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DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 29-83
CHANGE 3

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : MARY ANN WYRSCH *Mary Ann Wyrusch*
Director *ekj*
Unemployment Insurance Service

SUBJECT : Transfers of Experience

1. Purpose. To advise the States of the Department of Labor's interpretation of Federal law requirements relating to transfers of experience.

2. References. Section 3303(a) of the Federal Unemployment Tax Act (FUTA); UIPL 29-83, dated June 23, 1983; UIPL 29-83, Change 1, dated September 24, 1991; UIPL 15-87, dated March 30, 1987; and Sections 3770 through 3776, Part V, of the Employment Security Manual (ESM).

3. Background. When one employer (called the predecessor) is acquired by another employer (called the successor), a transfer of the predecessor's experience may occur. Following the transfer, rates are assigned based on the combined experience of the predecessor and successor. Although States are not required to make any provision for transferring experience, 52 States do so. Some States also provide for interstate transfers of experience.

The ESM contains the only major Departmental discussion of transfers of experience. However, it is both incomplete and, due to amendments to Federal law relating to new

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employer rates and the standard rate, out of date. As a result, the Department regularly receives inquiries concerning its position on transfers of experience. Also, a disproportionately large number of conformity issues relate to transfers of experience. To address these matters and assist the States in assuring that Federal requirements are met, this UIPL is being issued.

This UIPL supersedes the ESM material on transfers of experience. The Department has identified only two instances where a position taken in the ESM, other issuances, or correspondence is changed by the UIPL. The first relates to the use of managerial experience in certain transfers and is discussed in item 5.c. The second, which is more in the nature of a clarification, relates to the use of computation dates and is discussed in footnote 4 and the accompanying text. The Department knows of no State which will be required to amend its law due to these changes.

4. Basis for Transfers of Experience. Section 3303(a)(1), FUTA, requires, as a condition of employers receiving the additional credit against the Federal unemployment tax, that--

no reduced rate of contributions to a pooled fund or to a partially pooled account is permitted to a person (or group of persons) having individuals in his (or their) employ except on the basis of his (or their) experience with respect to unemployment or other factors bearing a direct relation to unemployment risk during not less than the 3 consecutive years immediately preceding the computation date.

Although the term "experience" is often used (as it is here) as convenient shorthand, no State actually measures "experience." Instead what is actually measured are "factors bearing a direct relation to unemployment risk." Typically, the factor used is benefits paid.

This section prescribes the conditions under which a reduced rate of contributions to a pooled fund may be permitted by State law "to a person (or group of persons)."¹ UIPL 29-83 states that the authority for group accounts is the basis

¹Section 7701(a)(1) of the Internal Revenue Code of 1986 defines "person" to "mean and include an individual, a trust, estate, trust or estate, partnership, association or corporation."

for allowing transfers of experience. There is, however, an additional, underlying reason for permitting transfers of experience: when a predecessor is acquired, the experience follows the work force, organization, trade and other assets to the successor.

Transfers of experience are not required by FUTA. Provided the transfers are consistent with FUTA's experience rating requirements, determining when and if a transfer takes place is a matter that has been left to the States. As a result, a State could, for example, require transfers when the ownership of the predecessor is substantially the same as that of the successor, but otherwise require the successor to petition the State for a transfer. As another example, a State could mandate transfers in most cases, while not requiring transfers when predecessors in bankruptcy court are acquired.

A single legal entity, which may or may not have been a subject² employer prior to the transfer, may obtain the experience of a predecessor in two cases:

- In a total transfer, the successor acquires the predecessor's organization, trade, or business and substantially all of the predecessor's assets to such an extent that the predecessor is unable to continue in business.
- In a partial transfer, the experience of the predecessor, in proportion to percentage of the payroll or employees assignable to the transferred portion, is transferred to the successor when it acquires part of the predecessor's business. For a partial transfer of experience to take place, there must be a clearly segregable and identifiable part of the predecessor's enterprise transferred, otherwise there will be no relation between the part of the business transferred and the experience attributable to the part transferred. What part of the experience of the predecessor is attributable to the part of the business transferred is a question of

² A "subject" employer is one that is required to pay taxes/file reports under State law.

fact to be determined on a case by case basis.

5. Application of Experience Rating Requirements to Transfers. If a State chooses to transfer experience, it must do so in accordance with all the requirements of Section 3303(a)(1), FUTA. Following is a discussion of the requirements which have been identified as affecting transfers:

a. Use of Experience. Section 3303(a)(1), FUTA, requires that the assignment of reduced rates be "on the basis of his (or their) [i.e., the employer's] experience with respect to unemployment or other factors bearing a direct relation to unemployment risk" This means that--

- Only actual experience may be used. This is why partial transfers must be allocated proportionally and are limited to instances where there is a segregable and identifiable part of the predecessor acquired by the successor. Since States must use actual experience, they may not make assumptions about what an employer's experience might have been when, for example, there is a lack of data. (See UIPL 15-87 which transmitted the Secretary of Labor's decision in the 1986 State of Washington Conformity Proceedings on the use of actual experience.)
- Once experience has been transferred, it becomes the successor's experience, and must be used in determining the successor's rates for any rate year following the year in which the transfer occurs. (An exception exists when the successor, following the transfer, still does not have 3 years of experience. See item 5.c below.) Since the transferred experience now belongs to the successor, it may no longer be used for computing rates for the predecessor for subsequent rate years.
- Any benefits paid which are based on wages paid by the predecessor prior to the transfer must be charged to the successor. Just as the successor acquires the organization, trade, business, assets and experience of a predecessor as of the date of transfer, so must it also acquire the benefit charges for current or future claims related to the

predecessor (or segregable part of the predecessor) prior to the transfer.

b. The Uniform Method Requirement. Under the "uniform method" requirement, the experience of all employers in a State must be measured by the same factor or combination of factors throughout the same period of time. (See UIPL 29-83 and 29-83, Change 1.) Therefore, no exceptions may be made to the State's method of measuring experience simply because the experience was transferred. Except as provided for partial transfers (item 4.), the State may not allow the transfer of only a portion of experience. For example, a reserve ratio State must transfer the entire experience of the employer, not merely the three years preceding the computation date. As another example, a State using benefits as the measure of experience may not, in the case of a total successorship of the organization, trade, business and assets of the predecessor, transfer only a portion of benefit charges.

c. The 3-year Requirement. Section 3303(a)(1), FUTA, requires that, if an employer has at least three years of experience, then experience must be measured "during not less than the 3 consecutive years immediately preceding the computation date."³ (Emphasis added.) As a result, any successor with 3 or more years of experience must be assigned a rate based on experience for rate years following the year the transfer took place. The years of experience must be consecutive; summing concurrent experience periods does not increase the number of consecutive years of experience.

If, immediately preceding the acquisition of the predecessor, the successor already has more years of experience than any predecessor, then the State will need to use only the period of time the successor has had experience to determine if the 3-year requirement is met. If the successor has less experience than the predecessor, then the State will need to determine whether the 3-year requirement is met by summing: (1) the years of experience transferred from the predecessor with the longest experience period and (2) the years of experience earned by the successor since the date of the transfer.

³ The computation date is the end of the experience period being measured. See UIPL 29-83 and Section 3303(c)(7), FUTA.

For example, as of the date of transfer, Predecessor A has 2 years of experience, Predecessor B has 1.5 years and the successor has 1 year. Since Predecessor A has the longest experience period, then Predecessor A's years of experience determine whether the 3-year requirement is met. As of the computation date, which occurs six months later, the successor now has 2.5 years of experience: 2 years of transferred experience plus one-half year of experience following the date of the transfer. The successor may continue to receive a new employer rate for the following rate year. However, as of the computation date one year later, the successor will have 3.5 years of experience and any reduced rate must be assigned based on the combined experience.

The 3-year requirement also applies to partial transfers of experience. In determining whether a successor will be assigned a reduced rate, only so much of the experience of the predecessor as is attributable to the transferred business and the experience of the successor (if any) may be used in determining if the 3-year requirement is met.

The above discussion assumes that a State requires 3 years of experience before assigning a reduced rate based on experience. Under the last paragraph of Section 3303(a), FUTA, a State may use as little as one year of experience in assigning reduced rates to newly subject employers. Accordingly, States assigning rates using less than 3 years of experience should use their own minimum experience periods in determining whether a rate based on experience is to be assigned.

The Department has reevaluated a provision found in Section 3776, Part V, ESM. That section in part provided that, for certain partial transfers, the State may provide that the successor will be immediately eligible for a reduced rate when part of the over-all managerial experience of the predecessor is attributed to the successor. The Department finds no relationship between the predecessor's transferred experience and over-all managerial experience. As discussed in item 5.a, the "experience" for the 3-year period would not be based on actual experience.

6. Rate Assignments During the Year in which the Transfer Occurs. Because FUTA mandates a rate computation based on experience only once a year, it is not necessary for a State to recalculate either the predecessor's or successor's rate for the remainder of the rate year during which the transfer occurs. If the State chooses to assign a different rate to

the successor for the remainder of the rate year, then the reassignment must be done in accordance with Section 3303(a)(1), FUTA. The following methods have been determined as acceptable for determining the rate for the period beginning the first day of the quarter in which the transfer occurs and ending with the next effective date for computation of rates of contribution:

a. If the successor was not a subject employer prior to the transfer, it may be assigned the predecessor's rate. If more than one predecessor is acquired, only the highest rate assigned to any of the predecessors may be assigned to the successor. Assigning a lower rate would reduce the employer's rate without recognizing the experience of the higher-rated predecessor(s). (However, averaging rates is permissible when the size of each predecessor is taken into account.) Since assigning the highest rate results in an increased rate (even though it may be less than the standard rate), there is no conflict with FUTA.

b. If the successor was not a subject employer prior to the transfer, a new employer rate of not less than 1 percent may be assigned under the authority provided by the last paragraph of Section 3303(a), FUTA.

c. A newly computed rate may be assigned to the successor based on the combined experience of the predecessor(s) and the successor using the computation date in effect for all other employers in the current rate year.⁴ (In the case of a partial transfer, it is not necessary to recompute the predecessor's rate for the remainder of the rate year.)

d. The standard rate under the State's law may be assigned.⁵

⁴ The Department previously appeared to allow the use of a computation date "occurring within 27 weeks prior to the effective date of the newly computed rate." (ESM, Part V, Sections 3770.B and 3772.A.5.) This suggests that a successor employer could have its rate computed using a computation date which is different from that used by all other employers. However, as this is inconsistent with the "uniform method" requirement, discussed in item 5.b. above, this is not an acceptable option.

⁵ Section 3303(a)(1), FUTA, applies only to reduced rates. "Reduced rate" is defined as a rate "lower than the

When the predecessor and successor become a single legal entity, a State may not assign one rate for transferred experience and another for all other experience. This is because Section 3303(a)(1), FUTA, provides that "no reduced rate of contributions . . . is permitted to a person . . ." (Emphasis added.) Since, after the transfer, there is only a single person, that person must be assigned a single rate based on all of its experience.

7. Interstate Transfers. Since nothing in Federal law prohibits interstate transfers of experience, States began providing for these transfers in the late 1940's. Interstate transfers differ from intrastate transfers in that a successor does not acquire a predecessor. Instead, the same employer transfers operations from one State (the prior State) to another (the new State).⁶ As in the case of intrastate transfers, all requirements of Section 3303(a) must be met for the transfer of experience to take place. Those of special importance to interstate transfers are:

a. Use of Experience. Only experience attributable to the transferred operation may be transferred. Like an intrastate transfer of experience, the experience follows the work force, organization, trade and assets of the predecessor. Further, when benefits are paid and charged (or noncharged as the case may be) in the prior State based on wages paid prior to the transfer, these charges (or noncharges) must also be transferred to the new State. Otherwise, the employer would escape experience. (In addition, the uniform method requirement would not be met since amounts chargeable during the same time period would be charged to some employers, but not to others. Also, the 3-year requirement would not be met since not all experience

standard rate." (Section 3303(c)(8), FUTA.) Some State laws use "standard rate" to mean the rate for new employers. This is not the standard rate for purposes of Section 3303(a)(1), FUTA. For identifying the standard rate in State law for experience rating purposes, refer to UIPL 15-84. Currently, every State has a standard rate of 5.4% or higher.

⁶ This discussion of interstate transfers is limited to the transfer of operations since, when an out-of-State employer acquires an already subject employer in a State, then the same situation exists as when a non-subject successor acquires a predecessor.

in the 3 years preceding the computation date would be used.)

b. The Uniform Method Requirement. The transferred experience must be converted into the factor used to measure experience in the new State, otherwise different factors will be used over the same period of time. For example, to assure uniformity of charging benefits, an amount noncharged in the prior State may be noncharged in the new State only if the new State allows for noncharging in the identical circumstances. As another example, a reserve ratio State (which uses the entire history of an employer) must reconstruct the entire history of an employer transferring experience from a benefit ratio State (which typically uses only 3 years of experience.)

The complexity and variety of experience rating provisions makes it exceedingly difficult for the new State to convert the employer's experience in the prior State. A simpler alternative is for the new State to assign a special new employer rate (of not less than 1 percent) in accordance with the last paragraph of Section 3303(a), FUTA, to employers transferring operations.⁷

8. Action. States are to review existing State law and rules involving transfers of experience to ensure that the Federal law requirements as set forth in this program letter are met.

9. Inquiries. Please direct inquiries to the appropriate Regional Office.

⁷ From a solvency perspective this is also more prudent. For example, an employer transferring a large reserve balance for experience rating purposes is not transferring the contributions which created the balance. If the transferring employer eventually laid off large numbers of workers, the new State's fund as a whole will subsidize the transferring employer. At the same time, the transferring employer may not see any significant change in its rate of contribution to make up for this subsidization. Since a new employer rate is temporary, the risk to the fund would not be as great.