In reply refer
to UODA

U.S. DEPARTMENT OF LABOR
Manpower Administration
Bureau of Employment Security

Unemployment Insurance
Program Letter No. 984
September 20, 1968

TO: ALL STATE EMPLOYMENT SECURITY AGENCIES

SUBJECT: Benefit Determinations and Appeals Decisions Which Require Determination of Prevailing Wages, Hours, or Other Conditions of Work

REFERENCES: Section 3304(a)(5)(B) of the Federal Unemployment Tax Act; Principles Underlying the Prevailing Conditions of Work Standard, September 1950, BSSUI (originally issued January 6, 1947 as Unemployment Compensation Program Letter No. 130)

Purpose and Scope

To advise State agencies and appeal authorities of the interpretation of the phrase "new work" for the purpose of applying the prevailing wage and conditions-of-work standard in section 3304(a)(5)(B) of the Federal Unemployment Tax Act, particularly in relation to an offer of work made by an employer for whom the individual is working at the time the offer is made.

This letter is prompted primarily by a current problem arising from a number of recent cases in which findings were not made with respect to the prevailing wages, hours, or other conditions of the work, because apparently it was not considered that "new work" was involved.

Federal Statutory Provision Involved

Section 3304(a)(5) of the Federal Unemployment Tax Act, the so-called labor standards provision, requires State unemployment insurance laws, as a condition of approval for tax credit, to provide that:

> "compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:
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> * * * * *
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> "(B) 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;"

Legislative History

The prevailing wage and conditions-of-work standard, originally in section 903(a)(5)(B) of the Social Security Act and since 1939 in section 3304(a)(5)(B) of the Federal Unemployment Tax Act applies only to offers of "new work."1/ The hearings before Congressional committees and the reports of these committees furnish little aid in construing the term.2/ The Congressional debates, however, clearly indicate that the labor standards provision was included in the bill for the protection of workers.3/ The objectives of the provision are clearly set forth by the Director of the Committee on Economic Security, which prepared the legislation:

> ". . . compensation cannot be denied if the wages, hours or other conditions of work offered are substantially less favorable to the employee than those prevailing for similar work in the locality. The employee cannot lose his compensation rights because he refuses to accept substandard work. That does not mean that he cannot be required to accept work other than that in which he has been engaged; but if the conditions are such that they are substandard, that they are lower than those prevailing for similar work in the locality, the employee cannot be denied compensation."4/

It is plain that the purpose of section 3304(a)(5)(B) is to prevent the tax credit from being available in support of State unemployment compensation laws which are used, among other things, to depress wage rates or other working conditions to a point substantially below those prevailing for similar work in the locality. The provision, therefore, requires a liberal construction in order to carry out the Congressional intent and the public policy embodied therein. Interpretation is required, for the term "new work" is by no means unambiguous. But any ambiguity should be resolved in the light of such intent and public policy.

1/ Many State laws extend its application by specifying that "no work shall be deemed suitable" which fails to satisfy the standard.

2/ The Report of the Committee on Ways and Means on the Social Security Bill (H.R. 7260), House Report No. 615, 74th Cong., 1st Session, page 35, uses the term "new job" and this is copied in the Report of the Senate Committee on Finance, Senate Report No. 628, 74th Cong., 1st Session, page 47, but the term "new job" is itself ambiguous and there is no indication that it was used by either committee in a narrow or exclusive sense.

3/ See statement of Senator Harrison, Congressional Record, Vol. 79, p.9271.

4/ HEARINGS BEFORE THE COMMITTEE OF WAYS AND MEANS, HOUSE OF REPRESENTATIVES, 74th Cong., 1st Sess., on H.R. 4120, pp. 137-38.

Interpretation of "New Work"

For the purpose of applying the prevailing conditions-of-work standard in section 3304(a)(5)(B) of the Federal Unemployment Tax Act, an offer of new work includes (1) an offer of work to an unemployed individual by an employer with whom he has never had a contract of employment; (2) an offer of re-employment to an unemployed individual by his last (or any other) employer with whom he 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 he has agreed to perform in his existing contract of employment, or (b) different terms or conditions of employment from those in his existing contract.5/

This definition makes the determination of whether an offer is of "new work" depend on whether the offer is of a new contract of employment. This we believe is sound.

All work is performed under a contract of employment between a worker and his employer. The contract describes the duties the parties have agreed the worker is to perform, and the terms and conditions under which the worker is to perform them. If the duties, terms, or conditions of the work offered by an employer are covered by an existing contract between him and the worker, the offer is not of new work. On the other hand, if the duties, terms, or conditions of the work offered by an employer are not covered by an existing contract between him and the worker, the offer is of a new contract of employment and is, therefore, new work.

It is not difficult to agree that "new work" clearly includes an offer of work to an unemployed individual by an employer with whom he has never had a contract of employment; that is, an employer for whom he has never worked before. If the worker has never had a contract of employment with the offering employer, the fact-finding and the application of the test are simple.

But if the phrase "new work" were limited to work with an employer for whom the individual has never worked, it is plain that the purpose of section 3304(a)(5)(B) would be largely nullified. It can make no difference, insofar as that purpose is concerned, that the unemployed worker is offered re-employment by his former employer rather than employment by one in whose employ he

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5/ The "group attachment" concept is outside the scope of this letter. "Group attachment" arises under the provisions of an industry-wide collective bargaining agreement between a group of workers and a group of employers whereby workers cannot be hired directly by individual employers but are referred to employers by a hiring hall on a rotational basis and under which each worker has a legally enforceable right to his equal share of the available work with such employers. See Matson Terminals Inc. v. California Employment Commission, 151 P. 2d 202, discussed in the Secretary's decision with respect to Washington dated December 28, 1949, and the Secretary's decision in the California conformity case. Benefit Series, FSLS 315.05.1.

has never been. It can make no difference either in the application of the test. The question is whether the offer of re-employment is an offer of a new contract of employment. If the worker quit his job with the employer, or was discharged or laid off indefinitely, the existing contract of employment was thereby terminated. An indefinite layoff, that is, a layoff for an indefinite period with no fixed or determined date of recall, is the equivalent of a discharge. The existence of a seniority right to recall does not continue the contract of employment beyond the date of layoff. Such a seniority right is the worker's right; it does not obligate the worker to accept the recall and does not require the employer to recall the worker. It only requires the employer to offer work to the holder of the right, before offering it to individuals with less seniority.

Any offer made after the termination is of a new contract of employment, whether the duties offered to the worker are the same or different from those he had performed under his prior contract, or are under the same or different terms or conditions from those which governed his last employment. There is not, however, a termination of the existing contract when the worker is given a vacation, with or without pay, or a short-term layoff for a definite period. When the job offer is from an employer for whom the individual had previously worked, inquiry must be made as to whether the contract with the employer was terminated, and if so, how?

Although it has been more difficult for some to see, the situation is no different when an individual's present employer tells him that he must either accept a transfer to other duties or a change in the terms and conditions of his employment, or lose his job. Applying the test, it is clear 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. Not only is this a sound application of legal principles, but it is thoroughly in harmony with the underlying purpose of the prevailing conditions of work provision. That purpose would be largely frustrated if benefits were denied for unemployment resulting from the worker's refusal to submit to a change in working conditions which would cause these conditions to be substantially less favorable to a claimant than those prevailing for similar work in the locality. The denial of benefits in such circumstances would tend to depress wages and working conditions just as much as a denial of benefits for a refusal by an unemployed worker to accept work under substandard conditions. If a proposed change in the duties, terms, or conditions-of-work not authorized by the existing employment contract were not "new work," prevailing wage and conditions-of-work standard could be substantially impaired by employers who hired workers at prevailing wages and conditions, and thereafter reduced the wages or changed the conditions, thereby depriving workers of the protection intended to be given them by the prevailing wage and conditions-of-work standard. The terms of the existing contract, so important in this situation, are questions of fact to be ascertained as are other questions of fact.

The following are examples of offers of new work by the employer for whom the individual is working at the time of the offer:

a. A worker employed as a carpenter is offered work as a carpenter's helper as an alternative to a layoff.

b. A bookkeeper is transferred to a job as a typist.

c. The hours of work of a factory worker employed for an 8-hour day are changed to 10 hours a day.

d. A worker employed with substantial fringe benefits is informed that he will no longer receive such benefits.

e. A worker employed at a wage of $3 an hour is informed that he will thereafter receive only $2 an hour.

In each of these cases either the offered duties are not those which the worker is to perform for the employer under his existing contract of employment, or the offered conditions are different from those provided in the existing contract.

Applying the Prevailing Conditions-of-Work Standard

The prevailing wage and conditions-of-work standard does not require a claims deputy or a hearing officer to inquire into prevailing wages, hours, or working conditions in every case of refusal of new work, or to determine in every such case in which he denies benefits whether the wages, hours, or other conditions of offered work are substandard. This would be unnecessarily burdensome. However, a determination must be made as to prevailing conditions of work when (1) the claimant specifically raises the issue, (2) the claimant objects on any ground to the suitability of wages, hours, or other offered conditions, or (3) facts appear at any stage of the administrative proceedings which put the agency or hearing officer on notice that the wages, hours, or other conditions of offered work might be substantially less favorable to the claimant than those prevailing for similar work in the locality.

State agency determinations and decisions at all levels of adjudication must reflect the State agency's consideration of prevailing conditions of work factors when pertinent. In particular, referees' decisions as to benefit claims must contain, in cases where issues arise as indicated above, appropriate findings of fact and conclusions of law with respect to the prevailing conditions-of-work standard. This is so whether the State ultimately determines the worker's right to benefits under the refusal-of-work provision of the State law or some other provision, as, for example, under the voluntary quit provision. Since the Federal law requires, for conformity, that State laws include a provision prohibiting denial of benefits for refusal of new work where the conditions of the offered work are substantially less favorable to the individual than the conditions prevailing for similar work, there cannot be, under the State law, a denial in such circumstances regardless of the provision of State law under which the ultimate determination is made.

In applying the labor standards, the State agency must determine first whether the offered work is "new work." If it is "new work" a determination must be made as to (1) what is similar work to the offered work, and (2) what are the prevailing wages, hours, or other conditions for similar work in the locality, and (3) whether the offered work is substantially less favorable to the particular claimant than the prevailing wages, hours, or other conditions. The key words and phrases in this standard ("similar work," "locality," "substantially less favorable to the individual," and "wages, hours, and other conditions of work") are discussed in detail in the Bureau's statement, Principles Underlying the Prevailing Conditions of Work Standard, Benefit Series, September 1950, 1-BP-1, BSSUI (originally issued January 6, 1947 as Unemployment Compensation Program Letter No. 130).

Please bring this letter to the attention of State agency and Appeal Board personnel engaged in benefit claim adjudication at all levels.

RESCISSIONS: None

Sincerely yours,

/s/ Robert C. Goodwin

Robert C. Goodwin
Administrator