

EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION Unemployment Compensation
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ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 14-14

TO: STATE WORKFORCE AGENCIES

FROM: PORTIA WU /s/
Assistant Secretary

SUBJECT: Effect of the U. S. Supreme Court’s Decision in *United States v. Windsor* on the Federal-State Unemployment Compensation Program

1. **Purpose.** To advise states of the effect of the U. S. Supreme Court’s decision in *United States v. Windsor* on the unemployment compensation (UC) program.

2. **References.**

- Federal Unemployment Tax Act (FUTA) Section 3306(c)(5), 26 U.S.C. 3306(c)(5);
- *United States v. Windsor*, 570 U.S. 12 (2013), striking down Defense of Marriage Act, Pub. L. 104-99, Section 3, 1 U.S.C. 7
- Training and Employment Guidance Letter (TEGL) No. 26-13, Impact of the U.S. Supreme Court’s Decision in *United States v. Windsor* on Eligibility and Services Provided Under Workforce Grants Administered by the Employment and Training Administration;
- TEGL No. 27-13, Impact of the U. S. Supreme Court’s Decision in *United States v. Windsor* on the Trade Adjustment Assistance Program.

3. **Background.** The decision of the United States Supreme Court in *United States v. Windsor* impacts the federal-state unemployment compensation program. This Unemployment Insurance Program Letter (UIPL) describes the impact for state UC agencies and the employers they serve.

Section 3306(c)(5), FUTA, excludes from the definition of “employment” “service performed by an individual in the employ of his son, daughter, or spouse[.]” Thus, an employer spouse may not include, in the calculation of FUTA taxes, wages paid to an employee spouse.

Coverage of services under FUTA does not directly impact coverage under state UC laws. States are not required to adopt the exclusions from the definition of “employment” set out in Federal law, and may cover additional services, such as services provided by a spouse in the employ of his/her spouse. However, in practice, many state UC laws closely mirror the definition of employment in FUTA. In addition to determining employer liability for state

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UC contributions, the state definition of “employment” determines whether wages earned by an individual may be used to establish eligibility for UC. If services are excluded from the definition of employment, the wages may not be used for UC eligibility purposes.

In 1996, Congress enacted the Defense of Marriage Act (DOMA). Section 3 of DOMA amended the rules of construction that apply to federal laws to provide that the word “marriage” meant “only a legal union between one man and one woman as husband and wife,” and the word “spouse” referred only to “a person of the opposite sex who is a husband or a wife.” By decision dated June 26, 2013, the U.S. Supreme Court, in *United States v. Windsor*, held that this provision was unconstitutional.

4. **ETA policy on same-sex marriage.** The Department of Labor’s policy is to recognize lawful same-sex marriages as broadly as possible to the extent that federal law permits, and to recognize all marriages valid in the jurisdiction where the marriage was celebrated (“state of celebration”). Consistent with this policy, ETA will recognize all marriages, including same-sex marriages, that are entered into lawfully and recognized under a state’s law. ETA will recognize such marriages even if the marriage is not recognized in the state where the married individual resides. The federal-state unemployment compensation program consists of 53 “states,” including the District of Columbia, Puerto Rico, and the Virgin Islands.
5. **Applicability of Windsor ruling to calculation of FUTA taxes.** Consistent with the text of section 3306(c)(5) and the decision in *Windsor*, for purposes of Federal law, wages paid to a same-sex spouse who is providing services in the employ of his/her same-sex spouse must be excluded from the calculation of FUTA taxes.

Consistent with the agency’s broader policy, in the case of FUTA, ETA has adopted a “state of celebration” rule. That is, for purposes of FUTA Section 3306(c)(5), “spouse” refers to persons married in a state that legally recognizes and designates the relationship as a “marriage” under that state’s law. State of residence is not relevant to whether the exclusion applies. For example: An employer is legally married in State #1 (state of celebration), which recognizes same-sex marriage. The couple then moves to State #2 (state of residence), which does not recognize same-sex marriage. While in State #2, the employer pays wages to his/her “spouse” and files a tax return as an employer in the state. With respect to federal payroll taxes, s/he must still observe the FUTA exclusion, even if his/her marriage is not recognized in the state where s/he is filing the return.

This interpretation has no effect on state UC law, when state law does not depend on federal law for definitions or interpretations. It does not require states to recognize same-sex marriages, nor does it require an exclusion from coverage of services provided by same-sex spouses in those states that exclude spouses from coverage but do not recognize same-sex marriages. States have authority to determine the scope of the spouse exclusion in accordance with state law.

Likewise, this interpretation does not affect payment of benefits under Federal UC programs, including Unemployment Compensation for Federal Employees (UCFE), Unemployment

Compensation for Ex-Servicemembers (UCX), Disaster Unemployment Assistance (DUA), and Trade Readjustment Allowances (TRA). States pay benefits to UCFE and UCX claimants under an agreement with the Secretary of Labor, and are required, by the terms of that agreement, to pay benefits “in the same amount, on the same terms, and under the same conditions” as would have been payable under the state UC law. See 5 USC 8502(b). For DUA, the terms and conditions of state law regarding payment of regular compensation generally apply to applications for and payment of DUA. See 20 C.F.R. 625.11. Similarly, for TRA, the law of the state in which the applicant is entitled to UC applies. See 20 C.F.R. 617.16 and 617.59.

TRA is only one of the benefits available under the federal Trade Adjustment Assistance (TAA) program for workers. The effect of the decision in *Windsor* on the delivery of other TAA benefits administered by the state workforce system is explained in TEGL No. 27-13, Impact of the U. S. Supreme Court’s Decision in *United States v. Windsor* on the Trade Adjustment Assistance Program. The effects of the *Windsor* decision on partner programs in the state workforce system are described in TEGL No. 26-13, Impact of the U.S. Supreme Court’s Decision in *United States v. Windsor* on Eligibility and Services Provided Under Workforce Grants Administered by the Employment and Training Administration.

6. **Action Requested.** States are requested to review this UIPL and share it with appropriate staff.
7. **Inquiries.** Inquiries should be directed to the appropriate Regional Office.