

U.S. DEPARTMENT OF LABOR  
Manpower Administration  
Washington, D.C. 20213

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DIRECTIVE: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 24-75

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : FLOYD E. EDWARDS  
Associate Manpower Administrator  
for Field Direction and Management

SUBJECT : The Secretary's Decision in the New York Conformity  
Hearing Held August 7, 1974; Exclusions From the State  
Definition of "Employment"

1. Purpose. To inform the States of the Secretary's Decision in the New York Conformity Hearing
2. References. None
3. Action Required. For distribution to appropriate State agencies staff.
4. Attachment. One copy of the Secretary of Labor's decision of June 6, 1975, In the Matter of the Question of Whether the State of New York's Unemployment Insurance Law Conforms with the Requirements of the Federal Unemployment Tax Act.

RESCISSIONS NONE	EXPIRATION DATE August 31, 1975
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U. S. DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY

WASHINGTON

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In the Matter of

THE QUESTION OF WHETHER THE  
STATE OF NEW YORK'S UNEMPLOYMENT  
INSURANCE LAW CONFORMS WITH THE  
REQUIREMENTS OF THE FEDERAL  
UNEMPLOYMENT TAX ACT  
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For the State of New York

Before: BURTON S. STERNBURG  
Administrative Law Judge

## DECISION OF THE SECRETARY

### Statement of the Case

Pursuant to "Notice of Hearing" issued by the Secretary of Labor on July 8, 1974, the captioned matter was referred to Administrative Law Judge Burton S. Sternburg, for the purpose of conducting a hearing and issuing a recommended decision on the question of whether or not the State of New York's unemployment insurance law conforms with the requirements of the Federal Unemployment Tax Act, as amended by Public Law 91-373, 84 Stat. 695, "Employment Security Amendments of 1970."

Hearing was held on August 7, 1974, in Washington, D.C. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues involved herein.

Upon the basis of the entire record, including the post-hearing briefs and reply briefs of the parties, and the exceptions and respective responses of the parties to his Proposed Recommended Decision of October 10, 1974, the Administrative Law Judge made findings of fact, conclusions of law, and recommendations in his Recommended Decision dated November 11, 1974.

This matter is now before me for consideration and review of the Administrative Law Judge's Recommended Decision. I have reviewed the entire record in this case certified to me by the Administrative Law Judge and I adopt the Administrative Law Judge's decision to the extent that it is consistent with the following.

### Discussion

#### A. Statutory Background.

Under the Federal Unemployment Tax Act, 26 U.S.C. 3301-3311 (hereinafter, FUTA), covered employers are assessed a Federal tax of 3.2 percent of the first \$4,200 of each covered employee's wages. However, if a State has a law which meets certain minimum Federal statutory requirements, the employer may offset against this Federal tax the amounts paid to the State in State unemployment taxes; the employer may also receive further credits against the Federal tax as a result of an approved "experience rating" plan. Under these provisions,

an employer may be relieved of a substantial portion of the Federal tax. On the other hand, if a State unemployment insurance law does not meet Federal requirements, all employers in that State lose their entitlement to offsetting credits against the Federal tax. The Secretary of Labor annually certifies to the Secretary of the Treasury those States which meet Federal requirements. 26 U.S.C. 3304(c).

The Employment Security Amendments of 1970, Public Law 91-373, 84 Stat. 695 (August 10, 1970) (hereafter, 1970 Amendments), amended FUTA by, among other things, adding to section 3304(a) of that Act certain new requirements for annual certification of States by the Secretary of Labor. Two of these amendments are directly at issue in this case: 26 U.S.C. 3304(a)(6)(A) and 26 U.S.C. 3304(a)(12). In addition, another of the 1970 Amendments provided that the Secretary of Labor is prohibited from certifying any State which he finds:

. . . after reasonable notice and opportunity for hearing . . . has failed to amend its law so that it contains each of the provisions required by reason of the enactment of the Employment Security Amendments of 1970 to be included therein, or has . . . failed to comply substantially with any such provision. 26 U.S.C. 3304(c)

Essentially, 26 U.S.C. 3304(a)(6)(A) requires, as a condition precedent to approval by the Secretary of Labor, that the State law provide for coverage of employees of non-profit organizations and for coverage of employees of State hospitals and State institutions of higher education. The amendment at 26 U.S.C. 3304(a)(12) requires, as a condition precedent to approval by the Secretary of Labor, that the State law allow political subdivisions of the State to elect coverage for employees of hospitals and institutions of higher education operated by the political subdivision. However, the 1970 Amendments do not extend the Federal FUTA tax to the employers of such employees.

The State of New York, in amending the New York unemployment insurance law to cover the services referred to in sections 3304(a)(6)(A) and 3304(a)(12),

has nevertheless retained certain exclusions from the State statute's definition of "employment." These exclusions are applicable to services which are to be covered pursuant to 26 U.S.C. 3304(a)(6)(A) and 3304(a)(12).

The relevant exclusions are contained in subdivisions 8, 9, 13, and 14 of section 511 of the New York Unemployment Insurance law, and provide as follows:

8. The term 'employment' does not include service as a golf caddy.

9. The term 'employment' does not include service during all or any part of the school year or regular vacation periods as a part-time worker or any person actually in attendance during the day time as a student in an elementary or secondary school.

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13. The term 'employment' does not include services of a minor engaged in casual labor consisting of yard work and household chores in and about a residence or the premises of a non-profit, non-commercial organization, not involving the use of power-driven machinery.

14. The term 'employment' does not include service by a child under the age of fourteen year.

The basic issue is, therefore, whether the State of New York, by creating such exclusions to the required coverage, has failed to amend its law in conformity with the 1970 Amendments and thus cannot be certified by the Secretary of Labor.

B. Requirements of 26 U.S.C. 3304(a)(6)(A).

The amendment of 26 U.S.C. 3304(a)(6)(A) provides, in pertinent part:

(a) The Secretary of Labor shall approve any State law submitted to him . . . which he finds provides that:

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(6) (A) compensation is payable on the basis of service to which section 3309(a)(1) applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law . . .

Accordingly, as a condition of approval and certification, the Secretary must find that under State law, unemployment compensation is payable to persons who have performed services to which the provisions of section 3309(a)(1) apply. In turn, section 3309(a)(1) states:

(a) State Law Requirements. -- For purposes of section 3304(a)(6) --

(1) except as otherwise provided in subsections (b) and (c), the services to which this paragraph applies are --

(A) service excluded from the term 'employment' solely by reason of paragraph (8) of section 3306(c), and

(B) service performed in the employ of a State, or any instrumentality of the State . . . for a hospital or institution of higher education located in the State, if such service is excluded from the term 'employment' solely by reason of paragraph (7) of section 3306(c).

Coverage under State unemployment compensation law is therefore required for workers performing certain services which would not be deemed, and are still not deemed, 'employment' for purposes of FUTA tax assessments. The services set forth in sections 3306(c)(8) and 3306(c)(7) are:

(8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3)

which is exempt from income tax under section 501(a); [i.e., non-profit institutions]

and

(7) service performed in the employ of a State, or any political subdivision thereof . . . .

Accordingly, in order for the State to be certified by the Secretary of Labor, the State law must provide for unemployment compensation benefits to persons who are performing service in the employ of non-profit organizations, State hospitals, and State institutions of higher education.

C. Requirements of 26 U.S.C. 3004(a)(12).

With respect to 26 U.S.C. 3304(a)(12), that requirement provides:

. . . each political subdivision of the State shall have the right to elect to have compensation payable to the employees thereof . . . based on service performed . . . in the hospitals and institutions of higher education . . . operated by such political subdivision; and if any such political subdivision does elect to have compensation payable to such employees thereof (A) the political subdivision shall pay into the State unemployment fund, with respect to the service of such employees, payments (in lieu of contributions), and (B) such employees will be entitled to receive, on the basis of such service, compensation payable on the same conditions as compensation which is payable on the basis of similar service for the State which is subject to such law.

This provision simply requires the States to permit political subdivisions to elect coverage for employees working in their hospitals and institutions of higher education, in a sense, the interpretation and application of this provision depends upon 26 U.S.C. 3304(a)(6)(A), since the conditions of coverage, once elected, are to be the same as those pertaining to service in State hospitals and institutions of higher education.

D. Analysis of New York's arguments.

The State of New York maintains that, despite the exclusions from coverage in its law, it has amended its unemployment compensation statutes in conformity with the 1970 Amendments to FUTA, and therefore should be certified. This conclusion is based on its own interpretation of the relevant 1970 Amendments.

The position advanced by the State of New York is basically two-pronged.

First, it asserts that the exclusions from the State's definition of "employment" under section 511 of its unemployment compensation law apply equally to profit, non-profit, and State institutions. This proposition appears to be correct. However, New York proceeds to argue that 26 U.S.C. 3304(a)(6)(a) requires only that coverage for services performed for non-profit organizations, State hospitals, and State institutions of higher education be co-extensive with the coverage the State requires for services performed for all other employers. (Transcript, pp. 19-20) In reaching this conclusion, New York places heavy reliance upon certain language of 26 U.S.C. 3304(a)(6)(A):

. . . compensation is payable on the basis of service to which section 3309(a)(1) applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law . . . . (emphasis added)

Since profit-making enterprises and the State and non-profit institutions at issue here are all subject to the New York exclusions from the State's definition of "employment," New York argues that such even-handedness satisfies the requirements of 26 U.S.C. 3304(a)(6)(A), and, by implication, 26 U.S.C. 3304(a)(12):

The interpretation advanced by the State of New York in this regard is based upon a misconception of the purpose of 26 U.S.C. 3304(a)(6)(A). That provision merely describes the manner in which compensation benefits are to be administratively

dispensed. It does not follow that a provision which deals with terms and conditions of compensation can be cited as justification for eliminating categories of coverage because similarly situated employees of profit-making enterprises would not receive unemployment benefits.

The provisions of 26 U.S.C. 3304(a)(6)(A) must be read in the context of the fundamental Congressional purpose to extend coverage. The new coverage mandated by the 1970 Amendments is a creation of Federal law. The scope of that coverage is delineated by Federal law, and it is the Federal law, not the State law, which provides the governing test of compliance with Federal requirements.

Identical language appears in both the House and Senate Committee Reports:

Section 104 of the bill amends section 3304 (c) of the Internal Revenue Code of 1954 by inserting a new paragraph (6) providing that to be approved (for purposes of the credit against the Federal unemployment tax) a State must cover certain employees of non-profit organizations and State hospitals and institutions of higher education. (emphasis added) (H.R. 91-612, p. 43; S.R. 91-752, p. 47)

The "certain employees" Congress intended to cover are delineated in the same reports:

Section 3309(a)(1) describes the required coverage as (A) service excluded from the term "employment" for purposes of the Federal tax solely by reason of paragraph (8) of section 3306(c) -- i.e., solely because it is performed in the employ of a religious, charitable, education or other non-profit organization . . .; and (B) service performed in the employ of a State or any instrumentality of the State . . . for a hospital or institution of higher education if such service is excluded solely by reason of paragraph (7) of section 3306(c) of the code. (emphasis added) (H.R. 91-612, pp. 43-44; S.R. 91-752, p. 48)

The whole thrust of the Congressional intent was the extension of coverage, and the limitation of exceptions to the new coverage. (See S.R. No. 91-752, pp. 14-15, 47-49; H.R. No. 91-612, pp. 11-12, 43-45). The only exceptions to coverage which may properly be applied, and the only persons (or categories of persons) who may properly be excluded from coverage, are those which are set forth in the Federal statute. To allow otherwise is to fly in the face of the 1970 Amendments. Congress can hardly be deemed to have engaged in a self-defeating exercise by, on the one hand, providing for extension of coverage, and, on the other hand, allowing the States to carve out exceptions to the new coverage as the States see fit.

Moreover from the standpoint of statutory structure, as it reflects Congressional purpose, the 1970 Amendments themselves contain exceptions to the general coverage provisions. It is a fundamental principle of statutory interpretation that where there is an express exception, that exception comprises the only limitation upon the operation of the statute, and no other exceptions will be implied. An enumeration of exceptions from the operation of a statute indicates that it should apply to all cases not specifically enumerated. 2A Sutherland, Statutory Construction 47.11. Congress, having set forth both coverage and exceptions to coverage within the 1970 Amendments, can hardly be deemed to have intended that the States would be at liberty to add further exceptions.

Moreover, the language relied upon by the State of New York does not itself support the construction placed upon it by New York.

Viewed individually, the qualifying phrases cited by New York may be analyzed as follows.

Benefits are to be payable "in the same amount." The word "amount" is a non-technical, everyday term which, in common usage, signifies some quantity. Webster's New World Dictionary, Second College Edition, 1972, p. 46. Zero is not a quantity.

The words "terms" and "subject to the same conditions" frequently occur in a more legalistic context. The word "terms" is a word of broad connotations and ordinarily embraces all limiting conditions. Shawmut Ass'n v. SEC, 146 F.2d 791, 795 (CA 1, 1945). Therefore, for our purposes, "terms" is synonymous with "conditions."

"Conditions" in turn are future or uncertain events upon the happening of which is made to depend the existence of an obligation, or that which subordinates the existence of a liability to a certain future event. Black's Law Dictionary, Rev. Fourth Edition, 365. However, the exclusion from the definition of "employment" which exists in the New York law at issue in this case is not a "condition," or a "term." It is an exception, and there is a distinction between an "exception" and a "condition." No future or uncertain event (which is the essence of a "condition") is involved in an "exception," which involves the creation of an exempt category. Stated another way, a condition presupposes an absolute obligation which may be avoided or annulled, whereas an exception is an exclusion from a general obligation of a certain class or classes, which, were it not for the exclusion, would be comprehended within the subject covered by the general obligation. See, 8 Words & Phrases 621, col. 2.

Putting the constituent parts of the statutory provision at issue back together, and viewing them as a whole, it would not be unfair to characterize New York's position as an argument that the provision should be read as follows:

. . . payable [not payable] . . . in the same amount [zero dollars], on the same terms [no payment], and subject to the same conditions [categorical disqualification] as compensation payable [not payable] on the basis of other service [not covered by State law], subject to such law . . . .

The anomalies of such an interpretation are obvious.

The second basic line of argument advanced by the State of New York focuses upon the nature of the exclusions under New York law. In essence, it is alleged that there are few or no employees working for non-profit institutions or State hospitals or

institutions of higher education who fall within the New York exception from the definition of "employment." Hence, the excluded categories are really irrelevant. (Transcript, p. 15), and the whole affair is de minimis. New York advances the argument that substantial compliance of its legislation with the 1970 Amendments is all that is required, and that minor deviations are permissible. Indeed, it seems to be argued that the Secretary has inherent authority to dispense with strict compliance and substitute, insofar as the organic legislation of the State is concerned, a concept akin to common law "substantial performance" of a contract. (Transcript, pp. 24-25)

Under the 1970 Amendments, the Secretary is prohibited from certifying any State which he finds has failed to amend its law so that the law contains "each of the provisions" required by the 1970 Amendments, or has failed "to comply substantially" with provisions required by the 1970 Amendments. 26 U.S.C. 3304(c). It does not require extensive analysis to determine the plain import of this provision. There are two separate and distinct legs to this provision. First, the basic State legislation must contain the provisions required by the 1970 Amendments. Second, once the legislation is operative, the State must carry out the legislation in a manner which complies substantially with FUTA requirements.

Statutorily, there is no provision allowing mere "substantial compliance" of the State law with FUTA requirements placed upon the law itself. Substantial compliance is relevant only to the operation of the State under its law. Nor is "substantial compliance" in the operation of its law some sort of substitute for conformity of the State law with the Federal statutory mandate. If the State law has not been amended to contain each of the provisions required by reason of the 1970 Amendments, it cannot, by terms of 26 U.S.C. 3304(c), be certified by the Secretary. "Substantial compliance" under a non-existent law is a contradiction in terms. A State law which does not contain the provisions required by the 1970 Amendments is a State law which, by definition, cannot be administered so as to comply substantially with the required provisions.

Nevertheless, the State of New York, despite conceding that neither the word "substantial" nor any synonym thereof is used in connection with that portion of section 3304(c) which goes to the requirements imposed upon the State legislation itself, argues that the concept of "substantial conformity" should be read into the requirements regarding State laws. The Secretary, it is argued, may overlook minor deviations. (Memorandum on behalf of New York State Department of Labor, p. 11)

There is no such provision in section 3304(c), and one should not be implied. The explicit use of a "substantial compliance" test on a related issue in the selfsame section, coupled with the absence of such a test on the issue at hand, argues strongly against any such latitude with respect to the requirements that the State legislation must meet to qualify for certification.

In any event, the principle inherent in the exclusion of entire categories of persons gainfully employed and drawing wages from the definition of "employment" can hardly be characterized as de minimis, even if we accept the allegation made by New York that the number of persons within such categories is minimal.

E. Summary.

In summary, 26 U.S.C. 3304(a)(6)(A) requires an approved State unemployment compensation law to include provisions for mandatory coverage of services performed in the employ of non-profit organizations and services performed in the employ of State hospitals and State institutions of higher education, while 26 U.S.C. 3304(a)(12) requires an approved State unemployment compensation law to include provision for election by political subdivisions of services performed in the employ of hospitals and institutions of higher education operated by the political subdivisions. Allowable exceptions are to be found in the Federal statute itself. For instance, certain small non-profit organizations may be excepted under section 3309(c). In addition, the services described in section 3309(b) may be excluded from coverage, as may the services described in paragraphs (1) through (6) and (9) through (18), of section 3306(c). However, a State cannot successfully maintain that its law meets the requirements of section 3304(a)(6)(A) and section 3304(a)(12) if it excludes from coverage any services that Congress has mandated shall be covered or be allowed to be covered.

As found by the Administrative Law Judge, New York State's unemployment insurance law fails to provide coverage for the following jobs and employees at non-profit organizations and State and local hospitals and institutions of higher education:

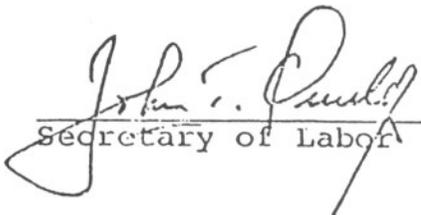
- (1) golf caddies;
- (2) students in elementary or secondary school who work part-time during the school year or regular vacation periods;
- (3) minors engaged in casual labor consisting of yard work and household chores not involving the use of power driven machinery;
- (4) all employment performed by persons under 14 years of age. (Administrative Law Judge Recommended Decision, p. 13)

As further found by the Administrative Law Judge, there is no exclusion set forth in the Federal Unemployment Tax Act (FUTA) applicable to the above categories as such, and the New York State exclusions are within the definition of "employment" contained in 26 U.S.C. 3306(c). (Administrative Law Judge Recommended Decision, pp. 13-14).

#### Conclusion

The Findings of Fact and Conclusions of Law submitted by the Administrative Law Judge are approved.

The Secretary of Labor finds that the exclusions contained in subdivisions eight (8), nine (9), thirteen (13), and fourteen (14) of section 511 of the New York Unemployment Compensation law do not meet the requirements of the Federal Unemployment Tax Act (FUTA), and, consequently, the New York State Unemployment Insurance law fails to contain the provisions required by reason of the enactment of the Employment Security Amendments of 1970 to be included therein.

  
Secretary of Labor

Dated: JUN 6 1975  
Washington, D. C.