

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 145

TO: R. F. Martin, Director
FROM: W. D. Holoman, Chief Counsel
RE: Officers of Corporations – Employment – Employees

The question has arisen in numerous instances as to whether or not officers of corporations are employees within the meaning of the Employment Security Law. I might say in the beginning that this interpretation will necessarily have to be in general terms, as so many questions are presented involving different situations that it will be impossible to prepare an interpretation which will cover all shades of the different questions which may arise.

For a proper interpretation it is necessary to quote the sections of the Employment Security Law which are applicable. Section 96-8(f)(1) defines “employer” to mean any employing unit which in each of twenty different weeks within the current or the preceding calendar year has, or had in employment, four or more individuals; therefore, for an individual to be counted as being an “employee”, he must be “in employment” within the meaning of the law.

Section 96-8(g)(1) of the Employment Security Law defines employment, and I quote below the pertinent portions of that section:

“Employment’ means service performed prior to January 1, 1949, which was employment as defined in this chapter prior to such date, and any service performed after December 31, 1948, including service in interstate commerce * * * performed for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. Provided, however, the term ‘employee’ includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules. * * *

When one first reads this definition, it might be interpreted to mean that every officer of a corporation is an employee of the corporation per se, but such is not the case and such was not the intent of that definition. That portion of the definition quoted above in the proviso which deals with the term “employee” is identical with the definition of employee as contained in the Federal Unemployment Tax Act.

At common law an officer of a corporation is not deemed to be an employee under any circumstances. He is deemed to be an agent of the corporation or of the board of directors and has duties to perform as an executive officer which no employee can legally perform. It was felt by the Congress when the original Social Security Act was adopted in 1935 that officers in certain instances should be deemed to be employees and, therefore, under the definition section of the original Act it was provided that the term “employee” included an officer of a corporation. It was not necessary to go beyond this simple statement to express the intent that the usual meaning of “employee” should prevail, except that the term should be taken to mean also “an officer of a corporation”. The intention of the Congress that “employee” under the Social Security Act should have the usual meaning under common-law rules realistically constructed was reaffirmed when the Congress made fundamental revisions of the Act in 1939.

When the definition of employment under the Employment Security Law was changed in 1949, at which time the so-called (A), (B), (C) provisions were deleted, the present definition as hereinabove quoted was enacted, for it was the intent of such section, when it was enacted, to make it possible for an officer of a corporation to be an employee. The basic and fundamental test in determining whether one is an employee is whether or not the relationship between such individual and the person for whom he performs services is the legal relationship of employer and employee as recognized at common law. Generally, such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished; that is, an employee is subject to the will and control of the employer, not only as to what shall be done but how it shall be done. In this connection it is not necessary that the employer actually direct or control the manner in which the services are performed, it is sufficient if he has a right to do so.

It is not necessary to elaborate further on this as we already have Interpretation No. 79, which is very full and sets out implicitly the common-law test which are necessary in determining the employer-employee relationship. Set forth in that interpretation are the tests laid down by the Supreme Court of this state in the case of Hayes v. Elon College, 224 N.C. 11, which are the tests that we use primarily in determining the employer-employee relationship, and those tests must also be used in determining whether or not an officer of a corporation is deemed to be an employee of a corporation for the purposes of determining liability under our act.

The definition of employment quoted above provides that the term “employment” means services performed for wage or under any contract of hire, written or oral, express or implied. Even though an individual may not be drawing wages in the literal sense of the word, he still may be in employment if he is performing services under any contract of hire, either written or oral, express or implied. It is fundamental that a contract of hire presupposes entitlement to remuneration in some form for the services rendered.

Under the definition of employment an officer of a corporation may be an employee. This statute means that an officer may be an employee of the corporation; provided, he comes within the category of the servant or employee under the common-law definition. In other words, the fact that he is an officer of the corporation does not prevent him from also being an employee; provided, he is performing the services of an employee and subject to the same directions and control in the performance of such services as other employees and would have been an employee under the common-law rules.

An executive officer of a corporation performing only executive duties which cannot be delegated and performed by someone other than an officer is not an employee and shall not be counted in determining whether or not the employing unit has a sufficient number of individuals in its employ to become subject to the act, and contributions should not be collected on the earnings of such individuals. In the case of Gassaway v. Gassaway & Owen, Inc., 220 N.C. 694, the Supreme Court of North Carolina stated in part as follows:

“Executive officers of a corporation are not, as such, its employees in the ordinary sense of the word and as it is used in this act. * * * When the president of a corporation acts only as such, performing the regular executive duties pertaining to his office, he is not an employee within the meaning of the statutory definition.* * *”

The court in that same case which involves the Workmen’s Compensation Act further states as follows:

“We adhere to the dual capacity doctrine under which executive officers of a corporation will not be denied compensation merely because they are executive officers if, as a matter of fact, at the time of the injury they are engaged in performing manual labor or the ordinary duties of a workman. * * *”

Let us not overlook the fact that an executive officer of a corporation is considered the agent of the corporation or of the board of directors, and as such he has duties to perform which no employee can legally perform and, therefore, unless such officer is also acting in the dual capacity as an employee by performing managerial duties or

other duties which are not of an executive nature, he is not to be counted as an employee, even though he is performing executive duties for the corporation for remuneration.

Section 55-49 of the General Statutes of North Carolina provides that every corporation shall have a president, secretary, and treasurer to be chosen either by the directors or stockholders, as the by-laws direct, and they shall hold office until others are chosen and qualified in their stead. It is provided that the president shall be chosen from among the directors; the secretary shall record all of the votes of the corporation and the directors in a book to be kept for that purpose and perform such other duties as are assigned to him. The treasurer may be required to give bond for the faithful discharge of his duty in such sum and with such surety as are required by the by-laws. It is also provided that two of the offices may be held by the same person, if the body electing so determine, and that the corporation may have such other officers and agents who shall be chosen in the manner and hold office for the terms, and upon the conditions prescribed by the by-laws or determined by the board of directors. The statute does not specifically set forth the duties of the officers.

It may be difficult at times to determine which duties are executive duties and which are not. As a general rule, any duties that cannot be delegated to some employee are executive duties. As an example, a president or vice president should preside over the meetings, and only the officers could be authorized by the board of directors to make loans and establish credit for the corporation, as these are duties which could not be delegated. Only officers of the corporation would have the authority to enter into contracts binding the corporation. The only instances in which real estate can be transferred or sold are by the signature of the president and secretary under seal. This authority cannot be delegated to any employee. These are merely examples of functions which are strictly executive and which cannot be delegated.

Listed below are excerpts from certain cases from other jurisdictions which bear upon the subject:

An officer of a corporation who performs no service and receives no compensation is not to be included as an "employee" under the Unemployment Tax Act, but an officer is not excluded as an "employee" if otherwise the relationship of employer-employee exists. Personal Finance Co. of Braddock v. U.S. D.C. Del., 86 F. Supp. 779, 786.

An officer of a corporation is not of the ordinary sense an "employee" of the corporation though he may also be an employee where, in addition to his duties as an officer, he is also employed in a separate capacity for particular purposes. McClayton v. W. B. Cassell Co., D. C. Md. 66 F. Supp. 165, 173.

First vice president in charge of business corporation whose duties were prescribed by by-laws, whose salary was fixed by directors, and who had no contract of

employment, was not an “employee” of corporation within statutes providing for re-employment of discharged veterans. McClayton v. W. B. Cassell Co., D.C. Md 66 F. Supp. 165, 173.

Holder of one-third of corporation’s stock who was its vice president and also its attorney, who was paid \$2,000 a year for legal and management fees, and negotiated with tenants, arranged leases, gave orders to employees and others, visited buildings and president’s office every morning, kept payroll book and slips, kept records of rents collected and checked monthly balances, was an “employee” and corporation who employed at least three other employees was, therefore, liable for contributions under the statute relating to unemployment insurance. Claim of Dybdal, 85 N.Y. S.2d. 657, 658, 274 App. Div. 1084.

President and vice president of corporation who worked in corporation’s store and received weekly salaries were properly counted as “employees” in determining whether corporation had eight or more “employees”, so as to be subject to the Unemployment Compensation Act. State ex rel. Murphy v. Welch & Brown, 103 P.2d, 533, 187 Okl. 470.

A nominal officer of a corporation who performs duties and receives compensation on a basis which, apart from his holding of the office, would place him in that category of an employee as generally understood, is an “employee” within contemplation of minimum wage act requirement that employer keep and furnish to Commissioner of Labor on demand a record of hours worked by and wages paid to each employee. Swiss Cleaners v. Danaher, 27 A.2d 806, 809, 129 Conn. 338.

A non-compensated president of defendant corporation whose acts were only such as were required for maintaining defendant as a corporation, a distinguished from those necessary to management and conduct of defendant’s business, was not an “employee” of a corporation for purpose of determining whether corporation was liable for contributions under Unemployment Compensation Act. Unemployment Compensation Division of Workmen’s Compensation Bureau v. People’s Opinion Printing Co. 295 N.W. 656, 658, 70 N.D. 442.

The provision of the Social Security Act that the term “employee” includes an officer of a corporation means that an officer can be an employee; that is, if he meets the tests determinative of the ordinary employment relationship, he is an employee and the fact that he is also an officer of the corporation does not destroy his status as an employee under the act. Deecy Products Co. v. Welch, C.C.A. Mass., 124 F.2d 592, 595, 596, 598, 599, 139 A.L.R. 916.

Under the Social Security Act, providing that the term “employee” includes an officer of a corporation, Congress meant to make it clear that all who meet the ordinary employment relationship tests are to be covered by the act whether they are superior

or inferior employees and that those who do not meet the tests are not to be covered by the act. Deecy Products Co. v. Welch, C.C.A. Mass., 124 F.2d 592, 595, 596, 598, 599, 139, A.L.R. 916.

It may be said, therefore, that officers of a corporation who perform no services other than services in a strictly executive capacity, which cannot be delegated or performed by persons other than officers, are not to be counted as employees of the corporation for employment tax purposes even though such officers are paid by the corporation for those executive services. An officer of a corporation who performs no service and receives no remuneration in any form is not to be considered as an "employee" for employment tax purposes.

An officer of a corporation, who performs executive services without consideration or remuneration will not be considered as an employee of the corporation, either because of such services or because of having the status of an officer. When services are performed by an officer which are outside of the usual scope and functions of the executive duties usually required of an officer and when such officer is paid for those additional services, then he is considered as an employee and should be counted in determining whether or not the employer is subject to the act.

An officer of a subsidiary corporation who receives no compensation from the subsidiary corporation for executive duties, but who receives his entire compensation from the parent corporation for whom he also performs only executive duties, shall not be considered an employee of either corporation.

An officer of a parent corporation who is farmed out or loaned to a subsidiary corporation and such individual performs services for the subsidiary corporation which are beyond the scope of the services or duties of an officer, and the subsidiary corporation either controls or has the right to control the manner in which such individual performs those services, shall be considered an employee of the subsidiary corporation, even though all of his remuneration for such additional services is paid by the parent corporation. This is also true where the same individual is an officer of both corporations, but performs such additional services or duties beyond the scope of an executive officer for the subsidiary corporation.

In a case of this kind it is only reasonable to assume that the subsidiary corporation is in some way reimbursing the parent corporation for the services rendered by such individual, or that there is some arrangement or charge-back of some kind when a situation such as this exists. In these cases a very careful investigation will be necessary in order to determine which employer shall be taxed for the services performed by such individual. If it should develop that the subsidiary corporation is not reimbursing the parent corporation for the services of such individual, and there are no charge-backs of any kind made by the parent corporation to the subsidiary, then of course we cannot tax the subsidiary for the services performed by that

individual, but he would still be counted for the purposes of determining status. In these rare instances the parent corporation would be required to pay the tax. Under the “loaned servant” rule, a loaned servant does not become the servant of the borrower unless the borrower has exclusive control over him for the period covered. Walter v. Everett School Dist. 24 Wash. 79 P.2d 689.

As a practical matter, it is felt that in many instances it will be found that officers of corporations are performing services for the corporation which are outside of the usual executive duties generally relating to their offices, and if they are performing such duties which may be delegated to persons other than officers, then they are to be counted as “employees”. It is felt that it will be generally found that officers are performing duties other than those generally attributable to executive officers only.

Generally speaking, in those instances where an officer is also in employment, his remuneration is considered as wages.

As stated in the opening paragraph of this interpretation, we cannot answer all of the questions which may arise, for so many different situations will present themselves that it would be impossible to contemplate all of those different situations. It is going to be difficult in some instances to determine whether or not an officer of a corporation is performing services other than in an executive capacity, and in such cases a thorough investigation should be made to determine the exact nature of the duties performed, and a report on such investigation should be made to the central office so that we in the central office may attempt to reach a proper conclusion.

Adopted as an official Interpretation of the Commission on July 16, 1957.
(Cancels and replaces Interpretation No. 141, adopted February 19, 1957.)