

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 114

TO: R. F. Martin – Director

FROM: W. D. Holoman – Chief Counsel

RE: Interpretation of Section 96-8(g)(2)(3)(4) and (5) of the Employment Security Law of North Carolina – Employment – Services Performed Within and Without This State – Interstate Employment

For the better administration of our Employment Security Program it is felt that an interpretation of the term “employment” should be made in respect to services performed by an individual solely within this state or both within and without this state, as contained in Section 96-8(g)(2), (3), (4) and (5) of the Employment Security Law.

Interstate employment or work which is performed in two or more states is, of course, subject to the Federal Unemployment Tax Act since it is performed in the United States. The place of contract, the citizenship or residence of an employer or of an employee, are all immaterial if the work is performed in the United States. Alaska, Hawaii, and the District of Columbia are considered as states for the purposes of the Federal Act.

The question of coverage of interstate employment under the state Employment Security Laws is a complicated one. The problem cannot be met by individual state acts alone, and uniformity of treatment is essential in order to avoid duplicate payments and returns, should more than one state claim that an employee is subject to its Employment Security Law.

Modern business structures are seldom confined to operations in one state. Many workers, such as salesmen, persons engaged in interstate transportation, and members of traveling repair crews, are constantly engaged in work of an interstate nature which must be performed in two or more states. It is of utmost importance that an employer knows in advance just what his liability may be for such employees under the law of any particular state. This is necessary and important in order that the employer may make the required reports and contribution payments under the proper state laws at the proper time and thus avoid confusion, penalties, and interest charges, and also to insure the proper payment of benefits to his employees. The problem of reporting is more often tied up with the payment of benefits under the various state laws. If an employer is required to report to several different states in which an employee works and is not able to consolidate the contributions on the

earnings of that particular employee in a particular state, the employee would be obliged to claim a portion of his benefits from each of several state funds.

Many of the states, therefore, have preferred either to cover all of an employee's employment by one employer or to exclude all of such employment, the result being that the employer's contributions on wages paid to one employee may be consolidated and paid into a single state fund. As a result, the employer need not be concerned with allocating to the various states the wages earned for employment performed in each state, and his reporting problem is greatly simplified. In turn, the employee is entitled only to benefits from the state fund into which his employer has paid contributions, although interstate agreements between the states have been arranged to enable him to file his claim for benefits through another state. Under such policy, double coverage is eliminated, and employers are saved a great deal of expense and inconvenience in making reports to more than one state on the same employee, and thus the administration of the contribution and benefit provisions of the state laws is simplified.

Section 96-8(g)(2), (3), (4) and (5) are quoted below for a ready reference and a better understanding of the subject being discussed:

“(2) The term ‘employment’ shall include an individual's entire service, performed within or both within and without this State if:

“(A) The service is localized in this State; or

“(B) The service is not localized in any state but some of the service is performed in this State, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this State, or (ii) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

“(3) Services performed within this State but not covered under paragraph (2) of this subsection shall be deemed to be employment subject to this chapter, if contributions are not required and paid with respect to such services under an employment security law of any other state or of the federal government.

“(4) Services not covered under paragraph (2) of this subsection, and performed entirely without this State, with respect to no part of which contributions are required and paid under an employment security law of any other state or of the federal government, shall be deemed to be employment subject to this chapter if the individual performing such service is a resident of this State and the Commission approves the

election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this chapter, and services covered by an election duly approved by the Commission in accordance with an arrangement pursuant to subsection (1) of § 96-4 shall be deemed to be employment during the effective period of such election.

“(5) Service shall be deemed to be localized within a state if:

“(A) The service is performed entirely within such state; or

“(B) The service is performed both within and without such state, but the service performed without such state is incidental to the individual’s service within the state; for example, is temporary or transitory in nature or consists of isolated transactions.”

Many of the states have adopted similar provisions to those quoted above, there being some slight variations.

An examination of the definition set forth above discloses that this standard definition lists in order the various factors which must be considered in determining employment coverage. The language of the Act as quoted above required application of the tests in the following prescribed sequence:

- (1) Is the individual’s service localized in this state or some other state?
- (2) If his service is not localized in any state, does he perform some service in the state in which his base of operations is located?
- (3) If he does not perform any service in the state in which his base of operations is located, does he perform any service in the state from which his service is directed and controlled?
- (4) If he does not perform any service in the state from which his service is directed and controlled, does he perform any service in the state in which he (has his residence)?

PLACE WHERE WORK IS LOCALIZED – The chief criterion of coverage is the localization of employment. Where all of the work is performed within this state, it is clearly “localized” in this state and constitutes “employment” under the law of this state. Where a part of the work is performed outside of this state, however, the entire work may still be “localized” within this state if the services which are performed outside of this state are incidental to the services within this state. The term “incidental” includes any service which is temporary or transitory in nature, or which consists of isolated transactions. So long as services are temporary or transitory or consist merely of isolated instances, they will be considered to be incidental to the principal employment in this state and the employee’s entire services will be subject

to our act. In determining whether the service of a worker is incidental or transitory in nature, some of the factors to be considered are:

1. Is it intended by the employer and the employee that the service be an isolated transaction or a regular part of the employee's work?
2. Does the employee intend to return to the original state upon completion of the work in the other state, or is it his intention to continue to work in the other state?
3. Is the work performed outside the state of the same nature as, or is it different from, the tasks and duties performed within the state?
4. How does the length of service with the employer within the state compare with the length of service outside the state?

Because of the wide variation of facts in each particular situation, no fixed length of time can be used as a yardstick in determining whether the service is incidental or not. The calendar year should, however, be used as a guide, provided that it is applied with some flexibility, taking into consideration the various circumstances under which the work is performed, such as the terms of the contract of hire, whether written or oral.

In some cases, it is difficult to determine whether or not services in one state are incidental to services performed in another state. The terms of the contract, if there be one, and also the facts in each case will have to be carefully considered. Even though there be no contract, the facts of employment and the intent will be the determining factors. The amount of time spent, or the amount of work performed outside of the state should not be decisive in determining that such work is incidental to work in this state. The weight of authorities indicates that when the "localization test" is used and it is determined that work is localized in this state, then no other factors need be considered; that is, the place of the "base of operations" or the "place from which the service is directed or controlled" or the "location of the employee's residence" is entirely irrelevant. For example, an employee may reside in Ohio, have his base of operations in Pennsylvania, and perform his work in North Carolina, with some incidental work in South Carolina. His work or services will be held to be localized in North Carolina, and his services will be covered by the North Carolina law, provided, of course, that his employer is otherwise subject to our law.

BASE OF OPERATIONS – Only if the service is not localized in any state is any other test necessary. If the service is not localized, it is necessary to determine where the individual's base of operations is and whether he performs any service in that state. The person who makes the coverage determination will have to ask, "Does the individual have his base of operations in this state and does he perform any service here?" If the answer to either question is "No", the next question is, "Is his base of operations in any state in which he performs some service?" If it is, all of his service is covered by the law of that state.

When services are normally or continually performed in two or more states, it cannot be said that the employment in one is incidental to employment in the other. In such case, the test of localization discussed above is not applicable, the services cannot be said to be localized in any one state, and the factor of "base of operations" must be considered. Under this test an employee's services may still be entirely covered by the law of a single state, even though they are not localized therein. If an employee's services are not localized in any state and some portion of the services is performed in the state where the "base of operations" is located, such state would be the proper one to receive contributions computed on the individual's entire employment. His residence is not material in determining his "base of operations" as it was under the localization test. For example, if his "base of operations" is North Carolina and his residence is in Kentucky, and if he does some work in both of these states (assuming that his work is not localized in any state), the location of his "base of operations" will be controlling, and his services will be subject to the North Carolina law. The "base of operations" is the place or fixed center of more or less permanent nature from which the employee starts work and to which he customarily returns in order to receive instructions from his employer, or communications from his customers or other persons, or to replenish stocks and materials, to repair equipment, or to perform any other functions necessary to the exercise of his trade or profession at some other point or points. The base of operations may be the employee's business office, which may be located at his residence, or the contract of employment may specify a particular place at which the employee is to receive his directions and instructions. This test is applicable principally to employees, such as salesmen, who customarily travel in several states.

In Appeal No. B-44-12-A-112, dated December 5, 1939, the Board of Review of Pennsylvania said:

"This term has been construed generally to mean the place from which the employee works or the place from which a start is made in his work and to which he customarily returns. It should not be confused with 'place from which service is directed or controlled', next mentioned . . . as a test for the determination of employment coverage. We are dealing here with two entirely different concepts. The term 'base for operations . . . is impliedly modified by the phrase 'of the employee'; the expression 'place from which service is directed or controlled' is impliedly modified by the phrase 'by the employer'. Aside from the starting and stopping place, the various elements to be considered in determining the employee's 'base of operations' are the principal point at which he receives instructions as to his work and where communications to his employer are ordinarily prepared, and the place where equipment, supplies, and records are kept or forwarded. In many cases a number of such elements will appear which will establish the 'base for operations' "

Where “the base of operations” has once been satisfactorily determined, it is only reasonable that such base shall remain unchanged unless some permanent change occurs in the surrounding circumstances. This rule has been adopted by North Carolina. (See Regulation No. 1.211.)

If the service is not localized in any state, but some of the services are performed in North Carolina, then the “base of operations” of the employee (not the employer) is the controlling test. The “base of operations” must precede consideration of the place from which the service is directed or controlled. Only in case there is no “base of operations” do we consider “the place from which such service is directed or controlled”. Unless we consider the term “base of operations” as a separate test from the term “place from which the service is directed or controlled”, it would seem that the employee could never have an individual “base of operations” apart from the sites of the employer’s business or branch office from which the employee is directed. This is important only in those cases where the physical “base of operations” is in one state and the “place of direction and control” is in another, and where some service is performed in each state. It is obvious that if the “base of operations” is in North Carolina and the individual is directed and controlled in North Carolina, then such individual is in employment in North Carolina. On the other hand, if it is determined that the individual’s “base of operations” is North Carolina and he is directed and controlled from another state, he is still considered to be in employment in North Carolina, provided, of course, that some of his services are performed in North Carolina as well as the other state or states.

The Pennsylvania Board of Review had a case in which this question was presented, and the Board of Review pointed out that the “base of operations” should not be confused with the “place from which the service is directed and controlled”. (appeal No. B-44-12-A-112, December 5, 1939, supra.)

PLACE FROM WHICH SERVICE IS DIRECTED OR CONTROLLED – In some cases it may be impossible to say that an employee’s services are “localized” in any state, and it may also be impossible to find any definite “base of operations” of such services. As an example, a salesman’s territory may be so indefinite and so widespread that he will not retain any fixed business office or address, but will receive his orders or instructions by mail or wire, wherever he may happen to be. In such cases, although the work is not localized in any state and although there is no fixed “base of operations”, the services may still come under the provisions of a single state law; that is, the law of the state in which is located the “place of direction or control”, provided that some of the work is also performed in such state. It is obvious that wherever an employer-employee relationship exists, the location of the place from which direction and control are exercised may be determined, no matter how general the control or how infrequently directions are given.

California has defined the term “the place from which the services are directed and controlled” as follows: “The third test to be applied, if the localization and the base of operation tests are not applicable and an interstate coverage arrangement is not elected by the employer, is the place from which the employee’s services are directed and controlled. This has been defined to mean the place from which the employer directs or controls the activities of the employee. It is the place at which the basic authority exists and from which the general direction and control emanates rather than the place at which a manager or foreman directly supervises the performance of services under general instructions from the place of basic authority. (DE Tax Manual Par. 4020.00.)”

Examples of service which is not localized in any state, where coverage is decided by the place-of-direction-and-control test:

- A. A contractor whose main office is in California is regularly engaged in road construction work in California and Nevada. All operations are under direction of a general superintendent whose office is in California. Work in each state is directly supervised by field supervisors working from field offices located in each of the two states. Each field supervisor has the power to hire and fire personnel; however, all requests for manpower must be cleared through the central office. Employees report for work at the field offices. Time cards are sent weekly to the main office in California where the payrolls are prepared. Employees regularly perform services in both California and Nevada. It is determined that neither the localization nor the base of operations test applies. Since the basic authority of direction and control emanates from the central office in California, the services of the employees are in employment in California under the place-of-direction-and-control test.

- B. A salesman residing in Cleveland, Ohio, works for a concern whose factory and selling office are in Chicago, Illinois. The salesman’s territory is Kentucky, Arkansas, Oklahoma, Illinois, and Missouri. He does not use either the Chicago office or his home in Ohio as his base of operations. Since his work is not localized in any state and he has no base of operations, all his service is covered by the Illinois law because his work is directed and controlled from his employer’s Chicago office and some of his service is in Illinois.

PLACE OF RESIDENCE – Where none of the enumeration tests results in the coverage of an employee’s services under a single state law, then, and only then, will the sites of the employee’s residence be determinative; that is, in those cases where

the services are not “localized” where no part of the services is performed in either the state where the “base of operations” is located, or in the state from which the work is directed or controlled, then the employee’s residence becomes important and is applicable. In such cases the employee’s entire services may be covered by the law of the state in which he resides, provided that some part of his services has been performed in such state. For example, an employee who resides in North Carolina, whose “base of operations” or the place from which his work is controlled is in Indiana, and whose work is performed in North Carolina, Kentucky, West Virginia, and Pennsylvania, would be subject to the North Carolina law rather than to the Indiana law, since some services are performed in North Carolina (the state of residence), and no services are performed in Indiana (the state of the “base of operations” or control). When services are performed within this state but are not covered under any of the above-enumerated tests, then they shall be deemed to be in employment in North Carolina if contributions are not required and paid with respect to the individual’s services under an Employment Security Law of any other state or of the federal government. (Section 96-8(g)(3).)

Where services are not covered under any of the above-enumerated tests and the services are performed entirely outside of this state and contributions are not required and paid under an Employment Security Law of any other state or of the federal government in respect to those services, such services shall be deemed to be employment in North Carolina, provided the individual is a resident of this state and the Commission approves the election of the employing unit to the effect that the entire service of such individual shall be deemed to be employment in North Carolina, and services covered by an election duly approved by the Commission in accordance with an arrangement pursuant to Section 96-4 (1) shall be deemed to be employment during the effective period of such election.

Most of the state laws permit employers to elect coverage for employees whose services are not subject to any state law under any of the above tests; hence, the reason for the provision as set out in Section 96-8(g)(4) of our act.

An employer could elect coverage in North Carolina for an employee who has his residence in North Carolina, even though he performs no services in this state, provided, of course, contributions are not required by any other state or by the federal government with respect to any of his services.

Reference: Commerce Clearing House Tax Service
Adopted as an Official Interpretation of the Commission on July 29, 1952.
(Cancels and replaces Interpretation No. 105, adopted July 17, 1951.)