



In the Matter of

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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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Before: BURTON S. STERNBURG
Administrative Law Judge

RECOMMENDED DECISION

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 the undersigned Administrative Law Judge for purposes of conducting a hearing and issuing both a proposed and final 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. "

A hearing was held in the captioned matter 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 on 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 my Proposed Recommended Decision of October 10, 1974, I make the following findings of fact, conclusions of law and recommendations:

Findings of Fact

While the parties agree on the facts underlying the instant dispute, they differ as to the interpretation and application of the 1970 amendments to the Federal Unemployment Tax Act with respect to the issue of conformity.

The Employment Security Amendments of 1970, Public Law 91-373, 84 Stat. 695, enacted into law on August 10, 1970, amended the Federal Unemployment Tax Act, 26 U.S.C. 3301-3311, by adding to section 3304 (a) of that Act certain new requirements for approved State unemployment compensation laws. Insofar as is pertinent to this matter the new requirements were to be added to the New York unemployment insurance law effective no later than January 1, 1972.

Paragraph (6)(A) of section 3304(a) of the Federal Unemployment Tax Act is a new requirement added to the Federal law by section 104(a) of the Employment Security Amendments of 1970. Section 3304(a)(6)(A) requires an approved State unemployment compensation law to provide for the payment of unemployment compensation to certain employees of the State and to employees of certain nonprofit organizations, in the following terms:

"(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; except that, with respect to service in an instructional, research, or principal administrative capacity for an institution of higher education to which section 3309(a)(1) applies, compensation shall not be payable based on such service for any week commencing during the period between two successive academic years (or, when the contract provides instead for a similar period between two regular but not successive terms, during such period) to any individual who has a contract to perform services in any such capacity for any institution or institutions of higher education for both of such academic years or both of such terms."

Section 3309(a)(1), which is referred to in new section 3304(a)(6)(A), prescribes in the following language the services on the basis of which unemployment compensation is required by section 3304(a)(6)(A) to be paid under the State law:

"(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 the State, or any instrumentality of the State or of the State and one or more other States, 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)."¹

Subsections (b) and (c) of section 3309, which are referred to in section 3309(a)(1), provide that:

"(b) Section Not To Apply To Certain Service.--This section shall not apply to service performed--

"(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

"(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

"(3) in the employ of a school which is not an institution of higher education;

"(4) in a facility conducted for the purpose of carrying out a program of--

"(A) rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or

¹Paragraphs (7) and (8) of section 3306(c) referred to above, read as follows:

(7) service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions; and any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 3301.

(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., nonprofit organizations].

"(B) providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market,

by an individual receiving such rehabilitation or remunerative work;

"(5) as part of an unemployment work relief or work-training program assisted or financed in whole or in part by any Federal agency or an agency of a State or political subdivision thereof, by an individual receiving such work relief or work training; and

"(6) for a hospital in a State prison or other State correctional institution by an inmate of the prison or correctional institution."

"(c) Nonprofit Organization Must Employ 4 or More.--This section shall not apply to service performed during any calendar year in the employ of any organization unless on each of some 20 days during such calendar year or the preceding calendar year, each day being in a different calendar week, the total number of individuals who were employed by such organization in employment (determined without regard to section 3306(c)(8) and by excluding service to which this section does not apply by reason of subsection (b)) for some portion of the day (whether or not at the same moment of time) was 4 or more."

Paragraph (12) of section 3304(a) of the Federal Unemployment Tax Act is another new requirement added to the Federal law by section 108(a) of the Employment Security Amendments of 1970. It requires an approved State unemployment compensation law to provide for the right of each political subdivision of the State to elect to have compensation payable under the State law to employees of the hospitals and institutions of higher education operated by the political subdivision, in the following terms:

"(12) each political subdivision of the State shall have the right to elect to have compensation payable to employees thereof (whose services are not otherwise subject to such law) based on service performed by such employees in the hospitals and institutions of higher education (as defined in section 3309(d)) 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 basis, in the same amount, on the same terms, and subject to the same conditions as compensation which is payable on the basis of similar service for the State which is subject to such law."

Chapter 1027 of the Laws of New York, which became a law on July 2, 1971, amended the New York Unemployment insurance law in a number of respects so that the services referred to in section 3304(a)(6)(A) of the Federal Unemployment Tax Act would be covered by the State law

on January 1, 1972, and so that the services referred to in section 3304(a)(12) of the Federal Unemployment Tax Act could be covered by an election by a political subdivision on and after January 1, 1971, except as noted below.

By virtue of existing provisions of the New York unemployment insurance law and the amendments made by Chapter 1027, the exclusions from the term "employment" which are contained in subdivisions 8, 9, 13, and 14 of section 511 of the New York unemployment insurance law were made applicable to the services referred to in section 3304 (a)(6)(A) of the Federal Unemployment Tax Act which otherwise were covered by the State law. By virtue of an amendment to section 561.4 of the State law the exclusions in subdivisions 8, 9, 13, and 14 of section 511 were made applicable to the services referred to in section 3304 (a)(12) of the Federal Unemployment Tax Act with respect to which political subdivisions otherwise are afforded the right to elect coverage.

The exclusions contained in subdivisions 8, 9, 13, and 14 of section 511 read 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 of any person actually in attendance during the day time as a student in an elementary or secondary school.
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 years.

These exclusions from coverage are also applied under New York State law for employees of "private, for profit" employers. There are no similar exclusions in the Federal Unemployment Tax Act, and "private, for profit" employers are liable for the Federal tax on wages paid for the aforementioned excluded employments.

Discussion

As noted above, N.Y. State does not dispute the facts but merely the Department of Labor's interpretation any application of them with respect to the 1970 amendments. Thus New York State contends (1) that the Department of Labor has misinterpreted the 1970 amendments and (2) that even accepting such misinterpretation, the inconsequential and irrelevant nature of the deviations occasioned by subdivisions 8, 9, 13, and 14 of section 511, New York unemployment compensation law compels a finding that such law conforms to the Federal Unemployment Tax Act as amended. In essence, New York State argues that substantial conformity with the statutory requirements is all that is needed for certification.

New York State would interpret the Amendments to only require that "coverage for services performed for non-profit organizations and State institutions is to be co-extensive with the coverage the State provides for services performed for all other employers". "In other words, the State is to pay unemployment insurance benefits on work for non-profit organizations just as if they were identical to any other employer in the State."

The Department of Labor, on the other hand, takes the position that its interpretation of the 1970 amendments is both correct and reasonable and must therefore prevail. Additionally, the Department of Labor takes the position that irrespective of the "inconsequential impact" of the New York State exclusions, a literal and logical reading of the amendments allow for no variance with respect to conformation to the Federal Unemployment Tax Act, as amended.

Section 3309(a)(1), Federal Unemployment Tax Act, sets forth basic coverage for nonprofit organizations and State and local hospitals and institutions of higher education. Subsections (b) and (c) set forth exceptions to that coverage. There is no question but that section 3309(a)(1) covers all employment in such organizations and governmental institutions referred to in paragraphs (7) and (8) of section 3306(c), except as that coverage is narrowed by 3309 (b) and (c).

Thus, section 3309(a)(1) states that, except as provided in subsections (b) and (c) of that section "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) [which refers to nonprofit organizations], and (B) service performed in the employ of the State, or any instrumentality of the State or of the State and one or more other States, 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)."

Subsection (b) of section 3309 sets forth six specific categories of services to which it is provided that section 3309 "shall not apply". Subsection (c) of section 3309 provides that coverage is not required for service performed in the employ of a nonprofit organization unless the nonprofit organization, in the current or preceding calendar year, employed at least four persons.

Section 3306(c), which is referred to above in paragraphs (A) and (B) of section 3309(a)(1), defines the term "employment" for Federal Unemployment Tax Act purposes. That definition says, in pertinent part, that "For the purposes of . . . , the term 'employment' means . . . any service of whatever nature performed . . . by an employee for the person employing him . . . except . . . [then eighteen specific exclusions are listed]. Two of those exclusions -- those found in paragraphs (7) and (8) -- are the exclusions specifically referred to in paragraphs "(A)" and "(B)" of section 3309(a)(1) set out above, and which provide the heart of the coverage under the 1970 Amendments. Paragraph (7) refers to "service performed in the employ of a State, or any political subdivision thereof . . ." Paragraph (8) refers to "service performed in the employ of a religious, charitable, educational, or other organization . . . which is exempt from income tax . . . [i.e., a nonprofit organization]."

The definition of the term "employment", therefore, makes it absolutely clear that employment means every employee of a covered employer, unless there is a specific exception set out to the contrary in the Act. Thus, when reference is made to employment covered by paragraphs (7) and (8) of the section which defines "employment" -- section 3306(c) -- it means "any service of whatever nature performed by an employee" of an organization or institution covered by paragraph (7) or paragraph (8).

The only questions then remaining are whether there is, in fact, an exclusion set out specifically in the Federal Unemployment Tax Act, for the types of employees and jobs involved in this proceeding, and whether those jobs or employees are excluded from coverage "solely by reason" of paragraphs (7) and (8) of section 3306(c). If there is no specific exclusion for these employees and jobs in the Federal Unemployment Tax Act, and if the sole reason for their not being covered by the Act is the exclusions provided by paragraphs (7) and (8), then the broad definition of employment would clearly cover the employees and jobs at issue here, and New York State would be required to cover them in its law. As noted below, I find, in agreement with the Department of Labor, that there is no specific exclusion for these employees and jobs in the Act and that the sole reason for their absence of coverage is paragraphs (7) and (8).

The foregoing analysis constitutes, in essence, the Department of Labor's interpretation of the 1970 Amendments to the Federal Unemployment Tax Act. Inasmuch as such analysis or interpretation comports with a literal and logical reading of the 1970 Amendments as applied to the then existing Act, I find it to be reasonable and hereby adopt and subscribe to such interpretation..

In this latter context, it is noted that as a general rule interpretations issued by agencies or administrators empowered and authorized to administer legislative acts are entitled to controlling weight, subject only to the test of "reasonableness." Cf. Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294; Udall v. Tallman, 380 U.S. 1; Brennan v. Southern-Contractors Service, 492 F. 2d 498, 501; Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 381.

Accordingly, in view of the foregoing, I need not and do not pass upon the merits of the conflicting interpretation urged by New York State, save to note that it does not, in my view, constitute a more reasonable interpretation of the amendments than that presented by the Department of Labor. To do otherwise, and possibly sustain New York State's interpretation, which is unsupported by any significant and/or compelling legislative history, would have a disastrous effect on the uniform application of the Act. Thus, each of the remaining forty nine States could conceivably present or propound other supportable interpretations of the Act, and amendments thereto, in order to justify their respective individual State actions.

Applying the above interpretation to the New York State law, I find that New York State's unemployment insurance law fails to provide coverage for the following jobs and employees at nonprofit organizations and State and local hospitals and institutions of higher education:

- (1) golf caddies;
- (2) students in elementary or secondary schools 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.

A comparison of the afore-cited exclusions from coverage under the New York State law with the exclusions set out in section 3309(b) and (c) of the Act discloses that the New York exclusions are no where to be found in the Federal Unemployment Tax Act. Thus, the New York State exclusions are within, the definition of employment set forth in section 3306(c) of the Act.

Moreover, but for the exclusions contained in paragraphs (7) and (8) of section 3306(c), there is no question that the employment of the four categories of employees currently excluded by the New York State law would be covered by the definition of "employment" in section 3306(c) which speaks of "any service of whatever nature performed . . . by an employee for the person employing him." However, since the 1970 Amendments to the Act make it clear that the exclusions in paragraphs (7) and (8) shall not be applicable to non-profit organizations and State and local hospitals and institutions of higher learning for purposes of State law coverage under such amendments, all employment in these organizations and governmental units is now covered.

In view of the foregoing, and since the New York State law does not cover the above-quoted four categories of employees, I find that the New York State law is not in conformity with the requirements set forth in the Federal Unemployment Tax Act, as amended.

While New York State does not contest that its law is not in conformity in all respects with the Federal Unemployment Tax Act as interpreted above by the Department of Labor, it does take issue with the test applied by the Department of Labor, i.e., total conformity. Thus, according to New York State, the true test should be "substantial" rather than "total" conformity. In support of this latter position, New York State contends that the impact on the Act by the exclusion of the four categories is de-minimus, if not non-existent, since some of the excluded categories would never have an opportunity for employment with the organizations involved. New York State further points out that the effect of the Department of Labor's interpretation would cause New York State's non-profit employers to make payments not required of profit-making concerns.

While I sympathize with New York State's plight in the above respect, I find no qualifying language and/or exceptions to the certification requirements set forth in Section 3304 (c) of the Federal Unemployment Tax Act with respect to the inclusion of the "provisions specified in subsection (a)" of Section 3304. In these circumstances, and absent any clear congressional intent to the contrary, I deem New York State's argument to be without merit.² As to New York State's argument with respect to the disruption the Department of Labor's interpretation will have on the equal application of its own unemployment law, suffice it to say that New York must take the good with the bad. Thus, New York having voluntarily opted to have a state plan and receive the

²The word "substantial" does, however, appear before "compliance" in Section 3304(c). Thus, it is entirely possible that New York, which I have found not to be in conformity with the requirements, may well be in "substantial compliance." However, inasmuch as the issue of "substantial compliance" was not fully litigated before me, I make no findings or recommendations thereon.

benefits of the unemployment tax, it then is obligated to conform to the conditions and/or requirements precedent to the vesting of same.

Conclusions of Law

1. Section 3304(a)(6)(A) of the Federal Unemployment Tax Act expressly requires an approved State unemployment compensation law, on and after January 1, 1972 in the case of New York's unemployment insurance law, to cover under the State law, for the purpose of paying unemployment compensation, all services in employment described in that section and in section 3309(a)(1) of the Federal Unemployment Tax Act; except that the State law may exclude the services described in section 3309(b) of the Federal Unemployment Tax Act, the services described in section 3306(c)(7) of the Federal Unemployment Tax Act which are not specifically described in section 3309(a)(1)(B), and any of the services described in the provisions of section 3306(c) of the Federal Unemployment Tax Act other than the services described in paragraphs (7), and (8) of that section.
2. Section 3304(a)(12) of the Federal Unemployment Tax Act expressly requires an approved State unemployment compensation law, on and after January 1, 1972 in the case of New York's unemployment insurance law, to provide for the right of each political subdivision of the State to elect to cover under the State law, for the purpose of paying unemployment compensation, all services performed in the employ of the hospitals and institutions of higher education operated by the political subdivision, and the services required to be covered by such an election are the same as the services for State hospitals and institutions of higher education which are required by section 3304(a)(6)(A) of the Federal Unemployment Tax Act to be covered by the State law.
3. The services excluded by subdivisions 8, 9, 13, and 14 of section 511 of the New York unemployment insurance law are not the same as or similar to any of the services described in section 3309(b), or those services described in section 3306(c)(7) which are not among the services specifically described in section 3309(a)(1)(B), or any of the services described in the provisions of section 3306(c) (other than paragraphs (7) and (8) of that section), of the Federal Unemployment Tax Act, and therefore are services which are required to be within the scope of provisions meeting the requirements of section 3304(a) (6) (A) and section 3304(a) (12) of the Federal Unemployment Tax Act.
4. The payment of unemployment benefits to persons covered by the State law pursuant to the provision required by sections 3304(a)(6)(A), "in the same amount, on the same terms, and subject to the same conditions" as apply to other persons covered by the State law, pertains to entitlement to and amount of benefits rather than to whether certain services may be excluded from coverage by the State law.
5. The payment of unemployment benefits to persons covered by the State law pursuant to the provision required by section 3304(a)(12), "on the same basis, in the same amount, on the same terms, and subject to the same conditions" as apply to other persons performing similar services for the State which are covered by the State law, pertains to entitlement to and amount of benefits rather than whether certain services may be excluded from coverage by the State law.

6. The third sentence of section 3304 (c) of the Federal Unemployment Tax Act requires an approved State unemployment compensation law to include each of the provisions required by reason of the enactment of the Employment Security Amendments of 1970 to be included therein. As this provision for required conformity is stated in the law it does not permit of deviations from the requirements that Congress has prescribed. A State law, as a condition of its continued approval under section 3304(a), must include each of the provisions required by sections 3304 (a) (6) (A) and 3304 (a) (12) to be included therein.

7. In devising the terms of its unemployment compensation law according to its interests and concerns a State must yield wherever a conflict between the State's interests and the requirements of the Federal Unemployment Tax Act arise, as a condition of the continued approval of the State law with respect to the tax credit provided for in section 3302 (a) of the Federal Unemployment Tax Act.

8. The State of New York has failed to amend the New York unemployment insurance law so as to make the exclusions of service in subdivisions 8, 9, 13, and 14 of section 551 of the New York unemployment insurance law inapplicable to the provisions required by sections 3304 (a) (6) (A) and 3304 (a) (12) of the Federal Unemployment Tax Act, as amended, to be included in the New York unemployment insurance law.

9. From January 1, 1972 to the date of the hearing in this matter the New York unemployment insurance law accordingly has failed to conform to the requirements of section 3304 (a) of the Federal Unemployment Tax Act, as amended, by the Employment Security Amendments of 1970.

RECOMMENDATION

In accordance with the findings of fact and conclusions of law set forth above, it is hereby recommended that the Secretary of Labor find that the New York State Unemployment Insurance Law fails to contain all the requirements set forth in "Employment Security Amendments of 1970."

BURTON S. STERNBURG
Administrative Law Judge

Dated: November 11, 1974
Washington, D.C.