

1996

Harrington v. Board of Review of the Industrial Commission of Utah : Unknown

Utah Court of Appeals

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Eugene Harrington; Claimant-Petitioner, Pro Se.

Lorin R. Blauer; K. Allan Zabel; Attorneys for Respondent.

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BOARD OF REVIEW

UTAH
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GOVERNOR

THE INDUSTRIAL COMMISSION OF UTAH

Department of Employment Security

140 East 300 South

P.O. Box 45244

Salt Lake City, Utah 84145-0244

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May 21, 1997

MEMBERS:

INDUSTRIAL COMMISSION:

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Thomas R. Carlson, Commissioner
Colleen S. Colton, Ed.D, Commissioner

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Connie Nielsen
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INDUSTRY:

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FILED

MAY 21 1997

Utah Court of Appeals
230 South 500 East, Suite 400
Salt Lake City, Utah 84102

COURT OF APPEALS

Re: Harrington vs. Department of Employment Security
Case No. 960710-CA

To the Honorable Justices of the Utah Court of Appeals:

While preparing for oral argument set for tomorrow morning at 9:30 a.m., I found two cases and Unemployment Insurance Program Letter (UIPL) No. 7-81 dated October 9, 1980 together with UIPL No. 7-81, Change 1, dated June 9, 1981 and UIPL No. 7-81, Change 2, dated March 11, 1983, from the U.S. Department of Labor which are pertinent to Point I, page 7 in Respondent's Brief. Copies of the cases and UIPL's are attached hereto. I am submitting these authorities pursuant to Rule 24(i) of the Utah Rules of Appellate Procedure.

The first case is *Coleman v. Department of Employment Security Board of Review Of the Industrial Commission of Utah*, 29 Utah 2d 326, 509 P.2d 355 (1973). The issue in *Coleman* was whether §35-4-3(b) [now §35-4-401 as amended] of the Utah Employment Security Act constitutionally discriminated against a class of citizens by its requirement "of a deduction from benefits otherwise payable, of 50 per cent of any amount received by a claimant under a former employer-employee plan where both contribute to a retirement fund." The Supreme Court concluded "that such deductions are not constitutionally offensive to equal protection."

In the second case, *Richardson v. Industrial Commission of Utah*, Utah, 656 P.2d 997 (1982), the Supreme Court followed *Coleman*.

The above-referenced UIPL No. 7-81, Change 2, dated March 11, 1983, is cited in footnote 4 on page 892 of *Rivera v. Becerra* included in Respondent's Brief as Appendix B.

I called Mr. Payton, who is appearing for Mr. Harrington for oral argument, discussed the above authorities with him and advised him I would deliver copies to him

Very truly yours,



Lorin R. Blauer

Attorney for Respondent

c. Steven Lee Payton

of the highway in the vicinity is sufficient to sustain the determination of the trial court. The judgment of the trial court is affirmed. No costs awarded.

HENRIOD, ELLETT, CROCKETT and TUCKETT, JJ., concur.



509 P.2d 355

Arthur D. COLEMAN, Plaintiff,

v.

DEPARTMENT OF EMPLOYMENT SECURITY
BOARD OF REVIEW OF the INDUSTRIAL
COMMISSION OF UTAH, Defendant.

No. 12947.

Supreme Court of Utah.

April 19, 1973.

A decision of the Industrial Commission through its board of review denied unemployment compensation benefits; and the claimant appealed. The Supreme Court, Henriod, J., held that a provision requiring deduction, from benefits otherwise payable, of 50% of any amount received by claimant under a former employer-employee plan where both contributed to a retirement

fund was not constitutionally offensive to equal protection.

Affirmed.

Crockett, J., concurred in result.

Constitutional Law ⌘243

Social Security and Public Welfare ⌘252

Unemployment compensation provision requiring deduction, from benefits otherwise payable, of 50% of any amount received by claimant under former employer-employee plan where both contributed to retirement fund was not constitutionally offensive to equal protection. U.C.A.1953, 35-4-3, 35-4-3(b).

Arthur D. Coleman, pro. se.

Vernon B. Romney, Atty. Gen., Edgar M. Denny, Asst. Atty. Gen., Salt Lake City, for defendant.

HENRIOD, Justice.

Review of a decision of the Industrial Commission through its Board of Review, under the Employment Security Act (Title 35-4, Utah Code Annotated 1953), denying unemployment compensation to petitioner Coleman, who had filed a claim therefor under Sec. 35-4-3(b) of the Act. Affirmed.

The only substantial issue here is whether the section constitutionally discriminates against a class,—the elder citizens,—where

the section requires a deduction from benefits otherwise payable, of 50 per cent of any amount received by a claimant under a former employer-employee plan where both contribute to a retirement fund. In this case the employer contributed $\frac{3}{5}$ to the fund and the petitioner, employee, $\frac{2}{5}$. Petitioner is past 65.

Petitioner's main thrust is that older persons are in a lower income bracket and consequently any pension or retirement income inuring to his benefit would tend to affect unemployment benefits to a greater extent than others better paid. Also in rather general way he questions the validity of the statute on the grounds it is against public policy to permit such a deduction, and that anyway, such retirement amounts are the return from a private investment,—which idea has been rejected.¹

Statutes of other states which are substantially the same as ours generally have been approved on grounds 1) that the amounts received under such plans, though not wages, amount to compensation for loss of wages within the letter and spirit of the well-known and similar language of such legislation;² 2) that where the contributions to the fund have been made either entirely by the employer or employee they

may be offset against unemployment benefits, and that they are deductible whether the statute provided 100 per cent deductibility or 50 per cent as in Utah;³ 4) that such deductions are not constitutionally offensive to equal protection.⁴

CALLISTER, C. J., and ELLETT and TUCKETT, JJ., concur.

CROCKETT, J., concurs in the result.



509 P.2d 356

L. W. FLYNN, dba L. W. Flynn Construction Company, Plaintiff and Appellant,

v.

W. P. HARLIN CONSTRUCTION COMPANY et al., Defendants and Respondents.

No. 12855.

Supreme Court of Utah.

April 17, 1973.

Action by subcontractor against general contractor for wrongful termination of contract and conversion of equipment and materials. The Third District Court, Salt

1. Yeager v. Unemp. Comp. Bd., 196 Pa. Super. 162, 173 A.2d 802 (1961).

2. 32 A.L.R.2d 896 (1952); Holmes v. Cook, 45 Ala.App. 688, 236 So.2d 352 (1970); Title 35-4-3 U.C.A.1953.

3. Ibid.

4. Rogers v. Dist. Unemp. Comp. Bd., 290 A.2d 586, (D.C.App.1972); Townsend v. Bd. of Rev., 27 Utah 2d 94, 493 P.2d 614 (1972).

venember 21, 1979, whereas the Policy Declaration is dated November 23, 1979, was also error. Both resolutions bear the caption "Resolution No. 11-21-79B," which in and of itself raises a genuine issue of material fact regarding the date of their adoption, thereby precluding summary judgment. See Utah R.Civ.P. 56(c). See, e.g., *Frederick May & Co. v. Dunn*, 13 Utah 2d 40, 368 P.2d 266 (1962). The trial court should have conducted an evidentiary hearing with respect to the circumstances surrounding the November 21 meeting to determine whether the defendant had actually or substantially complied with Utah's annexation statute. Thus, because of the errors of law by the trial court in granting summary judgment against the defendant, the subsequent denial by the trial court of the defendant's Motion to Amend Judgment or for a New Trial was an abuse of discretion which compounded rather than cured the original errors.

We therefore reverse the judgment and remand this case for a trial on the issues of actual and/or substantial compliance, and on any remaining claims or disputes that may exist between the parties. No costs awarded.

HALL, C.J., and STEWART, OAKS and HOWE, JJ., concur.



Lewis D. RICHARDSON, Plaintiff,

v.

The INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY, Defendant.

No. 17897.

Supreme Court of Utah.

Nov. 24, 1982.

Applicant for unemployment benefits sought reversal of decision of Industrial

Commission finding his benefits to be zero. The Supreme Court held that amounts which claimant was receiving from federal Civil Service Retirement System constituted "retirement benefits," deductible in computing unemployment benefits, notwithstanding that claimant had not yet received a return of his contributions to the federal retirement fund.

Affirmed.

1. Social Security and Public Welfare ⇌730

Amounts which unemployment benefits claimant was receiving from federal Civil Service Retirement System constituted "retirement benefits," deductible in computing unemployment benefits, notwithstanding that claimant had not yet received a return of his contributions to the federal retirement fund. U.C.A.1953, 35-4-3(b).

See publication Words and Phrases for other judicial constructions and definitions.

2. Social Security and Public Welfare ⇌251

Unemployment compensation is designed to alleviate hardship to an employee and his family due to involuntary layoff where the employee has no other means of meeting his expenses of living. U.C.A.1953, 35-4-3(b).

Lewis D. Richardson, pro se.

David L. Wilkinson, Floyd G. Astin, K. Allen Zabel, Salt Lake City, for defendant.

PER CURIAM:

[1, 2] Plaintiff is a retired federal civil service employee, with 34 years of credited service with the federal government. Subsequent to retiring from the federal service, plaintiff was employed part-time as a ski instructor, last working for Brighton Ski School until December 15, 1980. When he lost the job with Brighton Ski School, plaintiff submitted his application to the Depart-

ment of Employment Security ("department") for unemployment benefits. The department found that plaintiff was entitled to weekly benefits for a period of ten weeks, but reduced his benefits by 100% of the amounts which he was then receiving as retirement benefits, pursuant to U.C.A., 1953, § 35-4-3(b). This reduced plaintiff's unemployment benefits to zero.

Plaintiff began receiving payments from the Federal Civil Service Retirement System on or about January 27, 1980. The payments received by plaintiff from said Retirement System are not subject to federal income tax to the extent they are considered a return of plaintiff's contribution to his retirement fund, under applicable provisions of the Internal Revenue Code. At the department, plaintiff submitted proof that his receipts from the Civil Service Retirement System would not be taxable until July 15, 1981. U.C.A., 1953, § 35-4-3(b) provides, in part:

[T]he "weekly benefit amount" of an individual who is receiving, or who is eligible to receive, retirement benefits by reason of his past performance of personal services shall be the "weekly benefit amount" which is computed pursuant to this section less 50% until April 1, 1980, at which time the deduction for retirement income shall be 100% (disregarding any fraction of \$1) of his primary benefits which are attributable to a week.

In seeking a reversal of the decision of the department, plaintiff argues that his retirement benefits did not begin until July 15, 1981, and that until that time, plaintiff received only a return of his capital, which was neither "wages" nor new income.

On this basis, he contends that until July 15, 1981, he received only those amounts which he had been forced to save. He points out that other savings accounts are not deductible from unemployment benefits, and the statute requiring reduction of his unemployment benefits by the amounts received monthly from these savings, while disregarding other savings, constitutes discrimination and a denial of equal protection in violation of the Utah and U.S. Constitutions.

This Court has previously considered plaintiff's arguments and has found them to be without merit. *Coleman v. Department of Employment Security*, 29 Utah 2d 326, 509 P.2d 355 (1973). Unemployment compensation is designed to alleviate hardship to an employee and his family due to involuntary layoffs where the employee has no other means of meeting his expenses of living. In the same manner, retirement benefits enable the employee to meet these expenses.

Plaintiff's argument that his receipts are not income or wages is not persuasive. The statute does not speak in terms of wage or income receipts; rather, "retirement benefits" which are "received by reason of his past performance of personal services" are deductible under Section 35-4-3(b). The monthly payments payable to plaintiff from the Civil Service Retirement System meet this description, and are thus deductible from unemployment compensation under our statute.

Affirmed.



**The STATE of Utah, DEPARTMENT OF
SOCIAL SERVICES, Plaintiff
and Appellant,**

v.

**Roger C. HIGGS, Kurt Mathia, and
George C. Melis, Defendants and
Respondents.**

No. 17607.

Supreme Court of Utah.

Nov. 26, 1982.

Appeal was taken from order of the Third District Court, Salt Lake County, Kenneth Rigtrup, J., which dismissed

Price for disp.
U.S. DEPARTMENT OF LABOR
Employment and Training Administration
Washington, D.C. 20213

CLASSIFICATION UI
CORRESPONDENCE SYMBOL TURL
DATE October 9, 1980

DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO 7-81
TO : ALL STATE EMPLOYMENT SECURITY AGENCIES
FROM : OFFICE OF THE DEPUTY ASSISTANT SECRETARY
ROBERTS, J. D. JONES
Administrator
Office of Management Assistance
SUBJECT : Amendments Made to the Federal Unemployment Tax,
Act by P.L. 96-364



- Purpose. To inform State agencies of the amendments made by P.L. 96-364 to the Federal Unemployment Tax Act, the Federal-State Extended Unemployment Compensation Act of 1970 (EUCA) and Title 5 U.S.C. 8521.
- References. Sections 414, 415 and 416 of P.L. 96-364; Section 3304(a)(15), FUTA; Section 202, EUCA; 5 U.S.C. 8521(a)(1), and UIPL 24-80.
- Background. These amendments modify the pension deduction provision in section 3304(a)(15), FUTA, specify circumstances in which extended benefits are not payable on interstate claims, and increase the period of service necessary for former members of the Armed Forces to establish entitlement to unemployment compensation under Title 5 of the U.S.C.
- Amendment to Section 3304(a)(15), FUTA, the Pension Deduction Provision. Section 414 of P.L. 96-364 amended section 3304(a)(15), FUTA, to require deduction of pension payments only in specified circumstances, and to allow States to consider an individual's contributions to the pension payment in determining the amount to be deducted. As so revised, the pension deduction standard now provides as follows:

"the amount of compensation payable to an individual for any week which begins after March 31, 1980, 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

REVISIONS	EXPIRATION DATE October 31, 1981
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DISTRIBUTION

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 /; / except that --

"(A) the requirements of this paragraph shall apply to any pension, retirement or retired pay, annuity, or other similar periodic payment only if --

"(i) such pension, retirement or retired pay, annuity, or similar payment is under a plan maintained (or contributed to) by a base period employer or chargeable employer (as determined under applicable law), and

"(ii) in the case of such a payment not made under the Social Security Act or the Railroad Retirement Act of 1974 (or the corresponding provisions of prior law), services performed for such employer by the individual after the beginning of the base period (or remuneration for such services) affect eligibility for, or increase the amount of, such pension, retirement or retired pay, annuity, or similar payment, and

"(B) the State law may provide for limitations on the amount of any such reduction to take into account contributions made by the individual for the pension, retirement or retired pay, annuity, or other similar periodic payment;". (New language underlined, deleted language bracketed.)

The amendments made by P.L. 96-364 to section 3304(a)(15) became effective on September 26, 1980.

Section 414(b) of P.L. 96-364 provides that the new pension deduction standard is applicable for certification of the States for 1981 and subsequent years. Therefore, States have the option to implement the new Federal deduction standard as of September 26, 1980. However, full conformity and compliance with the requirements of section 3304(a)(15), FUTA, as amended, is required for certification of State laws for the 12-month period beginning on November 1, 1980, and ending October 31, 1981. The requirements of section 3304(a)(15) prior to amendment by P.L. 96-364 remain effective through September 25, 1980. However, we do not recommend that these amendments be made retroactive except as is necessary where the State will have no pension deduction provision as of November 1, 1980, in which case the law should be made effective retroactively as of that date.

State laws which now provide for the deduction of pension payments in the circumstances prescribed by the Federal law prior to these amendments are not required to take further action in order to satisfy the requirements in the new amendments. However, we strongly recommend that States

proceed now to take advantage of the less stringent condition under which pensions must be deducted from unemployment benefits pursuant to the Federal law requirement.

Section 3304(a)(15), FUTA as amended by P.L. 96-364, reflects only the minimum conditions under which deduction must be required by State law for certification under FUTA. Although a State may broaden the scope of its deduction of pension payments beyond the conditions in which deduction is required under the Federal law, it may not adopt less stringent conditions which fall short of the Federal requirement.

The requirement of the pension deduction standard in section 3304(a)(15), FUTA, as modified by the above cited amendments, is now applicable in less restrictive circumstances as noted above. The deduction is not only limited by the conditions contained in clauses (i) and (ii), but also gives States the option of limiting the deduction in unemployment benefits by taking into account an employee's contribution to the pension fund. As will be explained below, the limitations specified by these new clauses mean that the reduction in unemployment compensation by the amounts of pension payments received by an individual will be required under Federal law only if the pension is under a plan maintained or contributed to by a base period or chargeable employer and then, only if the services performed for such employer affect eligibility for, or increase the amount of, the retirement payment. However, as a result of the exception in clause (ii), eliminating application of its provisions to payments made under the Social Security Act or the Railroad Retirement Act of 1974, those particular payments are deductible in any case in which the individual's base period employer contributed to or maintained the pension plan under such Acts.

The limitation specifying that the deduction of a pension payment is required only if the pension is derived under a plan that a base period employer or chargeable employer contributed to or maintained is set forth in clause (i). Whether or not the employer is a chargeable or a base period employer is to be determined under the provisions of the State law. The employer need not be both a base period employer and also chargeable with any benefits payable under the State law. If it is either a base period or a chargeable employer that contributed to or maintained the plan, the pension received from the plan must be deducted.

Furthermore, the plan must be the same as that under which the individual has established his right to the pension payments. For example, if an individual at company A retires and collects

a pension from A under a particular plan maintained by that employer, but then goes to work for company B who has an entirely different plan, and is subsequently laid off, the pension payment from company A would not be deductible (assuming that A is no longer a base period employer). Conversely, if an individual retires from company C to collect Social Security and then goes to work for company D where the individual is also covered under the Social Security Act, and thereafter the individual is terminated, the Social Security pension would then be deductible since company D (base period employer) contributed to the same plan as company C.

Clause (ii) also requires in addition that the "services performed for such employer by the individual after the beginning of the base period (or renumeration for such services)" must affect "eligibility for, or increase the amount of, such pension...." This means that if the services performed for the base period or chargeable employer did not affect either eligibility for or the amount of the pension received from the plan maintained or contributed to by a base period or chargeable employer, then the deduction is not required. The phrase "eligible for" pertains to the individual's capability of satisfying the conditions necessary to qualify for the pension. Thus, if the individual qualifies for a pension on the basis of the services performed for the base period or chargeable employer, or if the amount of the pension payment is increased by reason of such services, the pension payment would then be deductible.

The provisions of clause (ii) allowing States to disregard pension payments if the base period employment did not affect eligibility for or increase the amount of the pension, is not applicable, however, to Social Security and Railroad Retirement pensions received by an individual. Clause (ii) states specifically that the conditions contained therein are applicable only "in the case of such a payment not made under the Social Security Act or the Railroad Retirement Act of 1974 (or the corresponding provisions of prior law)" Consequently, only the provisions in clause (i) apply to Social Security and Railroad Retirement payments, which means that those payments are deductible whenever the individual's base period employer or the chargeable employer contributed to the plans provided under those Acts. It is not necessary that any contribution made on behalf of an individual under those plans or any services performed for such employers affect eligibility for or increase the amount of the individual's pension.

Finally, under new section 3304(a)(15)(B), a State "may provide for limitations on the amount of any such

reduction to take into account contributions made by the individual for the pension" Under this option a State may provide under its law for eliminating any part of the pension payment equivalent to the employee's share of the contributions to the pension fund, or it can provide for elimination of a representative percentage of the pension as determined under the State law. These are only examples of the types of limitations that can be applied under this option and are not intended to cover all of the possible alternatives that may be developed by the States. Although broad latitude is provided to the State in exercising this option, we believe any limitation adopted should be consistent with the basic purpose of the option which is to allow elimination of the individual's share of the contributions to the pension fund in determining the amount of pension to be deducted.

Determinations and review decisions on pension deduction issues should include specific findings on each of the elements involved. The kinds of findings will depend upon the provision adopted by the State. For example, when a Social Security pension is involved, there should be a finding on whether the individual is a primary beneficiary, because only primary insurance benefits are required by the Federal requirement to be deducted. If the provision is limited to pensions maintained or contributed to by a base period employer, the findings should specifically indicate whether a base period employer is involved. When an individual is receiving more than one pension, it should be specifically found whether both meet the deduction requirements. It is also required that determinations and appeal decisions particularly include the method by which a monthly pension is pro-rated to a weekly amount.

A number of States that amended their laws to meet the requirements of section 3304(a)(15) prior to its amendment by P.L. 96-364, also included provisos to render those provisions inoperative if they were not required to be included in the State law as a condition for full tax credit against the tax imposed by the FUTA. Those provisos were included in anticipation of the possible deletion of the Federal pension deduction standard. Since no deletion occurred, a question has arisen as to the impact of the Federal law changes on these provisos. Whether or not those changes will require the States to invoke those provisos is, of course, a matter to be decided by State officials. However, since the prior provisions of section 3304(a)(15) are more restrictive than the revised provisions, a State law which contains the elements of the prior provision would nevertheless continue to be consistent with section 3304(a)(15) as amended. Therefore, it is strongly recommended that States take action or refrain from taking action under such provisos only if it is assured that

the State law will meet the requirements of section 3304(a)(15), as amended by P.L. 96-364. The States are urged not to take action which would have the effect of leaving the State without any pension deduction provision because that would immediately place the State in the position of having its law inconsistent with the requirements in section 3304(a)(15). In this case, the State should refrain from taking any action until the State legislature has had the opportunity to amend the law to assure consistency with the Federal requirement and thereby avoid any period in which the State law does not meet those requirements.

5. Amendment to Section 202 of the Federal-State Extended Unemployment Compensation Act of 1970. Section 416 of P.L. 96-364 amended section 202 of the Federal-State Extended Unemployment Compensation Act of 1970 by adding a new subsection (c) which prohibits payment of extended benefits pursuant to an interstate claim if the claim was filed in an agent-State where an extended benefit period was not in effect. However, the first 2 weeks of extended benefits otherwise payable under such a claim must still be paid to an individual since the prohibition applies only to weeks beyond that period.

New subsection (c) of section 202 reads as follows:

"(c) (1) Except as provided in paragraph (2), payment of extended compensation shall not be made to any individual for any week if—

"(A) extended compensation would (but for this subsection) have been payable for such week pursuant to an interstate claim filed in any State under the interstate benefit payment plan, and

"(B) an extended benefit period is not in effect for such week in such State.

"(2) Paragraph (1) shall not apply with respect to the first 2 weeks for which extended compensation is payable (determined without regard to this subsection) pursuant to an interstate claim filed under the interstate benefit payment plan to the individual from the extended compensation account established for the benefit year.

"(3) Section 3304(a)(9)(A) of the Internal Revenue Code of 1954 shall not apply to any denial of compensation required under this subsection."

This is a new Federal requirement that State laws must include in order to satisfy the provisions of section 3304(a)(11), FUTA, requiring payment of extended compensation as provided by the Federal-State Extended Unemployment Compensation Act of 1970. To meet this requirement, a State law must, as specified by Section 416(b), include provisions implementing new subsection (c) of section 202 for any week which begins on and after June 1, 1981, unless the State legislature

does not meet in a regular session which begins during 1981 and before April 1, 1981. In that event, the State must implement the requirement for weeks of unemployment beginning on or after June 1, 1982. However, since the amendment is otherwise effective for weeks of unemployment beginning after October 1, 1980, a State has the option to implement the requirement with the week beginning October 5, 1980.

Under the provisions of new subsection (c), when an individual files an interstate claim for extended compensation under the interstate benefit payment plan such compensation shall be paid for the first two compensable weeks but may not be paid for any additional week unless an extended benefit period is in effect in the agent State for such weeks. If a claimant thereafter moves to another agent State and files an interstate claim under the interstate benefit program, he or she may receive extended compensation only if an extended benefit period is in effect for the week compensation is claimed. If such a period is not in effect, the liable State would be prohibited from paying extended compensation under that claim since the individual will have previously received "the first 2 weeks for which extended compensation is payable" pursuant to an interstate claim filed in a State with an "off" trigger. Since the restriction in new subsection (c) is only applicable to interstate claims filed under the interstate benefit payment plan, it does not apply so as to deny extended compensation to an individual who files a claim classified as either a visiting, transient, or courtesy claim.

When Canada is the agent State, the denial of extended benefits applies to the same extent as for any other claim filed from an agent State that is not in an Extended Benefit Period. Canada is not a party to the Federal-State Extended Unemployment Compensation Act.

The provision in new section 202(c)(3) rendering the requirements in section 3304(a)(9)(A), FUTA, inapplicable to any denial required by these amendments, was included to avoid the conflict that would otherwise have occurred in the Federal law upon enactment of new subsection (c). Paragraph (3) has no other effect.

Procedural instructions for implementing this new requirement and amendments to the current Extended Benefit regulations to reflect these changes will be issued at a later date.

6. Amendment Relating to length of Service Needed to Qualify for UCX Benefits. Section 415 of P.L. 96-364 also amended Title 5 of the United States Code to increase the length of service in the Armed Forces that is required for former

members to establish eligibility for unemployment compensation. Under the provisions of subparagraph (A) of section 8521(a)(1) of Title 5, U.S.C., as amended, a service member must now have 365 days or more of active service in order to be eligible for unemployment compensation instead of the 90-day period formerly required by that section. The amendment applies with respect to any new (first) claims filed for unemployment compensation on or after October 1, 1980. Instructions for implementing this change are being provided in a separate document.

The attachment contains draft language which can be used by States to implement the new pension deduction standard and the amendment providing for the cessation of extended benefits in the prescribed circumstances discussed earlier.

7. UIPL No. 24-80. This letter supplements UIPL No. 24-80 dealing with the Federal pension deduction standard prior to amendment by P.L. 96-364, except that in those respects in which the two letters are inconsistent, this letter supersedes UIPL No. 24-80.

8. Action Required. SESAs are requested to:

a. Take necessary action to assure by change in the State law that pension payments received by claimants are deductible under the State law as required by section 3304(a)(15), FUTA, as amended, and that extended compensation is denied in the circumstances required by new subsection (c) of section 202 of the Federal-State Extended Unemployment Compensation Act of 1970 as amended; and,

b. Inform the regional offices of the necessity for action or no action invoking provisos included in existing pension deduction provisions which, when invoked, invalidate such provisions, and indicate what other action will be taken to assure that the State law continues to be applied consistent with the requirements of section 3304(a)(15), FUTA, if those provisos are invoked.

9. Inquiries. Inquiries should be directed to your regional office.

Draft Language to Implement Section 3304(a)(15), FUTA,
as Amended by P.L. 96-364,-- Federal Pension Deduction
Standard

The following draft provision provides for reduction of pensions as required by the amendments to section 3304(a)(15), and includes two options for adjusting the pension to take into account contributions made by the individual.

"For any week with respect to which an individual is receiving a pension (which shall include a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment) under a plan maintained or contributed to by a base period or chargeable employer (as determined under applicable law), the weekly benefit amount payable to such individual for such week shall be reduced (but not below zero),

(a) by the pro-rated weekly amount of the pension after deduction of that portion of the pension that is directly attributable to the percentage of the contributions made to the plan by such individual; or

(Alternative to subsection (a))

(a) by one-half the pro-rated weekly amount of the pension if at least half but less than 100 percent of the contributions to the plan were provided by such individual; or

(b) by the entire pro-rated weekly amount of the pension if subsection (a) or subsection (c) does not apply; or

(c) by no part of the pension if the entire contributions to the plan were provided by such individual, or by the individual and an employer (or any other person or organization) who is not a base period or chargeable employer (as determined under applicable law).

(d) No reduction shall be made under this section by reason of the receipt of a pension if the services performed by the individual during the base period (or remuneration received for such services) for such employer did not affect the individual's eligibility for, or increase the amount of, such pension, retirement or retired pay, annuity, or similar payment. The conditions specified by this subsection shall not apply to pensions paid under the Social Security Act or the

Railroad Retirement Act of 1974 (or the corresponding provisions of prior law. Payments made under such Acts shall be treated solely in the manner specified by subsections (a), (b) and (c) of this section."

The provisions of the alternative to subsection (a) are designed to facilitate administration of this option by providing a practical means of adjusting the deduction to take into account the individual's contribution to the pension fund without extensive calculations.

Draft Language to Implement new section 202(c) of the Federal-State Extended Unemployment Compensation Act of 1970 as amended by P.L. 96-364--Cessation of extended benefits paid under an interstate claim in a State when no extended benefit period is in effect.

Following the enactment of P.L. 91-373, which established the permanent Federal-State extended benefits program, we issued the Draft Legislation to Implement the Employment Security Amendments of 1970--H.R. 14705. Each State received a copy of that document for use in implementing P.L. 91-373. A section was included on pages 119-128 setting forth recommended language to implement the extended benefit program. The following draft language is intended to be incorporated into the framework of that section and should be inserted as new subsection (g).

"(g) (1) Cessation of extended benefits when paid under an interstate claim in a State where extended benefit period is not in effect.

Except as provided in paragraph (2), an individual shall not be eligible for extended benefits for any week if:

"(A) extended benefits are payable for such week pursuant to an interstate claim filed in any State under the interstate benefit payment plan, and

"(B) no extended benefit period is in effect for such week in such State.

"(2) Paragraph (1) shall not apply with respect to the first 2 weeks for which extended benefits are payable (determined without regard to this subsection) pursuant to an interstate claim filed under the interstate benefit payment plan to the individual from the extended benefit account established for the individual with respect to the benefit year."

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Manpower Administration
Washington, D.C. 20213

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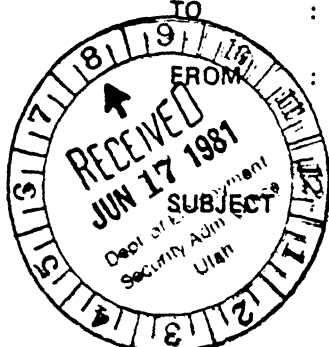
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June 9, 1981

DIRECTIVE: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 7-81
CHANGE 1 *and Change 2*

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : T. JAMES WALKER
Administrator
Administration and Management

Interpretation of Provisions in Section 3304(a)(15)(B), FUTA, Permitting State laws to Take into Account Employee Contributions to Pension Plans Under Pension Reduction Requirement



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<input checked="" type="checkbox"/> Asay	<input checked="" type="checkbox"/> Boag
<input checked="" type="checkbox"/> Astin	<input checked="" type="checkbox"/> Bromley
<input checked="" type="checkbox"/> McCafferty	<input checked="" type="checkbox"/> Barker
<input checked="" type="checkbox"/> Brickett	<input checked="" type="checkbox"/> Richards
<input checked="" type="checkbox"/> Price	<input checked="" type="checkbox"/> Sandstrom
<input checked="" type="checkbox"/> Webb	

FOR DISPOSITION

1. Purpose. To inform SESAs of the interpretation of subparagraph (B) of section 3304(a)(15) of the Federal Unemployment Tax Act giving States the option of limiting by law the amount to be deducted from an individual's weekly benefit entitlement by reason of receipt of a pension payment based on the previous work of the individual, by taking into account the individual's contributions for the pension.

2. References. Section 414, P.L. 96-364 (H.R. 3904); UIPL 24-80 and UIPL 7-81.

3. Background. UIPL 7-81, issued November 7, 1980, contained an explanation of the amendments to section 3304(a)(15) made by section 414 of P.L. 96-364. With reference to subparagraph (B), relating to the option to take into account employee contributions to pension plans, it was stated on page 5 of UIPL 7-81 that a State may eliminate from the pension amount to be deducted from a benefit amount payment "any part of the pension payment equivalent to the employee's share of the contributions to the pension fund" or "a representative percentage of the pension," as examples of acceptable types of limitations on pension reduction. In UIPL 7-81 it was further stated that subparagraph (B) gave States "broad latitude" in exercising the option; however, it also contained an expression of the view that any limitation adopted by a State "should be consistent with the basic purpose of the option which is to allow elimination of the individual's share of the contributions to the pension fund in determining the amount of pension to be deducted." In UIPL 24-80, a similar view had been expressed earlier with respect to two bills in Congress late in 1979 and

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	May 31, 1982 <i>10/31/82</i>

early in 1980 to amend the pension reduction requirement in language identical to subparagraph (B). The view was expressed on page 5 of UIPL 24-80 that State laws "can provide for deduction of a representative percentage of the pension as determined under the State law." (Emphasis added). A more recent decision on the meaning of subparagraph (B) necessitates changes on page 5 of UIPL 7-81, and supersedes the sentence on page 5 of UIPL 24-80 from which the above quote is taken.

Subparagraph (B) is an optional exception to the general rule which requires the deduction of pensions from unemployment benefits dollar for dollar, and is, therefore, to be narrowly construed to effectuate its purpose. Its purpose, as reflected in its legislative history, is to reduce the pension offset amount by an amount "consistent with" or "related to" contributions toward the pension made by the worker. The "flexibility" given to the States, mentioned in the legislative history, refers to the amendments to section 3304(a)(15) which limited the deduction requirement (1) to pension payments made under a plan maintained or contributed to by a base period or chargeable employer, in contrast to pension payments based upon the previous work of the individual in his work history; and (2) to pension payments where eligibility for the pension or the amount of the pension is affected by work performed after the beginning of the base period (except social security and railroad retirement pensions); and which further gave to the States the option to take into account by their laws contributions made by individuals for their pensions.

Reduction of the pension offset amount is "consistent with" the worker's contributions when, as explained by Congressman Brodhead, one of the conferees on the bill, a State limits "the offset to one-half the amount of the social security pension received by an individual who qualifies for unemployment benefits." Congressional Record, page H 9180, September 19, 1980. A similar statement was made and example given by Congressman Corman, Chairman of the Subcommittee on Public Assistance and Unemployment Compensation of the House Ways and Means Committee, which had jurisdiction of the bill, with respect to a provision identical to subparagraph (B) in H.R. 5507, Congressional Record page H 623, February 6, 1980. A similar example was given by Senator Bradley, one of two co-sponsors of the amendment in H.R. 3904. Congressional Record, page S 12901, September 18, 1980. States would be permitted by the option to reduce the offset amount by "that part of a pension which reflects a return of employee contributions." Senate Report No. 96-472, page 3, December 10, 1979. States would be permitted to apply the reduction

"in a manner which provides a reasonable adjustment" to take into account an employee's contributions to the pension plan. Ibid, page 12.

4. Interpretation of Subparagraph (B). It is clear from this legislative history that it was the intent of Congress to allow States to take into account employee contributions for a pension in an amount up to the proportion by which the employee contributed to the pension plan from which the payments are received. Subparagraph (B) is construed, in accordance with its language and related legislative history, as permitting a State to provide in its law for limiting the pension deduction otherwise required under subparagraph (A) of section 3304(a)(15) by reducing the offset amount by an amount that is the ratio of the employee's contributions to total contributions to the plan or system by both the employee and his or her employer(s). From the statutory language and the examples given in the legislative history, it is clear that the amount of the pension that may be disregarded may be no greater than such ratio of the employee's contributions.

In the case of pension plans or systems where the employee makes all of the contributions to the principal forming the basis of the pension, none of the pension would be deductible. This is so because if a base period or chargeable employer had not made any financial contribution to the principal of the pension for the employee, the amount received as a pension would not fall within the scope of subparagraph (A)(i) of section 3304(a)(15), and the provisions of subparagraph (B) would not be reached.

5. Determination of Proportion of Employee Contributions. It will be necessary in any State law provision that is consistent with subparagraph (B) to provide for reasonably based determinations of the proportion of employee contributions to a pension plan or system, so that the amount of any pension to be disregarded for benefit reduction purposes will not exceed the ratio of the employee's contributions to the total contributions to the principal of the plan or system by the employee and his or her employer(s). Because of the different types of pension plans and systems that exist, and the specific data that may be readily available to SESAs for making determinations of the ratios of employee contributions, it is recommended that the State laws confer broad authority for making reasonably based determinations.

Depending upon the type of plan or system and specific data available, the following rules apply:

a. General rule, where proportion of employee contributions to total contributions is known.

(1) Add values of total employee and employer contributions to find amount of total contributions.

(2) Divide amount of total employee contributions by total of all contributions to find proportion of contributions paid by employee.

(3) Multiply the ratio representing employee contributions by the amount of the employee's weekly pension to find amount of pension attributable to employee contributions.

Example: X, over his working life, contributed \$2500 to his employer's (ABC's) defined contribution pension plan. ABC also contributed \$7500 to the plan on X's behalf. When X retires, he will receive \$100 a week as a pension benefit. The portion of this pension attributable to X's contributions is calculated as follows:

Total amounts contributed on X's behalf: \$10,000 (\$2500 + \$7500).

Ratio of contributions attributable to X: 25% (\$2500/\$10,000).

Weekly pension amount attributable to X's contributions: \$25 (25% x \$100).

b. Rule where proportions of both employee and employer contributions are known.

Where the ratio of employee and employer contributions have been fixed at specified proportions in the plan or system over a substantial period of time preceding the employee's retirement, such ratio can be adopted without further determination for the purposes of a subparagraph (B) type of provision. For example, under the system for primary social security and Federal civil service retirement, the employee contributions are set at 50 percent, and it is not necessary to inquire any further.

c. Rule where amount of employer contributions is not known.

In situations where it is not possible to determine exactly the aggregate amount of employer contributions paid to a pension plan on an individual's behalf (as often is the case where the employee participates in a defined benefit plan), any method of computation that reasonably reflects or

approximates the proportion of contributions made by the employee will be acceptable.

6. Scope of Letter. The interpretations contained in this letter apply solely to section 3304(a)(15), FUTA, and have no application to any other Federal statute.

7. Revised Page 5. This letter transmits a change to page 5 of UIPL 7-81.

8. Action Required. SESAs are requested to substitute the attached page 5 for the one contained in UIPL 7-81, November 7, 1980, and retain this Change 1 to UIPL 7-81. The substituted text is in the first paragraph. There are, in addition, revisions in the second paragraph for consistency with the changes in the first paragraph.

The interpretations contained in this letter are effective for the certification period beginning November 1, 1980. SESAs should apply these interpretations as soon as possible after receipt of this letter.

9. Inquiries. Questions should be directed to the appropriate Regional Office.

Attachment

reduction to take into account contributions made by the individual for the pension. . . ." Suparagraph (B) is construed, in accordance with its language and related legislative history, as permitting a State to provide in its law for limiting the pension deduction otherwise required under subparagraph (A) by reducing the offset amount by an amount that takes "into account contributions made by the individual for the pension." From the examples given in the legislative history, it is clear that the offset amount reflecting the individual's contributions is intended to be in a maximum amount which is no greater than the proportion that is the ratio of the individual's contributions made to the pension plan, from which pension payments are received, to total contributions made to the pension plan by the individual and the employer(s) of the individual in the pension plan or system.

Determinations and review decisions on pension deduction issues should include specific findings on each of the elements involved. The kinds of findings will depend upon the provision adopted by the State. For example, when a social security pension is involved, there should be a finding on whether the individual is a primary beneficiary, because only primary insurance benefits are required by the Federal requirement to be deducted. If the provision is limited to pensions maintained or contributed to by a base period employer, the findings should specifically indicate whether a base period employer is involved. When an individual is receiving more than one pension, it should be specifically found whether only one or all meet the deduction requirements. It is also required that determinations and appeal decisions particularly include the method by which a monthly pension is prorated to a weekly amount, and the basis for the determination of the employee's contribution and the amount taken into account in arriving at the amount deducted.

A number of States that amended their laws to meet the requirements of section 3304(a)(15) prior to its amendment by P.L. 96-364, also included provisos to render those provisions inoperative if they were not required to be included in the State law as a condition for full tax credit against the tax imposed by the FUTA. Those provisos were included in anticipation of the possible deletion of the Federal pension deduction standard. Since no deletion occurred, a question has arisen as to the impact of the Federal law changes on these provisos. Whether or not those changes will require the States to invoke those provisos is, of course, a matter to be decided by State officials. However, since the prior provisions of section 3304(a)(15) are more restrictive than the revised provisions, a State law which contains the elements of the prior provision would nevertheless continue to be consistent with section 3304(a)(15) as amended. Therefore, it is strongly recommended that States take action or refrain from taking action under such provisos only if it is assured that

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Employment and Training Administration
Washington, D.C. 20213

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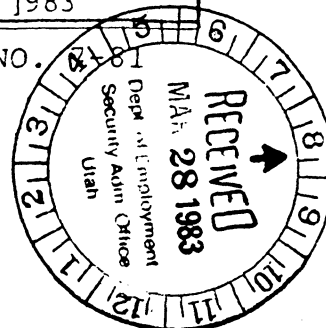
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March 11, 1983

DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO.
CHANGE 2

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : ROYAL DELLINGER
Administrator
for Regional Management



SUBJECT : Revocation of Change 1 to UIPL 7-81 and Reinstatement of Original Provisions of UIPL 7-81

1. Purpose. To announce reinstatement of the interpretation of subparagraph (B) of Section 3304(a)(15), FUTA, set forth in UIPL 7-81 issued on November 7, 1980.

2. References. UIPL 7-81 and Change 1.

3. Background. Under subparagraph (B) of Section 3304(a)(15), FUTA, a State law "may provide for limitations on the amount of any such reduction [of unemployment benefits otherwise required under subparagraph (A)] to take into account contributions made by the individual for the pension . . ." Basic UIPL 7-81 stated that a State may, under this option, provide by law for eliminating any part of the pension payment "equivalent to the employee's share of the contributions to the pension fund" or for eliminating "a representative percentage of the pension as determined under the State law." It further stated that, although "broad latitude" is provided to a State, "any limitation adopted should be consistent with the basic purpose of the option which is to allow elimination of the individual's share of the contributions to the pension fund in determining the amount of pension to be deducted."

Artz
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☐ Finch
☐ Sandstrom

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☒ Pickett
☒ Price
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Change 1 to UIPL 7-81 superseded the foregoing statements and prescribed what the U.S. Court of Appeals, District of Columbia Circuit, later, in a suit challenging the revised interpretation of subparagraph (B), described in part as rulemaking subject to the public notice and opportunity for comment requirements of the Federal Administrative Procedure Act. As a result, there remains in effect an injunction against enforcement of the requirements of subparagraph (B) of Section 3304(a)(15) as set forth in section 5 of Change 1.

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EXPIRATION DATE

October 31, 1983

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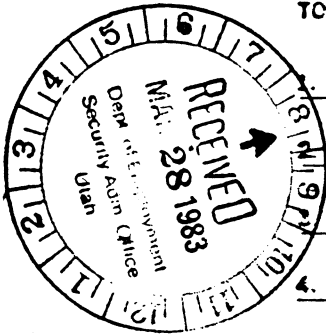
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To resolve this matter and overcome the injunction, the Department is reinstating the position taken in basic UIPL 7-81. Therefore, States may provide for taking into account employee contributions to pension plans to the extent provided in the State laws. It will no longer be required that the amount of employee contributions taken into account not exceed the proportion of an employee's contribution to the pension plan. States are encouraged, nevertheless, to carry out the intent of Congress in enacting subparagraph (B) by not giving greater effect to employee contributions than the proportion of employee contributions bears to total contributions to the pension plan.

4. Decision. The position set forth in the original UIPL 7-81 is hereby reinstated. Change 1 to UIPL 7-81 is hereby revoked.

5. Action Required. Administrators are requested to delete Change 1 to UIPL 7-81 and provide the above decision to appropriate staff.

6. Inquiries. Questions should be directed to the appropriate regional office.



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5-16-83

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ALL REGIONAL ADMINISTRATORS		

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As Requested	For Correction	Prepare Reply
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REMARKS

Subject: UIPL 7-81, Change 2, dated 3/11/83

Destroy the advance copy of the subject directive.

Minor changes were made in the 4th and last lines of the second paragraph of "background" and in the 2nd line of "Action Required."

Copy of the corrected UIPL attached.

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

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Directives Control	Phone No. 8-376-6826

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