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DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 41-98, Change 1

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : GRACE A. KILBANE
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SUBJECT : Application of the Prevailing Conditions of Work Requirement - Questions and Answers

- Purpose.** To provide further information and guidance concerning the requirements of the prevailing conditions of work provisions of the Federal Unemployment Tax Act (FUTA) and to provide answers to questions raised by State Employment Security Agencies (SESAs) and other interested parties.
- References.** Section 3304(a)(5)(B), FUTA; Unemployment Compensation Program Letter (UCPL) No. 130; Unemployment Insurance Program Letter (UIPL) No. 984; UIPL No. 41-98; Sections 6010-6015, Part V, of the Employment Security Manual.
- Background.** Section 3304(a)(5)(B), FUTA, requires, as a condition of employers in a State receiving credit against the Federal unemployment tax, that the State shall not deny unemployment compensation (UC) to any otherwise eligible individual for refusing to accept new work:

if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

On August 17, 1998, the Department of Labor issued UIPL No. 41-98 to remind States of the requirements of the prevailing conditions of work provision of Section 3304(a)(5)(B), FUTA, and to provide additional guidance to States when adjudicating prevailing conditions issues. UIPL No. 41-98 reiterated the guidance previously issued in UCPL No. 130 and UIPL No. 984 and addressed a change in the labor market (since the issuance of those two program letters) - the increase in temporary work - and its relation to the prevailing conditions requirement. It also expanded on the guidance found in UIPL No. 984 that a change in the duties, terms, or conditions of the work is, in effect, an offer of "new work."

The Department has received several comments and questions requesting further information and guidance concerning the prevailing conditions of work requirement. Therefore, this Change 1, incorporating answers to common questions regarding this requirement, is issued to assist States in applying the provision.

- Inquiries.** Please direct inquiries to the appropriate Regional Office.

Attachment - Questions and Answers

Questions and Answers

I. *New Work*

Q1. What constitutes new work?

A. New work is defined in both UIPL No. 41-98 and UIPL No. 984. On page 4, Section 4.b., of UIPL No. 41-98, new work is defined to include:

- (1) An offer of work to an individual by an employer with whom the worker has never had a contract of employment,
- (2) An offer of reemployment to an individual by a previous employer with whom the individual does not have a contract of employment at the time the offer is made, and
- (3) An offer by an individual's present employer of: (a) Different duties from those the individual has agreed to perform in the existing contract of employment; or (b) Different terms or conditions of employment from those in the existing contract. [Emphasis in original.]

This restates the definition of new work contained on page 3 of UIPL No. 984.

Q2. How does the definition of new work apply to changes in the employment conditions for an individual by the current employer? Is any change in conditions an offer of new work?

A. States are not required to treat any minor change in a job situation as an offer of new work. For a change in job situation to be considered new work, the change must be material. For example, if an individual is reassigned from one general secretarial position to another general secretarial position, and the only change is a different supervisor, an offer of new work does not exist under the prevailing conditions requirements. On the other hand, if the new assignment is as an accounting clerk, when the previous assignment was as a secretary, the change is material and the prevailing conditions requirements apply. (Note that the actual duties, and not simply job titles, must be examined. See Q & A #10.) This test for new work with a current employer applies to new assignments from either permanent employers or temporary help firms. In applying this test to either situation, States must determine on a case-by-case basis whether a change is material. ⁽¹⁾

Q3. When an individual works for a temporary help firm, and an assignment ends, is the offer of another assignment new work?

A. Not always. For the new assignment to be new work, the change between the assignments must be material. For example, if the first assignment was as a secretary at a rate of pay of \$10 per hour at ABC Company, and the second assignment is as a secretary at a rate of pay of \$10 per hour for XYZ Company (and there are no other changes), the second assignment is not an offer of new work, because the change in conditions is not material. On the other hand, if the second assignment is as an accounting clerk, even at the same rate of pay, the change is material, because the duties are substantially different; therefore, the offer is an offer of new work. (As discussed in Q and A #10, the actual duties, and not simply job titles, must be examined.) Alternatively, if the second assignment is as a secretary, but at a rate of pay of \$8 an hour, a material change in conditions exists.

Q4. Does a new assignment from a temporary help firm constitute new work when there is no break in employment between assignments? For example, if the individual's first assignment ends on Tuesday and the new assignment starts on Wednesday, there is no break in employment.

A. Provided the new assignment meets all other criteria for new work, the new assignment is new work. Whether there is a break in the employment relationship is not relevant. As stated in UIPL 41-98, new work includes an offer by an individual's "present employer."

II. *Determining Prevailing Conditions*

Q5. May temporary work be compared only with temporary work for purposes of determining what constitutes similar work?

A. No. UIPL No. 41-98 states (on page 10) that new temporary work must be compared not just with similar temporary work, but with "all work, temporary and permanent, in a similar occupational category." This statement continued the Department's precedent established in UCPL No. 130, dating from 1947, that the work offered is compared with similar work in the occupation. UCPL No. 130 also states on page 5 of its attachment that--

Neither should the question of what is similar work be determined on the basis of other factors [such as] . . . the permanency of the work. . . . These other factors must be considered, but only after the question of what is similar work is decided. If they were considered in determining what is similar work, such considerations would be the very question at issue: what conditions generally prevail for similar work? [Emphasis in original.]

The Department believes that the use of occupation is the proper starting point for determining what is and is not similar work. However, as discussed in Question and Answer 9 below, it is not sufficient in itself. If the basic type of work offered (for example, secretarial) for temporary employment is the same basic type of work offered for permanent employment, then the difference is in one of the conditions of the employment - permanent or temporary. Since the prevailing conditions requirement applies to "wages, hours or other conditions of work," the temporary nature of the work must be taken into account in applying the prevailing conditions of work requirement and in determining whether the work offered is substantially less favorable to the individual.

Q6. Must fringe benefits be considered in every case involving a prevailing conditions issue?

A. No. When a prevailing conditions issue is raised, the State need only examine those prevailing conditions such as hours, wages, physical conditions of the work, or fringe benefits that the State has reason to believe may be less than prevailing. However, if the individual raises a prevailing conditions of work issue concerning fringe benefits, the fringe benefits must be examined.

Q7. May wage and fringe benefit packages be combined when determining what is prevailing? May they be combined even if one element is not prevailing? For example, a building trades job offers higher than prevailing wages but no health insurance or retirement plan where those benefits are a prevailing condition in the locality. Must a value be placed on the fringe benefits to make a comparison?

A. FUTA is silent on this matter. Therefore, States may either consider fringe benefits as part of wages or treat them separately for purposes of the prevailing conditions requirement. If a State combines fringe benefits with wages, fringe benefits must be given a cash value and included in the calculation of wages.

Q8. May the State presume that a negotiated union wage and benefit package is not substantially less favorable than the conditions prevailing in the locality?

A. No. Determinations must not be made based on presumptions. States always must obtain as much information as necessary in each individual case to support a decision that conditions of a job offer meet the prevailing conditions requirement.

Q9. May the existence of a contract, collectively bargained or otherwise, that grants the employer the right to change employment conditions obviate the requirement to analyze whether a change in employment is new work? For example, a contract may provide for bumping rights as a result of a reduction-in-force or give management the right to transfer the worker to a new job.

A. No. As stated in Section 4.b. of UIPL No. 41-98, a finding that a change in employment is new work may not be limited by an employment contract which grants the employer the right to change employment conditions. This applies even if the employer is forced to change the employment conditions as a result of a collective bargaining agreement.

Q10. May the inquiry of what constitutes "similar work" be limited to occupation?

A. No. Occupation by itself is not sufficient. As stated on page 4 of the attachment to UCPL No. 130, "job titles are sometimes misleading." This UCPL also states that:

Different occupation and grade designations are often used in different establishments for the same work. Conversely, the same titles are sometimes used for different kinds of work. The actual comparison of jobs must therefore be made on the basis of the similarity of the work done without regard to title: that is, the similarity of the operations performed, the skill, ability and knowledge required, and the responsibilities involved. [Emphasis in original.]

In sum, the State must consider the knowledge, skills, abilities, and duties involved in the work.

Q11. Must States determine a separate prevailing criterion for entry level versus all other steps within a given occupation?

A. Yes. If the issue is skill grade within an occupation, the State must break down the given occupation accordingly. States also must distinguish other steps within the occupation from each other, when important differences exist between those steps. See also the answer to the previous question. In addition, as stated on pages 4 and 5 of the attachment to UCPL No. 130:

The nature of the services rendered may also be differentiated within an occupational category by the degree of skill and knowledge required. The work of a head bookkeeper in a large concern who sets up the bookkeeping system and assumes responsibility for it, is clearly different from that of a bookkeeper in charge of "accounts payable" or a posting clerk in the department.

The UCPL goes on to state:

[T]he fact that "similar" makes allowance for some difference though it implies a marked resemblance must also be given weight. Too fine a distinction is likely to result in a comparison of identical rather than similar work. Generally, distinctions should be made within an occupation only when important differences in the performance of the job outweigh the essential similarity of the work.

Q12. Is asking the parties the only feasible way of obtaining labor market information as to prevailing fringe benefits?

A. Not necessarily. However, alternatives are sometimes not available. States should, however, first use whatever resources are available to determine prevailing fringe benefits. Some sources are unions, Job Service records, or the Bureau of Labor Statistics.

III. Substantially Less Favorable to the Individual

Q13. Are assignments offered by a temporary help agency always substantially less favorable to the individual than permanent employment?

A. No. There are several considerations that must be addressed to determine if the offer is substantially less favorable to the individual.

States must first determine whether the temporary nature of the work offered is prevailing in the locality. As noted on page 10 of UIPL No. 41-98, if the norm for a particular occupation in a locality is temporary work, then temporary work is the prevailing condition of such work. There then exists no issue whether the temporary nature of new work is substantially less favorable to the individual. (However, fringe benefits, wages, hours, and other conditions also may be relevant in determining if the offer is substantially less favorable to the individual.)

Another consideration is whether the temporary employer demonstrates that the temporary worker will continue to be employed at the end of each individual assignment, but merely on different assignments with the same duties and pay. If this occurs, then the duration of the work is indefinite.

Another consideration is whether a particular condition (such as the temporary nature of the work refused) is actually less favorable to the individual than that prevailing for similar work in the locality. The next question and answer addresses this issue.

As is the case for all determinations, determinations regarding whether the work is substantially less favorable to the individual must be made by the State in accordance with the requirements of the Standard for Claims Determination, Sections 6010-6015, Part V, of the Employment Security Manual.

Q14. May the language "to the individual" be applied so as to interpret a short-term offer from a temporary help agency as being not substantially less favorable to an individual who has sought out and desires work in the temporary (as opposed to the permanent) market because of personal circumstances, such as a need to be flexibly in and out of the labor market?

Yes. If the temporary nature of the work is a voluntary or favorable condition of work for the individual, then UC may be denied if work is refused. As stated in the last full paragraph on page 10 of UIPL No. 41-98, "the short-term duration of temporary work may be a voluntary or favorable condition for some individuals. If the State establishes through fact finding that this is the case for an individual, then the work offered is 'not less favorable to the individual' than the work prevailing in the locality."

Q15. May a State deny UC if an individual refuses an offer of work on a non-prevailing shift? Does the answer change if the individual has a preference for the non-prevailing shift?

A. A State may not deny UC in this instance unless the individual has a preference for the non-prevailing shift. Shifts are addressed on page 22 of UCPL No. 130: ". . . second or third shift work would generally be substantially less favorable if most of the workers in the occupation were employed on the first shift. It is because the second and third shifts are recognized as less convenient by both employers and employees that differentials are frequently paid for such work."

The State must, however, determine whether working on a certain shift actually is a non-prevailing condition. For example, suppose that the prevailing condition for a particular type of work in a given locality is that almost all employers operate three shifts a day. Therefore, the State could determine that any of the three shifts meets the prevailing conditions requirement. Conversely, if the prevailing condition in the locality is to operate only two shifts, a day shift and an evening shift, an offer of work on a third shift, the night shift, would fail to meet the prevailing conditions test. However, if the individual has a preference for the non-prevailing shift, then that shift is not a condition of work that is less favorable to the individual and UC may be denied. (Also see the footnote to Question 2 above.)

1. Some changes in working conditions, such as a change in the physical location of the work, while not raising an issue under the Federal prevailing conditions requirements, may create an inquiry as to whether the work meets the suitability requirements of State law.