

<p style="text-align: center;">U.S. DEPARTMENT OF LABOR Employment and Training Administration Washington, D. C. 20213</p>	CLASSIFICATION
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	CORRESPONDENCE SYMBOL
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RESCISSIONS	ISSUE DATE
	March 30, 1987
	EXPIRATION DATE
	March 31, 1988

DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 15-87

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : DONALD J. KULICK
Administrator
for Regional Management

SUBJECT : Secretary's Decision in the 1986 State of Washington Conformity Proceedings

1. **Purpose.** To announce the Secretary of Labor's Decision in the 1986 conformity proceedings concerning the State of: Washington.
2. **References.** Section 3303(a)(1) of the Federal Unemployment Tax Act (FUTA); Secretary's Decision in Case No. 86-CCP-1, dated October 28, 1986.
3. **Background.** In 1984, the State of Washington amended its Employment Security Act to include provisions relating to workers with Marginal Labor Force Attachment (MLFA), which primarily affected the measurement of experience of employers relative to MLFA workers. MLFA workers are regularly and predictably unemployed during parts of each year and include, for example, certain agricultural, lodging, and construction workers.

Washington's experience rating system is a benefit ratio system which uses experience for the four years preceding the computation date in calculating an employer's contribution rate. Beginning in 1985, certain benefits paid to MLFA workers were noncharged. Rates for 1986 were calculated using the actual 1985 benefit charges (and no noncharges). Using the 1985 data, a "rate of savings" was applied to MLFA employers to receive a reduction in benefit charges for each of the prior three years, although the MLFA noncharging provision had not been in effect during those years.

This resulted in the actual benefit charges for these years being reduced, on the assumption that employer's experience in the three preceding years (1982-1984) was the same as in 1985.

The Department of Labor (DOL) challenged this retroactive application of 1985 experience as a violation of the experience rating requirements of Section 3303(a)(1), FUTA, which provides that no reduced rate may be allowed to an employer unless such rate is based on the employer's "experience with respect to unemployment or other factors bearing a direct relation to unemployment risk." DOL argued that Washington used "assumed" rather than actual experience for three of the four years in calculating 1986 rates, and that "assumed" experience does not meet the requirements of Section 3303(a)(1), FUTA.

A hearing on this issue was held before a Department of Labor administrative law judge (ALJ). On October 10, 1986, the ALJ issued a recommended decision and on October 28, 1986, the Secretary issued his Decision.

4. **Secretary's Decision.** The Secretary adopted the Findings and conclusions in the ALJ's recommended decision and held that the Washington Employment Security Act "no longer contains the provisions" required by Section 3303(a) (1) , FUTA.

On December 22, 1986, the Secretary issued a final order which approved the settlement agreement between the State of Washington and the Department of Labor reached as a result of that decision. Under this agreement, the Secretary found, that the offending provision of the Washington Employment Security Act had been declared inoperative as of October 31, 1986. Therefore, the Secretary stated he would "certify the unemployment tax law of the State of Washington to the Secretary of the Treasury."

5. **Action Required.** Administrators are requested to provide the above information to appropriate staff.
6. **Inquiries.** Direct inquiries to the appropriate Regional Office.
7. **Attachments.**
 - a. Order Approving Settlement and Modifying Order of October 28, 1986, dated December 22, 1986.
 - b. Final Decision and order, dated October 28, 1986. (Contains Recommended Decision of the Administrative Law Judge, dated October 10, 1986.)

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

U.S. DEPARTMENT OF LABOR,

Petitioner,

v.

STATE OF WASHINGTON EMPLOYMENT
SECURITY DEPARTMENT,

Respondent.

Case No. 86-CCP-1

ORDER APPROVING SETTLEMENT AND
MODIFYING ORDER OF OCTOBER 28, 1986

On November 21, 1986 I issued an order directing the parties in this matter to submit a settlement agreement and joint memorandum of law, setting forth all the terms and conditions of the settlement which the parties had indicated they had reached, and an explanation of the authority of the Secretary to approve it under the Federal Unemployment Tax Act (FUTA), 26 U.S.C. §§ 3301-3311 (1982). I had earlier, on October 28, 1986, adopted the recommendation of an administrative law judge (ALJ), made after notice and hearing, that the State of Washington had modified its unemployment tax law (the Washington Employment Security Act or WESA) in a manner which contravened the "clear and unequivocal" requirements of section 3303(a)(1) FUTA, 26 U.S.C. § 3303(a)(1). I held that I would not include the State of Washington in the October 31, 1986 listing of States whose laws are certified to the Secretary of the Treasury under 26 U.S.C. § 3303(b)(1).

The parties have submitted a Settlement Agreement and Joint Memorandum. They state, in essence, that the offending provision of the WESA has been declared, and has been, inoperative as of October 31, 1986, and will not be utilized in the tax computation process for years subsequent to 1986. Therefore, because the WESA was in conformity with FUTA as of October 31, 1986, the parties submit the WESA may be certified to the Secretary of the Treasury since this proceeding was strictly limited to the issue of conformity. In other words, my finding of October 28, 1986 that the WESA "no longer contains the provisions specified in subsection (a)" of FUTA section 3303 should be modified because the WESA now contains such provisions.^{1/} I would emphasize that this is a modification of my finding of October 28, 1986. It is, and should be considered, part of the same proceeding.

Accordingly, based on the representations of the parties in their Settlement Agreement and supporting Joint Memorandum, I will certify the unemployment tax law of the State of Washington to the Secretary of the Treasury under 26 U.S.C. § 3303(b)(1). The

^{1/} I continue to be troubled by the compliance question which seems apparent on the face of the Settlement Agreement in this matter. If the proper method of tax computation will only be used for years after 1986, and employees' tax rates need not be recalculated for 1986, the necessary implication is that the method provided for in WESA section 50.29.022 will be used for 1986, which would appear to be improper under and not in compliance with FUTA.

Department of Labor will prepare an appropriate letter.

SO ORDERED.



Secretary of Labor

Dated: DEC 22 1986
Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: USDOL v. State of Washington Employment Security
Department

Case No. : 86-CCP-1

Document : Order Approving Settlement And Modifying Order
Of October 28, 1986

A copy of the above-referenced document was sent to the following
persons on December 22, 1986.

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U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

October 28, 1986

The Honorable Booth Gardner
Governor of Washington
Legislative Building
Olympia, Washington 98504

Re: In the Matter of U.S. Department of
Labor v. State of Washington
Employment Security Department,
Case No. 86-CCP-1

Dear Governor Gardner:

Enclosed is a copy of my decision in the proceedings brought under section 3303(b) of the Federal Unemployment Tax Act (FUTA), codified at section 3303(b) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 3303(b) (1982). In accordance with section 3310 of FUTA, the State of Washington has 60 days after this notice in which to petition for judicial review of that part of my decision which finds that the unemployment tax law of the State of Washington is out of conformity. Judicial review may be sought in the United States Court of Appeals for the Ninth Circuit or in the United States Court of Appeals for the District of Columbia. During the initial 60-day period and for 30 days after the commencement of judicial proceedings, section 3310(d) provides for a stay of my action.

I hope, however, that this matter will be resolved to our mutual satisfaction. In the meantime, I am required by law to hold in abeyance the certification for 1986 under section 3303 with respect to section 50.29.022 of the Washington Employment Security Act.

Very truly yours,



WILLIAM E. BROCK

WEB:dkg

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

In the Matter of)	
U.S. DEPARTMENT OF LABOR,)	
Petitioner,)	
v.)	Case No. 86-CCP-1
STATE OF WASHINGTON EMPLOYMENT)	
SECURITY DEPARTMENT,)	
Respondent.)	

FINAL DECISION AND ORDER

This case arises under the provision of the Federal Unemployment Tax Act (FUTA), codified at 26 U.S.C. § 3303(b) (1982), which requires the Secretary of Labor to certify to the Secretary of the Treasury state unemployment tax laws which meet the requirements of section 3303(a) which would make employers in the state eligible for a credit against the Federal unemployment tax. This certification must be made on October 31 of each calendar year, and cannot be withheld unless, after notice and opportunity for a hearing, the Secretary of Labor finds that the state law does not meet the requirements of section 3303(a). 26 U.S.C. § 3303(b) (3).

Such a hearing has been held in this case and Administrative Law Judge (ALJ) Lawrence E. Gray has submitted a recommended decision to me. The ALJ found that the State of Washington


had modified its unemployment tax law in a manner which contravened the "clear and unequivocal" requirements of section 3303(a) (1). That section requires that before employers are allowed an additional tax credit under 26 U.S.C. § 3302(b), that the experience factor used in the state be based upon experience of such employers "during not less than the 3 consecutive years immediately preceding the computation date." 26 U.S.C. § 3303(a) (1). The record in this case, including the written submissions of the parties, has been carefully reviewed. Based upon this review, I adopt the Findings and Conclusions in the ALJ's Recommended Decision, a copy of which is appended to this decision.

The State of Washington requested that, if the provisions of its unemployment tax law are found not to meet the requirements of FUTA section 3303(a), the Secretary of Labor nevertheless certify those provisions to the Secretary of the Treasury for calendar year 1986. The State has offered no additional facts, legal authority, or policy considerations to support such an exercise of the Secretary's discretion here (assuming that there is such discretion under FUTA) and I deny the request.

Accordingly, I find that the unemployment tax law of the State of Washington, Section 50.29.022 of the Washington Employment Security Act, "no longer contains the provisions specified in subsection (a)" of FUTA section 3303, and I will not include the State of Washington in the October 31, 1986,

listing of States whose laws are certified to the Secretary of the Treasury under 26 U.S.C. § 3303(b)(1).

SO ORDERED.



Secretary of Labor

Dated: OCT 28 1986
Washington, D.C.

U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036



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In the Matter of : Case No. 86-CCP-1
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:
U. S. DEPARTMENT OF LABOR, :
Petitioner, :
:
v. :
:
STATE OF WASHINGTON EMPLOYMENT :
SECURITY DEPARTMENT, :
Respondent. :
:
.....

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For the State of Washington
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RECOMMENDED DECISION

Introduction

This proceeding arises under Section 3303(b) of the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. § 3303(b), a part of the Internal Revenue Code of 1954. The specific question is whether, with respect to the required certification

to the Secretary of the Treasury on October 31, 1986 of State laws under that statutory provision, the law of the State of Washington fails to conform with the requirements of 26 U.S.C. § 3303(a)(1) as to the 12-month period ending on that October 31.

Section 3301 of FUTA imposes a Federal unemployment tax on employers of 6.2% of taxable wages paid by them during the calendar year. However, an employing entity that has made contributions on FUTA-covered wages to a State unemployment fund, under a State unemployment compensation law approved pursuant to 26 U.S.C. § 3304(a), may receive a Federal tax credit for those contributions under 26 U.S.C. § 3302(a). In addition to this basic credit, employers entitled to a reduced rate of contributions under State law may receive an additional credit under 26 U.S.C. § 3302(b).^{1/} This additional credit may be utilized by a State's employers if the experience rating system of the State, which measures an employer's prior history with the payment of unemployment insurance benefits, meets the requirements of Section 3303(a)(1) of FUTA.-

In setting the standards for such additional credits, Section 3303(a)(1) of the Internal Revenue Code of 1954 provides:

(a) STATE STANDARDS.--A taxpayer shall be allowed an additional credit under section 3302(b) with respect to any reduced rate of contributions permitted by a State law, only if the Secretary of Labor finds that under such law--

(1) no reduced rate of contributions to a pooled fund or to a partially pooled account is permitted to a person (or group of persons) having individuals in his (or their) employ except on the basis of his (or their) experience with respect to unemployment or other factors bearing a direct relation to unemployment risk during not less than the 3 consecutive years immediately preceding the computation date.

^{1/} The total credit allowed an employer is limited to 90% of the basic Federal tax of 6.2% (i.e., 5.4%), thereby requiring a net Federal tax payment of at least .8%. See 26 U.S.C. §§ 3302 (c)(1), (d)(1).

FUTA requires that the Secretary of Labor certify annually to the Secretary of the Treasury the law of each State in which he finds reduced State unemployment tax rates were allowable for the 12-month period ending on October 31 in accordance with Section 3303(a)(1). 26 U.S.C. § 3303(b)(1). Eligibility for the Section 3302(b) additional tax credit is contingent upon such certification. However, the Secretary of Labor cannot withhold certification of a State's law until, after reasonable notice and opportunity for hearing to the State agency, the Secretary finds that the State's law no longer contains the provisions specified in Section 3303(a) or that the State has failed to comply substantially with such provisions. 26 U.S.C. § 3303(b)(3).

In 1985, in an effort to reduce a perceived hardship on employers of workers with Marginal Labor Force Attachment ("MLFA"), i.e., workers regularly and predictably unemployed during parts of each year, e.g., certain types of agricultural, logging, and construction workers, the State of Washington enacted legislation to modify its experience rating system and thereby affect the calculation of additional tax credits to be applied against the Federal unemployment tax by MLFA employers. The first relevant provision, codified at Section 50.29.022 of the Washington Employment Security Act, essentially allows for a reduced rate of contributions for tax year 1985 based on actual experience for the fiscal year ending June 30, 1985, and the use of the FY 1985 data to recalculate retrospectively such savings for benefit charges (noncharging) for fiscal years 1984, 1983, 1982, and 1981 as if the same (1985) experience had been demonstrated in those years. Other provisions in that section allow for similar retrospection of experience for succeeding years until the full experience required by FUTA Section 3303(a)(1) has been accumulated.

Specifically, Sections 50.29.022(1) and (2) of the Washington Employment Security Act provide:

(1) For the purpose of establishing an employer's rate of contribution for the tax year beginning January 1, 1985, the department shall calculate a percentage rate of savings for benefit charges for the fiscal year ending June 30, 1985 and apply the rate as though RCW 50.29.020(2)(g) had been in effect for fiscal years 1984, 1983, 1982, and 1981. For fiscal years ending June 30, 1986, and beyond, benefit charges will be calculated pursuant to RCW 50.29.020(2)(g).

(2) For the purpose of establishing an employer's rate of contribution for the tax year beginning January 1, 1986, the department shall calculate the percentage rate of savings for benefit charges for the fiscal year ending 1985, and apply the rate to fiscal years 1984, 1983, and 1982.

Section 50.29.020(2)(g) of the Washington Employment Security Act provides:

In the case of individuals identified under RCW 50.20.015, benefits paid with respect to a calendar quarter, which exceed the total amount of wages earned in the state of Washington in the higher of two corresponding calendar quarters included within the individual's determination period, as defined in RCW 50.20.015, shall not be charged to the experience rating account of any contribution paying employer.

The Department of Labor ("the Department") notified the State of Washington ("the State") in 1985 that the State's newly enacted changes raised a FUTA conformity issue as to the retrospective use of 1985 data; the State's general plan applicable to MLF employers has not been challenged by the Department at any time. The Department and the State entered into negotiations in 1985, but were unable to resolve the issue by October 31 of that year. There having been no opportunity for a hearing by that date, the State's law was certified under FUTA for tax year 1985. Negotiations continued, but the State did not amend its law to achieve what the Department considered conformity. It did, however, add a provision that would render those sections applicable to 1986 and the following years inoperative should the Secretary of Labor rule that the State's law was not in conformity with FUTA. (As stated above, this would apply only until the requisite data base had been developed as required by FUTA Section 3303(a)(1).)

Action in this matter was initiated by a Notice of Hearing sent to the State of Washington Employment Security Department on July 28, 1986; on that same date, the Governor of the State and the Commissioner of the State's Employment Security Department were personally notified by letters from the Secretary of Labor. A notice of the opportunity for hearing was published in the Federal Register on August 15, 1986, 51 FR 29337. Pursuant to this notice, a hearing on the issue was held at Washington, D.C. on September 10, 1986 before the undersigned administrative law judge, who had been designated by the Chief Administrative Law Judge to preside over the proceedings and render a recommended decision to the Secretary. Post-hearing briefs were submitted by the Department and the State.

Based upon the entire record, I make the following findings of fact and conclusions of law; I further recommend adoption of the decision that flows from those findings of fact and conclusions of law.^{2/}

Findings of Fact and Conclusions of Law

Section 3301 of the Federal Unemployment Tax Act, 26 U.S.C. § 3301, imposes a Federal unemployment tax on employers.

Section 3302 of the Federal Unemployment Tax Act, 26 U.S.C. § 3302, grants basic credits against the tax due under Section 3301 for contributions made by employers to a State unemployment compensation law approved pursuant to 26 U.S.C. § 3304(a).

Section 3302 of the Federal Unemployment Tax Act, 26 U.S.C. § 3302, also provides for additional credits to employers entitled to a reduced rate of contributions under State law if the experience rating system of the State meets the requirements of Section 3303(a)(1) of the Federal Unemployment Tax Act.

2/ In its brief, the State makes the following contingent request:

In the event that the Administrative Law Judge were to rule against the position of the State of Washington, Employment Security Department and the Secretary of Labor concurred in that ruling, we would ask that the Administrative Law Judge recommend to the Secretary that the State of Washington be certified pursuant to 26 U.S.C. § 3303(b)(1) for allowable credits on the listing of states for calendar year 1986; provided, that the Employment Security Department of the State of Washington invoke Washington Laws of 1986, chapter 111, section 3, subsection 5, declaring inoperative the first four subsections of that section and assessing tax rates for 1987 without regard to the objected to provisions of RCW 50.29.022.

I make no recommendation as to this request: it would be inappropriate for an administrative law judge to recommend policy to the Secretary.

Section 3303(a)(1) of the Federal Unemployment Tax Act conditions the allowance of the additional credits provided for under Section 3302(b) on the Secretary of Labor's finding that the reduced rate of contributions allowed under State law derives from experience with respect to unemployment or other factors that bears a direct relation to unemployment risk deriving from not less than the 3 consecutive years immediately preceding the computation date.

In 1985, the State of Washington enacted legislation, codified at Section 50.29.022 of the Washington Employment Security Act, that modified its experience rating system as to employers of workers with Marginal Labor Force Attachment. This legislation allowed for a reduced rate of contributions for tax year 1985 based on actual experience for the fiscal year ending June 30, 1985, and the use of the FY 1985 data to recalculate retrospectively such savings for fiscal years 1984, 1983, 1982, and 1981 as if the 1985 experience had been demonstrated in those years.

Other provisions in Section 50.29.022 of the Washington Employment Security Act allow for similar retrospection of experience for succeeding years until the full experience required by Section 3303(a)(1) of the Federal Unemployment Security Act has been accumulated.


Although the Department of Labor had notified the State of Washington in 1985 of its view that Subsection (1), the subsection of Section 50.29.022 of the Washington Employment Security Act relevant to the 1985 tax year, was not in conformity with the requirements of Section 3303(a)(1) of the Federal Unemployment Tax Act, there having been no opportunity for a hearing prior to October 31, 1985, the State's laws were certified for tax year 1985.

The experience rating requirements of Section 3303(a)(1) of the Federal Unemployment Tax Act are clear and unequivocal. There is no basis for considering that the stated requirements mean anything more or less than they say.

The provisions of Section 50.29.022 of the Washington Employment Security Act applicable to tax year 1986 do not conform to the experience rating requirements of Section 3303(a)(1) of the Federal Unemployment Tax Act, 26 U.S.C. § 3303(a)(1).

RECOMMENDATION

I recommend that the Secretary adopt the Findings of Fact and Conclusions of Law set forth above and find that certification to the Secretary of the Treasury of the law of the State of Washington as being in conformity with 26 U.S.C. § 3303 (a)(1) cannot be made for the 12-month period ending October 31, 1986.


LAWRENCE E. GRAY
Administrative Law Judge

Dated: October 10, 1986
Washington, D.C.

SERVICE SHEET

Case Name: Washington Employment Security Department

Case No: 86-CCP-1

Title of Document: Certification of Recommended Decision

A copy of the above document was sent to the following
parties on OCT 10 1986.

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CERTIFICATE OF SERVICE

Case Name: Washington Employment Security Department
Case No. : 86-CCP-1
Documents: Final Decision and Order
Letter of Notification to Governor Gardner

A copy of the above-referenced documents were sent to the
following persons on October 28, 1986.

Kathleen Gorham

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