APPENDIX—Continued

[Petitions instituted between 03/08/2004 and 03/12/2004]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
54,480	Ma's Manufacturing (Wkrs)	San Francisco, CA	03/11/2004	03/02/2004
54,481	Sierra Pacific Industries (Wkrs)	Susanville, CA	03/11/2004	03/01/2004
54,482	Umicore Optical Materials USA (Comp)	Quapaw, OK	03/11/2004	03/10/2204
54,483	Colortex Corporation, Inc. (Comp)	York, SC	03/11/2004	02/27/2004
54,484	Cady Industries (Comp)	Memphis, TN	03/12/2004	03/11/2004
54,485	Burlington Industries (Wkrs)	Hurt, VA	03/12/2004	02/20/2004
54,486	Pasminco Clinch Valley Mine (Comp)	Thorn Hill, TN	03/12/2004	03/11/2004
54,487	Maple Mountain Industries (Wkrs)	Meyersdale, PA	03/12/2004	03/05/2004
54,488	Fort Smith and Bow (AR)	Fort Smith, AR	03/12/2004	03/11/2004
54,489	Pradco (AR)	Fort Smith, AR	03/12/2004	03/11/2004
54,490	Parker Hannifin Corp. (Comp)	Ogden, UT	03/12/2004	03/04/2004
54,491	Art Craft Optical (Wkrs)	Rochester, NY	03/12/2004	02/19/2004
54,492	Regal Manufacturing Co. (Comp)	Hickory, NC	03/12/2004	03/08/2004
54,493	Burle Industries (Wkrs)	Lancaster, PA	03/12/2004	03/09/2003
54,494	Jones and Vining, Inc. (Comp)	Lewiston, ME	03/12/2004	03/10/2004
54,495	Milliken and Company (Wkrs)	Spartanburg, SC	03/12/2004	02/25/2004
54,496	Kilgore Knitting, Inc. (AL)	Fyffe, AL	03/12/2004	03/11/2004
54,497	Trek Bicycle Corp. (Comp)	Whitewater, WI	03/12/2004	03/11/2004

[FR Doc. 04–7170 Filed 3–30–04; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

Workforce Security Programs: Training and Employment Guidance Letter Interpreting Federal Law

The Employment and Training Administration interprets Federal law requirements pertaining to unemployment compensation (UC). These interpretations are issued in Unemployment Insurance Program Letters (UIPLs) to the State Workforce Agencies. The UIPLs described below are published in the **Federal Register** in order to inform the public.

UIPL 14–01

UIPL 14–01 informs states of the amendments made by the Consolidated Appropriations Act of 2001 (CAA) affecting the federal-state UC program. The CAA amended Federal law to change the way American Indian tribes are treated under the Federal Unemployment Tax Act (FUTA). The Indian tribes are now treated similarly to state and local governments. States with ''Indian tribes,'' as defined by the CAA amendments, within their state boundaries were required to amend their laws to implement the requirements created by the CAA.

UIPL 14–01, Change 1

UIPL 14–01, Change 1 responded to questions concerning the treatment of Indian tribes under the FUTA. This issuance addresses the scope of the law, answers questions about the Model Language provided in UIPL 14–01, and responds to questions concerning financing UC for businesses owned by Indian tribes.

Dated: March 25, 2004.

Emily Stover DeRocco,

Assistant Secretary of Labor.

U.S. Department of Labor,

Employment and Training Administration, Washington, DC 20210

Classification: UI
Correspondence Symbol: TEUL
Date: January 12, 2001

Directive: Unemployment Insurance Program Letter No. 14–01.

To: All State Employment Security Agencies.

From: Grace A. Kilbane, Administrator, Office of Workforce Security.

Subject: Treatment of Indian Tribes under Federal Unemployment Compensation Law—Amendments made by the Consolidated Appropriations Act, 2001.

1. *Purpose:* To inform States of the amendments made by the Consolidated Appropriations Act, 2001 affecting the Federal-State Unemployment Compensation (UC) program.

2. *References.* Section 166 of the Community Renewal Tax Relief Act of 2000 as enacted by the Consolidated Appropriations Act, 2001 (CAA), P.L. 106–554; Sections 3304(a)(6), 3306(c)(7), 3306(u), and 3309 of the Federal Unemployment Tax Act (FUTA); Section 204(a) of the Federal-State Extended Unemployment Compensation Act; Section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)); 20 C.F.R. Part 615; *Draft Legislation to Implement the Employment Security Amendments of 1970 * * * H.R. 14705* (1970 Draft Language); *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976–P.L. 94–566* (1976 Draft Language); Unemployment Insurance Program Letter (UIPL) No. 21–80 (February 29, 1980); UIPL No. 29–83 (September 13, 1983); UIPL No. 11–86 (January 31, 1986); UIPL No. 43–93 (September 13, 1993); UIPL No. 14–96 (April 12, 1996); and UIPL No. 30–96 (August 8, 1996).

3. *Background.* On December 21, 2000, the President signed the CAA into law. The CAA amended Federal law to change the way American Indian tribes are treated under the FUTA. Specifically, the Indian tribes are now treated similarly to State and local governments. This means—

Rescissions: None

Expiration Date: Continuing

- Services performed in the employ of tribes generally are no longer subject to the FUTA tax.
- As a condition of participation in the Federal-State UC program:

Services performed in the employ of tribes are, with specified exceptions, required to be covered under State UC laws. Prior to the CAA amendments, coverage was at the option of the State.

Tribes must be offered the reimbursement option. Prior to the CAA amendments, States were prohibited from offering the reimbursement option to Indian tribes. (See UIPL No. 4–96.)

- Extended Benefit payments based on services performed in the employ of tribes no longer qualify for Federal sharing.

Unlike State and local governments, if an Indian tribe fails to make required payments to the State's unemployment fund or payments of penalty or interest, then the tribe will become liable for the FUTA tax and the State may remove tribal services from State UC coverage.

States with ''Indian tribes,'' as defined by the CAA amendments, within their State boundaries will need to amend their laws to implement the requirements created by the CAA.

4. *Discussion.*

a. *What is the definition of Indian Tribe?* The CAA added a new provision to the FUTA defining Indian tribe. For FUTA purposes—

the term ''Indian tribe'' has the meaning given to such term by section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)), and includes any subdivision, subsidiary, or business enterprise wholly owned by such an Indian tribe. [Section 3306(u), FUTA.]

Section 4(e) of the Indian Self-Determination and Education Assistance Act provides—

''Indian tribe'' means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) (43 U.S.C. 1601 et seq.), which is recognized as eligible for the special programs and service provided by the United States to Indians because of their status as Indians.

A listing of these Indian tribes as of March 13, 2000, is contained in the attached **Federal Register** Notice. The amendments made by the CAA apply only to these Indian tribes. States are not required to cover services for Indian tribal entities not meeting this definition. States are prohibited from offering the reimbursement option to Indian tribal entities not meeting this definition.

b. *How does the CAA exempt tribal services from the FUTA tax?* Section 3306(c)(7), FUTA, excludes services performed by State and local governments from the FUTA definition of ''employment'' with the result that these services are not subject to the FUTA tax. The CAA amended this section to now provide that ''employment'' does not include—

service performed in the employ of a State, or any political subdivision thereof, or in the employ of an Indian tribe, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions or Indian tribes; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 3301. [Amendments in bold.]

The exception from employment applies only to services performed ''in the employ of an Indian tribe.'' It does not except from employment services performed for a private entity on reservation lands.

The Internal Revenue Service (IRS) is charged with administering this section and is therefore responsible for addressing any questions concerning services performed ''in the employ of an Indian tribe.''

c. *How does the CAA require coverage of tribal services*? As a condition of employers in the State receiving credit against the FUTA tax, FUTA requires State law to provide that UC must be—

payable on the basis of service to which 3309(a)(1) applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law. [Section 3304(a)(6)(A), FUTA.]

These requirements are generally referred to as the ''required coverage'' and ''equal treatment'' provision. They apply to the services described in Section 3309(a)(1), FUTA. Section 3309(a)(1)(B) applies to ''service excluded from the term 'employment' solely by reason'' of Section 3306(c)(7), FUTA. Since services performed in the employ of an Indian tribe are now included in Section 3306(c)(7), FUTA, they fall within the scope of the required coverage and equal treatment provisions.

In brief, this means that services performed in the employ of a tribe must be covered for State UC law purposes when the services are excluded from the FUTA definition of ''employment'' solely by reason of being performed for the tribe. It also means that ''equal treatment'' must be provided in the payment of UC based on services performed in the employ of a tribe. States may not create special eligibility provisions related to tribal services within the scope of Section 3306(c)(7), FUTA, without conflicting with Federal law.

d. *Are any services excepted from the required coverage of tribal services*? Yes. The same services which may be excluded from coverage for State and local governments may be excluded when performed for a tribe. These services are found in paragraphs (1) through (6) and (8) through (20) of Section 3306(c) and Section 3309(b) of the FUTA. The CAA amended three of the FUTA exceptions to specifically address their application to services performed for tribes. These exceptions now provide that States are not required to cover services performed—

- ''as a member of legislative body, or a member of the judiciary, of a State or political subdivision thereof, **or of an Indian tribe**.'' (Section 3309(b)(3)(B), FUTA; amendment in bold.)
- ''in a position, which under or pursuant to the State **or tribal** law, is designated as (i) a major nontenured policymaking or advisory position, or (ii) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than 8 hours per week.'' (Section 3309(b)(3)(E), FUTA; amendment in bold.)
- ''as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any Federal agency or an agency of a State or political subdivision thereof **or of an Indian tribe**, by an individual receiving such work relief or work training.'' (Section 3309(b)(5), FUTA; amendment in bold.)

Guidance on the exclusions relating to members of a legislative body or judiciary and to major nontenured policymaking or advisory position is found on pages 26–29 of the 1976 Draft Language. Guidance on work-relief or work-training programs is found in UIPL No. 30–96.

States are not required to except any services performed for a tribe from coverage. This decision is entirely a State option.

e. *How does the CAA give tribes the reimbursement option*? *How does the CAA allow States to terminate coverage and the reimbursement option*? FUTA also requires, as a condition of employers in the State receiving credit against the FUTA tax, that State law provide that—

payments (in lieu of contributions) with respect to service to which section 3309(a)(1) applies may be made into the State unemployment fund on the basis set forth in section 3309(a)(2). [Section 3304(a)(6)(B), FUTA.]

Since, as discussed in the preceding item, services performed in the employ of Indian tribes now fall under Section 3309(a)(1), the reimbursement option must be offered to Indian tribes. Therefore, the States are required to offer the option of ''payments in lieu of contributions'' (or reimbursement) option to Indian tribes.

The reimbursement option is described in Section 3309(a)(2), FUTA—

the State law shall provide that a governmental entity, **including an Indian tribe,** or any other organization (or group of governmental entities or other organizations) which, but for the requirements of this paragraph, would be liable for contributions with respect to service to which paragraph (1) applies may elect, for such minimum period and at such time as may be provided by State law, to pay (in lieu of such contributions) into the State unemployment fund amounts equal to the amounts of compensation attributable under the State law to such service. The State law may guards to ensure that governmental entities or other organizations so electing will make the payments required under such elections. [Amendment in bold.]

In addition to making the reimbursement requirements of Section 3309(a)(2) applicable to the tribes, the CAA added a new Section 3309(d) to FUTA concerning elections of reimbursement status by an Indian tribe. It provides that—

The State law shall provide that an Indian tribe may make contributions for employment as if the employment is within the meaning of section 3306 or make payments in lieu of contributions under this section, and shall provide that an Indian tribe may make separate elections for itself and each subdivision, subsidiary, or business enterprise wholly owned by such Indian tribe. State law may require a tribe to post a payment bond or take other reasonable measures to assure the making of payments in lieu of contributions under this action. Notwithstanding the requirements of section 3306(a)(6) [sic—should be 3304(a)(6)], if, within 90 days of having receiving a notice of delinquency, a tribe fails to make contributions, payments in lieu of contributions, or payment of penalties or interest (at amounts or rates comparable to those applied to all other employers covered under the State law) assessed with respect to such failure, or if the tribe fails to post a required payment bond, then service for the tribe shall not be excepted from employment under section 3306(c)(7) until any such failure is corrected. This subsection shall apply to an Indian tribe within the meaning of section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

f. *What is the effect of these amendments on the reimbursement option*? The

amendments to FUTA establish the following rules for offering tribes the reimbursement option—

- States must offer the reimbursement option to tribes.
- A tribe must be given the option of making separate reimbursement elections for itself, each subdivision, subsidiary, or business enterprise wholly owned by the tribe.
- Tribes must be allowed to combine into group reimbursement accounts if they so choose.
- States may require a payment bond or take other reasonable measures to assure reimbursements are made. (See the discussion contained in the 1970 Draft Language, pages 99–103, concerning bonds or other security.)
- States may establish minimum periods for which an election (or the declining of the election) is a applicable and the times at which elections may be made.

g. *What happens if a tribe fails to make payments required under State law?* Concerning any failure of a tribe to make payments required under State law—

- The failure applies to any contributions, reimbursements, penalties, interest, and bonds required by State law.
- The amount of the penalty or rate of interest must be ''comparable'' to those applied to all other employers covered under State law. For ease of administration, States are encouraged to apply identical amounts or rates. States should not vary the amount or rate from that which would be charged other employers by more than 10 percent.
- If, within 90 days of receiving a delinquency notice, the tribe fails to make a required payment, then the services performed will no longer ''be excepted from unemployment under section 3306(c)(7) until any such failure is corrected.'' This means that—
- Services performed for the Indian tribe become subject to the FUTA tax.
- States are, at their option, no longer required to cover services performed for the tribe.
- States are prohibited from allowing the tribe to reimburse the State's unemployment fund. If the State chooses to continue coverage of tribal services, the tribe must be converted to contributing status.

Whether a tribe fails to make the required payment within 90 days of receiving a delinquency notice is a determination made under State law. Since the effects of unpaid liabilities for Indian tribes differs from the effect on other employers, States should advise the tribes at the time of mailing of the delinquency notice that non-payment will result in the tribe becoming subject to the FUTA tax, the exclusion of tribal services from coverage (if the State decides to exercise this option), and loss of reimbursement status.

Under Section 3309(d), FUTA, if ''a tribe fails to make'' ''a payment or fails to post a required payment bond,'' then ''service for the tribe'' shall not be excepted from the FUTA definition of employment. When any subdivision, subsidiary, or business enterprise wholly owned by the tribe (''tribal units'') fails to make a payment or post a required bond, all services performed for the tribe become subject to the FUTA and States are no longer required to cover the services. If, however, the services continue to be covered, the tribe must be converted to contributing status. In cases where tribal units have separately elected the reimbursement option, States may wish to consider making the entire tribe and its tribal units jointly and severally liable so that the risk of the Indian tribe losing its privileges is minimized.

States are not required to terminate coverage due to nonpayment. If a State elects to do so, the State should terminate coverage due to non-payment only as a last resort because terminating coverage publishes workers who have no control over whether their employers satisfy the UC liabilities.

States have some flexibility to determine when the termination of reimbursement status becomes final. For example, the termination could become effective either immediately or the following tax year. Also, if the State has reason to believe the tribe will pay the amounts due, termination may be delayed. For example, States may enter into payment schedules, which, if adhered to by the tribe, would be a basis for delaying termination. Similarly, once the tribe satisfies its liabilities, the State has the option of immediately converting the tribe back to a reimbursing employer, waiting until the following tax year, or requiring a new election. States may also choose to treat certain delinquencies differently depending on the nature of the delinquency. For example, if a tribe is delinquent in posting the initial required payment bond for purposes of becoming a reimbursing employer, the State may grant reimbursing status immediately upon the bond being paid. Alternatively, if the delinquency is for unpaid reimbursements, the State may wait until the following tax year to again grant reimbursing status.

The IRS will determine any FUTA tax liability resulting from State determinations made under provisions of State law consistent with Section 3309(d), FUTA. To assure proper determination of FUTA liability, the 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.

h. *What options exist for allocating UC costs when the tribe elects reimbursement status.?* Under the FUTA, State law must provide for payment by reimbursing employers ''of amounts equal to the amounts of compensation attributable under the State law to such service.'' As explained in UIPL No. 21–80, whether UC paid is attributable to service in the employ of a reimbursing employer (and, therefore, whether the UC costs must be reimbursed by that employer) is to be determined under provisions of State UC law which reasonably interpret and implement FUTA. As a general rule, if an amount may be noncharged to a contributory employer, the State may similarly find that the payment is not ''attributable to'' a reimbursing employer. When this occurs, there is the possibility of unrecovered UC costs. UIPL No. 44–93 explains acceptable methods for establishing liability for these unrecovered UC costs.

i. *Is there any affect on Federal sharing under the Extended Benefit (EB) program?* Yes. States may no longer claim the Federal share of EB based on services performed for Indian tribes. The Federal-State Extended Unemployment Compensation Act (EUCA) provides that, with exceptions related to certain waiting weeks and rounding of benefits, the Federal share of EB will be 50 percent of benefit costs. (Section 204(a), EUCA.) Since, as discussed above, services performed for Indian tribes are now included in Section 3306(c)(7), the Department is prohibited from providing a Federal share based on these services. (The rationale for this prohibition is that the entities in question do not pay the FUTA tax which funds the Federal share of EB.)

How States allocate the costs of EB is controlled by 20 CFR 615.10. Contributory employers may be noncharged the costs of EB. In the case of reimbursing employers, the employer must reimburse at least 50 percent of the EB costs. As is the case for State and local governments, when Federal sharing is not permitted, the State may either charge the tribe for the all its EB costs or socialize its EB costs to the extent allowed by 20 CFR.

j. *Does the ''between and within terms denial'' for employees of education institutions apply?* Yes. The between and within terms denial provisions are an exception to the ''equal treatment'' requirements discussed in item 4.d. (Section 3304(a)(6)(A)(i)-(vi), FUTA.) some of these provisions are required; others are optional Denial between and within terms is required based on services performed in an instructional, research or principal administrative (that is, a ''professional'' capacity. (See UIPL No. 43–83 for a general discussion of these requirements.) When an Indian tribe operates an educational institution, UC based upon professional services for that institution are subject to the between and within terms denial. (Note that educational institutions on tribal lands may be operated by the Federal government. Treatment of these institutions is unchanged. *See* UIPL No. 11–86.)

k. *What is the CAA's Transition Rule for Indian Tribes?* The CAA's transition rule provides that, if a tribe has unpaid FUTA liabilities prior to its date of enactment, then the services for the tribe ''shall not be treated as employment''—that is, the FUTA tax will not be due—provided the tribe reimburses the State's unemployment fund for any UC paid prior to the date of enactment. This transition rule only affects the tribe's liability for FUTA tax prior to the date of enactment of the CAA. It has no effect on the requirement that coverage be extended to tribal services or on the requirement that tribes be offered the reimbursement option.

l. *Which States must amend their laws?* Only States with ''Indian tribes'' within their State boundaries must amend their laws. These States are:

Alabama
Alaska
Arizona

California
Colorado
Connecticut
Florida
Idaho
Iowa
Kansas
Louisiana
Maine
Massachusetts
Michigan
Minnesota
Mississippi
Montana
Nebraska
Nevada
New Mexico
New York
North Carolina
North Dakota
Oklahoma
Oregon
Rhode Island
South Carolina
South Dakota
Texas
Utah
Washington
Wisconsin
Wyoming

In addition, petitions for Federal recognition have been filed in the following States which do not currently have federally recognized tribes:

Arkansas
Delaware
Georgia
Indiana
Maryland
Missouri
New Jersey
Ohio
Tennessee
Vermont
Virginia

We recommend that States where Federal recognition has not been granted, but where petitions have been filed, amend their laws to assure State UC law automatically conforms with Federal law in the event Federal recognition is granted.

m. *By what date must amendments to State UC law be made?* The amendments ''apply to services performed on or after the date of enactment'' of the CAA. (Section need time to introduce and enact legislation, the Department will take no enforcement action prior to October 31, 2001.)

n. *Is the Department of Labor supplying model legislative language for States to use?* Model legislative language to aid States in developing their amendments is attached. States are not required to use this model legislation. As an alternative to using the model legislation, States may, for example, integrate the coverage provisions into the coverage provisions relating to State and local governments and integrate the reimbursement/bonding provisions into the reimbursement/bonding provisions applicable to all other employers who may elect the reimbursement option.

5. *Action Required.* Administrators are requested to provide this information to the appropriate staff. Action should be taken by the States with Indian tribes within their State boundaries listed in item 4.1. to implement the new Federal requirements discussed in this program letter as soon as possible.

6. *Inquiries.* Questions should be directed to the appropriate Regional Office.

Attachments—
Listing of Indian Tribes[1]
Model Legislative Language

Model Legislative Language

Section_____. Treatment of Indian Tribes

(a) The term ''employer'' shall include any Indian tribe for which service in employment as defined under this Act[1] is performed.

(b) The term ''employment'' shall include service performed in the employ of an Indian tribe, as defined in Section 3306(U) of the Federal Unemployment Tax Act (FUTA), provided such service is excluded from ''employment'' as defined in FUTA solely by reason of Section 3306(c)(7), FUTA, and is not otherwise excluded from ''employment'' under this Act. For purposes of this section, the exclusions from employment in section [insert provision of State law relating to State and local government exclusions] shall be applicable to services performed in the employ of an Indian tribe.

(c) Benefits based on service in employment defined in this section shall be payable in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject under this Act.

(d)(1) Indian tribes or tribal units (subdivisions, subsidiaries or business enterprises wholly owned by such Indian tribes) subject to this Act shall pay contributions under the same terms and conditions as all other subject employers, unless they elect to pay into the State unemployment fund amounts equal to the amount of benefits attributable to service in the employ of the Indian tribe.

(2) Indian tribes electing to make payments in lieu of contributions must make such election in the same manner and under the same conditions as provided in [enter section of State law] pertaining to State and local governments and nonprofit organizations subject to this Act. Indian tribes will determine if reimbursement for benefits paid will be elected by the tribe as a whole, by individual tribal units, or by combinations of individual tribal units.

(3) Indian tribes or tribal units will be billed for the full amount of benefits attributable to service in the employ of the Indian tribe or tribal unit on the same schedule as other employing units that have elected to make payments in lieu of contributions.

(4) At the discretion of the commissioner, any Indian tribe or tribal unit that elects to become liable for payments in lieu of contributions shall be required within ____ days after the effective date of its election, to:

(A) execute and file with the commissioner s surety bond approved by the commissioner or

(B) deposit with the commissioner money or securities on the same basis as other employers with the same election option.

(e)(1)(A) Failure of the Indian tribe or tribal unit to make required payments, including assessments of interest and penalty, within 90 days of receipt of the bill will cause the Indian tribe to lose the option to make payments in lieu of contributions, as described in section (d), for the following tax year unless payment in full is received before contribution rates for next tax year are computed.

(B) Any Indian tribe that loses the option to make payments in lieu of contributions due to late payment or nonpayment, as described in subparagraph (A), shall have such option reinstated if, after a period of one year, all contributions have been made timely, provided no contributions, payments in lieu of contributions for benefits paid, penalties or interest remain outstanding.

(2)(A) Failure of the Indian tribe or any tribal unit thereof to make required payments, including assessments of interest and penalty, after all collection activities deemed necessary by the commissioner have been exhausted, will cause services performed for such tribe to not be treated as ''employment'' for purposes of subsection (b).

(B) The commissioner may determine that any Indian tribe that loses coverage under subparagraph (A), may have services performed for such tribe again included as ''employment'' for purposes of subsection (b) if all contributions, payments in lieu of contributions, penalties and interest have been paid.

(C) The commissioner will notify the United States Internal Revenue Service and the United States Department of Labor of any termination or reinstatement of coverage made under subparagraphs (A) and (B).

(f) Notices of payment and reporting delinquency to Indian tribes or their tribal units shall include information that failure to make full payment within the prescribed time frame:

(1) will cause the Indian tribe to be liable for taxes under FUTA;

(2) will cause the Indian tribe to lose the option to make payments in lieu of contributions;

(3) could cause the Indian tribe to be excepted from the definition of ''employer,'' as provided in paragraph (a), and services in the employ of the Indian tribe, as provided in paragraph (b), to be excepted from ''employment.''

(g) Extended benefits paid that are attributable to service in the employ of an Indian tribe and not reimbursed by the Federal government shall be financed in their entirety by such Indian tribe.

U.S. Department of Labor,

Employment and Training Administration, Washington, DC 20210

Classification: UI
Correspondence Symbol: OWS/OIS/DL
Date: April 6, 2001

Directive: Unemployment Insurance Program Letter, No. 14–01, Change 1

To: All State Employment Security Administrators

[1] The attachment was published in the **Federal Register**, Vol. 65, No. 49, pp. 13298–13303, on Monday, March 13, 2000.

[1] ''Act'' refers to the State employment security law.

From: Grace A. Kilbane, Administrator, Office of Workforce Security.

Subject: Treatment of Indian Tribes under Federal Unemployment Compensation Law—Questions and Answers.

1. *Purpose.* To respond to questions concerning the treatment of Indian tribes under the Federal Unemployment Tax Act as amended by the Consolidated Appropriations Act, 2001.

2. *References.* Section 166 of the Community Renewal Tax Relief Act of 2000 as enacted by the Consolidated Appropriations Act, 2001 (CAA), P.L. 106–554; the Internal Revenue Code, including the Federal Unemployment Tax Act (FUTA); Section 303(a)(1) of the Social Security Act (SSA); Section 2079 of the Revised Statutes (25 U.S.C. 71); Internal Revenue Service (IRS) Revenue Ruling 59–354; Unemployment Insurance Program Letter (UIPL) No. 24–89 (April 4, 1989); UIPL No. 11–92 (December 30, 1991); UIPL No. 14–96 (August 8, 1996); and UIPL No. 14–01 (January 12, 2001).

3. *Background.* The Department of Labor (Department) has received numerous questions on the treatment of Indian tribes under the FUTA, as amended by the CAA. The Department has also received several questions concerning the Model Legislative Language issued in UIPL No. 14–01. The attachment to this UIPL responds to these questions. Note the Question and Answer pertaining to notifying the IRS of delinquent payments provides new language modifying the Model Legislative Language.

3a. *Inquiries.* Questions should be directed to the Appropriate Regional Office.

Attachment—Questions and Answers

Rescissions: None

Expiration Date: Continuing

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 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 (item 4.g.) of UIPL 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 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 3307(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—

Section 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 4.1. 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. In 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 experienced 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 contribution [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 provisions 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 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 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.

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DEPARTMENT OF LABOR

Mine Safety and Health Administration

Proposed Information Collection Request Submitted for Public Comment and Recommendations; Representative of Miners, Notification of Legal Identity, and Notification of Commencement of Operations and Closing of Mines

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

DATES: Submit comments on or before June 1, 2004.

ADDRESSES: Send comments to Darrin A. King, Chief, Records Management Branch, 1100 Wilson Boulevard, Room 2139, Arlington, VA 22209–3939. Commenters are encouraged to send their comments on computer disk, or via Internet e-mail to *king.darrin@dol.gov*. Mr. King can be reached at (202) 693–9838 (voice), or (202) 693–9801 (facsimile).

FOR FURTHER INFORMATION CONTACT: Contact the employee listed in the **ADDRESSES** section of this notice.

SUPPLEMENTARY INFORMATION:

I. Background

Section 103(f) of the Federal Mine Safety and Health Act of 1977, Pub. L. 91 173 as amended by Pub. L. 95 164, (Mine Act) establishes miners' rights which may be exercised through a representative. Title 30, Code of Federal Regulations (CFR) part 40 contains procedures which a person or organization must follow in order to be identified by the Secretary as a representative of miners. The regulations define what is meant by ''representative of miners,'' a term that is not defined in the Mine Act.

Title 30 CFR 40.3 requires the following information to be filed with the Mine Safety and Health Administration (MSHA): (1) The name, address and telephone number of the representative or organization that will serve as representative; (2) the name and address of the mine operator; the name, address and MSHA ID number, if known, of the mine; (3) a copy of the document evidencing the designation of the representative; (4) a statement as to whether the representative will serve for all purposes of the Act, or a statement of the limitation of the authority; (5) the name, address and telephone number of an alternate; (6) a statement that all the required information has been filed with the mine operator; and (7) certification that all information filed is true and correct followed by the signature of the miners' representative. Title 30 CFR 40.4 requires that a copy of the notice designating the miners' representative be posted by the mine operator on the mine bulletin board and maintained in current status. Once the required information has been filed, a representative retains his or her status unless and until his or her designation is terminated. Under 30 CFR 40.5, a representative who wishes to terminate his or her designation must file a written statement with the appropriate district manager terminating his or her designation.

Section 109(d) of the Mine Act, requires each operator of a coal or other mine to file with the Secretary of Labor (Secretary), the name and address of such mine, the name and address of the person who controls or operates the mine, and any revisions in such names and addresses. Title 30 CFR part 41 implements this requirement and provides for the mandatory use of Form 2000–7, Legal Identity Report, for notifying the MSHA of the legal identity of the mine operator.

The legal identity for a mine operator is fundamental to enable the Secretary to properly ascertain the identity of persons and entities charged with violations of mandatory standards. It is also used in the assessment of civil penalties which, by statute, must take into account the size of the business, its economic viability, and its history of previous violations. Because of the rapid and frequent turnover in mining company ownership, and because of the statutory considerations regarding penalty assessments, the operator is required to file information regarding ownership interest in other mines held by the operator and relevant persons in a partnership, corporation or other organization. This information is also necessary to the Office of the Solicitor in determining proper parties to actions arising under the Mine Act.

Under title 30 CFR 56.1000 and 57.1000, operators of metal and