees of institutions of higher education as well as employees of elementary and secondary schools.

Commentary - Section 4 (a) (3)

The contract or a reasonable assurance which an individual has with an educational institution may take a number of forms. For example, an individual who has tenure and will resume his post when the next academic term or year begins is considered to have an ongoing contract even though he has no formal written contract.

The term "a reasonable assurance", as used in this provision, is explained on page 12 of the Joint Explanatory Statement of the Committee of Conference. According to that statement, "when a claim is filed by an individual on the basis of prior employment in an educational institution or agency for compensation for any week of unemployment between successive academic years or terms, it is intended that the State employment security agency shall obtain from the educational institution or agency a statement as to whether the claimant has been given notification with respect to his or her employment status. If such claimant has been notified that he or she has a contract for, or a reasonable assurance of, reemployment for the ensuing academic year or term, then the claimant may not be entitled to unemployment benefits until the educational agency or institution informs the State agency that there is no such reasonable assurance or contract for reemployment or until the employee is not, in fact, offered reemployment. At this point the State agency would have a basis for allowing a claim, assuming that the individual is otherwise eligible under the requirements of the State law. For the purposes of this provision, the term 'a reasonable assurance' means a written, verbal, or implied agreement that the employee will perform services in the same capacity during the ensuing academic year or term. A contract is intended to include tenure status."

Commentary - Section 4 (a) (4)

Professional athletes

Section 4 (a) (4) parallels section 3304 (a) (13), Federal Unemployment Tax Act, which requires, as a condition for certification of the State law, that benefits shall be denied based on services substantially all of which consist of participating in, training for or preparing to participate in sports or athletic events. The denial is effective during the "off season," i.e., to any week between two successive sport seasons (or similar periods) if the individual performed the described services in the first season (or similar period) and there is a reasonable assurance of performing such services in the second season (or similar period).

The intent of the provision is to deny benefits to professional athletes on the basis of their athletic wages during the off season when their attachment to athletic employment appears to be continuing.

Because it is required that benefits be denied on services "substantially all of which consist of participating in sports or athletic events or training or preparing to so participate" the denial is applicable to the participant only, i.e., the football, baseball, or basketball player. The term "participant" does not include ancillary personnel involved with the team or event such as managers, coaches, trainers, referees, umpires, groundskeepers, etc.

The determination of the beginning and end of a "season" and the determination of the length of the period between two successive seasons may vary from sport to sport and for particular individuals within the same sport.

One of the requirements in section 3304 (a) (13) is that the individual performed the designated service in the first season and there is a reasonable assurance that such individual will perform such services in the later of such seasons (or similar period). In effect the question is, Did the individual perform services as a professional athlete in the season just ended and is there a reasonable assurance that he will again do so in the next season?

Commentary- Section 4 (a) (4)

Professional athletes

Where an individual has an effective multi-year contract there should be no question that there is a reasonable assurance of performing services prior to and following the off-season. Where an individual completes a season and his contract terminates or under his contract he is free to negotiate with others for his services, there is a reasonable assurance that he will perform such service in the next ensuing season so long as he affirmatively offers his services as an athlete to employers and there is some indication that employers are considering employing him. Put another way, a reasonable assurance is not present when the individual clearly withdraws from athletics.

If at the end of a season during which an individual performed services as an athlete there is not a reasonable assurance that he will perform such service in the coming season, he is entitled to benefits on all of his wages (athletic and non-athletic) until a reasonable assurance is established. As of that date, if otherwise eligible, he would be entitled to benefits based on non-athletic wages only.

Note that the provision does not prohibit all payments during the off-season or "similar period" between athletic events. It prohibits only the payment of benefits based on services "substantially all of which consist of participating in sports or athletic events or preparing to so participate." Accordingly, if a professional athlete has wage credits for other than athletic service and otherwise meets State law requirements, benefits are payable on such wages during the off-season.

The term "a reasonable assurance" is also used in section 4 (a) (3) which relates to the "between terms" denial applicable to employees in educational institutions. The term is interpreted differently for these employees than it is with respect to professional athletes because the situations are different. The employment relationship in education employment is likely to be of long duration because of tenure. In sports, the employment relationship is of shorter duration and more easily influenced by highly publicized performance. Services in education are performed

Commentary - Section 4 (a) (4)

Professional athletes

in a relatively stable structure, i.e., the school year is well defined as are the intervals between school years. In sports there is not such a clear definition of seasons or the intervals between seasons. The differences must be recognized in determining when an individual has "a reasonable assurance" of returning to employment whether in the education field or in athletics.

The comments above are not intended to be a comprehensive interpretation of section 3304 (a) (13). They are intended only to point to major considerations involved. The terms of the individual's contract, accepted practice and special situations involved in each claim must be carefully examined to determine whether the claim is subject to section 3304 (a) (13).

Commentary - Section 4 (a) (5)

Denial of benefits for illegal aliens

Section 3304 (a) (14), FUTA, requires, as a condition for certification by the Secretary, that the State law deny benefits based on service by an alien who has not been legally admitted to the country as a permanent resident. The provision does not deny benefits on the basis of services performed by noncitizens. It applies to services performed by individuals who do not have the legal status of permanent residence in this country.

To avoid discriminating against certain groups in the administration of this provision, it is required that information designed to identify illegal nonresident aliens shall be requested of all claimants for benefits. This can be accomplished by asking each claimant at the time he establishes his benefit year whether or not he is a citizen. The question should be included on the initial claim form so that a response can be secured in claims filed by mail, and so that the response will be subject to fraud provisions. If the response is "Yes" no further proof is necessary and the claimant's records should be marked accordingly. If the answer is "No", the claimant must be requested to present documentary proof of legal residency. The principal documents showing legal entry for permanent residency are "Arrival and Departure Record, "Form I-94, and "Alien Registration Receipt Card," Form I-151, both issued by the Immigration and Naturalization Service.

Whether or not an individual is a permanent resident is to be decided by "a preponderance of the evidence." Evidence may be considered preponderant when, fairly considered and weighed, it produces the stronger impression, has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition. Put another way, if the claimant presents documentary proof of permanent residency, such evidence should be accepted unless the proof is clearly faulty or there are reasons to doubt its authenticity.

Commentary - Section 4 (a) (5)

Denial of benefits for illegal aliens

According to the Senate debates on this provision (Congressional Record, September 29, 1976, S 17025),

"The Immigration and Naturalization Act as interpreted by courts and agencies is a very complex body of law . . . Even these trained experts have difficulty in determining the status of individuals.

"The problems for unemployment claims workers will be especially severe with respect to persons who claim citizenship but have no ready proof of citizenship. For example, there are many individuals who have neither birth certificates nor naturalization papers, but who are citizens under 8 U.S.C. 1401.

"It is not fair to ask untrained unemployment claims workers to attempt to interpret the Immigration and Naturalization Act. The amendment, therefore, proposes that all applicants be asked basic questions about citizenship or status as an alien. This information, together with other claims information, is verified by the employer in the normal claims process.

"Unless a preponderance of the evidence is developed indicating that the individual is not lawfully admitted for permanent residence in the United States, the claim will be paid. These administrative provisions are consistent with the intent of the bill to deny unemployment compensation to aliens not lawfully admitted to the United States without unintentionally penalizing persons who are eligible as citizens or as aliens lawfully admitted for permanent residence."

The "preponderance of evidence" requirement was further supported as a safeguard against the "unintended effect of discriminating against American citizens and persons legally residing in this country and eligible for work, simply because of their ethnic, racial, or linguistic characteristics."

Commentary - Section 4 (a) (5)

Denial of benefits for illegal aliens

The denial of benefits is not applicable to services performed by "(... an alien who is lawfully present in the United States as a result of the application of the provisions of section 203 (a) (7) or section 212 (d) (5) of the Immigration and Nationality Act)." These sections permit the entry of individuals who have fled from designated foreign areas "because of persecution or fear of persecution on account of race, religion or political opinion" or "persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode" (section 203 (a) (7)) or whose admission is otherwise deemed "in the public interest" (section 212 (d) (5)). Such individuals have been issued "Arrival and Departure Record," Form I-94, noted to indicate "Conditional entry" or "Parolee."

Note that instances in which an individual has earnings while a nonpermanent resident and while a permanent resident, he would be entitled to benefits based only on his earnings as as permanent resident.

Commentary--No draft language

Denial of benefits to recipients of retirement benefits

An amendment creating new section 3304 (a) (15) of the Federal Unemployment Tax Act reads as follows:

"The amount of compensation payable to an individual for any week which begins after September 30, 1979, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week."

This provision is unique in that it does not take effect until October 1, 1979, because the Committee of Conference delayed the effective date--

". . . thereby permitting the National Commission on Unemployment Compensation an opportunity for a thorough study of this issue and the Congress to act in light of its findings and recommendations."
(Conference Report to Accompany H.R. 10210, page 16.)

Draft language is not being provided for the States' use at this time because the Commission's study and report, due January 1, 1979, may well result in the Congress amending this section before it becomes effective.

Although the present pension reduction standard effective October 1, 1979, may not be retained, it is likely that Congress will adopt a standard of some type. For any State that (1) does not now provide for reducing unemployment benefits by pension or retirement pay and (2) decides to adopt such a provision, it is recommended that the reduction apply with respect to the pro-rated weekly amount only of a pension of which a base-period employer (a chargeable employer, if not a base-period employer) financed at least half the cost. If such employer financed at least half but not all the cost of the retirement, consideration should be given to reducing the weekly benefit by only half the pro-rated weekly amount of such pension.

Commentary - Section 4

No denial solely on basis of pregnancy

The 1976 Amendments to the Federal Unemployment Tax Act amended section 3304 (a) (12) to provide as a condition for certification of the State law by the Secretary that, effective January 1, 1978, "no person shall be denied compensation . . . solely on the basis of pregnancy or termination of pregnancy."

A draft provision to implement this requirement has not been provided because a specific affirmative provision is not necessary to implement the prohibition although a State may add a specific provision if desired. It is necessary that any provision specifically relating to pregnancy in the determination of entitlement to benefits be deleted from the law.

A number of State laws deny benefits for causes related to pregnancy. These provisions are inequitable in that benefits are denied regardless of whether or not the individual is able and available for work and otherwise eligible. The new provision requires that the entitlement to benefits of pregnant claimants be determined on the same basis and under the same provisions applicable to all other claimants. It does not mean that pregnant claimants are entitled to benefits without meeting the requirements of the law for the receipt of benefits. It requires only that a pregnant claimant not be treated differently under the law from any other unemployed individual and that benefits be paid or denied not on the basis of pregnancy but on the basis of whether she meets the statute's conditions for receipt of benefits. Amendments may be made effective at any time but not later than January 1, 1978, in order to meet this new requirement.

States should examine their laws to assure that all discriminatory provisions are deleted. See Unemployment Insurance Program Letters 1097, 1186, 33-75 and 1-76.

Section 8 (c)

Contributions

(Section 3306 (b) (1), FUTA)

* (c) Base of contributions.--For the purposes of section 8(a) and (b) and subsequent to _____¹ wages shall not include that part of remuneration which, after remuneration equal to \$6,000 has been paid in a calendar year to an individual by an employer or his predecessor with respect to employment during any calendar year, is paid to such individual by such employer during such calendar year unless that part of the remuneration is subject to a tax under a Federal law imposing a tax against which credit may be taken for contributions required to be paid into a State unemployment fund. For the purposes of this subsection, the term employment shall include service constituting employment under any unemployment compensation law of another State.

¹ Insert the date as of which the latest amendment to subsection (c) becomes effective, which should not be later than January 1, 1978.

Commentary Section 8 (c)

Contributions

The 1976 Amendments amended section 3306 (b) (1), Federal Unemployment Tax Act, to raise the taxable wage base from \$4,200 to \$6,000 with respect to remuneration paid after December 31, 1977. The only change to section 8(c) in the 1970 Draft Legislation is to substitute \$6,000 for \$4,200.

Commentary--Section 8 (e)--No draft language

Financing of State and local governmental entity
regular and extended benefit costs

(Section 3309 (a) (2), FUTA, and section
204 (a), Title II, P.L.91-373)

Section 3309 (a) (2) of the FUTA has been amended by the 1976 Amendments to extend to the States and their political subdivisions, effective January 1, 1978, the option of financing their benefit costs by paying contributions or by making payments in lieu of contributions (reimbursements), the latter in the same manner as nonprofit organizations. The States are required, as a condition for tax offset credit to their employers and for Federal administrative grants, to extend coverage to all State and local government employment with specified optional exclusions. Section 204 (a) of the Federal-State Extended Unemployment Compensation Act of 1970 (Title II of P.L. 91-373) has been amended to provide that, effective January 1, 1979, the Federal share of sharable regular and extended benefits will no longer include the costs of such benefits based on wages paid to employees of State and local governments.

The Federal law allows governmental entities (State and local governments) to elect to pay contributions or to make payments in lieu of contributions (reimbursements). The State law may treat the State government as a whole as a governmental entity or it may treat the branches of the State government (executive, legislative, and judicial) and the agencies of the State government as governmental entities individually. The political subdivisions of a State must be treated as governmental entities individually and must each be given the option of electing contributions or payments in lieu of contributions (reimbursements).

If a political subdivision elects the reimbursement method it must reimburse the State unemployment fund in amounts equal to the amount of benefits attributable to service in its employ, i.e., it must reimburse dollar for dollar. The same conditions applicable to reimbursing nonprofit organizations will apply to such a reimbursing political subdivision, for example, noncharging of benefits will not be applicable. If, however, the political subdivision

Commentary--Section 8 (e)

Financing of State and local governmental entity
regular and extended benefit costs

(Section 3309 (a) (2), FUTA, and section
204 (a), Title II, P.L.91-373)

elects the contributions method, payments may be made either as provided for in the experience rating system applicable to private for profit employers, or under a special contributions plan established by State law for governmental entities only. (Note that a nonprofit organization which elects the contributions method must make payments under the experience rating system on the same basis as private for profit employers. Governmental entities may be offered an alternative contribution scheme.)

Since a governmental entity is not "a person (or group of persons)" within the meaning of section 3303 (a) (1), FUTA, the payment of contributions need not conform to the requirements of that provision. A State system of contributions applicable solely to governmental entities may provide for the payment of a specified uniform percentage of taxable wages and may, alternatively or in combination, provide for a type of experience rating with noncharging or not.

Whether the method of financing the benefit cost of governmental entities be the payment of contributions or reimbursement, the payment must be for the State unemployment fund, subject to the usual immediate deposit and withdrawal requirements of Federal law as in the case of payments made by employers other than governmental entities.

If benefits paid to an individual are based on wages paid by more than one employer and the employers consist of one or more governmental entities and one or more other types of employers, the benefit costs should ordinarily be allocated or charged to individual employers, as the case may be, in the manner that those costs are allocated to more than one contributing employer that is subject to the normal experience rating provisions of the State law. The details should be set forth in either the State law or in appropriate regulations. Draft language is not offered because of the many possible varieties of financing provisions.

Section 8 (f) (1) (G)

Noncharging reimbursing employers for benefits
paid to newly-covered workers during transition

(Section 121, P.L. 94-566)

8 (f) (1) (G) Any nonprofit organization which elects to make payments in lieu of contributions into the unemployment compensation fund as provided in this paragraph shall not be liable to make such payments with respect to the benefits paid to any individual whose base-period wages include wages for previously uncovered services as defined in section 3 (b) (2) to the extent that the unemployment compensation fund is reimbursed for such benefits pursuant to section 121 of P.L. 94-566.

Commentary - Section 8 (f) (1) (G)

Noncharging reimbursing employers for benefits
paid to newly-covered workers during transition

Subparagraph G. Section 121 of the 1976 Amendments provides that a State may permit newly-covered workers to become eligible for regular benefits on the basis of wages earned prior to January 1, 1978, with Federal reimbursement to the States for the cost of regular benefits and the 50 percent of extended benefits paid to these newly-covered workers that would not have been reimbursed under the Federal-State Extended Unemployment Compensation Act. See the Commentary on section 3 (b) (2). Section 121 also permits the States, at their option, to noncharge both contributing employers and employers who had elected reimbursement for the benefits paid that are reimbursable by the Federal Government to the extent that the individual would not have been eligible for benefits had the State not provided for the payment of benefits on the basis of previously uncovered services. The language provided authorizes noncharging of these benefits for nonprofit reimbursing employers. Corresponding language would be needed to authorize noncharging of these benefits for contributing employers. It is not added here because of the wide variety of State experience rating systems.

Section 8 (g)

Transition provision

(Sections 3303 (f) and 3303 (g), FUTA)

* 8 (g) Notwithstanding any provisions in subsection (f), any nonprofit organization that prior to January 1, 1969, paid contributions required by subsection (a) of this section, and pursuant to subsection (f) of this section, elects before April 1, 1972, to make payments in lieu of contributions, shall not be required to make any such payment on account of any regular or extended benefits paid, on the basis of wages paid by such organization to individuals for weeks of unemployment which begin on or after the effective date of such election until the total amount of such benefits equals the amount

(Alternative 1)

of the positive balance in the experience rating account of such organization

(Alternative 2)

(i) by which the contributions paid by such organization with respect to the _____ year period before the effective date of the election under subsection (f) exceed

Section 8 (g)

Transition provision

(Alternative 1 of (ii))

(ii) the total amount of benefits paid for the same period that were attributable to service performed in the employ of such organization and were charged to the experience rating account of such organization.

(Alternative 2 of (ii))

(ii) the total amount of benefits paid for the same period that were paid under this Act on the basis of wages or service performed in the employ of such organization.

Section 8 (h)

Transition Provision

(Sections 3303 (f) and 3303 (g), FUTA)

* 8 (h) Notwithstanding subsection (f), any nonprofit organization or group of organizations that prior to October 20, 1976, paid contributions required by subsection (a) of this section, and pursuant to subsection (f) of this section, elects, within 30 days after _____,¹ to make payments in lieu of contributions shall not be required to make any such payment on account of any regular or extended benefits paid, on the basis of wages paid by such organization to individuals for weeks of unemployment which begin on or after the effective date of such election until the total amount of such benefits equals the amount

(Alternative 1)

of the positive balance in the experience rating account of such organization

¹ Enter effective date of provision.

Section 8 (h)

Transition provision

(Alternative 2)

(i) by which the contributions paid by such organization with respect to the _____ year period before the effective date of the election under subsection (f) exceed

(first alternative of (ii))

(ii) the total amount of benefits paid for the same period that were attributable to service performed in the employ of such organization and were charged to the experience rating account of such organization.

(second alternative of (ii))

(ii) the total amount of benefits paid for the same period that were paid under this Act on the basis of wages or service performed in the employ of such organization.

Commentary - Sections 8 (g) and (h)

Transition provisions

(g) and (h) Transition Provisions.--The 1976 Amendments added a new transition provision, which a State may adopt, at its option, applicable to nonprofit educational institutions (other than institutions of higher education) which were covered under the State law on a contributory basis prior to October 20, 1976, and which elect the reimbursement method were of financing benefits attributable to service performed in the employ of such organizations at the first opportunity such method of financing is available under the State law. The new provision is virtually identical to the transition provision in section 8 (g) of the 1970 Draft Legislation when coverage was first extended to service performed for nonprofit organizations and the commentary for that section on pages 105 and 106 also applies to the new transition provision in section 8 (h).

The draft language now includes two transition provisions for reimbursing nonprofit organizations. According to the Report to accompany H.R. 10210, U.S. House of Representatives, Committee on Ways and Means,

""A technical amendment to section 3303 (f) modifies the 1970 amendments which also permitted non-profit organizations covered prior to those amendments to use positive reserve balances to offset reimbursement costs, section 3303 (f) was interpreted as limiting this opportunity to organizations with a continuous period of coverage. Non-profit organizations that had elected coverage and then later withdrew before coverage became mandatory, were prevented from applying any reserve balance to future reimbursement costs. This amendment would permit such organizations to apply accumulated reserves to their reimbursement liability if they had elected the reimbursement method before April 1, 1972."

Commentary - Sections 8 (g) and (h)

Transition provisions

It should be noted that this permission for an organization which had a break in coverage to take advantage of the extended transition provision is applicable only to those nonprofit organizations which were first mandatorily covered in 1972 (by reason of section 3304 (a) (6) (A), FUTA) and elected the reimbursement method before April 1, 1972. Nonprofit organizations which are first mandatorily covered on January 1, 1978, (by reason of amended sections 3304 (a) (6) (A) and 3309(a), FUTA) will come under the 1976 transition provisions, i.e., the opportunity to apply accumulated reserves to reimbursement liability is limited to (1) organizations with a continuous period of liability from October 20, 1976, and until they elect reimbursement financing, (2) who were covered under the State law prior to October 20, 1976, and (3) who elect reimbursement financing within 30 days after the coverage became mandatory for all of the States pursuant to P.L. 94-566.

Section ____ (a) (2), (3), (4), and (5)

Definitions: "Extended benefit indicators"

* (a) (2) There is a national "on" indicator for a week if, for the period consisting of such week and the immediately preceding twelve weeks, the rate of insured unemployment (seasonally adjusted) for all States equaled or exceeded 4.5 percent. The rate of insured unemployment, for the purposes of this subsection, shall be determined by the Secretary of Labor by reference to the average monthly covered employment for the first four of the most recent six calendar quarters ending before the close of such period.

* (3) There is a national "off" indicator for a week if, for the period consisting of such week and the immediately preceding twelve weeks, the rate of insured unemployment (seasonally adjusted) for all States was less than 4.5 percent. The rate of insured unemployment, for the purposes of this subsection, shall be determined by the Secretary of Labor by reference to the average monthly covered employment for the first four of the most recent six calendar quarters ending before the close of such period.

Section ____ (a) (2), (3), (4), and (5)

Definitions: "Extended benefit indicators"

(Alternative 1)

* (4) There is a State "on" indicator for a week if the rate of insured unemployment under this Act for the period consisting of such week and the immediately preceding twelve weeks

(A) equaled or exceeded 120 percent of of the average such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and

(B) equaled or exceeded 4 percent.

(Alternative 2)

* (4) There is a State "on" indicator for a week if the rate of insured unemployment under the State law for the period consisting of such week and the immediately preceding twelve weeks

(A) equaled or exceeded 120 percent of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and

(B) equaled or exceeded 4 percent:

Section ____ (a) (2), (3), (4), and (5)

Definitions: "Extended benefit indicators"

Provided, That with respect to benefits for weeks of unemployment beginning after _____¹ the determination of whether there has been a State "on" or "off" indicator beginning or ending any extended benefit period shall be made under this subsection as if (i) paragraph (4) did not contain subparagraph (A) thereof, and (ii) the figure "4" contained in subparagraph (B) thereof were "5"; except that, notwithstanding any such provision of this subsection, any week for which there would otherwise be a State "on" indicator shall continue to be such a week and shall not be determined to be a week for which there is a State "off" indicator.

* (5) There is a State "off" indicator for a week if, for the period consisting of such week and the immediately preceding twelve weeks, either subparagraph (A) or (B) of paragraph (4) was not satisfied.

¹ As provided in the State law but no earlier than March 30, 1977.

Commentary - Section (a) (2), (3), (4), (5)

Extended benefit trigger

Title II of the Employment Security Amendments of 1970 established a permanent Federal-State extended benefits program. The program provides extended benefits to workers who during periods of high unemployment in a State or in the Nation (a) have exhausted their rights to regular benefits (including dependents' allowances and unemployment benefits payable to Federal civilian employees and to ex-servicemen) under the State law, (b) have no usable rights to regular benefits under such State law or any other State unemployment compensation law or to unemployment benefits or allowances, as the case may be, under any other Federal law, and (c) are not receiving unemployment benefits under the unemployment compensation law of Canada.

Extended benefits provided under the Federal-State extended benefit program are payable to eligible individuals only when periods, designated as "extended benefit periods," are in effect in the State. Under the extended benefit program enacted in 1970, the program triggers "on" for all States when the seasonally adjusted insured unemployment rate for the Nation was 4.5 percent for three consecutive months. Nationwide payment of extended benefits triggers "off" when the rate falls below the required level for three consecutive months. This requirement was temporarily modified to permit a State to elect, by law, to apply a 4.0 percent national trigger. Extended benefits were payable in a State without regard to the national IUR if two conditions were met:

- (a) the unadjusted insured unemployment rate for that State averaged 4 percent for any 13-consecutive week period; and (b) the rate exceeded 120 percent of the State's average IUR for the corresponding 13-week period in each of the two preceding years. However, the 120 percent requirement has been waived through March 31, 1977.

Commentary - Section ___ (a) (2), (3), (4), (5)

Extended benefit trigger

The intent of the trigger mechanism contained in the 1970 Amendments was to establish an extended benefit program which would provide early response to adverse economic conditions and end when the need had passed. The triggers were unsatisfactory, particularly when high unemployment continued over a protracted period. Specifically, the 120 percent factor would have prevented payments of extended benefits on several occasions in States where the unemployment rate was high and payment of extended benefits appeared appropriate. Congress has legislated on seven different occasions since 1970 to permit each State to waive the 120 percent factor in order to authorize payment of extended benefits.

The 1976 Amendments continue the "on" indicator for the Nation at a seasonally-adjusted insured unemployment rate of 4.5 percent, but it is based on a moving 13-week average rather than the average for a 3-consecutive-month period. Going to the 13-week moving trigger makes the national trigger more responsive to changes in national unemployment levels. For a State, the "on" indicator is an insured unemployment rate (not seasonally adjusted) of 4.0 percent, for a moving 13-consecutive-week period and a rate which equaled or exceeded 120 percent of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years. To overcome the objections to the 120 percent requirement that requires ever higher unemployment levels in a State to keep the program triggered "on", the 1976 Amendments permit each State, at its option, to provide for waiving the 120 percent requirement when the insured unemployment rate in the State equals at least 5 percent. This waiver may be provided by State law at any time in the future but not before March 30, 1977. Should a State provide, by law, for waiving the 120 percent requirement when the insured unemployment rate equals or exceeds 5 percent, the program will remain "on" until it would have triggered "off" without the waiver.

Commentary - Section ___ (a) (2), (3), (4), (5)

Extended benefit trigger

These are new requirements for State laws. The new national trigger applies to weeks beginning after December 31, 1976, while the new State triggers apply to weeks beginning after March 30, 1977. Since it is likely that the Federal-State extended benefit program will remain triggered "on" under either the old or new National triggers at least through 1977, the States will have ample opportunity to conform their laws to the changed requirements, and no active issue of consistency with the new provisions will be raised with any State through that period. However, as these new triggers are requirements for State laws under section 3304 (a) (11), FUTA, the necessary changes in State law should be accomplished as early as possible.

CHRONOLOGY OF LEGISLATIVE DEVELOPMENTS
CULMINATING IN ENACTMENT OF UNEMPLOYMENT
COMPENSATION AMENDMENTS OF 1976
(P.L. 94-566)

1975

- July 8 H.R. 8366, Unemployment Compensation Amendments Act of 1975, introduced by James C. Corman, Chairman, Unemployment Compensation Subcommittee, and referred to Way and Means Committee.
- July 14 H.R. 8614, Unemployment Compensation Amendments of 1975, introduced by William A. Steiger (Wisc.), Ranking Minority Member, Unemployment Compensation Subcommittee, and referred to Ways and Means Committee.
- July 16-30 U.C. Subcommittee holds public hearings on comprehensive bills (H.R. 8366 and H.R. 8614, see above) and several single-issue bills. Secretary of Labor John Dunlop testifies in favor of the Administration's bill, H.R. 8614.
- July 31 U.C. Subcommittee holds pre-markup session on permanent changes in the unemployment insurance program and schedules markup sessions for September and October. Chairman Corman announces his plan to report a Subcommittee bill on October 20.
- September 22 & 29,
October 6 & 20 U.C. Subcommittee holds markup sessions, adopting on Oct. 6 a Steiger "Substitute Proposal," which serves as the basis for H.R. 10210. Reported October 20 to full Ways and Means Committee, after being introduced that day by Chairman Corman and cosponsored by the following Subcommittee Members: Steiger (Wisc.), Burke (Mass.), Jacobs, Keys, Fisher, and Frenzel.
- October 31 Ways and Means Committee begins consideration of H.R. 10210. Secretary Dunlop testifies on behalf of H.R. 8614, including the benefit amount standard.

1975 (continued)

December 11 Ways and Means Committee concludes consideration of H.R. 10210, fails (17-18) to approve a Federal benefit amount standard, and votes to report H.R. 10210 with technical amendments on December 16. Ways and Means Committee agrees to request closed rule with 3 hours of debate.

December 16 Ways and Means Committee reports H.R. 10210 with technical amendments (Report No. 94-755).

1976

January 22 House Budget Committee considers arguments by Chairman Corman and Cong. Steiger in favor of a point of order waiver to permit quick House action on H.R. 10210. Letter of this date from Secretary Dunlop to Budget Committee Chairman Brock Adams expresses Administration support based on critical need for financial stability in the UI program and extension of coverage to groups now receiving only SUA.

January 27 House Budget Committee denies waiver, delaying House action on H.R. 10210 until at least May 15.

March 30 House Rules Committee grants Ways and Means Committee request for closed rule and 3 hours of debate.

April 28 Secretary of Labor W. J. Usery sends letter to Ways and Means Chairman Ullman stating that Administration will not object to passage of H.R. 10210, despite differences from earlier Administration position expressed in provisions of H.R. 8614.

April 28-30 U.C. Subcommittee holds public hearings on extension and modification of SUA and FSB, temporary programs. Asst. Secretary of Labor Kolberg states Administration support of 1-year extension of SUA, opposition to any extension of FSB.

May 10 House Rules Committee recommends closed rule on H.R. 10210 (House Report 94-1111).

1976 (continued)

- May 17 Closed rule on H.R. 10210 rejected by the House (vote: 125-219).
- May 22 President Ford's letters to Chairman Ullman and Ranking Minority Member Schneebeli (Ways and Means Committee) urging prompt action on legislation to correct financing deficiencies of the unemployment trust fund.
- May 24 Unemployment Compensation Subcommittee agrees to postpone further consideration of temporary program modification and extension pending action on H.R. 10210.
- May 25 Ways and Means Committee agrees to request a modified closed rule with four amendments allowed for Titles I-III, open rule on Title IV (National Study Commission), of H.R. 10210.
- June 3 Rules Committee approves modified closed rule with five significant amendments allowed for Titles I-III, open rule Title IV, of H.R. 10210 (House Report 94-1216), 2 hours of general debate, pro forma amendments permitted and one motion to recommit with or without instructions.
- June 28 H.R. 10210 scheduled to come to House floor, but House adjourns at 6:32 p.m. without consideration of the bill and recesses July 2. Solicitor of Labor issues opinion that H.R. 10210 State and local government coverage is constitutional; delivered to U.C. Subcommittee by 10 a.m.
- July 19 House accepts modified closed rule on H.R. 10210 by vote of 246 yeas to 131 nays.
- July 20 H.R. 10210 passed House by vote of 237 yeas to 157 nays after accepting by voice vote the Ullman Amendment to change the quarterly wage provision of farm coverage to \$10,000, the Pickle Amendment (283 yeas to 114 nays) to change the tax base to \$6,000, the Ways and Means Committee Amendment (unanimous) to move forward effective dates in the bill because of delay in floor action, the Sisk Amendment (division vote of 136 yeas to 22 nays) to deny benefits to professional athletes

1976 (continued)

between seasons and illegal aliens, and two amendments adding items to the National Study Commission agenda. The House rejected (186 yeas to 212 nays) the Ketchum Amendment to delete State and local government and nonprofit school employee coverage and the Corman Amendment (113 yeas to 281 nays) to include a Federal benefit amount standard requiring States to pay benefits equal to a claimant's average weekly wage up to a State maximum equal to two-thirds of the State's average weekly wage.

- July 21 H.R. 10210 introduced in the Senate, read twice and referred to the Committee on Finance.
- July 29 House Subcommittee marks up bill to extend the Special Unemployment Assistance (SUA) program for one year.
- July 30 H.R. 14970, Special Unemployment Assistance Act of 1976, introduced by Chairman Corman for himself, Mr. Steiger (Wisc.), and Mr. Burke (Mass.).
- Sept 8-10 Senate Finance Committee holds hearings on H.R. 10210. Under Secretary of Labor Michael Moskow testifies on behalf of the Administration to express strong support of H.R. 10210 as passed by the House.
- Sept. 20 Senate Finance Committee reports H.R. 10210 (Report No. 94-1265)
- Sept. 29 Senate passes H.R. 10210 by vote of 71 yeas to 6 nays after agreeing to Committee amendments and adopting Nelson Amendment to include provisions of H.R. 14970 (SUA extension), a number of SSI amendments previously passed by the House, and the provisions of H.R. 13272 (AFDC/UF and UI) as passed by the House. (Report No. 94-1112) The Senate also appoints conferees.
- Sept. 30 House appoints H.R. 10210 conferees.

1976 (continued)

- Sept. 30 House and Senate conferees meet and agree on a Conference Report which includes a modified version of the House farm and domestic service coverage provisions and a modified version of the Senate trigger provisions. (Report No. 94-1745)
- Oct. 1 Conference Report adopted by vote of 272 to 97 in the House and by voice vote (in less than 5 minutes) in the Senate.
- Oct. 8 Enrolled bill received at the White House. President has until midnight October 20 to sign bill if it is to become law.
- Oct. 20 President Ford signs H.R. 10210 into law as Public Law 94-566, The Unemployment Compensation Amendments of 1976.

U.S. DEPARTMENT OF LABOR
EMPLOYMENT AND TRAINING ADMINISTRATION
WASHINGTON, D.C. 20213

MEMORANDUM FOR: ALL STATE AGENCY ADMINISTRATORS AND ALL
REGIONAL ADMINISTRATORS, EMPLOYMENT
AND TRAINING ADMINISTRATION

FROM : LAWRENCE E. WEATHERFORD, JR.
Administrator, Unemployment
Insurance Service

SUBJECT: Supplement #1 -- Questions and Answers
Supplementing Draft Language and Commentary
to Implement the Unemployment Compensation
Amendments of 1976-P.L. 94-566

Following enactment of HR 10210 (PL 94-566) and the issuance of Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976-P.L. 94-566, legislative planning meetings were held in Washington, D.C., Atlanta, Georgia, Kansas City, Kansas and San Francisco, California. The enclosed questions and answers reflect inquiries made during these meetings.

The questions and answers are keyed to the applicable provision and its commentary in the 1976 Draft Legislation and are issued as a supplement to it.

Please annotate your copies of the 1976 Draft Legislation to reflect these additions.

Additional explanations and interpretations will be issued as needed and appropriate.

Enclosure

Supplement 1, 1976 Draft Legislation
December 7, 1976

Employer of domestic service, section 2 (i) (4) (B)
Refer: Commentary, pages 4, 33

1. Question:

Is an individual employed by a domestic service organization an employee of that organization or of the householder for whom the work is performed?

Answer:

An individual provided by a private service firm to perform domestic service in a private home is an employee of the service firm not the householder. In the usual situation the householder pays the firm. The firm is responsible for paying the worker, for withholding taxes from the wages, for paying Social Security taxes, etc.

Separating wages and employment in determining employer status, section 2 (i) (5)

Refer: Commentary, page 34

1. Question:

May a separate account for each type of service covered (general, agricultural, domestic) be established for an employer or must all of an employer's experience, regardless of the type of service involved, be included in one experience rating account?

Answer:

No. All of an employer's experience, regardless of the kind of service involved, must be included in a single experience rating account. Different types of service cannot be allocated to separate accounts consistently with section 3303 (a) (1), FUTA. For example, an employer who is covered because of general service, has a domestic. The domestic becomes covered when the employer has paid \$1,000 in cash in a quarter. The domestic service would be included with the employer's general service coverage so that his one account would reflect/his experience with general and domestic service.

Service for governmental entities, section 2 (k) (1) (B)
Refer: Commentary, page 25

1. Question:

Does the language in section 2 (k) (1) (B) (ii), 1976 Draft Legislation adequately provide for coverage of instrumentalities wholly owned by the State or any of its political subdivisions?

Answer:

No. The following technical changes have been made in section 2 (k) (1) (B) (ii) to assure coverage of governmental instrumentalities whether wholly owned within the State or jointly owned by governmental entities within and outside the State.

“(ii) service performed after December 31, 1977, in the employ of the State or any of its instrumentalities or any political subdivision thereof or any of its instrumentalities or any instrumentality of more than one of the foregoing or any instrumentality of any of the foregoing and one or more other States or political subdivisions: Provided, That such service is excluded from ‘employment’ as defined in the Federal Unemployment Tax Act by section 3306 (c) (7)¹ of that Act and is not excluded from ‘employment’ under section 2 (k) (1) (D)² of this Act.”

2. Question:

Do general coverage requirements of \$1,500 in a calendar quarter or 1 employee in each of 20 weeks apply to governmental entities?

Answer:

No. All governmental entities are covered regardless of whether they meet general coverage requirements.

Service for governmental entities, cont.

3. Question:

What is a governmental entity?

Answer:

The term is not defined in section 3309, FUTA. However, that section requires States to extend coverage to "service excluded from the term employment" solely by reason of paragraph (7) of section 3306(c)..." Section 3306 (c) (7) refers to service in the employ of a State, or any political subdivision thereof, or any instrumentality of either of them. It is therefore clear that Congress intended all governmental entities to be covered, with the exception of the optional exclusions provided in section 3309 (b) (3), FUTA. An instrumentality of one or more States or political subdivisions may be a part of a State or a political subdivision, or be independent of political entities and therefore a separate governmental entity.

What constitutes a "governmental entity" in any particular case will in general be controlled by State statutes creating the entities and prescribing their scope.

Service excluded from required coverage of nonprofit organizations, section 2 (k) (1) (D)

Refer: Commentary, page 25

1. Question:

Do the 1976 amendments affect church related schools?

Answer:

Yes, to the extent that coverage is extended to elementary and secondary schools. In other respects no changes were made, and the exclusion in sections 3309 (b) (1), (2), (4), and (5) are still applicable. Accordingly the commentary on pages 27-30, 1970 Draft Legislation, together with subsequent interpretations and explanations are still applicable.

For example, the coverage of nonprofit elementary and secondary schools does not affect the optional exclusion in 3309 (b) (1). The factors significant in determining whether or not service is performed

"(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches"

remain unchanged.

Some of these matters were dealt with in various issues of Interpretation Series, P.L. 91-373 which are still pertinent.

Option exclusions for required governmental entity coverage,
section 2 (k) (1) (D)

Refer: Commentary, pages 25-29

1. Question:

What is a “policy-making” position?

Answer:

“Policy-making” positions are discussed in 1976 Draft Legislation, commentary, page 28, paragraphs 1 and 2 .

2. Question:

What is the nature of the exclusion of service for the State National Guard or the Air National Guard?

Answer:

The optional exclusion of service for the State National Guard or Air National Guard applies to service in the individual's "military" capacity, usually during week ends or during summer training periods or when called into active duty. The exclusion does not apply to any service performed in any other capacity.

If a member of the National Guard or Air National Guard is employed in a “civilian” capacity performing services for either organization as distinguished from “military” service, the “civilian” service would be covered as an employee of a governmental entity to the same extent as any other employee. There are specified circumstances when National Guard or Air National Guard service in "civilian" and "military" capacities are covered under the UCFE or X program. With respect to UCFE coverage, such services would be identified on Form ES 931 as "Federal service" as defined in 5 USC 8501. With respect to UCX coverage, the individual would have been issued a DD 214 indicating that he had served at least 90 days in active duty (FTTD) and that he had been discharged under conditions other than dishonorable.

Optional exclusions for governmental entities, cont.

3. Question:

Is a "magistrate" a member of the judiciary within the meaning of section 3309 (b) (3) (B)?

Answer:

Yes. Section 3309 (b) (3) (B) excludes service performed by an individual in the exercise of his duties as "a member of judiciary, of a State or political subdivision thereof." A magistrate is a member of the judiciary and his service is excludable at the State's option.

4. Question:

Would an official elected by a body other than the public be performing excludable service as an "elected official?"

Answer:

No. The optional exclusion of service by elected officials from the required coverage of service for governmental entities is effective only if the individual is elected by the public. If he is elected initially through some other means, as by vote of a legislature, the exclusion is inapplicable.

When an individual is appointed to serve the unexpired term of an elective position, his service for such period is excluded because he is performing excluded service.

Agricultural labor, section 2 (k) (1) (E)
Refer: Commentary, page 30

1. Question:

Why did Congress permit only the two year exclusion from coverage of aliens admitted to the U. S. to perform agricultural labor?

Answer:

Section 3306 (c) (1) provides for the exclusion from the definition of agricultural labor "labor performed before January 1, 1980 by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to section 214 (c) and 101 (a) (15) (H) of the Immigration and Nationality Act. "

Concerning this 2-year exclusion, House Report No . 94-755, at the top of page 39 explained

“The alien exclusion, which relieves farm employers of the necessity to pay the Federal unemployment tax for these workers, is effective for two years. The time limitation will permit Congress to assess the impact of the exclusion in terms of whether employers are encouraged to hire aliens rather than U.S. citizens as a result of this provision.”

These services may be covered at the State's option. See Footnote ¹, page 13 and 14, 1976 Draft Legislation.

2. Question:

How would coverage be determined for a farm operator who employed both aliens admitted to perform agricultural labor and non-aliens in agricultural labor?

Answer:

Prior to January 1, 1980, the service of a section 214 (c) or section 101 (a) (15) (H), Immigration and Nationality Act alien may be excluded from agricultural labor coverage. If the farm operator did not pay at least \$20,000 dollars or more in a calendar quarter in a current or preceding calendar year, but had 20 employees in each of 20 weeks, 10 of which were the designated aliens, he would be considered an employer on the basis of having had 10 employees in agricultural labor in each of 20 weeks. The 10 aliens would not be counted in determining coverage prior to January 1, 1980.

Agricultural labor and domestic service,
Sections 2 (k) (1) (E) and (F)
Refer: Commentary, pages 30-35

1. Question:

What options are available to the State insofar as coverage of agricultural labor and domestic service is concerned? Must the State law parallel the Federal law?

Answer:

No. Under the Federal law agricultural labor will be covered, for Federal tax purposes, if a person employs 10 or more individuals in each of 20 weeks in agricultural labor, in the current or preceding calendar year, or pays wages of at least \$20,000, in cash, during any calendar quarter in the current or preceding calendar year. Similarly, domestic service will be covered when performed for a person who paid cash remuneration of \$1000 or more for such service in any calendar quarter in the current or preceding calendar year.

Only cash remuneration is counted in determining agricultural and domestic coverage for Federal tax purposes because of the specific provisions of sections 3306 (b) (11) and 3306 (c) (1), in regard to agricultural coverage, and the specific provisions of section 3306 (c) (2), in the case of domestic coverage. For Federal unemployment tax purposes, other categories of service for the same employer do not count toward domestic service, and domestic service does not count toward coverage of other categories of service for the same employer. Similarly, other categories of service for the same employer do not count toward coverage of agricultural labor, but coverage of agricultural labor does count toward general coverage for the same employer while it does not count toward coverage of domestic service.

States have the option of going beyond the foregoing conditions for Federal liability. For example, States may provide for liability under State law:

1. When a person employs fewer than 10 individual in fewer than 20 weeks in the current or preceding calendar year, or pays less than \$20, 000 in cash wages During a calendar quarter in the current or preceding calendar year;

Agricultural labor and domestic service, cont.

2. When a person pays remuneration other than cash, similarly to the definition of wages paid for general coverage of service; and
3. by mingling all categories of service.

For a fuller explanation, see the Commentary and charts on pages 33- 35, 1976 Draft Language.

It is important to bear in mind, however, that the language which identifies the crew leader or farm operator as the employer of crew members in specified circumstances should be used if the State is to avoid conflicting liability of the crew leader or the farm operator under the Federal and State laws. The Federal law governs liability for the Federal unemployment tax, and the State law governs liability for the State tax. We recommend that the State law parallel the Federal law in that respect to preclude a situation where the crew leader would be liable for the full Federal tax and the farm operator for the State tax for the same service.

Transition provision for previously uncovered services,
Section 3 (b) (2)

Refer: Commentary pages 42-46

1. Question:

When may new claims for regular benefits be established on the basis of previously uncovered services and wages?

Answer:

New claims may be established any time, prior to or on or after December 31, 1977, in accordance with the provisions of a State law which authorizes the use of previously uncovered services and wages in determining eligibility for regular benefits. Any existing SUA eligibility would terminate at the end of the week preceding the first week the individual qualifies for regular benefits. The State law may provide for the use of previously uncovered services or wages on as broad or narrow a basis as the State legislature may prescribe.

For the purposes of section 121 of Public Law 94-566, however, previously uncovered services and wages may include—

- a. Services performed and wages paid in calendar year 1977 with respect to employment for a private sector employer or a nonprofit organization, in agricultural labor or domestic service which was not covered by State law at any time during the calendar year 1975, and which is treated as employment under the State law as of January 1, 1978, by reason of amendments made by Public Law 94-566 and by corresponding changes in the State law, pursuant to which the employing unit became a subject employer under the State law as of January 1, 1978, because of employment or wage experience in calendar year 1977 or calendar year 1978 which meets the coverage requirements specified in the amendments made by Public Law 94-566; or

Transition provision for previously uncovered services, cont.

- b. Services performed and wages paid prior to January 1, 1978, with respect to employment for a State or local governmental entity, or a nonprofit organization, which was not covered by the State law at any time during the calendar year 1975, and which are services and wages to which section 3309 (a) (1), FUTA, applies by reason of amendments made by Public Law 94-566 and by corresponding changes in the State law, pursuant to which the employing unit became a subject employer under the State law as of January 1, 1978, or a prior date which is not earlier than October 20, 1976; and
- c. to the extent that SUA was not paid on the basis of such previously uncovered services and wages;

which form the basis, in whole or in part, for the payment of unemployment benefits for any week of unemployment that begins on or after January 1, 1978.

2. Question:

What benefits based on previously uncovered services and wages are reimbursable under section 121 of Public Law 94-566?

Answer:

In the Answer to the previous Question is a general description of the previously uncovered services and wages which may form the basis for the payment of unemployment benefits that are reimbursable under section 121. Reimbursements under that section are allowable for benefits paid with respect to weeks of unemployment beginning on and after January 1, 1978, including regular, additional, and extended benefits. The previously uncovered services and wages on which reimbursable benefits are based must be in the agricultural or domestic employment of an employer who becomes a subject employer as of January 1, 1978, on the basis of experience in calendar year 1977 or 1978, or in the employment of a State or local governmental entity or a nonprofit organization which becomes a subject employer with respect to such employment as of a date which is not later than January 1, 1978, and not earlier than October 20, 1976. For this purpose the previously uncovered services and wage include only those in the employment of an employer who becomes subject to the State law

Transition provision for previously uncovered services, cont.

under conditions of coverage corresponding to the applicable coverage provisions in the amendments made by Public Law 94-566, or who meets those conditions of coverage for becoming a subject employer as of a date not later than January 1, 1978.

There are other restrictions on reimbursements under section 121. The previously uncovered services and wages used in determining entitlement to benefits which are reimbursable may not include any services or wages covered by the State law at any time during the calendar year 1975. In addition, the previously uncovered services referred to must have been performed before July 1, 1978, in the case of any benefits payable for a week of unemployment that begins before July 1, 1978, and must have been performed prior to January 1, 1978, in the case of and benefits payable for a week of unemployment that begins on or after July 1, 1978.

Additionally, benefits paid are not reimbursable under section 121 to the extent that SUA was paid to the individual on the basis of such previously uncovered services and wages, or to the extent that the benefits are reimbursable under any other Federal law, including the Federal-State Extended Unemployment Compensation Act of 1970.

Transition provision for previously uncovered services, cont.

3. Question:

If an agricultural or domestic employer meets the requisite wage or employment requirements in 1977, does that mean he will be an employer in 1978?

Answer:

Yes. Coverage requirements are couched, in part, in terms of specified wages paid by an employing unit in a calendar quarter in the current or preceding calendar year. This means for example that if an employing unit paid \$20,000 in wages for agricultural labor during any calendar quarter in 1977 but had paid less than \$20,000 in wages for agricultural labor in any calendar quarter in 1978, that employing unit would be a covered employer with respect to calendar year 1978. The underlined phrase is also applied, as illustrated, with respect to other types of service.

4. Question:

Why does the language provided in the 1976 Draft Legislation (page 67) for noncharging reimbursers differ from that found in section 121 (e) of P.L. 94-566?

Answer:

Section 121 (e) provides for noncharging reimbursing nonprofit organizations for benefits based on previously uncovered wages. Section 8 (f) (1) (G), 1976 Draft Legislation, provides statutory language for implementing this optional provision. The result of the draft provision is the same as the statute. The wording varies because the draft provision supplies appropriate language for a State law to carry out the Federal authorization. Section 121 (e) is construed as being applicable also to State and local governmental entities, in view of the amendments to section 3309 (a) (2) in section 506 of P.L. 94-566.

Transition provision, cont.

5. Question:

May the noncharging permitted to reimbursing employers under section 121 (e) be extended to other situations; for example, is a State permitted to noncharge reimbursing employers for benefits paid due to administrative error?

Answer:

No. A reimbursing nonprofit organization is a self-insurer. As a self-insurer the organization is obligated to reimburse the State unemployment compensate on fund dollar for dollar for benefits paid on the basis of wages attributable to service in its employ. Noncharging is inapplicable because it would result in the organization reimbursing an amount less than an amount equal to the amount of compensation attributable to service in the organization's employ.

Nonprofit organizations may be noncharged benefits only under the specific, limited circumstances described in section 121 (e). Noncharging in other circumstances is not permitted by section 3309 (a) (2), FUTA.

Notice that the same provisions also apply to State and local governmental entities.

6. Question:

Why wasn't some provision made, in the transition provision, to provide Federal reimbursement for benefits paid based on employment with the State for States which have taken the initiative in extending coverage to State employees before it became mandatory under Federal law?

Answer:

The Senate did consider providing such Federal reimbursement in an Amendment to HR 10210 by Senator Nelson. However, because of budgetary considerations, the Amendment did not pass.

Transition provision, cont.

7. Question:

May Hawaii take advantage of transition provision for agricultural labor previously covered under its separate agricultural benefits law?

Answer:

Yes. The transition provision of section 121 of P.L. 94-566 defines "previously uncovered services," for purposes of the transition provision, as those which were not covered by a State UI law at any time during 1975 and which are the four categories of services newly covered by P.L. 94-566. For this purpose a State UI law means a State law approved under section 3304 (a), FUTA. Because agricultural labor in Hawaii was not covered under the State UI law but under a separate agricultural benefits law, Hawaii will be able to take advantage of the transition provision in paying benefits to agricultural workers beginning in 1978.

8. Question:

To what extent may a State noncharge benefits paid under the transition provision?

Answer:

Subsection (d) and (e) of section 121 are interpreted broadly, in accord with their language and the Congress' intent. A State may noncharge benefits paid that are reimbursable by the Federal government under section 121. In addition, benefits may be noncharged to the extent that the weekly benefit paid or the maximum amount paid is increased because of the inclusion of previously uncovered services and wages, and benefits paid may be noncharged if they would not have been paid but for the inclusion of previously uncovered services and wages. This applies to contributing employers and reimbursing employers. State experience rating systems that do not charge benefits paid may make equivalent adjustments in the accounts of contributing employers.

Between-terms denial, section 4 (a) (3)
Refer: Commentary, page 52

1. Question:

Does "between-terms" differ as applied to professional school employees and as applied to nonprofessional school employees?

Answer:

Yes. Although the term "between-terms" has been used to apply to both professional and nonprofessional school employees, the provisions of 3304 (a) (6) (A), FUTA, applying to the required denial of benefits to professional school employees are different from those applying to the optional denial of benefits to nonprofessional school employees. For professional employees, it is the period between two successive academic years, or a similar period between two regular but not successive terms, or a period of paid sabbatical leave provided for in the individual's contract. For nonprofessional employees it is the period between two successive academic years or terms. The between- terms provisions apply to the category of the claimant, i.e., whether he performs professional or nonprofessional services; neither applies where a claimant switches from one category to another. Note also that the optional provision does not apply to nonprofessional employees in institutions of higher education.

2. Question:

What does "a reasonable assurance" mean?

Answer:

The term "a reasonable assurance" is interpreted in the explanatory statement of the Conference Committee as requiring a specific act on the part of the school board to provide a written statement as to whether an employee has been given notification of returning to work in the same or a similar capacity (professional or nonprofessional). If a school employee takes issue with the bona fides of the school's assurance that he or she will return to the job, the claim

Between-terms denial, cont.

would be subject to the same fact-finding and determination procedures used on any other claim when an issue arises.

The specific guidance provided by Congress as to the meaning of "a reasonable assurance" is found in the Conference Committee report as reproduced on page 54 of the 1976 Draft Legislation. The States are expected to interpret their laws according to those guidelines whether they limit their between-terms denial to professional school employees, as required by Federal law, or take the option of also extending the denial to nonprofessional school employees.

3. Question:

Does a teacher have "a reasonable assurance" of reemployment while the teacher's union is still negotiating for a new collective bargaining contract in the summer?

Answer:

It depends on the circumstances in each case. If the school has informed the teacher that she/he has a bona fide reasonable assurance of returning to work, and the State agency has been so informed, benefits must be denied during the summer even though a union contract has not been signed. If the teacher has no such assurance from the school, the between terms denial would not apply until such assurance is received, whether or not the union contract has been signed.

4. Question:

What is "a reasonable assurance" in the case of a substitute teacher?

Answer:

The same as applies to other school employees, both professional and nonprofessional, as set forth in the Answer to Question 2 above. Where there is a written assurance of reemployment on essentially the same or better terms as in the past year, that is sufficient. Thus, if a substitute teacher is provided assurance that he/she will be retained on the "active substitute list for the ensuing school year, there is a reasonable assurance that the individual will perform such

Between-terms denial, cont.

services in the ensuing school year. Whether or not the individual actually performs any services as a substitute teacher in the ensuing school year is material only as it may reflect upon the bona fides of the original assurance.

5. Question:

Does the "between-terms" denial apply to a teacher who teaches classes during the same and only quarter every year and has contract for each year?

Answer:

Yes. Some institutions of higher education operate on a 4 quarter academic year instead of the traditional 2 semester year or a trimester (3 quarter) year. The "between-terms" denial in section 3304 (a) (6) (A) would apply to an instructor in an institution of higher education who regularly teaches only during one quarter or semester in an institution of higher education, because the individual has a contract to teach in the ensuing year. See Answers to Questions 2 and 4 above.

6. Question:

How do the "between-terms" provisions apply when there is no reasonable assurance or contract at the end of the first year, or the contract or reasonable assurance provides for reemployment after the beginning of the school year?

Answer:

In some situations, because it may not be established at the end of the school year how many teachers will be employed at the beginning of the next ensuing year, all teachers are notified that they are terminated at the end of the current school year. Such teachers would not, under these have a reasonable assurance of employment for the next school year and accordingly, could not be denied benefits "between terms". If, however, prior, to the beginning of the school year, any of the teachers are notified that they are to return at the beginning of the school year and the State agency is similarly notified, "a reasonable assurance" is achieved and the between terms denial is applicable as of the date of the assurance.

Between-terms denial, cont.

In the event some of the teachers are notified that they will return to work some time after the beginning of the school year, the between-terms denial would not apply after the beginning of the new school year, because section 3304 (a) (6) (A) requires denial only for weeks of unemployment beginning during the period between two successive academic years.

7. Question:

Is "a reasonable assurance" effective if it is not bona fide?

Answer:

No. Where at the end of a school year or term an individual has a reasonable assurance of reemployment for the next ensuing year or term, a valid basis does not exist for a redetermination that the assurance was not bona fide merely on the ground that the assurance as not fulfilled. If upon later revealed facts, it is determined that the assurance when given was faulty, for example, was not based on facts which were true at the time the assurance was given or the individual making the commitment had no authority to do so, the assurance purportedly given was not bona fide and therefor is not a valid basis for application of the between-terms provision. If however, the assurance is not fulfilled because of later developments such as budgetary restrictions forbidding the employment of the individual concerned, there would be no basis for a redetermination that the original assurance was not bona fide. In the latter case, the individual would be entitled to benefits, if otherwise eligible, from the date when it became clear that the initial assurance would not be fulfilled; retroactive benefits are not payable in this situation.

Between-terms denial, cont.

8. Question:

Some States employ individuals to provide school lunch programs in schools. These are State employees, not employees of the school. Would the between-terms denial apply?

Answer:

No. The optional between-terms denial of section 3304 (a) (6) (A) applicable to nonprofessional school employees applies to services for an educational institution (other than an institution of higher education). The employees described would be employees of the State working in but not for the educational institution. Therefore, between-terms and reasonable assurance would not be applicable to those employees.

Those provisions would not apply to any individual who works in an educational institution but who is employed by an employing unit other than the educational institution. The entitlement to benefits of such workers should be determined by other applicable provisions in the State law.

Between seasons denial for athletes
Section 4 (a) (4) Commentary pages 55-57

1. Question:

When are benefits payable on athletic wages and non-athletic wages?

Answer:

Benefits paid with respect to weeks of unemployment commencing during a sports season shall be based on all wage credits of the individual, which would include those earned in sports as well as in other employment covered by the State law. However, with respects to weeks of unemployment that begin during a period between sports seasons (or similar periods), no benefits are payable on the basis of any athletic or nonathletic wages if substantially all of the services performed by the individual during the base period were in sports or athletic events prescribed in section 3304 (a) (13), FUTA. As a minimum requirement, an individual shall be deemed to have performed substantially all services in such sports or events if the individual engaged in such sports or athletic events for 90% or more of the total time spent in the base period in the performance of all covered services.

This answer replaces the Commentary on page 56 of the 1976 Draft Legislation to the extent they are in conflict. The third paragraph and the last sentence of the second paragraph on page 56 accordingly should be deleted, and in the second paragraph on page 55 the phrase "on the basis of their athletic wages" should be deleted.

2. Question:

Does an athlete have to return to the same team for the between seasons denial to apply?

Answer:

No. If the individual has a reasonable assurance of employment with a team other than the one for which he played in the previous season, the "between-seasons" denial applies.

Between seasons denial for athletes, cont.

3. Question:

What is a "professional" athlete?

Answer:

The word "professional" is not used in section 3304 (a) (13) to describe "athlete." Nevertheless, the provision is intended to apply to professional athletes. A professional athlete is an individual whose occupation is participating in athletic or sporting events for wages. Whether a semi-professional ("semi-pro") athlete is within the scope of section 3304 (a) (13) depends upon whether his sports services are compensated in covered wages.

4. Question:

Are retroactive benefit payments allowable when a reasonable assurance fails for an athlete?

Answer:

No. When a professional athlete is denied benefits because there is a reasonable assurance that he will again perform services as a professional athlete in the next ensuing season, but the assurance fails to materialize, the denial of benefits is effective until the date established that the assurance is ineffective. Following the ineffective date, benefits can be paid if the individual is otherwise eligible. As in the case of school employees, however, if an assurance given to an individual is found to be not a bona fide assurance, benefits are payable if the individual is otherwise eligible.

5. Question:

Does the "between-seasons" denial apply to tennis and golf professionals?

Answer:

Whether the denial applies to golf and tennis "professionals" would depend on the individual's status; that is whether the individual is an employee performing services for an employer for wages. The provision does not apply to services in self-employment, or to prizes won in tournament play.

Denial of benefits to certain aliens, section 4 (a) (5)
Refer: Commentary, page 58

1. Question:

Does the provision requiring denial of benefits based on services performed by an alien apply to Canadians or other foreign nationals who lawfully perform services in the United States but are not permanent residents or lawfully admitted for permanent residence?

Answer:

The language of section 3304 (a) (14), FUTA, does appear clearly to apply to such individuals since a denial of benefits will be required unless the alien has been lawfully admitted to the United States for permanent residence. We believe such results are contrary to Congressional intent. Accordingly, a technical amendment is being developed to assure that benefits would not be denied to such individuals who are lawfully performing services in the United States. In the interim, and to assure State law consistency with 3304 (a) (14) as well as the contemplated amendment, we recommend the following proviso be added to Subparagraph (A) on page 51 of the 1976 Draft Legislation containing the language implementing section 3304 (a) (14):

"Provided, that any modifications to the provisions of section 3304 (a) (14) of the Federal Unemployment Tax Act as provided by Public Law 94-566 which specify other conditions or other effective date than stated herein for the denial of benefits based on services performed by aliens and which modifications are required to be implemented under State law as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act, shall be deemed applicable under the provisions of this section."

The addition of the above proviso would not interfere with the requirement of section 3304 (a) (14) as presently written and would permit the State automatically to apply any modifications made by Congress without the necessity of further amendment to the State law.

Denial of benefits to certain aliens, cont.

The language for the alien provision suggested on page 51 of the 1976 Draft Legislation should be used, with the proviso above added. This supersedes advice previously given on the language for the alien provision.

In seeking a technical amendment to section 3304 (a) (14) it is possible that the effective date for the provision might also be changed to January 1, 1979, instead of January 1, 1978. The recommended language contains referral to effective date. The necessity for this special provision on effective date is that we believe the alien provision as now written could not be made effective prior to the date required by the Federal law without producing a conflict between that provision and the requirements of section 3304 (a) (9) (A), FUTA.

Denial of benefits solely on the basis of pregnancy, section
3304 (a) (12)

Refer: Commentary, page 62

1. Question:

Are there conditions under which States should include an affirmative provision specifying that benefits will not be denied solely on the basis of pregnancy or the termination of pregnancy?

Answer:

Yes. If the State law does not include provisions conflicting with this prohibition, but any other provision is interpreted inconsistently with the prohibition, an affirmative provision should be included in the statute. If there are no inconsistent provisions and the State law is interpreted consistently with the prohibition, amendments would not appear to be necessary, but it is for the State to decide whether in that event a specific provision in the State law is needed.

2. Question:

Does the amendment to section 3304 (a) (12) relating to pregnancy prohibit a State from treating a pregnant claimant more favorably than other claimants?

Answer:

No. Section 3304 (a) (12) of FUTA has been amended to require that no person be denied benefits under State law or policy on the basis of pregnancy or termination of pregnancy. Some State laws include a restricted good cause disqualification but exclude from such disqualification claimants who must leave their jobs because of illness or injury, including pregnancy. Under such provisions pregnant women may be more favorably treated (but cannot be more adversely affected) than in the absence of such a provision. The new amendment does not speak to treating pregnant claimants more favorably. It only requires that they not be disqualified solely on the basis of pregnancy or its termination. No issue under 3304 (a) (12) would be raised if a State chooses to treat pregnant claimants more favorably than other claimants, but it seems likely that more favorable treatment of a specific class of women might well raise other issues grounded on discrimination.

Denial of benefits to recipients of retirement benefits,

Section 3304 (a) (15)

Refer: Commentary, page 61

1. Question:

Must all State legislatures (except Kentucky) take action in 1977 to include the new pension reduction standard?

Answer:

No. Section 314 (a) of the Unemployment Compensation Amendments of 1976 (P.L. 94-566) established, as section 3304 (a) (15), FUTA, the following standard:

“The amount of compensation payable to an individual for any week which begins after September 30, 1979, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by an amount equal to the of such pension, retirement or retired pay, annuity, or other payment which is reasonably attributable to such week.” (Emphasis added.)

Section 314(b), P.L. 94-566 provides,

“The amendment made by subsection (a) shall apply with respect to certification of States for 1978 and subsequent years, or for 1979 and subsequent years in the case of States the legislatures of which do not meet in a regular session which closes in the calendar year 1977.” (Emphasis added.)

Although section 314 (b) prescribed that section (a) amendments apply with respect to certifications of States for 1978, the clear congressional intent was to delay until October 1, 1979, the application of the pension reduction requirement. This is evidenced by the language in (a) underlined above and-by the following statement from the Conference Report to accompany H.R. 10210 explaining that the effective date was delayed,

“ . . . thereby permitting the National Commission on Unemployment Compensation an opportunity for a thorough study of this issue and the Congress to act in light of its findings and recommendations.”

Denial of benefits to recipients of retirement benefits, cont.

Accordingly, no State will be denied certification with respect to 1978 solely because the State law does not include a pension reduction provision in 1978 similar to that in new section 3304 (a) (15).

2. Question:

Should all State legislatures meeting in 1977 take action to include the new pension reduction standard?

Answer

It is recommended that States, with laws that currently provide for the reduction of unemployment benefits by pensions, take no legislative action in this area in 1977, unless they are dissatisfied with their present pension reduction provisions. It is recommended that those States that do not now have such provisions consider adopting a pension provision similar to the following:

"For any week with respect to which an individual is receiving a governmental or other pension and claiming unemployment compensation, the weekly benefit amount payable to such individual for such weeks shall be reduced (but not below zero),

- (a) by one-half the pro rated weekly amount of the pension if at least half the cost of the pension plan was contributed by an employer who employed the individual during the base period (or whose account would be chargeable with any unemployment compensation paid to the individual for such week); and
- (b) by the entire pro rated weekly amount of the pension if the entire cost of the pension plan was contributed by such an employer; or
- (c) by the entire pro rated weekly amount of any governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on any previous work of such individual if such reduction is required as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act."

December 7, 1976

Denial of benefits to recipients of retirement benefits, cont.

There are a number of reasons for these recommendations. First, it is not necessary for States to adopt the pension reduction requirement (section 3304 (a) (15), FUTA) before 1979. There is some likelihood that Congress will amend section 3304 (a) (15) before it becomes effective. By delaying action until 1979, States could avoid any need to alter 1977 amendments to follow 1978 Congressional changes in section 3304 (a) (15). It is believed that once a provision patterned after section 3304 (a) (15) is adopted by a State, it will be extremely difficult to modify. The provision is more stringent than corresponding provisions now in any State law.

It is recommended that States, that do not now reduce benefits by pensions, adopt a limited provision along the lines indicated above because if Congress finds that all States have taken action in this area, it may be persuaded to delete the standard in section 3304 (a) (15). The language recommended, however, provides for State implementation of the current 3304 (a) (15) requirement in the event Congress takes no further action. Absent further action, this requirement will become effective for all States for weeks of unemployment that begin after September 30, 1979.

3. Question:

Does section 3304 (a) (15) require that duration also be reduced?

Answer:

No. Section 3304 (a) (15), effective with respect to weeks of unemployment beginning after September 30, 1979, relates only to the reduction of the weekly benefit amount by the pro-rated weekly amount of the retirement pay received by the claimant. The Federal law does not relate to whether duration is also to be reduced.

December 7, 1976

Denial of benefits to recipients of retirement benefits, cont.

4. Question:

What is the meaning of the phrase "based on the previous work" in section 3304 (a) (15)?

Answer:

The words "based on the previous work" in the phrase "or any other similar periodic payment which is based on the previous work of such individual" is intended to distinguish payments received by the claimant as a result of work as an employee for an employer from those which he financed himself in his capacity as an individual. For example, payments received by an individual from an annuity which he purchased from a private insurance company, which annuity is not related to any plan involved in his previous employment would not be deductible. Conversely, payments received from a company retirement plan, available only to employees, could be based on the previous work of the individual and therefore would be deductible.

Since section 3304 (a) (15) includes "governmental" payments the following would also be deductible: Social security old-age benefits and Federal civilian and military pensions, and also disability payments based on retirement from work due to disability.

December 7, 1976

Benefit costs of governmental entities, section 8(e)

Refer: Commentary, page 65

1. Question:

May the State be treated as a single governmental entity?

Answer:

Yes. The State law may treat the State government as a whole as a governmental entity or it may treat the branches of the State government (executive, legislative, judiciary and the agencies of the State government as governmental entities individually. If the State treats branches and agencies of the State Government as individual governmental entities, each such entity must be given the option of electing contributions or payments in lieu of contributions.

2. Question:

Must governmental entities be permitted to form joint accounts?

Answer:

Yes. Governmental entities must be permitted to form joint accounts (also known as "group accounts"). Such an account must be permitted the option to elect contributions or payments in lieu of contributions method of financing the benefit costs attributable to service in the employ of the members of the account. There are no Federal standards applicable to the method by which the group derives the funds from its individual members in to meet the account's obligations to the State unemployment compensation fund.

Regulations should prescribe the procedure for forming joint accounts, and the entry of new members and the withdrawal of members, among other matters.

December 7, 1976

Benefit costs of government entities, cont.

3. Question:

What requirements apply to reimbursements and to contributions by governmental entities?

Answer:

Governmental entities must have the option to elect either contributions or payments in lieu of contributions (reimbursement) method of financing benefit costs and be permitted to form joint accounts. All of the requirements with respect to reimbursement by nonprofit organizations (for example, dollar for dollar reimbursement, no noncharging, credit for an overpayment only to the extent that the overpayment is recovered) apply equally to governmental entities choosing the reimbursement option.

The contributions method applicable to governmental entities may vary from the contributions provisions applicable to private sector employers. For example, a flat quarterly rate may be assessed against taxable or total payrolls. At the end of the contribution year, the entities' experience could be computed and the rate for the next ensuing year adjusted up or down so as to provide adequate financing of benefit costs of service attributable to governmental entities.

Another approach would be to assign a flat rate until a benefit cost rate for all governmental entities may be computed for a specified period of time preceding a prescribed computation date (benefit cost rate: total dollar amount of benefits paid to claimants on the basis of service with governmental entities divided by dollar amount of total or taxable wages) and then to require contributions at such rate. This approach is a modification of the second option page 72, 1970 Draft Legislation.

It should be noted that any plan which (a) requires quarterly payments regardless of the basis on which determined and (b) a year end accounting to determine whether the total of the quarterly payments is more or less than the actual benefits paid and (c) requires additional payments by the entity or a credit to the

December 7, 1976

Benefit costs of government entities, cont.

entity to effectuate dollar for dollar balance, would be considered reimbursement rather than contributions because it results in dollar for dollar repayment.

In addition to the foregoing discussion, upon further consideration, the new Federal requirements have been construed as permitting wider options to the States in regard to financing benefits paid on the basis of Governmental service.

First, with respect to the required option for election of the reimbursement method, the State law may provide what the reimbursement method (consistent in all respects with section 3309 (a) (2), FUTA) shall be the basic requirement for governmental entities, with the option to elect the contributions method which is consistent with the Federal law. Whether the basic requirement is the contributions or reimbursement method, with the option to elect the other method, the effect is the same so long as the option exists for each employer when new coverage first begins, and there is periodic opening for a change in the election.

Second, in lieu of financing benefits paid on the basis of governmental services by each governmental employer, a State may by law provide for complete financing of all such costs from State appropriations to a special State fund from which all benefit costs (determined in accordance with the requirements of section 3309 (a) (2), FUTA) would be paid to the State's unemployment compensation fund. The assumption of State liability in this manner of all benefit costs attributable to governmental entities accomplishes the important purpose of financing all such costs attributable to governmental entities, and in relieving governmental entities of direct liability for the costs makes unnecessary a strict adherence to the requirements that governmental entities shall have the option of financing benefit costs by a contributions or reimbursement method.

In the case of both contributions and reimbursements, payments must be made into the State's unemployment fund, and there must be effective provisions for collection and enforcement of payments due to the fund, as in the case of other employers subject to the State law.

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Benefit costs of governmental entities, cont.

4. Question:

If a State establishes a special contributions plan for governmental entities, must the entities be permitted to choose between the special plan and the regular contributions system?

Answer

No. If the State legislature chooses to enact a special contributions system for governmental entities in addition to the regular contributions and experience rating system for private employers, the State is not required to give a choice of contribution systems to the governmental entity. The choice is only required to include that between reimbursement and the special contributions system for governmental entities.

5. Question:

What is the basis for the conclusion that governmental entities are not "persons" and therefore not subject to the experience rating requirements in section 3303 (a) (1), FUTA?

Answer:

"Person" is defined in section 7701 (a) (1) of the IRC as ". . .an individual, a trust or estate, a partnership, or a corporation." This definition has historically been interpreted as not including a State or other governmental entity. Hence, governmental entities are not within the scope of section 3303 (a) (1), FUTA.

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Benefit costs of governmental entities, cont.

6. Question:

Must State and local governmental entities have an opportunity to change the financing option?

Answer:

Yes. The State law must permit governmental entities to change the method of financing benefits. Once an option is chosen the entity is bound to finance benefit costs under the option for the period specified by State law; however, the entity must be free to change its method at periodic intervals.

Failure to provide for a change in the financing method would negate the Federal requirement that entities be permitted the option of contributions or payments in lieu of contributions and therefore be inconsistent with Federal requirements.

It is suggested that the length of time for which the option must be chosen not be longer than that period of time that it takes for a contributing employer to qualify for a computed rate nor shorter than administratively feasible, e.g., 1 year. See provisions with respect to choice of financing method by nonprofit organizations in 1970 Draft Legislation, section 8 (f) (1), pages 74-76.

7. Question:

Must the contributions paid by State and local governments meet the costs of benefits paid to their former employees?

Answer:

There is no Federal requirement that the contributions paid by the State or local governments meet the actual costs of benefits paid on the basis of governmental service. However, sound administration would provide for contribution rates that would adequately finance the benefit costs of State and local government coverage, so as to provide adequate financing and not transfer the costs to private sector employers.

December 7, 1976

Benefit costs of governmental entities, cont.

8. Question:

Must States pay extended benefits to employees of governmental entities?

Answer:

Yes. The definition of "shareable benefits" under the Federal-State extended benefits program has been revised to eliminate any sharing of extended benefits by the Federal government based on services performed by workers in State and local governments. The change is effective with respect to benefits paid for weeks of unemployment after January 1, 1979. State and local governments will have to absorb these costs. Nevertheless, extended benefits must be paid to eligible State and local government workers for consistency with section 3304 (a) (11), FUTA.

ERRATA

On page 14 of the illustrative materials distributed at the four legislative planning sessions, in the table showing extended benefit triggers, the State "off" trigger needs to be changed. The State triggers "off " of it fails to meet either the 120% or the 4% criterion.

U.S. DEPARTMENT OF LABOR
EMPLOYMENT AND TRAINING ADMINISTRATION
WASHINGTON, D.C. 20213

MEMORANDUM FOR: ALL STATE AGENCY ADMINISTRATORS AND
ALL REGIONAL ADMINISTRATORS, EMPLOYMENT
AND TRAINING ADMINISTRATION

FROM: LAWRENCE E. WEATHERFORD, JR.
Administrator, Unemployment Insurance Service

SUBJECT: Supplement #2 -- Questions and Answers
Supplementing Draft Language and Commentary to
Implement the Unemployment Compensation Amendments of
1976 - P.L. 94-566

By this time a number of draft proposals to implement the provisions of P.L. 94-566 have been sent to the National office for review. The enclosed questions and answers reflect issues that have arisen in the course of that review.

The questions and answers are keyed to the applicable provision and its commentary in the 1976 Draft Legislation and are issued as the second supplement to it.

Please annotate your copies of the 1976 Draft Legislation to reflect these additions.

Additional explanations and interpretations will be issued as needed and appropriate.

Enclosure

Amendments to State laws required for conformity.
Refer: Preface, page iii

1. Question:

What are the consequences of a State's failure to enact either all or some of the legislation necessary to implement P.L. 94-566?

Answer:

Some P.L. 94-566 provisions are required to be included in State law as a condition for certification of the State for tax offset credit and for the receipt of administrative grants. Attachment B to Field Memorandum No. 20-77, issued October 22, 1976, described the following provisions of this category:

- (1) Coverage of State and local government services described in section 3309 (a) (1) (B), FUTA which are required to be covered pursuant to section 3304 (a) (6).
- (2) Coverage of nonprofit elementary and secondary schools described in section 3309 (a) (1) (A) which are required to be covered pursuant to section 3304 (a) (6).
- (3) Inclusion of provisions required by section 3309 (a) (2) permitting governmental entities described in section 3309 (a) (1) (B) to elect to pay contributions or to finance benefits on a reimbursement basis and to combine into groups for benefit financing purposes.
- (4) Inclusion of Virgin Islands in definition of State for extended benefit purposes and as required for full implementation of the combined-wage program, State participation in which is required pursuant to section 3304 (a) (9) (B). (This is required by section 3304 (a) (11) also, and, in addition, by section 3304 (a) (9) (A) with respect to interstate claims.)

Amendments to State laws required for conformity, cont.
Refer: Preface, page iii

- (5) Denial between school terms of benefits based on services performed for educational institutions in certain occupational categories if the individual has either a contract or reasonable assurance of employment for the forthcoming academic term.
- (6) Removal of provisions denying benefits on the basis of pregnancy pursuant to section 3304 (a) (12).
- (7) Denial of benefits to certain aliens not lawfully admitted for permanent residence or otherwise permanently residing in the U.S. pursuant to section 3304 (a) (14).
- (8) Denial of benefits to professional athletes between seasons who have reasonable assurance of reemployment, pursuant to section 3304 (a) (13).
- (9) Denial, on and after October 1, 1979, of benefits to a retiree whose weekly pension exceeds the individual's weekly benefit amount, pursuant to section 3304 (a) (15).
- (10) Changes in definitions of national and State extended benefit triggers to conform with corresponding provisions in section 203 of the Federal-State Extended Unemployment Compensation Act of 1970.

If, by reason of not including appropriate amendments in the areas identified above, a State is not certified for tax offset credit, all employers in the State subject to the FUTA would be required to pay an additional 2.7 percent tax to the Federal Government. In most States, they would continue to pay the same State tax they would have paid if certification had not been withheld. If the State tax were cancelled, there would be no means of financing benefit costs. In addition, denial of offset credit would result in withholding administrative grants, since they are available only for programs approved under the FUTA. Withdrawal of Federal administrative grants would end State operations unless the State provided the necessary funds from some State source.

Amendments to State laws required for conformity, cont.
Refer: Preface, page iii

Implementing State legislation is needed for other P.L. 94-566 provisions, not to ensure that the State law be certified, but rather to protect certain employers from being denied tax credit. As indicated in FM No. 20-77, the following provisions are in this category:

- (1) Coverage of services performed in agricultural labor for employers with 10 or more workers in 20 weeks or with a quarterly payroll of \$20,000 or more.
- (2) Coverage of domestic services performed for employers who paid \$1,000 or more in wages for such services in a calendar quarter.

If coverage is not extended under State law, at least as far as outlined above, such services would be covered for FUTA purposes but not under State laws. The employers in question would not receive credit against the Federal tax since they would not pay State taxes on the basis of such services. Accordingly, such employers would be liable for the full Federal tax (3.4 percent on a \$6,000 taxable wage base after January 1, 1978). The State would receive no benefit for such tax and the workers, not covered under State law, would be ineligible for any benefits.

Definitions - service for nonprofit organizations, section 2 (k) (1) (C)
Refer: Commentary, page 25

1. Question:

Must an "organization" be a "legal entity" for the purposes of section 3309 (b) (1), FUTA?

Answer:

No. Section 3309 (b) (1) provides that service performed –

"(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches"

may be excluded from the required coverage of governmental entities and nonprofit organizations.

The word "organization" is broader than the phrase "legal entity" and will include but not be limited to such entities. Accordingly, an organization within the meaning of section 3309 (b) (1) need not be a separate legal entity, but includes any organization other than the unit constituting a church or convention or association of churches, even though the organization may be so closely connected to the church, etc., as in fact to be operated, supervised or controlled by the church itself.

See also the Answer to Question 2 below.

Definitions - service for nonprofit organization,
section 2 (k) (1) (C), cont.

Refer: Commentary, page 25

2. Question:

What factors govern the application of the exclusions in section 3309 (b) (1) (A) and (B), FUTA?

Answer:

Only services performed directly in the employ of a church or convention or association of churches, as distinguished from any other organization, are excluded under subparagraph (A). The exclusion in (B) involves a two part test: (1) Is the employer some other organization than the church or a convention or association of churches? (2) Are the services performed for an organization which is (operated, supervised, controlled, or principally supported by a church, or convention or association of churches) operated primarily for religious purposes?

The fact that the organization is owned, operated, supervised and controlled by a church does not justify a conclusion that the services performed for the organization are performed in the employ of the church rather than the organization. Ownership does not necessarily signify exclusive possession and control. Ownership may be retained concurrently with the creation and exercise of other legal interests. Furthermore, the form under which the organization is operated, supervised or controlled may be distinct from that entity which operates, supervises and controls the religious activities of the church, even though the church retains ownership of the organization and even if the same individuals comprise the authority of both the organization and the church.

With respect to the second test, if the services are performed for an organization other than the church, the services may be excluded only if the organization (which is operated, supervised, controlled or principally supported by a church or convention or association of churches) is operated primarily for religious purposes.

Definitions - service for nonprofit organization, section 2 (k) (1) (C)
Refer: Commentary, page 25

Thus, under section 3309 (b) (1), FUTA, it must first be determined whether the workers in question are employed by a church or by an organization other than the church. If the workers are employed by a church, their services are excluded. Whether the church is the employer is primarily a question of fact. If, however, the workers are not employed by the church, it must then be determined whether the employing organization is operated primarily for religious purposes. If operated primarily for religious purposes, the services are excluded only if the employing organization is operated, supervised, controlled or principally supported by the church.

The determination of whether the exclusion applies can be made only after a thorough analysis of the legal interests and relationships between the organization and the church.

The changes made in section 3309 by P.L. 94-566 do not change the application of the exclusions in section 3309 (b) (1) (A) and (B).

Definitions - domestic service, section 2 (k) (1) (F)
Refer: Commentary, page 33

1. Question:

The definition of agricultural labor in section 2 (k) (6) (A), 1976 Draft Legislation, includes in subsection (k) (6) (A) (v) service performed "on a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer." (Underlining added.) What is the effect on section 2 (k) (1) (F) (the domestic coverage provision) of the domestic service provision quoted above?

Answer:

Section 2 (k) (1) (F), which follows section 3306 (c) (2), FUTA, requires coverage of domestic service after December 31, 1977, in a private home, among other places, for a person who paid cash remuneration of \$1,000 or more in a quarter during the current or preceding calendar year. The place at which the domestic service is performed for the employer is immaterial. Accordingly, it makes no difference that the employer has not met the requirements for coverage as an agricultural employer. If he meets the domestic service coverage requirements, the domestic service is covered. Note in this connection the separate treatment, for coverage purposes, of agricultural and domestic services in the 1976 Draft Legislation, commentary, page 34.

It is recommended that, in the interest of clarity, the underlined phrase in the question above be deleted from State law definitions of agricultural labor.

Separating wages and employment in determining employer status, section 2 (i) (5)

Refer: Commentary, page 34

Note: This Answer revises the Answer given to Question 1, page 2 of Supplement #1.

1. Question:

May separate accounts be established for a single employing unit, with respect to coverage of general, agricultural, or domestic services in the employ of the employing unit, or must a single account be established for each employing unit with respect to all coverage under the State's law?

Answer:

The question present issues concerning administration, use of granted funds, and experience rating. Whether for administrative reasons it is better to have one account or multiple accounts for a single employing unit is a matter primarily within the judgment of the State. However, if multiple accounts would involve higher administrative costs than single-account administration, the use of granted funds for such higher costs would not be approved unless the justification for multiple accounts from an administrative perspective were sufficient to be overriding. With regard to experience rating, the computation of reduced rates for employers must be based upon all of their experience, and therefore whether one or more accounts are established for any single employer there must be a combining of the employer's accounts for rate computation purposes so that the employer's computed rate is based upon all of his experience and only one rate is computed for all coverage under the State's law.

Definitions - American Employer, State, United States, Exhaustee,
sections 2 (k) (1) (G), 2 (p), extended benefits

Refer: Commentary, page 36

1. Question:

What changes in present provisions of State laws must be made to effectuate the extension of the Federal-State Unemployment Compensation Program to the Virgin Islands? When must such changes be effective?

Answer:

The principal provisions of State laws which must reflect the status of the Virgin Islands' law after it has been approved by the Secretary of Labor are those defining the terms American employer, State and the United States, and the definition of "exhaustee" in the provisions for the extended benefit program, which include provisions affecting coverage and provisions which are necessary to meet sections 3304 (a) (9) (A) and (B) and 3304 (a) (11) of the FUTA.

We believe proper recognition of the application of these provisions to the Virgin Islands can be achieved upon the effective dates provided in section 116 (f) of P.L. 94-566 by amending the following provision in the 1976 Draft Legislation and 1970 Draft Legislation as indicated below:

- (1) Amend section 2 (k) (1) (G) on page 17 of the 1976 Draft Legislation to read:

"(G) The term 'employment' shall include the service of an individual who is a citizen of the United States, performed outside the United States after December 31, 1971 (except in Canada, and in the case of the Virgin Islands after December 31, 1971 and prior to January 1 of the year following the year in which the U.S. Secretary of Labor approves the unemployment law of the Virgin Islands under section 3304 (a) of the Internal Revenue Code of 1954), [after December 31, 1971, or after December 31, 19____¹ in the case of the Virgin Islands] . . ." (New language underlined, bracketed language to be deleted.)

Definitions - American Employer, State, United States, Exhaustee,
sections 2 (k) (1) (G), 2(p), extended benefits, cont.

Refer: Commentary, page 36

- (2) Amend section 2 (p) (1) and (2) on page 37 of the 1976 Draft Legislation, relating to the definitions of State and United States, by adding the following subparagraph:

"(p) (3) The provisions of subparagraphs (1) and (2) of paragraph (p), as including the Virgin Islands, shall become effective on the day after the day on which the U.S. Secretary of Labor approves for the first time under section 3304 (a) of the Internal Revenue Code of 1954 an unemployment compensation law submitted to the Secretary by the Virgin Islands for such approval."

- (3) Amend section _____ (a) (11) (C) on page 124 of the 1970 Draft Legislation, relating to the definition of exhaustee, to read:

"(C) (i) has no right to unemployment benefits or allowances, as the case may be, under the Railroad Unemployment Insurance Act or under such other Federal laws as are specified in regulations issued by the U.S. Secretary of Labor; and (ii) has not received and is not seeking unemployment benefits under the unemployment compensation law of Canada or the Virgin Islands; but if the individual is seeking such benefits and the appropriate agency finally determines that the individual is not entitled to benefits under such law, the individual shall be considered an exhaustee if the other provisions of this definition are met: Provided, That, the reference in this subparagraph to the Virgin Islands shall be inapplicable effective on the day on which the U.S. Secretary of Labor approves under section 3304(a) of the Internal Revenue Code of 1954, an unemployment compensation law submitted to the Secretary by the Virgin Islands for approval."

Definitions- American Employer, State, United States, Exhaustee,
sections 2 (k) (1) (G), 2(p), extended benefits, cont.

Refer: Commentary, page 36

The above language modifies that provided on page 124 of the 1970 Draft Legislation to delete obsolete references to the Trade Expansion Act of 1962 and the Automotive Products Trade Act of 1965, and to reflect the date on which the Virgin Islands will become a State within the Federal-State program.

We believe the above provisions provide an effective way of handling this matter. However, a State may, if it desires, simply provide for the appropriate effective dates in the amending legislation rather than including the effective dates in the provisions of its unemployment compensation law.

The amendment to section 2 (k) (1) (G), relating only to coverage, will be effective on January 1 of the year following the year in which the Virgin Islands' law is approved by the Secretary of Labor under the FUTA. This is the same date as FUTA coverage with respect to the Virgin Islands becomes effective.

The amendment to section 2 (p) relates both to coverage and the inclusion of the Virgin Islands in other aspects of the Federal-State program, and the amendment to the definition of "exhaustee" relates to inclusion of the Virgin Islands in the extended benefits program. For the purposes of interstate claims, combined-wage claims, and extended benefits, it is necessary that all State laws include the Virgin Islands and its law as a part of the Federal-State program effective on the day after the day on which the Secretary of Labor approves the Virgin Islands' law under the FUTA, in order thereafter to remain consistent with the requirements of sections 3304 (a) (9) (A) and (B) and section 3304(a) (11) of the FUTA. It is also necessary that those changes not be made effective prior to the day after the day on which the Secretary of Labor approves the Virgin Islands' law, in order to meet the requirements of the Federal law as in effect prior to that date.

Between terms denial, section 4 (a) (3)
Refer: Commentary, page 52

1. Question:

May the phrase "benefits shall not be paid based on such services" (emphasis added) in section 4 (a) (3) be interpreted to be applicable solely to the specified professional (or nonprofessional) services performed after December 31, 1977?

Answer:

No. To do so would make the denial-of-benefits provisions only partially applicable during 1978 and the first part of 1979. Despite the language "based on such services" and "on the basis of such services" in paragraphs (6) (A) (i) and (6) (A) (ii), and the effective date provision in section 115 (d) of P.L. 94-566, it is clear that the intent of the Congress was to make the provisions fully applicable on and after January 1, 1978, as is apparent from the language contained in the provisions making them applicable to weeks commencing in any period between academic years or terms that occurs after December 31, 1977.

Senate Report No. 94-1265, page 9, and Conference Report No. 94-1745, pages 11-12, make clear that there were no differences between the House and Senate versions of the bill in this respect. For example, the Conference Report, at page 12 explains it in this way:

"Conference agreement.--The conference agreement provides that unemployment compensation based on services performed for an educational institution shall be denied to a teacher or other professional employee during periods between academic years or terms if there is a contract or reasonable assurance that the individual will perform such services in the forthcoming academic year or term. States are permitted to deny benefits based on services performed for educational institutions to nonprofessional school employees during periods between academic years or terms if there is reasonable assurance that the individual will be employed by the educational institution in the forthcoming academic year or term."

Between terms denial, section 4 (a) (3), cont.
Refer: Commentary, page 52

See also page 9 of Senate Report No. 94-1265.

Similarly, House Report No. 94-755, at page 56, makes it clear that the provisions were intended --

" . . . to provide that the existing rules dealing with the denial of unemployment compensation to teachers and other professional employees of institutions of higher education during periods between academic years or similar terms will also apply to the newly covered teachers and other professional employees of other educational institutions."

See also page 41 of the House Report.

Were the amendments to be construed otherwise, they would not apply with respect to transitional services performed (and wage credits earned) prior to January 1, 1978, and the "a reasonable assurance" limitation would be applicable only with respect to services performed (and wage credits earned) after December 31, 1977. This would produce inconsistent and incongruous results in periods between school years and terms during 1978 and the first part of 1979. Such results would not carry out the Congressional intent, and accordingly the interpretation stated above is adopted as the position of the Department.

Benefit costs of governmental entities, section 8(e)
Refer: Commentary, page 65

1. Question:

The answers to Questions 2 and 3 on pages 31 and 32 of Supplement #1 to the 1976 Draft Legislation, suggest that governmental entities must be permitted to form group accounts whether they elect either contributions or payments in lieu of contributions. Is this correct?

Answer:

No. Only those governmental entities that have elected the payments in lieu of contributions method of financing their benefit costs must be permitted to form group accounts. The provisions in section 3309 (a) (2), FUTA, regarding group accounts is not applicable to contributors. Accordingly, to the extent that the above mentioned questions in Supplement #1 suggest otherwise, they are amended as stated here. A State law may, of course, permit governmental entities that are contributors to form into groups in the same manner as other contributing employers may do under the State law, but provision for group accounts for contributing employers is not required by any provision of the Federal law.

Noncharging reimbursing employers for benefits paid based on
previously uncovered services, section 8 (f) (1) (g)

Refer: Commentary, page 68

1. Question:

Should the draft provision in section 8 (f) (1) (G), page 67, 1976 Draft Legislation, be revised to include any reimbursing employer, not just reimbursing nonprofit organizations?

Answer:

Yes. Section 121 of the 1976 Amendments also applies to previously uncovered services performed for governmental entities. These governmental entities have the option of electing contributions or reimbursement. See Supplement #1, page 16, question 8.

To include all reimbursing employers, whether a nonprofit organization or a governmental entity, section 8 (f) (1) (G) should be revised to read

"Any employer [nonprofit organization] which elects to make payments in lieu of contributions" (Revision underlined; deletion in brackets.)

Notice that the requirements of section 3309 (a) (2) are the same for all employers electing the reimbursement method. Those requirements include 100 percent reimbursement of attributable benefit costs, without any noncharging except as specifically authorized for certain transitional benefit costs by section 121 (e) of P.L. 94-566. Although section 121 (e) refers only to organizations, it is interpreted in the light of the intent and scope of section 121 to include governmental entities.

Transition provision - credit for excess of contributions
over benefits paid section 8 (h)

Refer: Commentary, page 78

1. Question:

Does the language provided on page 71 1976 Draft Legislation, the transition provision permitting a nonprofit organization credit for the excess of contributions over benefits paid, before becoming liable for payments in lieu of contributions, apply only to nonprofit organizations newly required to be covered by P.L. 94-566?

Answer:

Yes. In order to clarify that this provision applies only to nonprofit organizations newly required to be covered under Federal law, we are suggesting the following addition to the language on page 71 of the 1976 Draft Legislation:

“Notwithstanding subsection (f), any nonprofit organization or group of organizations not required to be covered pursuant to section 3309 (a) (1) of the Federal Unemployment Tax Act prior to January 1, 1978, and that prior to October 20, 1976, paid contributions required by subsection (a) of this section, and pursuant to subsection (f) of this section elects....”

(New language underlined.)

Notice that provision applies only to nonprofit organizations, and does not apply to governmental entities.

US. DEPARTMENT OF LABOR
EMPLOYMENT AND TRAINING ADMINISTRATION
WASHINGTON, D.C. 20213

MEMORANDUM FOR: ALL STATE ADMINISTRATORS AND ALL REGIONAL
ADMINISTRATORS EMPLOYMENT AND TRAINING
ADMINISTRATION

FROM: LAWRENCE E. WEATHERFORD, JR.
Administrator, Unemployment Insurance Service

SUBJECT: Supplement # 3 -- Questions and Answers Supplementing
Draft Language and Commentary to Implement the
Unemployment and Compensation Amendments of: 1976 -
P.L. 94-566 -- Amendments Enacted by P.L. 95-19

On April 12, 1977, the President signed P.L. 95-19, the Emergency Unemployment Compensation Extension Act of 1977. Included in that law are amendments to the provision enacted by P.L. 94-566 which will affect State unemployment insurance laws. This Supplement # 3 is limited to questions and answers involving the provisions of P.L. 95-19.

The questions and answers are keyed to the applicable provision and its commentary in the 1976 Draft Legislation and are issued as the third supplement to it.

Please annotate your copies of the 1976 Draft Legislation to reflect these additions.

Additional explanations and interpretations will be issued as needed and appropriate.

Enclosure

Amendments enacted by P.L. 95-19

1. Question:

What amendments were made by P.L. 95-19 that affect State unemployment insurance laws?

Answer:

Public Law 95-19 (HR 4800), the Emergency Unemployment Compensation Extension Act of 1977, was signed by the President on April 12, 1977. Titles II and III of that Act included amendments which we are briefly outlining here. For a more detailed discussion of the alien (3304 (a) (14), FUTA) and school employee (3304 (a) (6) (A), FUTA) amendments, please see Questions 1 and 2, pages 9 and 28.

a. Title II of P.L. 95-19 extends until January 1, 1980 (instead of January 1, 1978) the time within which a State may qualify for a deferral of the incremental reduction in total tax credits otherwise applicable to employers of States with outstanding advances from the Federal unemployment account in the Unemployment Trust Fund. No change was made in the requirement that, in order to qualify for the repayment deferral, a State must meet the criteria set out, in section 110(b) of the Emergency Compensation and Special Unemployment Assistance Extension Act of 1975 (P.L. 94-45). These criteria were published in the Federal Register Vol. 40, No. 216, Friday, November 7, 1975. Modifications of the criteria are now being considered.

b. Section 301 of P.L. 95-19 changed the effective dates of the between-terms provision in 3304 (a) (6) (A), relating to school employees, the pregnancy provision in 3304 (a) (12), and the election of financing provisions for governmental entities in 3309 (a) (2), to provide that these provisions will not be required to become effective as a condition for certification of the State law until January 1, 1979, in a State whose legislature does not meet in a regular session in 1977. The only State this affects is Kentucky. The other benefit provisions in P.L. 94-566 (applicable to athletes and aliens) appear in section 314 of that Act and already include a special effective date for Kentucky.

Amendments enacted by P.L. 95-19

c. Section 301 of P.L. 95-19 also changed the effective date of the provisions of section 3304 (a) (6) (A), the between-terms denial provisions for professional and nonprofessional school employees, so that these are applicable to weeks of unemployment beginning after December 31, 1977, rather than to services performed after that date as provided in section 115 of P.L. 94-566. We discussed this issue in Question 1, page 17 of Supplement #2, 1976 Draft Legislation, February 2, 1977.

d. Section 302 of P.L. 95-19 amended the alien denial provision in section 3304 (a) (14) to ensure that, when it becomes effective on January 1, 1978, it does not apply to Canadian or other foreign nationals who were lawfully present to perform services in the United States but were not permanent residents. Please see Questions 1 and 2, pages 9 & 28, for a discussion of the alien provision and its application.

e. Section 302 also amended section 3309 (a) (2) to specify that, beginning January 1, 1978, governmental entities that elect the reimbursement method must be permitted to form group accounts. We discussed this issue in Question 2, page 31, Supplement #1, 1976 Draft Legislation, December 7, 1976.

f. The between-terms denial provision applicable to professional school employees in section 3304 (a) (6) (A) (i) was amended by section 302 to provide that the blanket denial will apply effective January 1, 1978, between successive academic years or terms or a similar period between two regular but not successive terms when an agreement so provides. In addition, a comma was added between the words "instructional" and "research" in section 3304 (a) (6) (A) (i) so that the three professional categories subject to the blanket denial provision are instructional, research, and principal administrative. Please see Question 1, page 4, for a further discussion of the between-terms provision.

Amendments enacted by P.L. 95-19

- g. A new optional provision was added by section 302 which affects professional employees in any educational institution and nonprofessional school personnel in educational institutions other than institutions of higher education. A new clause (iii) was added to section 3304 (a) (6) (A) to provide that, beginning January 1, 1978, a State may provide, by law, that benefits will be denied to school personnel for any week within a term which begins during an established or customary vacation period or holiday recess if the individual performed services prior to the vacation or holiday and there is a reasonable assurance that the individual will perform services following the vacation or holiday. Please see Question 2, page 6, for a discussion of this provision and appropriate implementing language.
- h. Section 302 delayed the effective date of the denial provision applicable to recipients of retirement benefits in section 3304 (a) (15) from September 30, 1979, to March 31, 1980.
- i. In concert with the previous item, the due date for the interim report of the National Commission on Unemployment Compensation was changed (section 303) from March 31, 1978, to September 30, 1978, and the due date for the final report from January 1, 1979, to July 1, 1979.

Between-terms denial, section 4 (a) (3)
Refer: Commentary, page 52

1. Question:

Does the amendment to section 3304 (a) (6) (A) (i), FUTA, by P.L. 95-19 require the application of the blanket between-terms denial provision to professional school personnel between academic years or terms, whether or not successive?

Answer:

Yes. The amendment made by P.L. 95-19 added to that section that the professional between-terms denial will apply "...during the period between two successive academic years or terms (or, when an agreement provides instead for a similar period between two regular but not successive termed during such period)...." (Emphasis supplied) Thus, any period or term within an institution's academic year which occurs between two regular but not successive terms, or between two regular and successive terms, and during which the individual is not required under his-her contract to perform services would be a period to which the prohibition against the payment of benefits applies.

The period between two regular and successive terms is the short period of weeks between regular semesters or quarters, whether the institution operates on a two or three semester or a four-quarter basis. The suspension of classes during that short period in which services are not required is not a compensable period.

Thus section 4 (a) (3), 1976 Draft Language, is revised to read:

“(3) Benefits based on service in employment defined in section 2 (k) (l) (B) and (C) shall be payable in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to this Act; except that, with respect to weeks of unemployment beginning [service performed] after December 31, 1977, in an instructional, research, or principal administrative capacity for an educational institution, benefits shall not be paid based on such services for any week of unemployment

Between-terms denial, cont.

commencing during the period between two successive academic years, or terms (or, [during] when an agreement provides instead for a similar period between two regular but not successive terms, during such period) or during a period of paid sabbatical leave provided for in the individual's contract, to any individual if such individual performs such services in the first of such academic years or terms and if there is a contract or a reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms. Section 4 (a) (2) shall apply with respect to such services prior to January 1, 1978."

We believe it is appropriate to emphasize that the between-terms provision in section 3304 (a) (6) (A) (ii), FUTA, applicable to nonprofessional school personnel, was not amended by P.L. 95-19 and applies only to the period between successive academic years or terms. Thus, the between-terms denial provisions continue to apply differently to professional and nonprofessional personnel since the professional denial applies between either successive or nonsuccessive academic years or terms while the nonprofessional denial applies only between successive academic years or terms. However, neither provision would apply in the case where a school closes down for any reason within a term, or for an entire term or longer period, or for the remainder of an academic year in the case where a school closes early. (See Question & Answer 3.)

This supersedes Question & Answer 1, page 17 on the same subject in Supplement #1, which should be annotated accordingly.

Between-terms denial, cont.

2. Question:

May a State law now include a blanket denial provision for school personnel within a school term during customary vacation periods and holiday recesses?

Answer:

Yes. P.L. 95-19 includes an amendment adding a new clause (iii) to section 3304 (a) (6) (A), which permits a States at its options to include a provision in its law denying benefits to professional employees of all educational institutions and nonprofessional personnel of educational institutions other than institutions of higher education, "...for any week which commences during an established and customary vacation period or holiday recess if such individual performs such services in the period immediately before such vacation period or holiday recess, and there is a reasonable assurance that such individual will perform such services in the period immediately following such vacation period or holiday recess."

The "established and customary" vacation period or holiday recess involved in this provision include those scheduled at Christmas and in the Spring, when those vacation periods or recesses occur within a term. In addition, in some localities the Thanksgiving recess may also be an established and customary vacation period or holiday recess during which, absent this denial, benefits may be payable. Because this provision is a blanket disqualification which treats school personnel differently than other claimants in the State, we believe it should be interpreted narrowly by confining the "established and customary" vacation periods to those indicated above.

There may be an overlap between the between-terms provision in clauses (i) and (ii) and the within-terms provision in clause (iii) if, for example, a Christmas holiday fell between terms or began within a term and continued into the period between terms. In that event, we suggest applying clause (i) or (ii), as appropriate, if the holiday or recess begins between terms and clause (iii) if the holiday or recess commences within a term.

Between-terms denial, cont.

A distinction between the between-terms provisions in clauses (i) and (ii) and the within-terms provision in clause (iii) is that the between-terms provisions do not apply to cross-overs between professional and nonprofessional capacities, -- e.g., when an individual is employed in a nonprofessional capacity in one year and in a professional capacity in the succeeding year the between-terms denial would not apply during the summer. On the other hand, the denial provision in clause (iii) would apply to such cross-overs which occur during the vacation period or holiday recess within a term or between terms.

The term "a reasonable assurance" has the same meaning when used here as explained on page 54, 1976 Draft Language, and as further explained in several Questions and Answers in Supplement #1, 1976 Draft Legislation.

In view of this amendment, new optional section 4 (a) (3) (C) has been added to the 1976 Draft Language:

"(C) With respect to weeks of unemployment beginning after December 31, 1977, benefit shall be denied to any individual for any week which commences during an established and customary vacation period or holiday recess if such individual performs any services described in subparagraph (A) or subparagraph (B) in the period immediately before such vacation period or holiday recess, and there is a reasonable assurance that such individual will perform any such services in the period immediately following such vacation period or holiday recess."

In regard to this optional provision, as well as clause (ii), the option that exists is to go that far but no further, but of course, a State may decide to utilize this option only partly or not at all.

Between-terms denial, cont.

3. Question:

If a school closes down for all or part of a regularly scheduled term, or at the beginning of or prior to the end of the regularly scheduled academic year, are the between-terms provisions applicable to laid-off employees for weeks which begin within the close-down period?

Answer:

No. The between-terms provision of clause (i) of section 3304 (a) (6) (A), FUTA, applies only between "two successive academic years or terms (or, when an agreement provides instead for a similar period between two regular but not successive terms, during such period)." School closings at the beginning or end of an academic year or beginning within terms neither occur between successive academic years or terms, nor could they reasonably be considered "a similar period between two regular but not successive terms" provided for by "an agreement." The period of a school closing within an academic year is a cancellation or interruption of a term rather than a period between nonsuccessive terms similar to a summer recess and provided for by agreement with the employee. If the period schools are closed is not contemplated to be a period similar to a normal summer recess and is not provided for in the employee's agreement, clause (i) may then not be applied to the school employees who are laid off because of the closing. The same result must occur under clause (ii) because a school closing beginning within any term cannot reasonably be considered to be between academic years or terms.

This supplements the Answer to Question 6 on page 19 of Supplement #1, 1976 Draft Legislation.

Denial of benefits to illegal aliens, section 4 (a) (5)
Supersedes: Answer, pages 24 and 25, Supplement #1,
December 7, 1976

1. Question:

What categories of aliens are exempt from the required denial of benefits by reason of alien status?

Answer:

Aliens whose wage credits were earned at a time when they were authorized to work in the United States. Section 3304 (a) (14) (A), FUTA, as enacted in P.L. 94-566 and amended by P.L. 95-19, requires that, effective January 1, 1978:

"(A) compensation shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed (including an alien who was lawfully present in the United States as a result of the application of the provisions of section 203 (a) (7) or section 212 (d) (5) of the Immigration and Nationality Act)."

This new Federal requirement exempts certain categories of individuals from denial of benefits by reason of alien status: (1) an alien who was lawfully admitted for "permanent residence" at the time when the services were performed and for which the wages paid are used as wage credits; (2) an alien lawfully present in the United States to perform the services for which the wages paid are used as wage credits; and (3) an alien who was permanently residing in the United States "under color of law," including one lawfully present in the United States under specified provisions of the Immigration and Nationality Act.

For the purposes of section 3304 (a) (14) (A), any alien who has been lawfully admitted to the United States as an "immigrant" qualifies as an alien lawfully admitted for permanent residence, including daily and seasonal commuters from Canada and Mexico. Non-

Denial of benefits to illegal aliens, section 4 (a) (5), cont.

immigrant aliens who are lawfully present in the United States and who are authorized to work are exempt from the required denial of benefits as are "immigrant" aliens.

Because of the absence or inadequacy of records of admission to the United States in certain cases, the Immigration and Naturalization Service has designated in 8 CFR 101.1 and 101.2 a number of categories of individuals whose lawful admission is presumed for all purposes under the immigration laws, except as otherwise provided in these regulations.

Aliens granted conditional entry as refugees from specified countries or areas as a result of the application of section 203 (a) (7) of the Immigration and Nationality Act are not immigrants; however, they are usually granted permanent residence status after two years of residence in the United States. Aliens admitted into the United States on parole as a result of the application of section 212 (d) (5) of the Act are allowed temporary asylum and, although not yet granted admission, have many privileges accorded aliens admitted for permanent residence in the United States.

Section 3304 (a) (14) (A), FUTA, requires an approved State unemployment compensation law to include provision, effective on and after January 1, 1978, that compensation shall not be payable on the basis of service performed by an alien unless the alien is within one of the authorized categories described above. In addition, the wage credits must have been in employment performed at a time when the alien was authorized under Federal law and regulations to perform such work in the United States. In addition to having the requisite wage credits, an alien must, while in claim status, be currently available for work and be otherwise eligible under the State law. Availability for work in these circumstances means that the alien must be available for suitable work in the United States and be lawfully authorized to perform such work, or, in the case of Canadian nationals who are or were authorized to work, meet the availability requirements of the applicable liable State with respect to work in Canada.

For a more detailed explanation of various categories of aliens, "immigrant" and "nonimmigrant" and the nonimmigrants who are authorized to work, see the Appendix to this item.

Denial of benefits to illegal aliens, section 4 (a) (5), cont.

If a State has adopted in its law the proviso to its alien provision as we recommended in the Answer to Question 1 on page 24 of Supplement #1, 1976 Draft Legislation, it clearly has the authority to apply its alien provision as explained above. If a State law does not contain the proviso, we believe a State may, nevertheless, reasonably interpret its law in a manner consistent with the intent of Congress in amending section 3304 (a) (14) (A). The language of that provision may be used for a State law merely by changing "compensation" to "benefits."

Appendix to Question 1 on Aliens

The immigration laws provide for the admission of aliens to the United States under either "immigrant" or "nonimmigrant" status. The former category denotes those aliens who have been granted the privilege of residing permanently in the United States; the latter, those who have been admitted only temporarily for certain purposes. An alien is presumed an immigrant until it is established that he is a nonimmigrant. The language of section 3304 (a) (14) (A), FUTA, except as explained below, requires the denial of unemployment benefits to nonimmigrants.

I. Lawfully Admitted for Permanent Residence

Aliens who have been lawfully admitted under the numerical and qualitative requirements of law and who are in fact permanently residing in the United States are immigrants "lawfully admitted for permanent residence." There are, in addition, many thousands of aliens who live in Canada and Mexico who commute daily or seasonally to work in the United States.

Soon after the 1924 immigration law was enacted, it was recognized that strict enforcement of its provisions would have created many troublesome problems; thus, the category of "commuter" was devised. Commuters were deemed not to be nonimmigrants, and nationals of Canada and Mexico were able to obtain lawful admission for permanent residence in order to pursue their employment in the United States. The right to enter the United States each day was attested under the 1924 law by an alien registration receipt card. This device was an amiable fiction, since the commuter was entering temporarily and usually returned to home in Canada or Mexico each evening. The practice was not changed by the 1952 immigration law. The commuter status was deemed appropriate even in situations where the alien was self-employed, employed part time, or entry to this country was regular but not daily. For example, a seasonal commuter enters this country and works for several months, then returns to his home country until time to return for work the next season.

The 1965 amendments to the immigration laws were minor and technical and did not change the commuter practice. The major change was the provision that strengthened the safeguards for domestic workers. Prior to the 1965 amendments an alien worker was admitted unless the Secretary of Labor had certified that

Appendix to Question 1 on Aliens, cont.

admission would have an "adverse effect" on American workers. The 1965 amendments exclude every alien worker until the Secretary of Labor has certified that admission will not have an "adverse effect" on domestic labor.

As a result, commuters as described above are exempt from the required denial of benefits with respect to work performed and wages earned while in that status. Other aliens included within the terms of the exemption are immigrants in the nonpreference and sixth-preference classes who are admitted for entry into the United States to perform work, and the third-preference class of aliens (professionals, scientists, or artists) who are admitted to perform such work in the United States.

To obtain initial admission into the United States, a commuter follows the normal immigration procedure, including seeking authorization to work pursuant to a favorable certification by the Secretary of Labor. The Canadian or Mexican national must apply for an immigrant visa and must satisfy all of the requirements of the Immigration and Nationality Act. A commuter granted admission receives an Alien Registration Receipt Card (Form I-151), commonly called a "green card," in lieu of a visa. This card is normally used as an entry document following temporary absence from the United States. The daily or seasonal reentries are treated as returns from temporary visits outside the country. The theory, since 1953, is that the commuter status is based upon an alien's having been accorded the privilege of residing permanently in the United States. There is no requirement in the law that this privilege be exercised. Under current regulations (8 CFR 211.1 (b) (1)), generally any alien who leaves the country after admission must return within one year or lose immigrant status. Reentry would, normally, require obtaining a visa or going through the process again of seeking lawful admission. In addition, a commuter must renew the "green card" every six months, and, if unemployed for more than six months, the commuter's status reverts under the law and regulations to that of a nonresident alien.

Appendix to Question 1 on Aliens, cont.

The interpretation of the Immigration and Naturalization Service (INS) described above was challenged several times; however, the U.S. Supreme Court finally confirmed the commuter practice and clarified the commuter's status in Saxbe Attorney General v. Bustos, November 25, 1974, 419 U.S.65, 95 S.Ct. 272, 42 L.Ed.2d 231. The Supreme Court held that aliens who have their homes in Canada and Mexico and commute daily or seasonally to places of employment in the United States are in a "special immigrant" class under the law--8 U.S.C. 1101 (a) (27) (B)--that they are not nonimmigrants, that they are immigrants "lawfully admitted for permanent residence," and that they are returning from a temporary visit abroad when they reenter the United States. These special immigrants are "lawfully admitted for permanent residence" even though they may have no actual residence in the United States. Under the Court's decision, it may be said that anyone who has been lawfully admitted as an "immigrant" qualifies as an alien lawfully admitted for permanent residence.

The "green card" alien (Form I-151) is to be distinguished from the "white card" alien. An alien residing in a contiguous country may be granted a nonresident alien border crossing card, known as a "white card," under current regulations (8 CFR 212.6) for a limited period of time -- one type (Form I-186) for up to 72 hours, and another (Form SW-434) for a period of up to 15 days within 25 miles of the border of Mexico in specified States of the United States. The "white card" is a recognition of the interdependence of border towns. It is issued in lieu of a visa. This "white card" has been used as a sub rosa work permit for Mexican nationals. Assignment of a social security number and presentation of a social security card are not evidence of immigrant status or authorization to work (20 CFR 422). The "white card" or a social security card should not be confused with the "green card" and the status of the holder of the latter document as aliens "lawfully admitted for permanent residence" in the United States.

Aliens in the third and sixth preference classes are admitted only upon petitions filed by their prospective employers. Prior to the 1976 amendments to the immigration laws (P.L. 94-571, 90 Stat. 2703), a petition for a third preference class immigrant could be filed by the individual alien or the prospective employer.

Appendix to Question 1 on Aliens, cont.

As in the cases of other aliens seeking entry into the United States, the normal immigration procedure is required to be followed, including authorization to work pursuant to a favorable certification by the Secretary of Labor.

II. Lawfully Present to Perform Services

Aliens "lawfully present [in the United States] for purposes of performing such services" by these terms probably include all aliens in the first category who are lawfully admitted for permanent residence at the time the services are performed. The language is much broader, however, and is intended to include nonimmigrants who have been granted a status authorizing them to work in the United States.

The immigration laws permit a nonimmigrant to work in the United States as a temporary visitor for business or as a worker whose admission has been certified by the Secretary of Labor as not having an "adverse effect" upon domestic workers. The certification for "immigrants" and "nonimmigrants" are not precisely the same legally. The certification of the Secretary of Labor for "immigrants" (for permanent work) is conclusive; for "nonimmigrants" (for temporary work), is not conclusive, and the Attorney General has the authority to certify admission nevertheless (8 CFR 214), but has rarely, if ever, used it.

Nonimmigrants admitted temporarily for specific purposes and periods of time, and aliens paroled into the United States, are generally required to carry INS Form I-94 which will be endorsed to show their status. The I-94 will bear a letter indicating a particular status and will also bear a number following the letter. Except for aliens admitted specifically to work, such as agricultural laborers, nonimmigrant aliens normally are not permitted to work in the United States. Students and exchange visitors may, with written permission, accept certain types of work. On the other hand, parolees are permitted to work in most instances. The I-94 will in all cases bear a stamp stating "employment authorized" when employment is authorized.

Appendix to Question 1 on Aliens, cont.

III. Permanently Residing in the United States Under Color of Law

A. Presumption of lawful admission (8 CFR 101.1)

Section 101.1 of 8 CFR reads as follows:

“A member of the following classes shall be presumed to have been lawfully admitted for permanent residence even though a record of his admission cannot be found, except as otherwise provided in this section, unless he abandoned his lawful permanent resident status or subsequently lost that status by operation of law:

“(a) Prior to June 30, 1906. An alien who establishes that he entered the United States prior to June 30, 1906.

“(b) United States land borders. An alien who establishes that, while a citizen of Canada or Newfoundland, he entered the United States across the Canadian border prior to October 1, 1906; an alien who establishes that while a citizen of Mexico, he entered the United States across the Mexican border prior to July 1, 1908; an alien who establishes that while a citizen of Mexico, he entered the United States at the port of Presidio, Texas, prior to October 21, 1918, and an alien for whom a record of his actual admission to the United States does not exist but who establishes that he gained admission to the United States prior to July 1, 1924, pursuant to preexamination at a United States immigration station in Canada and that a record of such preexamination exists.

“(c) Virgin Islands. An alien who establishes that he entered the Virgin Islands of the United States prior to July 1, 1938, even though a record of his admission prior to that date exists as a non-immigrant under the Immigration Act of 1924.

Appendix to Question 1 on Aliens, cont.

"(d) Asiatic barred zone. An alien who establishes that he is of a race indigenous to, and a native of a country within, the Asiatic zone defined in section 3 of the Act of February 5, 1917, as amended, that he was a member of a class of aliens exempted from exclusion by the provisions of that section, and that he entered the United States prior to July 1, 1924, provided that a record of his admission exists.

"(e) Chinese and Japanese aliens --(1) Prior to July 1, 1924. A Chinese Alien for whom there exists a record of his admission to the United States prior to July 1, 1924, under the laws and regulations formerly applicable to Chinese and who establishes that at the time of his admission he was a merchant, teacher, or student, and his son or daughter under 21 or wife accompanying or following to join him; a traveler for curiosity or pleasure and his accompanying son or daughter under 21 or accompanying wife; a wife of a United States citizen; a returning laborer; and a person erroneously admitted as a United States citizen under section 1993 of the Revised Statutes of the United States, as amended, his father not having resided in the United States prior to his birth.

"(2) On or after July 1, 1924. A Chinese alien for whom there exists a record of his admission to the United States as a member of one of the following classes; an alien who establishes that he was readmitted between July 1, 1924, and December 16, 1943, inclusive, as a returning Chinese laborer who acquired lawful permanent residence prior to July 1, 1924; a person erroneously admitted between July 1, 1924, and June 6, 1927, inclusive, as a United States citizen under section 1993 of the Revised Statutes of the United States, as amended, his father not having resided in the United States prior to his birth, an alien admitted at any time after June 30, 1924, under section 4 (b) or (d) of the Immigration Act of 1924; an alien wife of a United States citizen admitted between June 13, 1930, and December 16, 1943, inclusive, under section 4 (a) of the Immigration Act of

Appendix to Question 1 on Aliens, cont.

1924; an alien admitted on or after December 17, 1943, under section 4 (f) of the Immigration Act of 1924; an alien admitted on or after December 17, 1943, under section 317 (c) of the Nationality Act of 1940, as amended; an alien admitted on or after December 17, 1943, as a preference or nonpreference quota immigrant pursuant to section 2 of that act; and a Chinese or Japanese align admitted to the United States between July 1, 1924, and December 23, 1952, both dates inclusive, as the wife or minor son or daughter of a treaty merchant admitted before July 1, 1924 , if the husband-father was lawfully admitted to the United States as treaty merchant before July 1, 1924, or, while maintaining another status under which he was admitted before that date, had his status changed to that of a treaty merchant or treaty trader after that date, and was maintaining the changed status at the time his wife or minor son or daughter entered the United States.

“(f) Citizens of the Philippine Islands -- (1) Entry prior to May 1, 1934. An alien who establishes that he entered the United States prior to May 1, 1934, and that he was on the date of his entry a citizen of the Philippine Islands, provided that for the purpose of petitioning for naturalization he shall not be regarded as having been lawfully admitted for permanent residence unless he was a citizen of the Commonwealth of the Philippines on July 2, 1946.

“(2) Entry between May 1, 1934 and July 3, 1946. An alien who establishes that he entered Hawaii between May 1, 1934, and July 3, 1946, inclusive, under the provisions of the last sentence of section B (a) (1) of the Act of March 24, 1934, as amended, that he was a citizen of the Philippine Islands when he entered, and that a record of such entry exists.

“(g) Temporarily admitted aliens. The following aliens who when admitted expressed an intention to remain in the United States temporarily or to pass in transit through the United States, for whom records of admission exist, but who

Appendix to Question 1 on Aliens, cont.

remained in the United States: An alien admitted prior to June 3, 1921, except if admitted temporarily under the 9th proviso to section 3 of the Immigration Act of 1917, or as an accredited official of a foreign government, his suite, family, or guest, or as a seaman in pursuit of his calling; an alien admitted under the Act of May 19, 1921, as amended, who was admissible for permanent residence under that Act notwithstanding the quota limitations thereof and his accompanying wife or unmarried son or daughter under 21 who was admissible for permanent residence under that Act notwithstanding the quota limitations thereof; and an alien admitted under the Act of May 19, 1921, as amended, who was charged under that Act to the proper quota at the time of his admission or subsequently and who remained so charged.

"(h) Citizens of the Trust Territory of the Pacific Islands who entered Guam prior to December 24, 1952. An alien who establishes that while a citizen of the Trust Territory of the Pacific Islands he entered Guam prior to December 24, 1952, by records, such as Service records subsequent to June 15, 1952, records of the Guamanian Immigration Service, records of the Navy or Air Force, or records of contractors of those agencies, and was residing in Guam on December 24, 1952.

"(i) Aliens admitted to Guam. An alien who establishes that he was admitted to Guam prior to December 24, 1952, by records such as Service records subsequent to June 15, 1952, records of the Guamanian Immigration Service, records of the Navy or Air Force, or records of contractors of those agencies; that he was not excusable under the Act of February 5, 1917, as amended; and that he continued to reside in Guam until December 24, 1952, and thereafter was not admitted or readmitted into Guam as a nonimmigrant, provided that the provisions of this paragraph shall not apply to an alien who was exempted from the contract laborer provisions of section 3 of the Immigration Act of February 5, 1917, as

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amended, through the exercise, expressly or impliedly, of the 4th or 9th provisos to section 3 of that act.

"(j) Erroneous admission as United States citizens or as children of citizens.

(1) (i) An alien for whom there exists a record of admission prior to September 11, 1957, as a United States citizen who establishes that at the time of such admission he was the child of a United States citizen parent; he was erroneously issued a United States passport or included in the United States passport of his citizen parent accompanying him or to whom he was destined; no fraud or misrepresentation was practiced by him in the issuance of the passport or in gaining admission; he was otherwise admissible at the time of entry except for failure to meet visa or passport requirements; and he has maintained a residence in the United States since the date of admission, or (ii) an alien who meets all of the foregoing requirements except that if he were, in fact, a citizen of the United States a passport would not have been required, or it had been individually waived, and was erroneously admitted as a United States citizen by a Service officer. For the purposes of all of the foregoing, the terms "child" and "parent" shall be defined as in section 101 (b) of the Immigration and Nationality Act, as amended.

"(2) An alien admitted to the United States before July 1, 1948, in possession of a section 4 (a) 1924 Act nonquota immigration visa issued in accordance with State Department regulations, including a child of a United States citizen after he reached the age of 21, in the absence of fraud or misrepresentation; a member of a naturalized person's family who was admitted to the United States as a United States citizen or as a section 4 (a) 1924 Act nonquota immigrant on the basis of that naturalization, unless he knowingly participated in the unlawful naturalization of the parent or spouse rendered void by cancellation, or knew at any time prior to his admission to the United States

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of the cancellation; and a member of a naturalized person's family who knew at any time prior to his admission to the United States of the cancellation of the naturalization of his parent or spouse but was admitted to the United States as a United States citizen pursuant to a State Department or Service determination based upon a then prevailing administrative view, provided the State Department or Service knew of the cancellation."

[23 FR 9119, Nov. 26, 1958, as amended at 24 FR 2583, Apr. 3, 1959; 24 FR 6476, Aug. 12, 1959; 25 FR 581, Jan. 23, 1960; 31 FR 535, Jan. 15, 1966]

B. Presumption of lawful admission; entry under erroneous name or other errors
(8 CFR 101.2).

Section 101.2 of 8 CFR reads as follows:

“An alien who entered the United States as either an immigrant or nonimmigrant under any of the following circumstances shall be regarded as having been lawfully admitted in such status, except as otherwise provided in this part: An alien otherwise admissible whose entry was made and recorded under other than his full true and correct name or whose entry record contains errors in recording sex, names of relatives, or names of foreign places of birth or residence, provided that he establishes by clear, unequivocal, and convincing evidence that the record of the claimed admission relates to him, and, if entry occurred on or after May 22, 1918, if under other than his full, true and correct name that he also establishes that the name was not adopted for the purpose of concealing his identity when obtaining a passport or visa, or for the purpose of using the passport or visa of another person or otherwise evading any provision of the immigration laws, and that the name used at the time of entry was one by

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which he had been known for a sufficient length of time prior to making application for a passport or visa to have permitted the issuing authority or authorities to have made any necessary investigation concerning him or that his true identity was known to such officials."

[32 FR 9622, July 4, 1967]

Any alien under a presumption of lawful admission pursuant to CFR 101.1 or 101.2 is to be presumed to be in a status in which working in the United States is lawful. Such an alien will have a Form I-151 if adjudication has been requested by the alien. Thus, such an alien will be indistinguishable from other aliens admitted for permanent residence. Otherwise, such an alien must carry a Form I-94, with the "employment authorized" stamp.

C. Lawfully Present Under Conditional Entry or Parole

Among the third category of aliens exempt from denial of benefits are those lawfully present in the United States "as a result of the application of the provisions of section 203 (a) (7) or section 212 (d) (5) of the Immigration and Nationality Act."

1. Conditional Entry

Section 203 (a) (7)--8 U.S.C. 1153 (a) (7)--provides with respect to allocation of immigrant visas:

"Conditional entries shall next be made [after the preceding six categories] available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 1151 (a) (ii) of this title, to aliens who satisfy an Immigration and Naturalization officer at an examination in any non-Communist or non-Communist- dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled I from any Communist or Communist-dominated

Appendix to Question 1 on Aliens, cont.

country or area, or II from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing, the term 'general area of the Middle East' means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south; Provided, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."

World War II and the period following produced vast refugee problems, and the United States participated in international efforts to alleviate them. The United States has accordingly admitted hundreds of thousands of refugees, initially under special legislative authorizations. The first was the Displaced Persons Act of 1948, then the Refugee Relief Act of 1953. After 1956 there were legislative proposals and limited enactments until the reception of large numbers of Cuban refugees, usually on parole. Hungarians admitted after the uprising in Hungary were admitted under a special act in 1958. The 1965 amendments to the immigration laws fashioned a new device called conditional entry, instead of parole, applicable to refugees only. Conditional entry, however, resembles parole very closely. Prior to the 1976 amendments, the statute made conditional entry available only to the worldwide annual quota, and thus excluded natives of Western Hemisphere countries who were classed as special immigrants, including thereby Cuban refugees as special immigrants. Under the 1976 amendments, there are no such special immigrants.

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The members of the refugee groups are not required to obtain visas and are admitted as conditional entrants, not immigrants. They are usually granted permanent residence status after two years residence. An application for conditional entry is filed on Form I-590, assurances of employment and housing in the United States are executed on Form I-591, and upon arrival at a port of entry the applicant swears to a declaration on Form I-592 certifying to the truth of the statements in his application. Conditional entrants are issued Form I-94 endorsed-to show status.

The second category of refugee, in contrast to refugee escapees, is an extension of prior legislation under which persons displaced from their homes by natural calamity in the Azores were granted asylum in the United States. However, that provision has not been used.

2. Parole of Excludable Aliens

Section 212 (d) (5) of the Immigration and Nationality Act--8 U.S.C.
1182 (d) (5)--provides with respect to excludable aliens:

"The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

Parole allows temporary asylum in the United States for humane considerations or for reasons rooted in the public interest, including refugees before the 1965 statute on refugees. The parole procedure was initiated administratively, and was accorded statutory recognition in 1952. The refugees from Cuba were admitted under this provision. In addition, crew members refused shore leave may be admitted on parole for medical treatment,

Appendix to Question 1 on Aliens, cont.

because they would face persecution if they were to return to Communist-dominated countries, or for other humanitarian or emergent reasons. A parolee has no legal residence status, and legally he may be regarded as outside the United States; nevertheless, such an alien's presence in the United States invests him with some status or privileges. A parolee is required to carry a Form I-94 endorsed to show parolee status.

IV. Interstate Benefit Payment Plan

Section 3304 (a) (9) was added to the Federal Unemployment Tax Act by P.L. 91- 373, effective as a requirement of State laws on January 1, 1972. Subparagraph (A) provides, as a condition of approval of a State law, that:

"(A) compensation shall not be denied or reduced to an individual solely because he files a claim in another State (or contiguous country with which the United States as an unemployment compensation) or because he resides in another State (or contiguous country) at the time he files a claim for unemployment compensation."
(Emphasis added.)

The Social Security Act as enacted in 1935 made no provision for payment of unemployment compensation outside of a State. The States, however, recognized early that failure to provide an interstate benefit payment system that would treat interstate claimants essentially equally with intrastate claimants could result in the failure eventually of the State system of compensation. For that reason, the States acted to establish an interstate system and the first steps were taken in 1937 to adopt the Interstate Benefit Payment Plan. In addition, the United States entered into an Executive Agreement with Canada in 1942 to provide unemployment compensation for workers who earned wage credits in either country. Thus, Americans who earned wages in Canada are able to use them as wage credits in claims against Canada and Canadian nationals who earned wages in covered work in the United States are able to use them as

Appendix to Question 1 on Aliens, cont.

wage credits in claims against a State of the United States. The Executive Agreement was amended in 1951 by mutual agreement. The United States Government undertook to persuade the States to honor the Agreement.

Congress was aware of the Executive Agreement with Canada as evidenced by the language of section 3304 (a) (9) (A) and also by a comment in Report No. 91-612 of the Committee on Ways and Means, November 10, 1969, which accompanied H.R. 14705, as follows:

" . . . the refusal of even a small number of States to adhere to reasonable arrangements and agreements, or the refusal of a small number of States to honor agreements with certain other participants in the agreement, jeopardizes the integrity and effectiveness the System." (Emphasis added.)

Congress became aware that there could be a conflict between the Executive Agreement with Canada (and the requirements of section 3304 (a) (9) (A)) and section 3304 (a) (14) (A). The latter provision was amended by P.L. 95-19 to exempt from the required denial of benefits to aliens "an individual . . . lawfully present for purposes of performing" services used as the basis of benefits. Report No. 95-67 to accompany H.R. 4800, Senate Committee on Finance, March 28, 1977, stated the intent of the amendment as follows:

"The House bill contains a technical correction to the provisions of present law intended to prevent the payment of unemployment compensation to illegal aliens who work in the United States. The present provision prevents the payment of benefits to certain Canadian and Mexican residents who legally work in the United States. The amendments which would be made by the bill is intended to permit benefits to be paid to these people . . . The committee amendment. . . modifies the House-passed provision so that benefits would not be paid to an individual who was illegally working at the time he earned his eligibility for benefits."

Appendix to Question 1 on Aliens, cont.

Most Canadian nationals will qualify for benefits as "immigrant" commuters with a "green card"; others, as "nonimmigrants" authorized to work in the United States. Many Mexican nationals will qualify for benefits in a similar manner. In addition, Canadian nationals may, under the Executive Agreement, file interstate claims in Canada against a State of the United States.

Accordingly, with the clarifying amendment and explanation to section 3304 (a) (14) (A), it is now clearly established that no conflict should arise in regard to the application of the provisions required by sections 3304 (a) (9) (A) and 3304 (a) (14) (A), FUTA.

V. Exhibits of Immigration Documents

As a means of assisting administration of the alien provisions, exhibits of the most common immigration documents discussed above are attached as exhibits at the end of this Supplement.

Denial of Benefits to illegal aliens, section 4 (a) (5)
Supercedes: Answer, pages 24 and 25, Supplement #1,
December 7, 1976

2. Question:

Are subparagraphs (B) and (C) of section 3304 (a) (14) needed in the State law?

Answer:

Yes. In addition to the conditions in subparagraph (A), there are other conditions in section 3304 (a) (14) relating to denial of benefits to aliens, as follows:

"(B) any data or information required of individuals applying for compensation to determine whether compensation is not payable to them because of their alien status shall be uniformly required from all applicants for compensation; and

"(C) in the case of an individual whose application for compensation would otherwise be approved, no determination by the State agency that compensation to such individual is not payable because of his alien status shall be made except upon a preponderance of the evidence."

It is necessary, to avoid discriminating against certain groups of individuals, to request information with respect to alien status of all claimants for benefits uniformly, at least initially. A determination that benefits are to be denied because of an individual's alien status is to be made upon the basis of the preponderance of the evidence--evidence that is more convincing than contrary evidence of the individual's alien status. Thus, in the case of an alien whose claim for benefits would otherwise be approved, a determination of ineligibility on the basis of alien status must be supported by a preponderant weight of evidence that the alien's wage credits were earned at a time when work in the United States was not authorized in accordance with the immigration laws. This weight of evidence is a requirement in lieu of whatever weight of evidence is applied for determinations and decisions on other issues under the State law.

Denial of Benefits to illegal aliens, section 4 (a) (5), cont.

Subparagraphs (B) and (C) of section 3304 (a) (14) were added by amendment of Senator Cranston. He explained their purposes in the Congressional Record, September 29, 1976, at page S 17025 as follows:

"[The Immigration and Nationality Act is very complex and difficult to administer.] The problems for unemployment claims workers will be especially severe with respect to persons who claim citizenship but have no ready proof of citizenship. For example, there are many individuals who have neither birth certificates nor naturalization papers, but who are citizens under 8 U.S.C. 1401.

"It is not fair to ask untrained unemployment claims workers to attempt to interpret the Immigration and Nationality Act. The amendment, therefore, proposes that all applicants be asked basic questions about citizenship or status as an alien. This information, together with other claims information, is verified by the employer in the normal claims process. (Emphasis added.) Unless a preponderance of the evidence is developed [to deny benefits as provided in subparagraph (A)], the claim will be paid. These administrative provisions are consistent with the intent of the bill to deny unemployment compensation to aliens"

Under subparagraph (B), therefore, all claimants are to be asked the same basic questions. Procedural instructions will be issued in the future. We recommend that new claim forms (or a supplementary form) for all programs (UI, UCFE, UCX, DUA, SUA, etc.) contain questions essentially as follows:

"Are you a citizen of the U.S.? Yes [] No []"

"If 'No,' when you were working in the U.S., were you issued an Alien Registration Receipt Card, Form I-151, commonly called a 'green card'? Yes [] No []"

"If 'No,' when you were working in the U.S., what document or Form number were you issued? " _____"

What further inquiry should be made in any case will be covered in the procedural instructions to be issued.

U.S. DEPARTMENT OF LABOR
EMPLOYMENT AND TRAINING ADMINISTRATION
WASHINGTON, D.C. 20213

September 1, 1977

MEMORANDUM FOR: ALL STATE AGENCY ADMINISTRATORS AND
ALL REGIONAL ADMINISTRATORS, EMPLOYMENT
AND TRAINING ADMINISTRATION

FROM: LAWRENCE E. WEATHERFORD, JR
Administrator, Unemployment Insurance Service

SUBJECT: Supplement #4 -- Questions and Answers
Supplementing Draft Language and Commentary
to Implement the Unemployment Compensation
Amendments of 1976 - P.L. 94-566

The enclosed questions and answers reflect issues that have arisen since Supplement #3 was issued.

The questions and answers are keyed to the applicable provision and its commentary in the 1976 Draft Legislation (and supplements, as appropriate) and are issued as the fourth supplement to it.

Please annotate your copies of the 1976 Draft Legislation to reflect these additions.

Additional explanations and interpretations will be issued as needed and appropriate.

Enclosure

Service for governmental entities, section 2 (k) (1) (D)
Refer: Commentary, page 29

Question:

Are wages paid to inmates of a State correctional institution taxable when the inmates are placed on a work release program working for private employers?

Answer:

Yes. As is indicated on page 29 of the 1976 Draft Language, "...services by an inmate of a custodial institution, whether a governmental or a nonprofit institution, or an inmate of a penal institution for the State, its political subdivisions or a nonprofit organization, may be excluded. The same services performed for a private, for profit employer, as in a prison work release program would be covered services under FUTA."

Optional exclusions for required governmental entity coverage,
section 2 (k) (1) (D)

Refer: Commentary, pages 25-29

Question:

If a State agency or department is not covered by the merit system, does the "major nontenured policy making" exclusion apply to all top management?

Answer:

Whether the agency or department is covered by a merit system is immaterial. The important factor is whether a particular position is designated as a major, nontenured, policy-making or advisory position under or pursuant to State law. Please see also page 28 of the 1976 Draft Language.

Domestic service, section 2 (k) (1) (F)
Refer: Commentary, pages 30 - 35

Question:

Is remuneration paid in any medium other than cash to an employee performing domestic service considered "wages" for FUTA purposes?

Answer:

No. Only cash remuneration paid for domestic service is wages for FUTA purposes under section 3306 (c) (2), FUTA.

This provision of Federal law does not, however, preclude a State from taxing under its law remuneration paid for domestic service in a medium other than cash if it wishes. Please see page 33 of the 1976 Draft Language.

Definitions: Educational Institution, Section 2 (u)
Refer: Commentary, pages 38-39

1. Question:

Since the term "educational institution" as used in the between-terms and within-terms denial provisions of section 3304 (a) (6) (A), FUTA, apply to all educational institutions including institutions of higher education, is the definition provided on page 39 of the 1976 Draft Language correct?

Answer:

No. The parenthetical phrase in paragraph (a) on page 39 should be changed to read "(including an institution of higher education as defined in section 3304 (f) of the FUTA)."

The word "except" in that phrase was originally used to distinguish between an educational institution and the definition provided for an institution of higher education. However, since the between-terms denial provision in section 4 (a) (3) of the 1976 Draft Language only uses the words "educational institutions," it is necessary that the term as defined include institutions of higher education to assure proper application of the provision in section 3304 (a) (6) (A) (i), FUTA.

The same reasons apply to the application of "educational institutions" in the optional within-terms denial provision enacted by P.L. 95-19 as section 3304 (a) (6) (A) (iii), FUTA. Notice that the optional provision in section 3304 (a) (6) (A) (ii), FUTA, applies only to nonprofessional school employees in educational institutions other than institutions of higher education, and that therefore the optional provision in section 3304 (a) (6) (A) (iii) also applies by its terms only to non-professional school employees in educational institutions other than institutions of higher education. Furthermore since section 3304 (a) (6) (A) (iii) also applies to services described in section 3304 (a) (6) (A) (i), professional employees in all educational institutions are also subject to the optional within-terms denial provision.

Definition - Educational institutions, section 2(u)
Refer: Commentary, page 39

2. Question:

Are Head Start programs "educational institutions" or "schools" within the meaning of the Federal law?

Answer:

No. Title 45, part 1304 of the Code of Federal Regulations, promulgated by the Department of Health, Education and Welfare, sets out the program performance standards for the Head Start program. In these regulations, the program is defined as a comprehensive developmental program designed to meet children's needs in the health (medical, dental, mental, nutritional) social, and educational areas. The goal is child adjustment and development at the emotional and social level, rather than school- type training. There are educational objectives, but these are designed to

"Provide children with a learning environment and the varied experiences which will help them develop socially, intellectually, physically, and emotionally in a manner appropriate to their age and stage of development toward the overall goal of social competence."

It appears to us that the educational aspect is incidental to the primary purpose of bringing the participating children to a level of development where they can better cope with the environment of a kindergarten or primary school. In addition, it is our understanding that, in general, the Head Start staff members are not licensed as teachers and the Head Start programs are not licensed as schools in the States.

Definition- Educational institutions, section 2 (u), cont.

We provided a definition of "educational institution" on page 39 of Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976 -- P.L. 94-566. We believe an organization is an educational institution within the meaning of the Federal law in question if: (a) participants, trainees, or students are offered an organized course of study or training designed to transfer to them knowledge, skills, information, doctrines, attitudes or abilities from, by or under the guidance of an instructor or teacher; (b) it is approved, licensed or issued a permit to operate as a school by the State Department of Education or other government agency that is authorized within the State to approve, license or issue a permit for the operation of a school; and (c) the courses of study or training which it offers may be academic, technical, trade or preparation for gainful employment in a recognized occupation.

For all of these reasons, Head Start programs do not, in our opinion, come within the definition of educational institution as used in the FUTA.

According to the Department of HEW, Head Start programs are operated by two major groups: Community Action Programs and local Boards of Education. If the Head Start program is operated by a Community Action Program that is a nonprofit organization of the type described in section 501 (c) (3) of the Internal Revenue Code of 1954, exempt from income tax under section 501(a) of that Code, as about 80 percent of the Head Start programs in the country are, then each Head Start program that employed four or more workers in 20 weeks should have been mandatorily covered under the State law as a subject nonprofit organization pursuant to the requirements of section 3309 (a) (1) (A), FUTA, as added by P.L. 91-373, effective for services performed after December 31, 1971. If the Head Start program is operated by Boards of Education or some other governmental entity, as about 20 percent of the programs in the country are, then the Head Start employees would be employees of the governmental entity and coverage determined accordingly.

Definition- Educational institutions, section 2 (u), cont.

Since Head Start programs are not educational institutions as defined, the employees are not subject to the "between-terms disqualifications" applicable to school personnel by reason of sections 3304 (a) (6) (A) (i), (ii) and (iii), FUTA. Benefits paid to individuals based on service with a Head Start program must be paid under the same terms and subject to the same conditions as benefits paid based on any other service subject to the State unemployment compensation law, in order to meet the "equal treatment" requirements of section 3304 (a) (6) (A), FUTA, applicable to benefits based on any service for a nonprofit organization or governmental entity.

Supplement #4, 1976 Draft Legislation
August 26, 1977

Benefit Formula--Qualifying wages--previously uncovered services
section 3 (b) (2)

Refer: Commentary, pages 42 and 43; pages 11, 12 and 13
Supplement #1, December 7, 1976

Question:

Are questions 1 and 2 on pages 11 through 13 of Supplement #1, issued December 7, 1976, still valid?

Answer:

No. The information provided on the subject in those questions will be covered in the Handbook on Transition Benefits to be issued soon. The subject as set forth in the Handbook will take a position which in some respects is different from that taken in questions 1 and 2 identified above. Consequently the Handbook should be used as the source for answers to those questions rather than the Supplement.

Between-terms denial, section 4 (a) (3)
Refer: Commentary, page 52

1. Question:

Are teachers employed by Educational Service Agencies (ESA's) subject to the blanket between-terms denial provision of section 3304 (a) (6) (A), FUTA?

Answer:

No. The situation, as understood, is as follows: ESA's are governmental entities in about 28 States which employ a variety of teachers with special skills. These teachers are contracted out by the ESA's to individual schools to provide special education courses, such as remedial reading. The teachers remain employees of the ESA's, and are not employees of the schools to which they are contracted.

Public Law 94-566, signed by the President on October 20, 1976, as amended by P.L. 95-19, signed on April 12, 1977, amended section 3304 (a) (6) (A) of the Federal Unemployment Tax Act to include a blanket between-terms denial provision applicable to professional employees of educational institutions which overrides any of the State law eligibility and disqualification provisions applicable to other claimants.

This provision of Federal law requires States, beginning January 1, 1978, to deny benefits to individuals based on service in an instructional, research, or principal administrative capacity for an educational institution if the individual performed the services in one year or term and has a contract or a reasonable assurance of performing those services in a succeeding year or term.

There is no definition of an "educational institution" in the Federal law other than that for an institution of higher education. However, it is clear from the Congressional debates and reports on P.L. 94-566 that Congress intended this term to mean schools, and not other governmental entities such as ESA's which employ teachers but are not themselves schools. The definition of "educational institution" on page 39 of the 1976 Draft Legislation reflects this Congressional intent. Accordingly, the between-terms denial provision does not apply to ESA employees.

Between-terms denial, cont.

As for the status of employees of ESA's during the summer or other vacation periods, it does not follow that unemployment benefits should automatically be paid to these individuals simply because the blanket between-terms denial provision does not apply. These claimants must meet the same eligibility and disqualification provisions of the State law applicable to any other claimant in that State.

2. Question:

Should professional school employees such as counselors, social workers and nurses come within the "professional" between-terms denial in clause (i) of section 3304 (a) (6) (A), FUTA?

Answer:

Not necessarily. These individuals may be considered professional in the sense that advanced degrees, licensing, or membership in a professional organization is required to perform their jobs; however, the language of section 3304 (a) (6) (A) (i) does not speak to what the individual is, but to what the individual does. That section specifies categories of services, i.e., instructional, research, or principal administrative, to which the between-terms denial must apply. Therefore, the provisions of that section can not be applied to all school nurses, counselors, or social workers without regard to the services actually being performed by each individual. However, it must be applied if the individual nurse, counselor or social worker is performing services in one of the three categories specified. That is, a nurse, counselor or social worker will be serving in a principal administrative capacity only when the individual is the head of such activities in the school and in such capacity occupies a principal administrative position in the school. Otherwise, the individual will be serving in a nonprofessional capacity.

Clause (ii) of section 3304 (a) (6) (A), an optional between-terms denial, also speaks to the services actually performed by the individual. That clause is applicable to nonprofessional school employees who perform services in any other capacity for an educational institution (other than an institution of higher education); i.e., other than in an instructional, research, or principal administrative capacity. Under the provisions of section 3304 (a) (6) (A) (ii) this optional provision, if a State elects to enact it, would be applicable to school nurses, social workers and counselors who did not perform services in one of the three capacities specified in section 3304 (a) (6) (A) (i), FUTA.

Between seasons denial for athletes

Refer: Section 4 (a) (4), Commentary, pages 55-57: Answer to
Question 1 on page 22, Supplement #1, December 7, 1976

Question:

Is the between seasons denial required by section 3304 (a) (13), FUTA, construed as prohibiting the denial of benefits during such a period if services performed by the individual in sports constituted less than 90% of the total time spent in the base period in the performance of all covered services, or as prohibiting the denial of benefits to ancillary personnel in addition to professional athletes?

Answer:

No. The conditions in which benefits must be denied to professional athletes between seasons pursuant to section 3304 (a) (13), FUTA, represents the minimum circumstances in which a State must deny benefits during the specified period. That section does not act to prohibit denial in other than the stated conditions provided that any different conditions applied are more and not less stringent than those imposed under the Federal law. Therefore, a State is free to enact a law which would require denial between seasons even though the amount of time spent in sports events was less than 90% of the total time in the base period.

For the same reason a State may also extend denial of benefits between seasons to ancillary personnel such as coaches, trainers, referees, etc., without violating the requirements of section 3304 (a) (13), FUTA. However, application of the denial of ancillary personnel performing such services for a nonprofit organization or governmental entity would be inconsistent with the "equal treatment" requirements of section 3304 (a) (6) (A), FUTA, with respect to services performed for such organizations and entities, unless other workers with contractual relationships similar to those between ancillary workers and nonprofit organizations or governmental entities are denied benefits in similar circumstances under State law. In other words, there is equal treatment and the denial may be applied to services of ancillary personnel performed for such organizations, if all other workers in the State (not just the same as other covered employees in the same occupational category) who perform services before a period when no services are required and have reasonable assurances of returning to such work after that period, are denied benefits on the ground that they are not unemployed.

Denial of benefits to certain aliens, section 4 (a) (5)

Refer: Commentary, page 58

Supplement #3, pages 9-29; exhibit following page 29;

1. Question:

An alien may be admitted to this country on a student visa and bring his wife along. If the wife is employed while in this country, would she be denied benefits, as an alien, if unemployed and should employers be taxed on wages paid to the wife?

Answer:

Whether the wife would be denied benefits as an alien would depend on her own status, not that of her husband; i.e., whether she fits into one of the categories of aliens exempt from the denial required by section 3304 (a) (14) (A), FUTA. Whether or not benefits are payable to any alien depends on whether the individual was authorized to work when the services were performed for which the wages are used as wage credits and whether or not the individual is currently available (authorized to work) while claiming benefits. See page 9 and following of Supplement 3, 1976 Draft Legislation, May 6, 1977, for a full discussion of the alien provision.

The wages paid to the wife would be taxable without regard to her alien status and notwithstanding that the wages may be subject to a section 3304 (a) (14) ineligibility provision. Taxability in this instance is determined under the applicable provisions of the FUTA as in other cases of employment for wages subject to the taxing provisions.

Denial of Benefits to certain aliens, cont.

2. Question:

When the United States evacuated from Indochina, many natives of that area fled to the United States. Are any of those individuals exempt from the required denial of benefits to aliens?

Answer:

Yes, provided that their employment was in accordance with documented authorization as is required of other aliens. Vietnamese and Cambodian nationals were admitted to the United States in 1975 and after under the Indochina Migration and Refugee Assistance Act of 1975 (P.L. 94-23; 89 Stat. 87) approved May 23, 1975.

Section 3 of that Act provides that:

“the term 'refugee' as defined in section 2 (b) (3) of the Migration and Refugee Assistance Act of 1962, as amended, shall be deemed to include aliens who (A) because of persecution or fear of persecution on account of race, religion, or political opinion, fled from Cambodia or Vietnam; (B) cannot return there because of fear of persecution on account of race, religion, or political opinion; and (C) are in urgent need of assistance for the essentials of life.”

The 1962 Act (22 U.S.C. 2601) referred to in the quoted language above authorized continuation of United States membership in the Intergovernmental Committee for European Migration and authorized appropriation of amounts as may be necessary from time to time for the payment by the United States of its contributions to the Committee. The Act also provided for "assistance to or in behalf of refugees designated by the President. . .when the President determines that such assistance will contribute to the defense, or to the security, or the foreign policy interests of the United States." Section 2 (b) (3) of the 1962 Act defined “refugee” to mean:

Denial of Benefits to certain aliens, cont.

"aliens who (A) because of persecution or fear of persecution on account of race, religion, or political opinion, fled from a nation or area of the Western Hemisphere; (B) cannot return thereto because of fear of persecution on account of race, religion, or political opinion; and (C) are in urgent need of assistance for the essentials of life."

Section 2 (b) (6) of the 1962 Act further provides for using money appropriated to carry out the purposes of the Act (and the 1975 Act appropriated additional money), among other things:

"for establishment and maintenance of projects for employment or refresher professional training of individuals who meet the requirements . . . and who, having regard for their income and resources, need such employment or need assistance in obtaining such retraining."

Aliens admitted to the United States under authority of the 1975 Act are deemed to be permanently residing in the United States under color of law within the meaning of section 3304 (a) (14) (A), FUTA. To be eligible for benefits, an alien must have earned the wage credits used to compute entitlement while in such status, or other status exempt from denial, and be able and available under the State law.

3. Question:

Is the "green card" (Form I-151) being replaced?

Answer:

Yes. The "green card" that has been used for 35 years, in 17 different versions, is being phased out. According to the Immigration and Naturalization Service (INS) the "green card,"

Denial of Benefits to certain aliens, cont.

which is actually blue currently, will be replaced gradually by a new Alien Documentation, Identification and Telecommunication (ADIT) system. The new ADIT card went into operation in Miami in March 1977, after a test in El Paso in 1976 and several years of development.

Priority will be given for issuance of the new card to new immigrants and current holders of "green card" identification who require replacement cards. The ADIT system will be phased in throughout the country in INS district offices and ports of entry. The front of the ADIT card contains a photograph of the holder and states RESIDENT ALIEN. More information is contained on the reverse of the card in the form of numerical codes. The multi-colored card is encased in a plastic lamination, which obliterates the information if anyone tries to separate it.

Benefit costs of governmental entities, section 8 (e)

Refer: Commentary page 65

Supplement #1, page 15

1. Question:

Must a political subdivision which has elected to make payments in lieu of contributions reimburse the fund for benefits paid because of an error made in the reporting of wages by the subdivision?

Answer:

Yes. A reimbursing employer, whether a governmental entity or a nonprofit organization, is required to reimburse the fund for any benefits paid attributable to service in the employ of the reimbursing employer even though the wages upon which the claim is based were reported erroneously. Section 3309 (a) (2), FUTA, requires a reimbursing employer "to pay...into the State unemployment fund amounts equal to the amounts of compensation attributable under the State law to such service." This provision in Federal law precludes any noncharging for reimbursing employers. Benefits are calculated on employment and wages reported by the employer, and benefits so paid clearly are attributable to service in the employ of the employer and chargeable to that employer. Even if the State agency made an error in its calculations the employer would be liable for the benefits paid. When the employer errs the situation is not in any way different. In any such case, the employer may be released from liability only if the overpaid benefits are recovered to the State's unemployment fund.

Benefit costs of governmental entities, section 8 (e)

Refer: Commentary, page 65

Supplement 1, pages 31-36

Supplement 2, page 19

2. Question:

What options are available to a State in treating a governmental entity which changes its method of financing benefit costs?

Answer:

This answer (which follows the position in FM 165-72 dated April 20, 1972, with respect to "switching" nonprofit organizations) assumes that the State law does not include a special contributions plan for governmental entities and that contributions will be paid by the electing entity under the system applicable to private-for-profit employers. Where there is a special contributions plan solely for governmental entities, the rate for the electing entity will be determined by its provisions.

A State may treat a governmental entity which changes from the reimbursement to the contributory method of financing benefit costs either as a "new or newly covered" employer, or as an "old" employer.

If the entity is treated as "new or newly covered," the period during which it was in reimbursement status would not be taken into account for any of the purposes of experience-rating. In effect, it would be treated for experience rating purposes as though it had not been subject to the law prior to the effective date of the election of contributions. It would pay contributions on the same basis as other new and newly covered employers until such time as it became eligible for and was assigned a computed rate in accordance with the State law.

Benefits costs of governmental entities, cont.

If the switching entity is treated as an "old" employer, the State has two options:

1. It may construct the entity's experience during the reimbursement period as if the employer had been in contribution status. Thus, when the entity has had a total of three years of experience immediately preceding the computation date--constructed experience plus actual experience in contributing status after the effective date of the election of contributions and immediately preceding the computation date--it would be eligible for computation of a rate based on experience. Until such time, the entity would pay contributions at not less than the standard rate.
2. The State may require the switching entity to have not less than three years of experience, after the effective date of the election of contributions and immediately preceding the computation date, before becoming eligible for computation of a rate based on its experience. Until such time, the entity would pay not less than the standard rate.

A governmental entity changing from contributions (whether the regular or a special plan) to reimbursement must reimburse benefit costs, dollar for dollar, beginning with the effective date of the election.

Benefit costs of governmental entities, section 8 (e)
Refer: Commentary, page 65

3. Question:

Must State laws include provisions for enforcing collection of payments from governmental entities?

Answer:

Yes. Section 303 (a) (1), Social Security Act (the methods of administration provision), requires that the State law must provide for reasonable means to enforce satisfaction of liabilities to the State's unemployment fund. The requirement applies to governmental entities to the same extent as it applies to private-for-profit employers.

Because of the difference between private-for-profit employers and governmental entities, it may be that the enforcement and collection methods applicable to the former are not appropriate for the latter. In such cases, the State law should include special provisions to enforce satisfaction of a governmental entity's liability to the State unemployment fund.

In addition, the interest and penalty provisions applicable to private-for-profit employers are to be made applicable to governmental entities.

The following provisions are among those being considered by various States. They are offered as examples, without recommendation, and should be modified as appropriate to meet specific State needs.

Example 1. “(a) Should any amounts due from any component or instrumentality of this State remain due and unpaid for a period of 90 days after the due date, the State Comptroller shall take such action as is necessary to collect such amounts and is hereby authorized and required to levy against any funds

Benefit costs of governmental entities, cont.

due such component or instrumentality by any other department, agency or official of the State or against any bank account established in any bank whether or not in this State. Such department, agency or official shall deduct such amounts as are certified by the Comptroller from any accounts or deposits or any funds due such delinquent component or instrumentality without regard to any prior claim and promptly forward such amounts to the Comptroller.

(b) Should any amounts due from any Governmental entity of any county, municipality or any instrumentality thereof, as defined in Section _____ of this chapter, remain due and unpaid for a period of 120 days after the due date, the director shall take such action as is necessary to collect such amounts and is hereby authorized and required to levy against any funds due such governmental entity by the State Treasurer, Comptroller, Commissioner of Revenue, or any other official or agency of this State or against any bank account established in any bank. Such officials, agency or bank shall deduct such amounts as are certified by the director from any accounts or deposits with or any funds due such delinquent governmental entity without regard to any prior claim and promptly forward such amounts to the director for the fund. Provided, however, the director shall notify the delinquent entity of his intent to file such levy by certified mail at least ten days prior to filing of a levy on any funds due the entity by any State official or agency."

Example 2. "If any Governmental entity (other than the State of _____ and its wholly owned instrumentalities) referred to in Section _____ fails to pay contributions or to make a payment in lieu of contributions (as the case may be) required by this Section, when due, or fails to pay accrued interest or penalties, if any, the Director, in addition to utilizing any of the other remedies available to him under this Act or any other law to enforce such payment, may notify the State Comptroller of the amount due, whereupon the State comptroller shall issue a

Benefit costs of governmental entities, cont.

warrant on the State Treasurer, authorizing him to deduct such amount from any grants of State funds or from State funds due or which become due to such governmental entity, and the State Treasurer shall transmit the amount so deducted for deposit in the clearing account established by Section _____."

Example 3. "In the event any governmental entity which is a covered employer under the terms of this chapter becomes delinquent in payments due under this chapter, upon due notice, and upon certification of the delinquency by the Commission to the State holding funds that may be payable to the delinquent governmental entity, the amount of such delinquency shall be deducted from any such funds in the hands of the State Treasurer or other department or agency and paid to the Commission in satisfaction of such delinquency. This remedy shall be in addition to any other collection remedies in this chapter or otherwise provided by law."

Benefit costs of governmental entities, section 8 (e).

Refer: Commentary, page 65

Supplement #1, page 35

4. Question:

May a negative balance experience rated governmental entity or a nonprofit organization be denied the right to change to the reimbursement option solely on the basis of the negative balance?

Answer:

No. Section 3309 (a) (2), FUTA, requires that nonprofit organizations and governmental entities have the option of financing benefit costs by contributions or payments in lieu of contributions. The exercise of this option includes the right to change the financing method. See 1970 Draft Legislation, commentary page 93; 1976 Draft Legislation, commentary page 65, and Supplement #1, page 35, Question 6 and 7.

The only basis on which a change in the financing method may be denied is that the organization or entity failed to comply with the State law requirements for making the change: the period for which the current election was made has not expired, the organization or entity did not give notice of intent to change within the specified time, etc.

A provision that a negative balance employer may not change to reimbursement until a zero balance is achieved cannot be supported as a "safeguard" provided for in section 3309 (a) (2). This safeguard provision applies only to reimbursers, not to experience rated employers. It is intended to ensure only that the employer make the payments for which he is liable and includes authority to terminate the reimbursement option if the reimbursers is delinquent or fails to file a required bond or to make a required deposit. See 1970 Draft Legislation, page 82, Section 8 (f) (3) (D), First Optional provision and section 8 (f) (3), Second Optional provision.

However, in the case of a negative balance, it would not be inconsistent with any provision of Federal law to impose liability on the employer for the negative balance and enforce collection of that liability in such manner as may be provided by the State law.

Benefit costs of governmental entities, section 8 (e)
Refer: Commentary, page 65

5. Question:

May the State law specify the financing option for the State as a whole and provide that the individual State components shall make the required payments to the State unemployment fund?

Answer:

No. Section 3309 (a) (2), FUTA, provides that each governmental entity must have the option to choose either contributions or payments in lieu of contributions. As indicated in the Answer to Question 1, page 31, Supplement #1, the State law may designate the State as a whole as a governmental entity and choose for it the financing option. Under such provisions, the State as a whole is the "employer" rather than the individual components. Since the State is the "employer," there needs to be one source to which the agency looks for payment, i.e., the agency would have to bill the State (in the person of the designated official, for example, the State Treasurer) for the benefit costs of the State as a whole. The State would be required to pay the entire bill to the agency.

The method by which the liable employer, the State, finances its unemployment insurance costs, whether by allocating costs to and collecting amounts due from the separate State components, or by some other method, is a matter for the "employer," the State, to decide. However, the costs involved in the mechanics of financing and paying the unemployment insurance bill are "employer" costs and not an administrative cost of the agency. Accordingly, granted funds may not be used for such "employer" costs. Similarly, if the State establishes a special fund from which the benefit costs of the State are paid, the costs of administering such fund are "employer" costs for which granted funds may not be used.

Benefit costs of governmental entities, cont.

State agencies will need to keep records of benefits paid based on service with individual State components in order to detail and support the total bill to the State. Such costs are properly an administrative expense of the agency for which granted funds may be used.

Under section 303 (a) (1), Social Security Act (the methods of administration provision), each individual State component should make the reports and have responsibility for activities relating to benefit rights (wage and employment reports, separation notices, attendance at appeals hearings, etc.). Granted funds may not be used for such activities.

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U.S. DEPARTMENT OF LABOR
EMPLOYMENT AND TRAINING ADMINISTRATION
WASHINGTON, D.C. 20213

November 13, 1978

MEMORANDUM FOR: ALL STATE AGENCY ADMINISTRATORS AND
ALL REGIONAL ADMINISTRATORS, EMPLOYMENT
AND TRAINING ADMINISTRATION

FROM: ROBERT EDWARDS
Acting Administrator, Unemployment
Insurance Service

SUBJECT: Supplement #5--Questions and Answers
Supplementing Draft Language and Commentary
to Implement the Unemployment Compensation
Amendments of 1976 - P.L. 94-566

The enclosed questions and answers reflect issues that have arisen since Supplement #4 was issued. It also reports the most recent issuance of the Department explaining the Secretary of Labor's decision on coverage of church-related elementary and secondary schools.

The questions and answers are keyed to the applicable provisions and commentary in the 1976 Draft Legislation (and supplements, as appropriate) and are issued as the fifth supplement to it.

Please annotate your copies of the 1976 Draft Legislation to reflect these additions.

Additional explanations and interpretations will be issued as needed and appropriate.

Enclosure

Definitions-service for nonprofit organization, section

2 (k) (1) (C)

Refer: Commentary, page 25

1. Question:

Have any official issuances other than UIPL No. 39-78 and the Secretary's decision of April 18, 1978, been prepared by the Department concerning the coverage of employees of church-related schools?

Answer:

Yes. The office of the Solicitor in its letter of August 7, 1978 to Mr. Orin G. Briggs of Columbus, South Carolina, provided further explanation of the Secretary of Labor's decision on the coverage of church-related elementary and secondary schools under State unemployment compensation laws. The comments respond to the question of whether certain teachers employed by members of an association of religious schools come within the scope of the exclusion contained in section 3309 (b) (1) of the Federal Unemployment Tax Act (26 U.S.C. 3301 et seq.), and in pertinent part states:

"In order to properly understand this question it may be helpful to briefly review the legislative history of the 1970 and 1976 amendments. In the 1970 Amendments (Public Law 91-373) Congress extended unemployment insurance coverage "to services for nonprofit organizations (and State hospitals and institutions of higher education) by requiring that State unemployment compensation laws cover those services effective January 1, 1972, as a condition for certification of the States for tax credit purposes under the Federal Unemployment Tax Act (FUTA). States were, however, permitted to exempt from coverage certain services described in section 3309 (b), FUTA, including services performed:

Definitions-service for nonprofit organization, cont.

"(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

"(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

"(3) in the employ of a school which is not an institution of higher education.

"It is obvious that under paragraph (3) employment in nonprofit elementary and secondary schools could have been exempted from coverage.

"The 1976 Amendments (Public Law 94-566) required, as a condition for tax credit, that States extend coverage effective January 1, 1978, to nonprofit elementary and secondary schools, as well as all State and local government workers. Although retaining the limited exemptions under paragraphs (1) and (2) above, the Congress removed the exemption authorized in paragraph (3) relating to employment in nonprofit elementary and secondary schools."

Definitions-service for nonprofit organization, cont.

"The issue considered by the Secretary of Labor was whether, as a result of the repeal of paragraph (3), employees of elementary and secondary schools that happened to be "church-related" could now be exempted from State law coverage under paragraph (1). Secretary Marshall's decision was announced on April 18, 1978, in a letter of that date to The Most Reverend Thomas C. Kelly, O.P., General Secretary of the United States Catholic Conference, a copy of which was previously furnished to you. Secretary Marshall concluded that the repeal by Congress of the exemption in section 3309 (b) (3), FUTA, was clearly intended to result in State coverage of all nonprofit elementary and secondary schools, including church-related schools.

"With respect to services performed in elementary and secondary schools that are church-related, some employment in the schools may be of a type that would come within the scope of the exemption permitted by section 3309 (b) (1), FUTA, if the services performed are strictly church duties performed by church employees at the schools pursuant to their religious responsibilities. However, the exemption in section 3309 (b) (1) (A) relating to church employees exempts no other activities performed in elementary and secondary schools since the schools are not churches within the meaning of that section. The exemption contained in section 3309 (b) (1) (B) applies only to services performed for organizations that are operated, supervised, controlled, or principally supported by a church and are primarily engaged in religious activities. The only educational institution recognized as falling within this exemption would be an institution for the training of candidates for the priesthood, ministry or rabbinate.

Definitions-service for nonprofit organization, cont.

"In summary, it should be emphasized that the exemptions contained in section 3309 (b) are of mixed legal types and must be rationalized in order to achieve the purposes of the statutory provisions. For example, section 3309 (b) (2) exempts the "ordained . . . minister . . . in the exercise of his ministry . . .," obviously an exemption for a particular kind of employee only while the employee is engaged in the activities of the specific occupation. By contrast, former section 3309 (b) (3) exempted all employees of a particular type of establishment, 'a school which is not an institution of higher education.' Likewise section 3309 (b) (1) (A) exempts employees of the type of establishment which is a church or 'house of worship.' However, section 3309 (b) (1) (B) adds another dimension beyond 'house of worship' which is definitionally confined to 'an organization which is operated . . . by a church or convention or association of churches.'

"Reading the provisions of section 3309 (b) together, and giving meaning to the words of each exemption in accordance with the purpose of the statute, reasonably leads to the conclusion that 'organization' as contained in section 3309 (b) (1) (B) does not encompass elementary or secondary schools since separate language formerly contained in section 3309 (b) (3) exempted such institutions. The only educational institutions that may be included within the term 'organization' as used in section 3309 (b) (1) (B) are those institutions training candidates for occupations such as the priesthood, ministry or rabbinate because those occupations are 'primarily religious' and involve duties of a nature consistent with the activities usually associated with a 'church' as a kind of establishment. In other words, if the activities conducted at the establishment are those ordinarily constituting the operation of an elementary or secondary school, the activities cannot be the kind of activities of a 'church' or 'organization' that are exempted by section 3309 (b) (1).

Definitions-service for nonprofit organization, cont.

"Because FUTA is a remedial statute aimed at overcoming the evils of unemployment it is to be liberally construed to effectuate its purposes see United States v. Silk, 331 U.S. 704, 712 (1947) (Social Security Act); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947) (Fair Labor Standards Act), and exemptions are to be 'narrowly construed . . . and their application limited to those establishments plainly and unmistakably within their terms and spirit,' Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960) (Fair Labor Standards Act), thereby avoiding 'difficulties for which the remedy was devised and . . . adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.' U.S. v. Silk, supra. Many years ago Circuit Judge Goodrich observed:

Finally, there is this comment to be made with regard to the nature of these [unemployment compensation] statutes. These are not penal statutes nor are they, except incidentally, revenue statutes. They are to be classed under the broad, though indefinite, heading of social legislation. The classes of workers to be covered by this legislation are very broad. The exemptions are, in general, rather narrow and become more so as the scope of this legislation is widened from time to time. We think that courts should not be eager to extend the scope of the exceptions by artificial construction of language broadening them beyond what Congress has prescribed. Farming, Inc. v. Manning, 219 F.2d 779 782 (CA 3, 1955).

Definitions-service for nonprofit organization, cont.

"We do not think it is advisable to attempt to draw any definitive outlines in advance of all of the services that would constitute church duties performed by church employees pursuant to their religious responsibilities within schools. What we have said should furnish guidance on the scope of permissible exemptions. The following examples may be of further help.

"In the first example, a minister has an office in his church where he performs his ministerial duties with the assistance of a secretary, and they also have an office in a church-related school where they perform the same duties. The office in the school is in effect an extension of the church, and since exempt duties are being performed the exemption under section 3309 (b) (1) (A) may apply.

"In the second example, a person is employed as a sexton by a church and also as a janitor for the church-related school. When performing custodial services for the church, the sexton clearly may be exempt under section 3309 (b) (1) (A) since he is employed by an exempt establishment. However, when performing custodial services as a school janitor the exemption would not be applicable because the janitorial duties do not constitute church duties or a performance of religious responsibilities within the school and the janitor is not employed by an exempt establishment."

In addition to the Briggs letter quoted above, the Department's position on coverage of employees of church-related elementary and secondary schools has been more fully explained in a Memorandum of Points and Authorities filed by the Department in the case of Independent Baptist Church v. Tennessee. Copies of the brief have been furnished to the State agencies through the regional offices.

Definitions- service for nonprofit organization, section
2 (k) (1) (C), cont.

Refer: Commentary, page 25

2. Question:

Does the Secretary's decision on coverage of church-related elementary and secondary schools also change the application of the exclusion in section 3309 (b) (1) (A) and (B) as they apply to other organization?

Answer:

No. The decision made by the Secretary of Labor in his letter of April 18, 1978 to Bishop Kelley only affects the exemption of church-related elementary and secondary schools under these provisions. The exemptions still apply to other organizations in the same way they did before the Secretary's decision. Thus, the factors governing the application of the exclusions in section 3309 (b) (1) (A) and (B), FUTA, as set forth in the answer to question 2 on page 6 of Supplement 2 1976 Draft Legislation, issued February 2, 1977, are still valid in determining whether other organization are exempt under those provisions.

Definitions-Employment, section 2 (k) (1) (D)

Refer: Commentary, page 26

1. Question:

Are there conditions under which services performed for a nonprofit or governmental institution of higher education on a part-time basis by a student who is enrolled as a doctoral candidate can be exempted from coverage required by section 3304 (a) (6) (A), FUTA, if the student is not regularly attending classes?

Answer:

Yes. In addition to the services described in section 3309 (b), FUTA which may be excluded from coverage required by section 3304(a) (6) (A), a State may also exclude the services described in paragraph (1) through (6) and (9) through (10) of section 3306(c) FUTA. Included among the latter exclusions are the provisions in section 3306 (c) (10)(B) which exempt

" service performed in the employ of a school, college, or university if such service is performed (i) by a student who is enrolled and is regularly attending classes at such school, college or university . . . "

The condition requiring regular class attendance is construed as a formal requirement in all cases and must be met before that exemption can be applied. However, we are advised by officials of the Internal Revenue Service that the application of this requirement to doctoral candidates given in Ruling 78-17 published on page 18 of Internal Revenue Bulletin 1972-2, issued January 9, 1978, with respect to the identical exemption provided by section 3121 (b) (10) (B), FICA, is equally applicable to section 3306 (c) (10) (B), FUTA. This ruling recognizes that a certain amount of nonclassroom study may be necessary to obtain an academic degree in the case of a doctoral candidate. Consequently, it concluded that pursuance of a regular course

Definitions- Employment, section 2 (k) (1) (D), cont.

study necessary to receive the desired degree, in accordance with the requirements of the school, satisfies the requirement of regularly attending classes. However, a student working on a dissection must be actually enrolled at the university for such independent study during the academic term when the services were performed, and such employment to be exempt must be on a part-time basis and be incident to and for the purpose of pursuing a course of study.

Assuming the State law contains an exemption the same as that provided by section 3306 (c) (10) (B) FUTA, and the individual is employed under the conditions specified and is enrolled as indicated, the services performed in the employ of the university could be exempted consistent with the requirements of section 3304 (a) (6) (A), FUTA.

Definitions-domestic service

section 2 (k) (1) (F)

Refer: Commentary, page 4 and 33

1. Question:

What approaches can be taken to ease the unemployment tax burden of elderly and disabled individuals as well as welfare recipients now considered the employers of domestic workers including nurses whose services are necessary to them?

Answer:

The Internal Revenue Service was asked for advice in this matter. They referred to Revenue Rulings 61-196 and 75-101, which deal specifically with instances in which practical nurses and registered nurses may be considered either self-employed or employees of some agency or organization other than the private individual needing care. For example, a licensed practical nurse performing private-duty nursing and not affiliated with a hospital, clinic, nursing home or employment agency may be considered an independent contractor and not an employee for Federal unemployment tax purposes. Presumably, the individual would have the same status under most State unemployment insurance laws and would, therefore, not be covered by unemployment insurance.

Pertinent language from the two rulings follows:

Rev. Rul. 61-196

* * * *

(a) Independent contractor.--Registered nurses are skilled professionals who have been trained to render technical assistance in administering medications and treatment to the sick, wounded, or enfeebled. Although some of their duties may be domestic in nature, such duties are usually incidental to their regular professional duties. Registered nurses, by reason of their professional status, generally are independent

Definitions-domestic service, cont.

contractors in the performance of private duty nursing services. They hold themselves out to the public as exercising an independent calling requiring specialized skills. Ordinarily, they have full discretion in administering their professional services and are not subject to sufficient direction or control to warrant the finding of an employment relationship, even though they may be subject to the supervision of the attending physician. Under such circumstances they are independent contractors and not employees for Federal employment tax purposes.

"(b) Employment relationship.--Hospitals, clinics, nursing homes, public health agencies, etc., engage registered nurses on a full-time basis as a part of their regular staffs. Some physicians engage them as office attendants in connection with their private practice. The nurses work for a salary and follow prescribed routines during fixed hours. Although their duties are professional in nature, these nurses lose their individuality by integrating their services into the employer's business and by the employer's right to set the order of and supervise their services. These nurses are subject to the direction and control of the institution, agency, physician, etc., and are employees in every sense of the word.

Practical Nurses

"In the past several years the status of practical nurses as a group has undergone a change from one of a practically domestic role to that of a qualified semi-professional. Almost uniform statutes now in force in all fifty states require that before qualifying

Definitions-domestic service, cont.

as a licensed practical nurse an individual must successfully complete a prescribed course of formal training and pass the state's licensing examination. By reason of these training and licensing requirements, the nursing and medical professions generally recognize licensed practical nurses as being qualified to render nursing services in all but the most acute or complex cases.

"As is true in the case of registered nurses, licensed practical nurses are frequently engaged by hospitals, clinics, nursing homes, etc., on their regular staffs. In these situations the licensed practical nurses work for a salary, follow prescribed routines during fixed hours, and are otherwise subject to the direction and control of the institutions, etc., engaging them. Consequently, they are employees for Federal employment tax purposes.

"Licensed practical nurses who perform private-duty nursing, as in the case of registered nurses, ordinarily have discretion in performing their nursing services. Although there may be situations where they follow the instructions of an attending physician or registered nurse, they are for the most part not subject to supervision or control by the person for whom they are rendering services. Thus, in private duty nursing, licensed practical nurses usually perform their services under the same general conditions as registered nurses and, therefore, are ordinarily independent contractors and not employees for Federal employment tax purposes when performing services under such circumstances.

Definitions-domestic service, cont.

"The conclusion in the preceding paragraph has no application to a licensed practical nurse who is engaged primarily to perform services of a household nature as distinguished from services involving the care of a private patient since under these circumstances she would be performing services as an employee for Federal employment tax purposes.

"As in all situations where a determination as to the existence of either an employer-employee or independent contractor relationship is required, the complete factual data and all circumstances must be considered. The pertinent factors which must be considered are (a) the type and nature of the services performed; (b) the control exercised and by whom; (c) whether the individual is a licensed nurse; and (d) evidence establishing whether or not the services were performed in the conduct of an independent trade, business, or profession.

"Nurses' aides, domestics, and other unlicensed individuals who continue to classify themselves as practical nurses are, in general, insufficiently trained or equipped to render professional or semiprofessional services according to the professional concept of "nursing." Their services are normally those expected of maids and servants, i.e., bathing the individual, combing the individual's hair, reading, arranging bedding and clothing, preparing and serving meals and occasionally giving oral medication left in their

Definitions-domestic service, cont.

custody. As these and similar tasks are normally performed by domestics, the individuals performing them are, like domestics, subject to virtually complete direction and control in the performance of the service regardless of whether they work for a medical institution, physician, or in a private household and, therefore, are employees for Federal employment tax purposes.

"The Self-Employment Contributions Act of 1954 (chapter 2, subtitle A, Internal Revenue Code of 1954) imposes for each taxable year a tax on the self employment income of every individual. Thus, it may be stated that generally if a nurse is not an employee for Federal employment tax purposes the provisions of the Self-Employment Contributions Act may be applicable. Therefore, determinations whether tax liability may be incurred under that Act should be made with due regard to the applicable income tax provisions of the Code since an individual's status as a self-employed individual is initially dependent upon whether he is engaged in a trade or business. Doubtful cases should be submitted to the Internal Revenue Service for specific rulings."

Rev. Rul. 75-101

"Advice has been requested as to the status of a licensed practical nurse performing services, under the circumstances described below, for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages (chapters 21, 23, and 24,

Definitions-domestic service, cont.

respectively, subtitle C, Internal Revenue Code of 1954).

"A company, that is in the business of furnishing the services of licensed practical nurses, engages, such nurses pursuant to oral contracts. The company requires each licensed practical nurse desiring to be placed on its register to complete an application form on which she must list her training and previous experience. The company reviews each application prior to assigning a nurse to one of its clients to insure that the nurse is fully trained, has passed the State board examination for licensed practical nurses, and has a current professional license. The nurse is expected to maintain her own license and certification. The company issues instructions to the nurse regarding her professional appearance and conduct while on assignment, and periodically checks with each client to determine if the nurse's services are satisfactory. In addition, the company employs a visiting registered nurse, on a full time basis, to make periodic on-the-job visits to evaluate the professional competence of the practical nurse. When appropriate, the visiting nurse has the authority to make recommendations to the practical nurse regarding the care of the patient. It is understood that the practical nurse will follow these recommendations.

"The oral contract between the company and the nurse contemplates that substantially all services will be performed personally, under the company's name, for a predetermined hourly rate and that an assignment will be completed.

Definitions-domestic service, cont.

In the event a nurse is unable to complete an assignment she will receive remuneration for the number of hours that she performed services. The nurse may terminate her relationship with the company at any time. The company may terminate her services for repeated failure to report on assignments, theft, habitual tardiness, indulgence in alcoholic beverages, or failure to perform satisfactory services. The nurse is not eligible for sick pay or bonuses.

"A prospective client contact the company regarding his particular need for nursing services. The company secures the pertinent information regarding the request, such as, time, place, length, and nature of the services. The company contacts one of its nurses and relays the information regarding the client. The nurse is free to accept or decline any assignment. If the assignment is accepted the nurse is expected to arrive at the time and place specified and is expected to report to the company by telephone on a weekly basis regarding the assignment. The nurse is paid by the company on a weekly basis as the services are performed. The company bills the client monthly or at the completion of the assignment.

"An individual is an employee for Federal employment tax purposes if he has the status of an employee under the usual common law rules applicable in determining the employer-employee relationship.

Definitions-domestic service, cont.

Rev. Rul. 61-196, 1961-2 C.B. 155, states that whether a nurse is self-employed or an employee depends on the facts and circumstances of each case. Generally speaking, licensed practical nurses and registered nurses are considered to be self-employed. However, when such nurses are on the regular staff of a hospital, clinic, nursing home, or physician, work for a salary, follow prescribed routines during fixed hours, and are subject to the direction and control of those engaging them, they are employees. Rev. Rul. 61-196 also lists four factors to be considered in situations where a determination as to the existence of either an employer-employee or independent contractor relationship is required with respect to nurses. They are (a) the type and nature of the service performed, (b) the control exercised and by whom, (c) whether the individual is a licensed nurse, and (d) evidence establishing whether or not the services were performed in the conduct of an independent trade, business, or profession.

"In this case, the nurse performs professional nursing services as a licensed practical nurse for the clients of the company. The nurse represents the company, her services are periodically checked by the company, she is issued instructions, paid on a weekly basis, and her services may be terminated by the company. The nurse is not engaged in an independent enterprise in which she assumes the risk of profit and loss. Since she is a skilled worker, she does not require constant supervision.

Definitions-domestic service, cont.

Guides for determining the existence of that status are found in three substantially similar sections of the Employment Tax Regulations, namely, sections 31.3121(d)-1, 31.3306(i)-1, and 31.3401(c)-1. Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is the employer.

"Furthermore, consideration must be given to such factors as the continuity of the relationship, and whether or not the employee's services are an integral part of the business of the employer as distinguished from an independent trade or business of the individual himself in which he assumes the risk of realizing a profit or suffering a loss. See U.S. v. Silk and Greyvan Lines, Inc., and Bartels v. Birmingham, 332 U. S. 126 (1947), 1947-2 C.B. 174.

Definitions-domestic service, cont.

"Accordingly, it is held that the company retains the right to exercise over the nurse the degree of control and direction necessary to establish the relationship of employer and employee, and, therefore, the nurse is an employee of the company for purposes of the taxes imposed by the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages."

In addition, we recommend to all State agencies that in cases in which the individual requiring domestic services is a welfare recipient, efforts be made to explore with the welfare agency the availability of welfare agency funds to pay the costs of such services, including the unemployment tax.

Between-terms denial, section 4 (a) (3)
Refer: Commentary, page 52;

I. Question:

May a State law, in implementing section 3304 (a) (6) (A) (ii), FUTA, apply the between terms denial applicable to nonprofessionals to differentiate among classifications of employees or among school districts?

Answer:

No. The nonprofessional denial provision may not differentiate either among classifications of employees, e.g., applying the denial to bus drivers but not cafeteria workers, or among school districts, e.g., applying the denial to school district "X" but not school district "Y".

The reason is that Congress, in providing for the required between-terms denial in section 3304 (a) (6) (A) (i), FUTA, specified three categories of services, instructional, research and principal administrative, to which the denial must apply. The optional denial in section 3304 (a) (6) (A) (ii), FUTA, applies to services in any other capacity for an educational institution, other than an institution of higher education. Congress authorized no distinction among categories of services within the optional denial provision, as it did in the required denial provision. In addition, the only distinction authorized among different schools is that the optional denial may not apply to services performed for institutions of higher education.

The Congressional reports and debates on the between-terms disqualification include no indication that Congress intended any other distinctions among types of services or among schools other than the distinctions mentioned above.

Between- terms denial, cont.

Had Congress wanted to make other distinctions within the optional denial provision, it could have done so in the same way it did for the three categories of services in the required denial provision or as it did by exempting institutions of higher education from the optional denial provision. Congress did not do so. Since no such distinctions were made, a State has only the option provided in section 3304 (a) (6) (A) (ii), FUTA, as it applies to categories of services and schools, and may make no additional distinctions within its law.

A State may enact an optional between-terms disqualification that applies more stringent criteria than the Federal law as to the quality of the evidence acceptable in determining whether the individual will be returning to his or her school job at the end of the vacation period. That is, a State may, instead of requiring a reasonable assurance, require that the individual have a contract to return to work in the next year or term before the disqualification can be applied.

The reason a State may substitute a contract for a reasonable assurance in the optional denial provision is that, when the latter was defined on page 12 of the Joint Explanatory Statement of the Committee of Conference, it was defined to include a written agreement as well as verbal or implied agreements. Therefore, if a State wants to restrict the evidence of reemployment it will accept to a written agreement or contract, the definition Congress provided would not preclude such a restriction.

2. Question:

May employees of an Educational Service Agency be denied benefits similarly to employees of educational institutions?

Answer:

Yes. Section 2, P.L. 95-171, approved November 12, 1977 amended section 3304 (a) (6) (A), Federal Unemployment Tax Act, by adding a new clause (iv) which provide States with the option to deny benefits "between-terms" and/or "within-terms" to employees of an educational service agency. This additional option was explained in Unemployment Insurance Program Letter 38-78, March 6, 1978.

Between- terms denial, cont.

In Supplement 4, Answer to Question 1, page 9-10 the question was answered with "No." Accordingly, Supplement 4, Answer to Question 1, pages 9-10, is superseded and should be appropriately annotated with references to this answer and UIPL 18-78 .

3. Question:

For purposes of applying the between-terms denial, will a school still be considered to be an "educational institution" if it is not approved, licensed or issued a permit to operate as a school by the appropriate authorities within the State whose UI law governs the claimant's benefit rights?

Answer:

Yes. A claimant may have performed services for an educational institution within the State in the period prior to the "summer break" and have a contract or reasonable assurance of performing services for an educational institution in another State at the beginning of the upcoming fall term. For purposes of applying the between-terms, vacation or holiday recess denial provisions, an educational institution including an institution of higher education, need not be situated in the same State which determines the individual's eligibility for benefits. So long as the educational institution legally is authorized to operate as a school or an institution of higher education by the appropriate authorities in the other State it will be considered an educational institution or institution of higher education for purposes of the between terms denial provisions. The between-terms denials in section 3304 (a) (6) (A), FUTA, as they apply to professional and nonprofessional school employees pertains to services performed by such individuals in "any educational institution" referred to in section 3309 (a) (1), irrespective of whether the institution is located within or without the State whose UI law applies to the claim filed. This means of course that the State must look to the law of the other State to determine if the educational institution satisfies the above criteria.

Between- terms denial, cont.

The above explanation is also intended as further clarification of the criteria contained in the definition of "educational institution" or page 39 of the 1976 Draft Legislation establishing the condition that the school must be approved, licensed or issued a permit to operate as a school "by the State Department of Education or other government agency that is authorized within the State" to issue such licenses or permits. The State referred to in this language is the State in which the educational institution is operated.

4. Question:

In applying a between-terms denial provisions, may consideration be given to the suitability of the work for which a claimant has a reasonable assurance?

Answer:

No. The Federal law requires that the between-terms denial provision for teachers, researchers, and principal administrators be applied if the individual has a reasonable assurance of work in any of these capacities. Thus, a former principal who has a reasonable assurance of a teaching position would be subject to the denial. Suitability criteria, including the labor standards, are to be considered at the point when a position becomes available, is offered, and is refused.

If a State has adopted the optional between-terms denial provision permitted by the FUTA with respect to school workers other than teachers, researchers, and principal administrators, the provision must be applied in the same way. Thus, a librarian with a reasonable assurance of a clerical position, or a secretary with a reasonable assurance of a job on the custodial staff, would be subject to the denial.

Between- terms denial, cont.

5. Question:

Does application of a between-terms denial provision require a total denial of benefits during a between-terms period?

Answer:

Not necessarily. The denial pertains only to benefits based on school services. If a claimant has sufficient non-school employment and earnings in the base period to qualify for benefits, then these benefits would be payable during the between-terms denial period if the claimant were otherwise eligible.

6. Question:

How is the amount of benefits payable during a between-terms denial period determined for an individual with both school and nonschool wage credits ?

Answer:

A determination of the amount of benefits payable between terms when there is both school and nonschool wage credits is accomplished through recomputation of the individual's benefit rights which is based solely on the nonschool employment and earnings in the claimant's base period. All of the monetary eligibility criteria under the State law must be considered in the recomputation, including weeks of work and qualifying wage requirements. The result may be an invalid claim, a reduced weekly benefit amount and maximum entitlement, no change in the weekly benefit amount or maximum entitlement, or an increased weekly benefit amount with a reduced maximum entitlement, depending on the claimant's situation and the provisions of the State law.

Between-terms denial, cont.

Whatever the result of the recomputation, it is applicable only during the between-terms denial period. During the denial period, the new weekly benefit amount is the amount to be paid for a week of total unemployment (if the claimant is otherwise eligible), and no benefits may be paid in excess of the new maximum benefit entitlement. After the end of the denial period, the original weekly benefit amount based on both school and nonschool wages applies. The original maximum potential benefit entitlement also applies (less the amount of benefits drawn).

7. Question:

Where a recomputation is made for this purpose, what notification to the claimant is required?

Answer:

At the initial claim point, a monetary determination must be made using all covered employment and wages. A notice of the monetary determination is given to the claimant. At the appropriate time during the benefit year, a non-monetary determination must be made regarding application of the between-terms denial provision. If the criteria for denial are met (e.g., the claimant worked for a school, has a reasonable assurance of work, etc.), a notice of the nonmonetary determination is given to the claimant, together with the recomputation of the individual's benefit rights applicable during the between-terms period. The monetary determination, the nonmonetary determination, and the recomputation of benefit rights are separately appealable determinations.

Vacation/holiday denial, section 4 (a) (3) (c)
Refer: Supplement 3, 1976 Draft Legislation,
pages 3 (item g) and 6-7

1. Question :

May the optional provision for denial of benefits to school employees during a vacation period or holiday recess be applied with respect to a week which includes a vacation or holiday but does not begin during a vacation or holiday?

Answer

No. Section 3304 (a) (6) (A) (iii), FUTA, permits denial of benefits only for a week of unemployment which “. . . commences during an established and customary vacation period or holiday recess. . .”. Even if the other conditions for the vacation/holiday denial are met (e.g., there is a reasonable assurance of school employment in the period following the vacation or holiday), benefits cannot be denied under the vacation/holiday denial provision unless the week of unemployment commences during the vacation period or holiday recess. If a State law defines “week” to be the seven-day period Sunday through Saturday, benefits could be denied under the vacation/holiday denial provision only if the Sunday of the week in question were included through the following Tuesday, the vacation/holiday denial provision would not be applicable to that week which included the first two days of the vacation, since that week commenced on the Sunday prior to the vacation period rather than during the vacation period. However, the denial provision would, if its other criteria were met, be applicable to the week including the last two days of the vacation period (Monday and Tuesday) because that week did commence during the vacation period.

Vacation/holiday denial, section 4 (a) (3) (c), cont.

Under circumstances described in a State law, a “week” may be any seven consecutive days. Pursuant to such a provision, a school employee out of work over a Thanksgiving vacation which began on a Thursday and continued through the following Wednesday (seven consecutive days) would be subject to the vacation/holiday denial of benefits if the week of unemployment were determined to have commenced on that Thursday, since the first day of the week would, then, have occurred during the vacation period.

Although the vacation/holiday denial provision is applicable only if the week in question commences during the vacation or holiday, other provisions of a State law may operate to curtail benefit payments during weeks of unemployment which include, but do not begin during, vacation periods or holiday recesses. For example, State laws provide that an individual is “unemployed” with respect to a week only if the individual performs no services and is entitled to no remuneration with respect to that week, or if the individual works less than full-time for remuneration less than his weekly benefit amount. It seems likely that a school employee not working over Labor Day or Memorial Day, for example, would not be considered unemployed under the State law, and would not be eligible for benefits. This might also be the case for the worker in the first example above, returning to school on the Wednesday following Thanksgiving Day.

Denial of benefits to illegal aliens, section 4 (a) (5)

Refer: Commentary, page 58

Supplement #3 May 6, 1977, pages 9-29; exhibits
following page 29

1. Question :

What are the various provisions on aliens in the Federal Unemployment Tax Act (FUTA) and how do they differ?

Answer:

There are three provisions on aliens in the FUTA-- in sections 3304 (a) (14), 3306 (c) (1) (B), and 3306 (c) (18). The first one is a requirement for approval of State law and has been discussed in detail in Supplements 3 and 4, 1976 Draft Legislation, and in UIPL 15-78. The other two provisions relate to exemption from coverage of services performed by specified classes of aliens.

Section 3306 (c) (1) (B) exempts from the Federal unemployment tax agricultural labor “performed before January 1, 1980, by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to sections 214 (c) and 101 (a) (15) (H) of the Immigration and Nationality Act.” Section 214 (c) of the Immigration and Nationality Act (INA)-- 8 U.S.C. 1184 (c) -- is procedural, providing:

“The question of importing any alien as a nonimmigrant under section 101 (a) (15) (H) . . . of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer . . .”

Denial of benefits to illegal aliens, cont.

The Department of Labor in 20 CFR Part 655 has promulgated regulations setting forth procedures for determining whether U.S. workers are available to perform temporary work in the United States for which an employer desires to employ nonimmigrant foreign workers and whether the employment of such workers for such temporary work will adversely affect the wages or working conditions of similarly employed U.S. workers.

Section 101 (a) (15) (H)-- 8 U.S.C. 1101 (a) (15) (H)-- describes one of the classes of nonimmigrant aliens who may be admitted temporarily to the United States, as follows:

an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as a trainee; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him. (Emphasis added)

Denial of benefits to illegal aliens, cont.

In summary, an alien admitted to the United States as a non-immigrant to perform temporary work in agricultural labor pursuant to the labor certification procedures of the employment service system may, under a State law, be exempt from coverage until January 1, 1980.

Section 3306 (c) (18), FUTA, exempts from the Federal unemployment tax service “performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101 (a) (15) of the Immigration and Nationality Act . . . and which is performed to carry out the purposes specified in subparagraph (F) or (J), as the case may be.”

Section 101 (a) (15) (F) -- 8 U.S.C. 1101 (a) (15) (F)-- describes another of the classes of nonimmigrant aliens who may be admitted temporarily to the United States, as follows:

“(i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United State, particularly designated by him and approved by the Attorney General after consultation with the Office of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place or study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following to join him.”

Denial of benefits to illegal alien, cont.

An alien admitted under subparagraph (F) is normally not authorized to work in the United States while in that status.

Section 101 (a) (15) (J)-- 8 U.S.C. 1101 (a) (15) (J)-- describes an additional class of nonimmigrant aliens who may be admitted temporarily to the United States, as follows:

“an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description , who is coming temporarily to the United States as a participant in a program designated by the Secretary of State, for the purpose of teaching, instructing, or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training, and the alien spouse and minor children of any such alien if accompanying him or following to join him.”

This class of alien is an exchange student or teacher and is most often engaged in the described activities at a university, research institute, or other governmental or nonprofit organization.

The latter two classes of alien may be exempt from coverage under a State law when the services they perform, if any, are performed to carry out the purposes specified in subparagraphs (F) and (J).

In summary, the services of an alien admitted temporarily to the United States as a nonimmigrant to study in the United States at an established institution of learning or other recognized place of study or who was admitted temporarily as an exchange student or teacher may be exempt from coverage under a State law similarly to the exemption under FUTA.

Denial of benefits to illegal alien, cont.

It is possible to determine from the alie's documentation under what category of nonimmigrant he was admitted. As a nonimmigrant lawfully admitted under one of the categories discussed above, he will have a Form I-94, Arrival-Departure Record. The I-94 will in all cases bear a stamp stating "employment authorized" when employment in the United States is authorized. See facsimiles of alien documentation attached to Supplement 3, 1976 Draft Legislation, May 6, 1977.

Benefit costs of governmental entities, section 8 (e)
Refer: Commentary, page 65

1. Question :

What is the difference between requiring reimbursement for benefits paid based on wages earned during the effective period of the election to reimburse and the requirement that reimbursement be made for benefits paid for weeks of unemployment beginning during the effective period of the election?

Answer :

The “wages earned” and the “weeks beginning” concepts each have a separate application and different results.

The “weeks beginning” concept requires the employer to reimburse for benefits paid for each week of unemployment which begins during the period for which the reimbursement obligation is effective. It looks to the beginning of the week of unemployment regardless of when the wages were earned on which the benefits are based. When the reimbursement period ends, the employer’s obligation for reimbursement of benefits for weeks of unemployment beginning after that date ends. Thereafter he would be liable for contributions wages paid after that date and throughout the period for which his liability for contributions continues. The weeks beginning concept is provided for in section 8 (b), 1970 Draft Legislation.

Benefit costs of governmental entities, cont.

The “wages earned” concept requires that the employer reimburse for benefits based on wages earned during the effective period of the employer’s obligation to reimburse. It looks to the period when the wages on which the benefits are based were earned (or paid). Even though the employer may have changed to the contributions method his obligation to reimburse continues so long as benefits are paid based on wages earned (or paid) during the period for which he had elected reimbursement.

The following examples illustrate the difference between these two concepts.

Weeks beginning

Effective period for which reimbursement is elected: January 1, 1978 to December 31, 1979.

The employer is obligated to reimburse benefits paid for any week which begins on or after January 1, 1978 and before December 31, 1979 regardless of when the wages on which the benefits are based were earned (or paid). The employer changes to contributions for the period January 1, 1980 to December 31, 1981. The employer is liable for contributions on wages paid beginning with January 1, 1980.

There is a clear demarcation between his reimbursement and contributions obligations. His reimbursement obligation terminates when he has reimbursed for benefits paid for the last week of unemployment which began before January 1, 1980.

Wages earned

Effective period for which reimbursement is elected: January 1, 1978 to December 31, 1979.

The employer is obligated to reimburse for benefits paid based on wages earned (or paid) between January 1, 1978 and December 31, 1979.

Benefit costs of governmental entities, cont.

Beginning with January 1, 1980 to December 31, 1981 the employer changed to the contributions method of financing benefit costs.

Assume the following:

Benefit year	July 5, 1979	to July 5, 1980
Base period	April 1, 1978	to March 31, 1979
Benefit year	July 1, 1980	to July 4, 1981
Base period	April 1, 1979	to March 31, 1980

The employer would be obligated for benefits based on wages earned (or paid) during the calendar years 1978 and 1979 regardless of when the benefits are paid. Thus, the employer would have a reimbursement obligation during the benefit years beginning July 5, 1979, and July 1, 1980, since during these benefit years, benefits will be based at least in part on wages earned (or paid) during the period for which the employer had elected reimbursement.

Beginning January 1, 1980, the employer would be subject to contributions for wages earned (or paid) after January 1, 1980. The agency would have to maintain two accounts for the employer at the same time: a reimbursement account and a contributions account. Determinations would have to distinguish between those benefits based in wages earned (or paid) during calendar years 1978 and 1979 which are to be reimbursed and wages earned (or paid) after January 1, 1980 which are subject to contributions as well as those benefits which are to be charged against his experience rating account. Two bills would have to be sent to the employer: one for reimbursement and one for contributions. The result is that the employer would remain liable for reimbursement for a considerable period of time during the period for which he had elected contributions. This results because the effect of the wages earned (or paid) concept is to make reimbursement prospective rather than concurrent with the effective period of the election as is the case in the weeks beginning approach.

April 16, 1979

INDEX FOR SUPPLEMENTS #1 - #5 TO
Draft Language and Commentary to Implement
the Unemployment Compensation Amendments of 1976-P .L. 94-566

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If you are aware of any errors or omissions with respect to this table, please bring them to my attention. Thanks