EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 144

TO: R. F. Martin, Director

FROM: R. B. Billings, Attorney

RE: Interpretation of Section 96-8(g)(7)(I) of the Employment Security Law of North Carolina Status of Insurance Agents, Solicitors, and Securities Salesmen under the Employment Security Law

Under the Employment Security Law of this state all insurance agents, solicitors, and securities salesmen are within the definition of employment contained in the law excepting those cases in which they are in an independent contractual relationship to the company. These individuals, hereafter called insurance agents, are in employment unless all such services performed by them for the employing unit or employer are performed for remuneration solely by way of commissions. The exemption and conditions under which these insurance agents are excluded from the term employment are contained in Section 96-8(g)(7)(I) of the act, reading as follows:

> "Service performed on and after March 10, 1941, by an individual for an employing unit or an employer as an insurance agent or as an insurance solicitor or as a securities salesman if all such service performed by such individual for such employing unit or employer is performed for remuneration solely by way of commission;"

The question is raised first, what is meant by commissions, and second, if an agent is not remunerated solely by commissions, for what period are his wages taxable.

Contracts of employment between insurance companies and their agents are customarily complicated and unusual due to the nature of the business itself and the plans of payment which have been adopted by practically all insurance companies. Generally speaking, it will be necessary to submit all contracts between insurance companies and their agents for a determination as to the status of such agents under the act. In addition, it is also necessary to ascertain the facts concerning the relationship between the company and the agents either from information secured directly from the companies themselves or through some member of our field forces. In determining whether the agent is remunerated by way of commissions in such cases, the terms of the contract must be studied and certain principles which have been adhered to by the courts in arriving at what commissions are must be applied. The distinction between commission and salary has been stated as follows:

> "***'Commissions,' when 'used to express compensation for services rendered', usually denotes 'a percentage on the amount of moneys paid out or received'. Purifoy v. Godfrey, 105 Ala. 142 16 So. 701, 703."

> "'Salary' is generally defined as 'a fixed annual or periodical payment for services, depending upon the time and not upon the amount of services rendered'. See Benedict v. United States, 176 U. S. 357, 360, 20 S. Ct. 458, 44 L. Ed. 503; in re Information to Discipline Certain Attorneys, 351 Ill. 206, 184 N. E. 332, 359; King v. Western Union Tel. Co., 84 S. C. 73, 65 S.E. 944, 946.
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> "As is pointed out in Greer v. Hunt County, Tex. Com. App., 249 S.W. 831, 832: 'The controlling element in determining whether the amount to be received is upon a commission or salary basis is whether that amount, by whatever name it may be called, is absolute and fixed regardless of what the lawful commissions may be, or is made contingent upon earning that amount as commissions'. ***"

The basic guide which the courts have followed as to whether an agent's remuneration is by way of commissions is whether the remuneration paid to the agent varies with the agent's efforts and the business which he produces. If such be true, the courts have held that the agent is remunerated by way of commissions. U.C.C. vs. Union Life Insurance Co., Inc., 34 S.E.2d 385. It is true that an agent may have an arrangement or work under a plan whereby he receives both commissions and salary. In such cases he is, of course, not remunerated solely by way of commissions. Usually in applying the following provision, "*** if all such service performed by such individual for such employing unit or employer is performed for remuneration solely by way of commission," it is held that the agent must actually be paid some type of remuneration other than commissions to be considered in employment, and in those cases where an agent may be guaranteed a fixed sum per week but his actual commissions and the earnings which he produces by his own efforts exceed the amount of the guarantee, such agent would be remunerated solely by way of commissions. There are other types of contracts, however, in which an agent is guaranteed a specified salary per week plus certain commission on business produced. He, of course, would not come within the exemption since he would not be remunerated solely by way of commissions. In order for the remuneration to be by way of commissions, the remuneration received by him should increase or decrease from week to week or some other specified pay period dependent upon his activities in producing new business, preventing lapsing of existing policies, and the doing of other services required of him by the employer. Under such conditions his remuneration is substantially and closely related to his activities and considered as commissions within the meaning of the act. After applying the principles stated, if it is found that the agent is remunerated solely by way of commissions, he is within the exemption contained in the Act and his services are not "employment."

If it is determined under the contracts and the circumstances under which the insurance agent works that he is not remunerated solely by way of commissions, the second question is during what period of time are contributions payable upon his

remuneration. It has been the established policy of the Commission so far as we are able to ascertain since December 1943, to hold that where an insurance agent is not remunerated solely by way of commissions his aggregate wages including commissions and salary are taxable during the entire calendar year in which his services are not remunerated solely by way of commissions. The Employment Security Law provides that contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this chapter with respect to wages for employment. This requirement is set forth in Section 96-9 (a) (1) of the act and is as follows:

> "(a) Payment – (1) On and after January first, one thousand nine hundred and thirty-six, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this chapter, with respect to wages for employment (as defined in § 96-8(g)). ***"

In other words, you look at the entire taxable period and then apply the exception set forth in Section 96-8(g)(7)(I), and if it is found that during any part of the taxable period; i.e., the calendar year, any of the services performed by the agent are performed for remuneration other than by way of commission, then such agent would not come within the exemption during the taxable period and all of his services would be "employment" and contributions would be payable upon the remuneration received by him for such services including both commissions and other wages.

This interpretation has been followed by the Supreme Court of Virginia in Home Beneficial Life Insurance Company v. U.C.C., 27 S.E. 159, in which the following language was used by the court:

> "*** This statement likewise disposes of the appellant's contention that the employment of Prins was exempt after his weekly debit collections had reached $85, and that it did not include his compensation for writing new business. As the italicized extract from the Senate Report on the Federal amendment points out, 'If any part of such remuneration is a fixed salary' the agent is covered, and 'the tax is computed on the basis of his aggregate remuneration' – that is, his 'salary or salary plus commissions.'
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> "The result, therefore, is that where an agent is compensated during a calendar year partly by a guaranteed minimum salary of $15 per week and partly by a commission on the amount of his weekly collections, as is the case here, he is covered by the Act, and the unemployment tax is to be computed on the basis of his aggregate remuneration for that year."

Although the regulations relating to the Federal Unemployment Tax Act do not specify the period to be considered in determining whether the exemption exists, the Tax Service, CCH explanation with respect to the period to be taxed specifies that the proper period is the entire taxable year. See CCH, Unemployment Insurance Reporter, Unemployment Insurance Law, Federal Para. 3183 (.07), in which the following is stated:

> ".07 Services must be exempt for entire calendar year - - If all or any part of the remuneration of an employee for services performed as an insurance agent or insurance solicitor is a salary, none of his services is excepted and his total remuneration is included for purposes of computing the unemployment tax. This raises the question as to what period should be used in determining whether or not all of the services of an insurance agent are performed solely by way of commissions. Since the federal tax is on a calendar year basis, it would seem that the agent's services must be performed solely on a commission basis throughout the calendar year in order to meet the requirements of the exemption provision. If the agent's services were not performed solely on a commission basis during any part of the calendar year, it would seem that his services during the entire calendar year would be covered by the law. - - - CCH."

Adopted as an official Interpretation of the Commission on June 25, 1957.
(Cancels and replaces Interpretation No. 140, adopted February 12, 1957.)