TREATMENT OF INDIAN TRIBES FOR FUTA PURPOSES QUESTIONS AND ANSWERS

MODEL LEGISLATIVE LANGUAGE

Q. Exclusions from Employment. Subsection (b) of the Model Legislative Language provided in UIPL No. 14-01 says that the "exclusions from employment in section [insert provision of State law relating to State and local government exclusions] shall be applicable to service performed in the employ of an Indian tribe." What does this accomplish?

A. The amendments to the FUTA allow the exclusions from employment currently available to State and local governments, such as those related to work-relief and work-training, to also be available to Indian tribes. (See pages 4 and 5 of UIPL No. 14-01.) Since these State law exclusions are currently written to apply only to State and local governments (and in some cases to nonprofit organizations), States wishing to exclude these services when performed for tribes will need to amend their laws to do so. Using subsection (b) of the Model Legislative Language is one method of doing so. Another method is to amend the sections of State law containing the exclusions.

Q. Current State Law Covers Tribal Services. My State law currently requires coverage of all Indian tribal services except in those cases where Federal law permits an exclusion from coverage. Also, my State law currently determines eligibility based on tribal services the same as all other services. The Model Legislative Language seems to assume that tribal services are not currently covered and that tribal services are treated differently for eligibility purposes. As a result, adding this language would be redundant. Is it necessary to add this language?

A. No. As noted in UIPL No. 14-01, States are not required to use the Model Legislative Language.

If your State law already covers tribal services and if tribal services are treated the same as all other services in determining benefit eligibility, then subsections (a) through (c) of the Model Legislative Language are not necessary.

States are cautioned, however, that in some cases their laws may contain exclusions from coverage which are not found in FUTA. These exclusions do not raise conformity issues when they are limited to FUTA taxable services. However, when the services are performed for State and local governmental

entities or nonprofit organizations, and now for federally recognized Indian tribes, those services not excluded by FUTA must be covered. States not using the Model Legislative Language will need to ensure that any such exclusions do not apply to tribal services.

States are also cautioned to examine their between- and within-terms denial provisions to ensure that they apply to tribal services. (See UIPL No. 14-01, item 4.j.)

Q. Termination of Coverage. Is it necessary for States to adopt the provisions in subsection (e)(2) of the Model Legislative Language regarding the termination of coverage of tribal services for failure to make a required payment?

A. Although the amendments to the FUTA permit termination of coverage, they do not by their own terms require termination. However, Section 303(a)(1), SSA, requires "[s]uch methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due." We interpret this provision to mean that a State must have administrative means to prevent drains on its unemployment fund. Therefore, if the State has no other effective means of enforcing tribal liabilities to its fund, then the State will need to include a provision for termination of coverage.

As noted in UIPL No. 14-01, termination of coverage should be used as a last resort because termination punishes workers who have no control over whether their employers satisfy their UC liabilities. For this reason, the termination provisions are written to give the head of the State agency considerable discretion in determining whether and when to terminate coverage.

Whether or not a State opts to terminate coverage, the State is prohibited from allowing a tribe to continue reimbursing its unemployment fund if the tribe fails to make a required payment within 90 days of receiving the delinquency notice and until such delinquency is corrected. As explained in UIPL No. 14-01, item 4.g., if the State chooses to continue coverage of tribal services, the tribe must be converted to contributing status.

Q. Delinquency Notices. Is it necessary for States to adopt the provisions in subsection (f) of the Model Legislative Language regarding the content of delinquency notices sent to tribes?

A. No. State law need not spell out the contents of the delinquency notice. However, since the effects of unpaid delinquencies differ from those on non-tribal employers, inclusion of subsection (f) is recommended.

Q. When to Notify the IRS. Page 8 (item 4.g.) of UIPL No. 14-01 states that a State "will need to advise the IRS and the Department of Labor of any determination it has made concerning an Indian tribe's failure to make required payments or post a required bond and whether the tribe has subsequently satisfied these liabilities." However, the Model Legislative Language only requires such notification when the State has terminated the tribe from coverage. Which is correct?

A. Under Section 3309(d), FUTA, services performed for the tribe are not excepted from the FUTA definition of employment if "within 90 days of having received a notice of delinquency, a tribe fails to make contributions, payments in lieu of contributions, or payment of penalties or interest . . . or if the tribe fails to post a required payment bond." Therefore, page 8, item 4.g. of UIPL No. 14-01 correctly states the requirement of Federal law as it relates to a tribe's delinquency in making required payments, but not to State coverage of services.

The Model Legislative Language in UIPL No. 14-01 should accordingly be modified by striking subsection (e)(2)(C) and inserting the following new subsection:

> (h) If an Indian tribe fails to make payments required under this section (including assessments of interest and penalty) within 90 days of a final notice of delinquency, the commissioner will immediately notify the United States Internal Revenue Service and the United States Department of Labor

SCOPE OF AMENDMENTS/COVERAGE OF SERVICES

Q. Applicability. Do the amendments to the FUTA apply to all enterprises wholly owned by an Indian tribe, including those that might compete with similar private businesses?

A. Yes. The amendments to Section 3306(a)(7), FUTA, apply to service performed "in the employ of an Indian tribe." Section 3306(u) defines "Indian tribe" to include "any subdivision, subsidiary, or business enterprise **wholly owned by such an Indian tribe**." (Emphasis added.) As a result, the amendments apply to all wholly-owned tribal enterprises, regardless of whether they compete with private businesses. This parallels the treatment of governmental entities performing business activities, such as the operation of resorts or the sale of beer, wine and liquor.

The amendments do not apply when the service is performed in the employ of an enterprise jointly-owned by an Indian tribe (as defined in Section 3306(u),

FUTA) and another entity. In this case, the services are not "performed in the employ of" the tribe itself, but for the jointly-owned entity or partnership. In addition, the amendments do not apply when the service is performed in the employ of a contractor who may operate a tribally-owned business because the services are not "performed in the employ of" the tribe itself, but for the contractor.

Q. Coverage of Tribal Councils. Are services performed as a member of an Indian tribal council required to be covered?

A. No. IRS Revenue Ruling 59-354 states that "amounts paid to members of Indian tribal councils for services performed by them as council members do not constitute 'wages' for the purposes of the" FUTA. As a result, the required coverage provisions of the FUTA do not apply to these services.

Q. Exceptions to Coverage. My State law contains several exceptions from the definition of "employment" which are not found in FUTA. Does the Model Legislative Language automatically override these non-FUTA exceptions? If not, will other amendments to State law be needed to assure coverage of tribal services?

A. The Model Legislative Language does not override any non-FUTA exceptions from employment found in State law. As a result, States may need additional amendments to their UC laws.

As explained in item 4.c. of UIPL No. 14-01, FUTA requires coverage of services "excluded from the FUTA definition of 'employment' *solely* by reason of being performed for the tribe." (Emphasis in original.) If no other exclusion of the services from "employment" or "employee" is found in Federal law, then the services must be covered. These exclusions are described in paragraphs (1)-(6) and (9)-(21) of Section 3306(c), FUTA; Section 3309(b), FUTA; and Sections 3121(d)(3)(B) and (C), and 3508 of the Internal Revenue Code. An exclusion related to fishing rights activities is described in the following Question and Answer.

States will need to determine if any non-FUTA exclusions are present in their laws. If any are present, the State will need to determine whether other provisions of State law require coverage when provided for a tribe. For example, under some State laws, non-FUTA exceptions from the State definition of "employment" are covered when the services are performed for State and local governmental entities and nonprofit organizations. Such provisions will need to be amended to add services performed for Indian tribes. Other State laws

provide for the required coverage by specific reference to Section 3306(c)(7), FUTA, (pertaining to services performed for State and local governmental entities and, following the CAA amendments, for Indian tribes) or by a general statement that the non-FUTA exceptions will not apply if Federal law requires coverage. If the State determines that these provisions result in coverage of non-FUTA exceptions, then no additional amendments are necessary.

Q. Treatment of Certain Fishing Rights-Related Activities. Section 7873 of the Internal Revenue Code provides that no employment tax (including FUTA) will be imposed on services performed "in a fishing rights-related activity of an Indian tribe by a member of such tribe for another member of such tribe or for a qualified Indian entity" as defined in Section 7873(b). Are States required to cover these services?

A. No. Section 2079 of the Revised Statutes (25 U.S.C. 71) provides that States may not impose taxes on the activities described in Section 7873 of the Internal Revenue Code. As explained on pages 7 and 8 of the Attachment to UIPL No. 24-89–

> Sections 7873 and 2079 exempt fishing rights income from Federal and State tax, "including income, social security, and unemployment compensation insurance taxes." . . . Therefore, States may no longer tax remuneration paid for services to which Section 7873 pertains for State unemployment compensation purposes.

States are not required to cover services which they are prohibited from taxing. However, nothing prevents tribes from voluntarily entering into coverage for such services.

Q. Tribe Has Employees in Other State(s). Item 4.l. of UIPL No. 14-01 says that "[o]nly States with 'Indian tribes' within their State boundaries must amend their laws" and then lists 33 States which have tribes "within their State boundaries." My State is not included in the list of 33 States, but a tribe based in another State has employees in my State. Is my State required to cover these services?

A. Yes. The State is also required to offer the reimbursement option. In this case, the situation is no different from a nonprofit organization headquartered in one State but having employees in another State.

As a result, there may be cases when States not listed in UIPL No. 14-01 will need to amend their laws to conform with the FUTA requirements related to Indian tribes.

FINANCING

Q. Experience Rating Systems. My State has a separate experience rating system for State and local governments. Do the amendments to the FUTA require that Indian tribes be made part of this system when they do not elect the reimbursement option?

A. No. When Indian tribes are experience rated, they must be assigned rates under your State's general experience rating provisions.

The experience rating requirements of Section 3303(a)(1), FUTA, apply to "persons." "Person" is defined in Section 7701(a)(1) of the Internal Revenue Code to "mean and include an individual, a trust, estate, partnership, association, company or corporation." Tribes have been considered persons for purposes of experience rating. (See UIPL No. 14-96.) The amendments to the FUTA did not change the definition of "person" and therefore did not change the fact that the experience rating provisions are applicable to tribes which do not reimburse the State's unemployment fund. Rather, the amendments simply required States to offer Indian tribes the option of electing reimbursement in lieu of contributions under an approved experience rating plan.

Q. Use of Positive Reserve Balances. Under my State law, employers reimburse the State's unemployment fund for weeks of unemployment which begin during the effective period of such election. May tribes which convert from contributory to reimbursing status use any positive balances accumulated as a contributory employer to pay reimbursements?

A. No. The reimbursement option is controlled by Section 3309(a)(2), FUTA, which provides that an entity "may elect, for such minimum period and at such times as may be provided by State law, to pay (in lieu of such contributions [i.e., reimbursements]) into the State unemployment fund amounts equal to the amounts of compensation attributable under the State law to such service." (Emphasis added.) Simply put, an employer in reimbursement status must reimburse 100 percent of all UC costs attributable to service with that employer. Because FUTA does not contain any exception to this reimbursement requirement, a past contribution may not be treated as a "reimbursement." This rule applies to all entities eligible for the reimbursement option. Indeed, in 1970 and 1976, amendments to FUTA were necessary to allow nonprofit entities which had previously been contributory

employers to apply their positive balances to reimbursements during a transition period which has since expired. (See 3303(f) and (g), FUTA.)

Q. Retroactivity of Reimbursement Option. UIPL No. 14-01 says that "The coverage and reimbursement requirements were . . . effective on December 21, 2000, and all affected States must enact conforming legislation immediately and retroactive to December 21, 2000." Does this mean States are required to permit tribes currently covered by State UC law to convert to reimbursement status retroactive to that date?

A. No. The Department's main concern regarding retroactivity is to ensure that States cover all tribal services as of December 21, 2000.

In addition, allowing tribes to retroactively change from contributory to reimbursement status may offer the tribes no advantages for State UC purposes. As noted in UIPL No. 11-92, Federal UC law authorizes only the withdrawal of "compensation" from a State's unemployment fund "unless a clear and unambiguous exception is found in Federal law." Under UIPL No. 11-92, refunds of contributions are permissible only if the payment was in error and "results in an amount being paid into the fund which was not required by the State law in effect at the time the payment was made." In short, a retroactive conversion to reimbursing status would not result in a refund of contributions paid as a contributory employer.

Q. State Effective Date of Reimbursement Option. Must tribes be allowed to convert to the reimbursement option as of the date of enactment of the State's law?

A. No. Under Section 3309(a)(2), FUTA, the reimbursement option applies "for such minimum period and at such time as may be provided by State law." Therefore, regular State law provisions governing conversion will apply. For example, if a State's law is amended on July 31, and the State law provides that the next effective date for converting employers to reimbursing status is January 1, then the State will convert tribes to reimbursing status on such January 1. Similarly, in the case of newly covered tribes, State law provisions governing the election of the reimbursement option at the time of establishing liability will apply.

TRANSITION PROVISION

Q. Transition Payments. The transition provision permits an Indian tribe to escape unpaid FUTA tax liability for services performed for the tribe before the enactment of the amendments to the FUTA if the tribe reimburses the State unemployment fund for UC attributable to this service. Does this mean my State must, for conformity and compliance purposes, permit an Indian tribe to convert to reimbursement status for the period before the enactment of the amendments if it makes a transition payment?

A. No. The transition provision does not affect conformity and compliance. The reimbursement option of Section 3309(a)(2), FUTA, (as well as the mandatory coverage requirement of Section 3304(a)(6)(A), FUTA) only applies when services are excluded from the term "employment" *solely* by reason of Section 3309(a)(1)(B), FUTA. Services performed for an Indian tribe before the enactment of the amendments on December 21, 2000, are not excluded from the term "employment" *solely* by reason of Section 3306(c)(7), FUTA. Rather, these services are excluded because the transition provision provides that they "shall not be treated as employment (within the meaning of section 3306 of [FUTA])." As a result, FUTA does not require a State to permit an Indian tribe to elect the reimbursement option with respect to services performed before December 21, 2000, nor does it mandate coverage for these services.

The transition provision does not require the State to convert tribes to reimbursement status in order for the State to accept a tribal transition payment. The State may, in addition to accepting the tribal transition payment, waive outstanding liabilities for contributions for the period to which the transition payment applies.

The terms and conditions under which States accept transition payments and apply waivers will be determined under State law. However, the transition provision clearly contemplates that States will accept transition payments because they are necessary if an Indian tribe chooses to escape unpaid FUTA liability. States therefore should accept any tribe's transition payment.

IRS Bulletin 2001-8 discusses the transition provision as it affects an Indian tribe's liability for unpaid FUTA taxes.