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DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 41-98

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : GRACE A. KILBANE
Director
Unemployment Insurance Service

SUBJECT : Application of the Prevailing Conditions of Work Requirement

- Purpose.** To remind States of the requirements of the prevailing conditions of work provision of the Federal Unemployment Tax Act (FUTA) and to provide additional guidance.
- References.** Section 3304(a)(5)(B), FUTA; [Unemployment Compensation Program Letter \(UCPL\) No. 130](#); and [Unemployment Insurance Program Letter \(UIPL\) No. 984](#).
- Background.** Section 3304(a)(5)(B), FUTA, requires, as a condition of employers in a State receiving credit against the Federal unemployment tax, that unemployment compensation (UC) shall not be denied to any otherwise eligible individual for refusing to accept new work--

If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (1)

The Department previously issued guidance on the prevailing conditions requirement in 1947 in UCPL 130 (2) and in 1968 in UIPL No. 984. Although both issuances remain in effect, the Department is concerned that, because they were issued a long time ago, not all States remain aware of them or properly apply them. This concern arises from several training sessions and conferences where the prevailing conditions requirement was discussed. The Department also learned of a State-conducted survey on the prevailing conditions requirement which indicated that many States were not examining fringe benefits. When the Advisory Council on Unemployment Compensation queried States on their eligibility provisions, it notably did not ask about the prevailing conditions requirement and only a few States mentioned that requirement in their responses. Also, in the 30 years since the most recent UIPL was issued, the labor market has undergone significant changes, notably in the increase in temporary workers and the importance of fringe benefits. Therefore, this UIPL is being issued.

Section 4 of this UIPL offers a brief summary of UCPL 130 and UIPL 984 (both attached). It also emphasizes that the prevailing conditions requirement applies to certain voluntary quits and clarifies UIPL 984's discussion of a "contract of employment." Section 5 discusses one aspect of adjudicating prevailing conditions issues. Section 6 addresses a change in the labor market - the increase in temporary work - and its relation to the prevailing conditions requirement. Except for the discussion of the contract of employment, this UIPL does not modify UCPL 130 or UIPL 984, both of which remain in effect.

This UIPL contains the minimum requirements States must meet to conform with the prevailing conditions requirement. Nothing prohibits States from interpreting State law provisions implementing the prevailing conditions requirement in a manner more favorable to the individual worker.

4. Discussion.

- a. **In General.** To determine if the offered work is suitable, States conduct a two-tiered analysis. First, the work must be suitable to the individual considering his or her previous wage and skill levels. Whether the work is suitable under this test is generally a matter of State law.⁽³⁾ Second, the work must meet the requirements of Section 3304(a)(5)(B), including the "prevailing conditions of work" requirement. As discussed below, the prevailing conditions requirement applies not only to refusals of work, but also to separations from employment involving a refusal of "new work." It does not matter why the individual refused new work not meeting the prevailing conditions requirement; if the work does not meet the prevailing conditions requirement, compensation may not be denied.

According to UIPL 984, the prevailing conditions requirement is designed to assure that an individual cannot lose rights to compensation because of a refusal of substandard work. Also according to UIPL 984, the purpose of the requirement is to prevent, among other things, depressing wage rates or other working conditions to a point substantially below those prevailing for similar work in the locality. The provision requires a liberal construction to effectuate its purpose.

- b. **Definition of New Work.** The prevailing conditions of work requirement applies whenever an offer of "new work" is refused. Under UIPL 984, "new work" includes:

- (1) An offer of work to an individual by an employer with whom the worker has never had a contract of employment,
- (2) An offer of reemployment to an individual by a previous employer with whom the individual does not have a contract of employment at the time the offer is made, and
- (3) An offer by an individual's present employer of:
 - (a) Different duties from those the individual has agreed to perform in the existing contract of employment; or
 - (b) Different terms or conditions of employment from those in the existing contract.⁽⁴⁾

UIPL 984 further provides that "an attempted change in the duties, terms, or conditions of the work, not authorized by the existing employment contract, is in effect a termination of the existing contract and the offer of a new contract." (Emphasis added.) UIPL 984 did not, however, recognize that, if an employer requires a contract providing for constantly changing conditions, then the prevailing conditions requirement would be nullified. A common-sense understanding of the term "new work" includes performing different work, even if the employment contract provides for performing such different work. Further, by accepting this as a condition of obtaining employment, the individual would, in effect, be forced to waive the protections under the prevailing conditions requirement as a condition of accepting a job. For these reasons, UIPL 984 is supplemented by the following: No contract granting the

employer the right to change working conditions may act as a bar to determining that "new work" exists.

A refusal of new work may occur when the individual is already unemployed or it may be the cause of an individual's separation from employment. When the refusal is the cause of an individual's unemployment, States must assure that issues adjudicated as "voluntary quits" under State law are also adjudicated, when appropriate, under the prevailing conditions of work requirement. An individual may not be disqualified for voluntarily quitting or for refusing an offer of otherwise suitable work when the new work does not meet the prevailing conditions of work in the locality.

c. **When States Must Investigate Prevailing Conditions.** The State has an affirmative duty to assure an offer of new work meets the prevailing conditions requirement before denying UC if:

(1) The individual specifically raises the issue,

(2) The individual objects on any grounds to the suitability of wages, hours, or other offered conditions of new work, or

(3) Facts appear at any stage of the administrative proceedings which put the agency or hearing officer on notice that the conditions of the new work might be substantially less favorable to the individual than those prevailing for similar work in the locality.

To conduct a prevailing conditions inquiry, States must determine what constitutes "similar work" and "prevailing wages, hours, or other conditions," and whether the offered work is "substantially less favorable" to the particular claimant than the prevailing wages, hours, or conditions of similar work in the locality.

d. **Similar Work.** Under UCPL 130, similarity of work is determined by examining the "operations performed, the skill, ability, and knowledge required, and responsibilities involved." States should not rely on job titles alone, which are sometimes misleading. In some occupations the similarity of the work cuts across industry lines. (For example, many accounting functions are similar regardless of the industry.) The nature of the services within an occupation may vary depending on the degree of skill and knowledge required. UCPL 130 continues--

"[s]imilar work" is basically a common sense test On the one hand, the comparison should not be so broad as to result, for example, in the finding of a prevailing wage which bears no relation to those generally paid for some of the kinds of work being compared. On the other hand, the distinctions should not be so fine as to leave no basis for comparison with other work done in the locality

The UCPL goes on to say that the question of what is similar work should not be determined on the basis of what constitutes conditions of work such as the hours of employment, the permanency of the work, unionization, or benefits, since such factors beg the question at issue: what is "similar work?" Rather, the determination of what constitutes similar work will be made on the basis of the similarity of the operations performed, the skill, ability and knowledge required, and the responsibilities involved.

The determination of similar work applies to work performed in the "locality". Under UCPL 130, the locality consists of work in the competitive labor market area in which the conditions of work offered by an employer affect the conditions offered for similar work by other employers because they draw upon the same labor supply. If no similar work exists in the locality, the State may, but is not required to, examine work outside the competitive labor market.

e. **Prevailing Wages, Hours and Conditions of Employment.** Once similar work is identified for the locality, the State must focus on what wages or hours are most prevalent and what conditions are most common for similar work in the locality.

Under UCPL 130, the phrase "conditions of work" refers to the express and implied provisions of the employment agreement and the physical conditions under which the work is performed, as well as conditions that arise at work as a result of laws and regulations, such as coverage for workers' compensation. The phrase "conditions of work" encompasses fringe benefits such as life and group health insurance; paid sick, vacation, and annual leave; provisions for leaves of absence and holiday leave; pensions, annuities and retirement provisions; and severance pay. It also encompasses job security and reemployment rights; training and promotion policies; wage guarantees; unionization; grievance procedures; work rules, including health and safety rules; medical and welfare programs; physical conditions such as heat, light and ventilation; shifts of employment; and permanency of work.

States may not disregard any of these factors when investigating a "prevailing conditions" issue. An individual may not be denied UC for refusal of work if the wages, hours, or any other material condition or combination of conditions of the work offered is substantially less favorable to the individual than those prevailing in the locality for similar work.

f. **Substantially Less Favorable to the Individual.** UCPL 130 describes the language "substantially less favorable to the individual" as presenting a definite but not inflexible standard based on the conditions under which the greatest number of employees in an occupation are working in the locality. It does not preclude the denial of benefits because of the existence of minor or purely technical differences that would not undermine the existing labor market conditions or would not have an appreciable adverse effect on the individual. In borderline cases where it is not clear whether the difference is material or the facts cannot be precisely determined, the general rule of liberal interpretation of remedial legislation indicates that the claimant should be given the benefit of the doubt.

In the prevailing conditions context, the question is whether any material condition or combination of conditions render the work substantially less favorable to the worker than similar work in the locality. Factors to be considered are the actual conditions in question, the extent of difference between the offered work and similar work, and the effect such differences have on the worker. When conditions can be converted into a monetary value, these can be compared as part of the wage package or wage rate. The value to the worker of health insurance, pension, paid vacations, and holidays, for example, is readily ascertainable and provides an objective basis for comparing the conditions of employment and determining the prevailing labor standards and thus the suitability of the offered work.

5. **Adjudicating a Prevailing Conditions Issue.** Before an individual is disqualified from the receipt of UC due to a refusal of suitable work, the State must determine:

- (1) That there was a **bona fide** offer of work;
- (2) That, under State law, the work is suitable to the individual in terms of the individual's previous wage and skill levels;
- (3) That the wages, hours, and other conditions of the work were not substantially less favorable to the individual than those prevailing in the locality; and,
- (4) That, under State law, there was not good cause for refusing the offer.

The information needed to determine items (1), (2) and (4) is usually readily available. As a result, the State may be able to decide that an individual is eligible without adjudicating the often time-consuming

prevailing conditions issue. For example, if the job offer was not **bona fide**, the work was not reasonably suitable to the individual, or there was good cause for refusing work, then there is no need to adjudicate prevailing conditions issues. Conversely, if the State determines the individual would be ineligible under any of items (1), (2) or (4), then it must adjudicate any prevailing conditions issue before denying the individual.

Similarly, when the refusal of an offer of new work involves the application of a State's voluntary quit provisions, there is no need to adjudicate a prevailing conditions issue when the individual is determined to be otherwise eligible. However, the State must adjudicate any prevailing conditions issue before denying the individual.

6. **Temporary Work.** Since UCPL 130 and UIPL 984 were issued, the use of temporary or contingent workers has greatly expanded. One of the incentives for employers to use temporary workers is that these workers reduce employer costs since they often do not enjoy the wages, hours, and other conditions enjoyed by their permanent counterparts. Temporary workers may be ineligible for fringe benefits and they may not be trained for higher-skilled jobs. By avoiding the costs associated with permanent workers, employers could be depressing precisely those factors considered "prevailing conditions" within the FUTA labor standards: fringe benefits, health insurance, promotion policies, etc.

Just as it applies to other refusals of work, the prevailing conditions requirement applies to refusals of offers of temporary work. The fact that the work is temporary should generally be sufficient to trigger a prevailing conditions inquiry. Also, as noted in item 4.b., "new work" may not be limited by an employment contract which grants the employer the right to change employment conditions. Therefore, a refusal of temporary work in the form of a new assignment from a temporary help firm is also subject to the prevailing conditions requirement.

As noted in item 4.d., what constitutes similar work is not determined on the basis of the conditions of work such as the hours of employment, the permanency of the work, or benefits. (These factors are considered only after the question of similar work has been decided.) Accordingly, temporary work should not be compared only to similar temporary work. Instead, it must be compared with all work, temporary and permanent, in a similar occupational category.

Temporary work is not **per se** unsuitable under the prevailing conditions requirement. If, for example, the norm for a particular occupation in a locality is temporary work, then temporary work is the prevailing condition of such work. As another example, when temporary help firms are involved, an individual so desiring may work continuously. The State must collect the necessary facts to determine the specifics in each case.

Also, the short-term duration of temporary work may be a voluntary or favorable condition for some individuals. If the State establishes through fact finding that this is the case for an individual, then the work offered is "not less favorable to the individual" than the work prevailing in the locality.

7. **Action.** Appropriate staff, including higher and lower appellate authorities, should be provided with copies of this UIPL. Action should be taken to assure that the prevailing conditions requirement is applied as described in this UIPL, UIPL 984 and UCPL 130.
8. **Inquiries.** Please direct inquiries to the appropriate Regional Office.

Attachments

[UCPL 130](#)

[UIPL 984](#)

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1. Two other requirements exist in Section 3304(b)(5), FUTA: UC may not be denied for refusing new work if the position offered is vacant due directly to a strike, lockout or other labor dispute or if "as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization."
 2. UCPL 130 was later incorporated in the Department's Benefit Series, 1-BP-1, BSSUI, September 1950.
 3. The exception is for extended benefits where "suitable work" must meet the requirements of Section 202(a)(3)(C) of the Federal-State Extended Unemployment Compensation Act.
 4. The basis for this position is discussed in UIPL 984.