

UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 3

TO: W. R. Curtis, Acting Chairman

FROM: Ralph Moody, Chief Counsel

SUBJECT: Interpretation of Section 19(f)(6) of the Law

This will answer your memorandum of June 30, 1943, in which you ask for an opinion on eight questions involving the administration of Section 19(f)(6) of the Law.

A number of other states have somewhat similar provisions, but due perhaps to the fact that most of those provisions have been recently enacted, I have been unable to find any decisions or opinions involving the construction of such provisions that have been of any benefit.

Under Section 19(f)(6) of the Law, a new "employer" is created, as follows:

"Any employing unit not an employer by reason of any other paragraph of this subsection, for which within either the current or preceding calendar year services in employment are or were performed with respect to which such employing unit is liable for any Federal tax against which credit may be taken for contributions required to be paid into a State unemployment compensation fund."

It seems to me that Section 19(f)(6) of the Law must also be construed in conjunction with Section 19(g)(7)(0), which is as follows:

"Notwithstanding any of the other provisions of this subsection, services shall be deemed to be in employment if with respect to such services a tax is required to be paid under any Federal law imposing a tax against which credit may be taken for contributions required to be paid into a State unemployment compensation fund."

It also seems to me that, this being a taxing statute, it must be given a strict construction.

Given the strictest possible construction, this section adds nothing new to the Law. By this I mean that the phrase "contributions required to be paid into a State unemployment compensation fund," implies or presupposes existing liability to the State, for else how could contributions be "required to be paid" unless liability already existed. Perhaps this may be considered a strained rather than a strict construction.

Inasmuch as the Federal Act now permits credit against the Federal tax for payments made to a State, there is no great need for the use of this language. On the other hand, if this feature of the Federal Act were repealed, it would render the provision of our Law inoperative.

However, the intent of the law is to make my employing unit which is subject to the Federal tax an “employer” under our Law. Liability then attaches for contributions which are “required to be paid” and credit for which “may be taken” against the Federal tax. The language of the Law clearly appears to demand that a liability for the Federal Tax coexist with liability for the State tax or else the use of the language “against which credit may be taken” is without meaning. If this is true, then liability for the Federal tax in the “preceding calendar year” would not necessarily make the employing unit an “employer” during the “current” year, for there may be no liability for the Federal tax during the current year. It then appears that the phrase, “preceding calendar year”, should be disregarded in such cases.

Sections 19(f)(6) and 19(g)(7)(o) of the Law, create the same liability as is created by the statutes of several other States, typical of which is that of Nebraska statute, which follows:

“(6) Any employer of any person in this state not an “employer” by reason of any other paragraph of this subsection for which services in employment are performed with respect to which such employer is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment compensation fund; but services performed for such employer shall constitute employment for the purpose of this law only to the extent that such services constitute employment with respect to which such federal tax is payable.”

The Nebraska Law clearly seems to say that liability for the State tax must coexist with liability for the Federal tax. It will be noted that this statute does not attempt to make liability for the State tax depend on liability for the Federal tax in the “preceding year”, and it is submitted that this is proper if liability must coexist.

Turning now to your questions, I answer them as follows:

1. Question

If an employing unit was covered by the Federal Act in 1942, can we hold him liable effective January 1, 1943, before it is known if he is liable under the Federal Act for 1943?

Answer

In the light of what I have said above, that is, that the Law requires coexisting liability, we could not hold an employer who was covered under the Federal Act in 1942 liable effective January 1, 1943, before it is known that he is liable under the Federal Act for 1943. This amounts to a disregard of that part of the Law which makes an employing unit an "employer" if he was liable for the Federal tax in the "preceding calendar year." This seems, however, to be in accord with the rule as to statutory construction. (State v. Barksdale (1921) 181 N.C. 621.)

2. Question

If an employing unit was not covered by the Federal Act for 1942, can we hold him liable effective January 1, 1943, if the facts indicate he will be liable under the Federal Act for 1943, or is it necessary to wait until he is actually held liable under the Federal Act?

Answer

I think we can safely say, under Section 8 (a), that, if an employing unit becomes liable under Section 19(f)(6) at any time during the year 1943, His liability will date from January 1, 1943. If the employing unit was not liable for the Federal tax in 1942, but the facts indicate that he will be liable under the Federal Act for 1943 (Assuming the employment experience is already sufficient to create liability although payment of the Federal tax is not yet due), then it seems to me that liability for the State tax has also come into existence and we can hold him liable as of January 1, 1943. Of course, the Commission has no authority to determine liability for the Federal tax, and holding that the employing unit was liable for the State tax would not be determining liability for the Federal tax. This would amount to no more than finding that a factual situation exists which creates liability for the State tax. Of course, this answer is based on the fact that the employment record of the employing unit is sufficient to create an actual liability for the Federal tax. If we cover an employing unit which is subsequently held not liable for the Federal tax, we would be compelled to relieve such employer of liability. As I have pointed out in other parts of this memorandum, it seems that it is incumbent on the employing unit to report his liability as soon as it comes into existence by reason of his employment experience under the Federal Act, and his failure to do so will make him delinquent under our Law, although the due date for making reports and paying the Federal tax had not arrived.

3. Question

If we are required to wait until an employing unit is held liable under the Federal Act and has paid taxes as of January 31, 1944, wouldn't it be too late for the employer to get credit on his Federal taxes for 100% of the payment made to the state?

Answer

Under the Federal Act, the tax is due on January 31 of each year for taxes due with respect to employment for the preceding calendar year. The Federal Act also provides (CCH Treatise paragraph 1160) that the taxpayer may credit against the Federal tax only those contributions paid on or before the due date of his Federal return and, to a certain extent, those paid before July 1, next following such due date. It seems to me to be incumbent on the employing unit to ascertain his tax liability, both as to the State and Federal government, and make his payments accordingly. He would then receive full credit against the Federal tax for contributions paid to the State if he pays his State tax as indicated in 5(a) of this memorandum.

4. Question

What action should a Field Representative take if he finds that an employing unit should have paid taxes under the Federal Act, but did not?

Answer

It is my thought that neither a Field Representative nor any other agent of the Commission, nor even the Commission itself, can determine the liability of an employing unit for the Federal tax. This would appear to be clearly outside the jurisdiction of such agent or the Commission. If the Field Representative has reason to believe that an employing unit should have paid taxes under the Federal Act when he did not, he should so advise the proper Federal agent. If liability for the Federal tax should then be assessed by the Federal agency, liability for the State tax would immediately arise. (See also answer to Question 2.)

5. Question

When would contributions be due and interest start accruing, with respect to:

- (a) First year coverage?
- (b) Second and subsequent years of coverage?

Answer

- (a) It is my thought that liability for the Federal tax may arise before the end of a calendar year by reason of the employing unit's having the required number of individuals in employment for the required length of time, although the tax is not due until January 31 of the following year. At the very instant the employing unit becomes liability for the Federal tax, liability for contributions to the Commission attaches, and contributions become due as provided in Paragraph 1.205 E of Regulation No. 1.200.
- (b) Liability for the Federal tax depends on the employment record of the employing unit for each calendar year. Therefore, if I am correct in assuming that liability for the Federal tax must coexist with liability for the State tax, it seems to me that the answer given in the preceding paragraph equally applies here. In other words, liability for contributions for "second and subsequent years of coverage" would await liability under the Federal Act. However, this involved questions 6, 7, and 8 and reference should be made to answers to those questions. Once liability is established, it should be continued until the employer shows that he is not subject to the Federal tax. We can at that time make a refund if necessary.

6. Question

If an employing unit is liable for contributions under Section 19 (f) (6) for 1943, and not liable under the Federal Act for 1944, would the employer be covered under Section 19 (f) (6) for 1944?

Answer

As will be noted above, I am convinced that liability for a Federal tax is so much a part and parcel of the Law, the very bone and tissue, so to speak, that I must necessarily conclude that, if an employer is liable for contributions under Section 19 (f) (6) for 1943, and is not liable under the Federal Act for 1944, he would not be covered under Section 19 (f) (6) for 1944.

7. Question

How can an employer terminate coverage under 19(f)(6)?

Answer

It is not necessary for an employer to file an application for termination of coverage to end his liability under the Federal Act. His liability thereunder automatically ceases in any year in which he does not have the required employment experience. (CCH Treatise paragraph 1305). Holding that Federal and State liability must coexist, I must conclude that coverage under the State act is also automatically terminated when the employer ceases to have the required employment experience to create liability under the Federal Act. It will be necessary for such an employer to show us that he is no longer liable for the Federal tax.

Connecticut is the only state that I have found which has a provision in its Law applying to termination of coverage of an employer who is liable under the State law because of liability for the Federal tax. Under the Connecticut Law (CCH 4008 Conn.): “An employer subject to the federal unemployment tax act for 1941 or any subsequent year shall be subject to the provisions of this chapter from the beginning of such year if he had one or more employees in his employment in the state of Connecticut in such year.”

In the same section it is provided that: “An employer may cease to be subject to this chapter at the end of any calendar year following the calendar year in which he became subject to this chapter if he shall give written notice to the administrator, accompanied by proof satisfactory to the administrator that he has not employed as many as four employees at the same time during as many as thirteen weeks during the next preceding fifteen months, that he has paid all contributions due under the provisions of this chapter, that he is not subject to the federal unemployment tax act, and that he has notified his employees of his intention to cease to be subject this chapter.”

Under this provision it seems that an employer is, by the very language of the statute, covered for two or more calendar years. And this seems to be true when liability for the State tax arises by reason of liability for the Federal tax, even though there is no liability for the Federal tax during the second or subsequent calendar year. However, the language of the Connecticut statute does not seem to require, as does the language of the North Carolina Law, a liability for a Federal tax against which credit may be taken for contributions paid to the State.

8. Question

Since it is possible that an employer may be liable under the Federal Act for 1943 and not liable for 1944, can coverage under the State Act be terminated under Section 8(b) after only one year of coverage?

Answer

The answer to question 7 also applies to this question, in that coverage is automatically terminated. In further explanation, however, it is my thought that termination of coverage created under Section 19(f)(6) cannot be handled under Section 8(b). This section was intended to apply to employers who are liable by reason of their employment experience under section 19(f)(1), (2), (3), and (4), and I know of no rule of statutory construction which would permit this section to be applied to a situation subsequently created and not in the contemplation of the legislature at the time of passage of the Act, and the facts of which are clearly not embraced in the language of Section 8(b).

If my conclusion that coverage automatically ceases in any year in which he does not have the required employment experience to be liable for the Federal tax is correct, then there is no need to have a provision covering termination except for the purpose of clarification. It would also seem that the provision applying to termination could not have the effect of extending liability to any year in which there is no liability for the Federal tax, if the reason for liability under the State Law is dependent upon a liability under the Federal Act.

Adopted as an official interpretation by the Commission on August 10, 1943.