DRAFT LEGISLATION

TO IMPLEMENT THE EMPLOYMENT SECURITY AMENDMENTS OF 1970 ... H.R. 14705

TOGETHER WITH EXPLANATORY COMMENTARY

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PREFACE

This is a compilation of draft legislation for State use in implementing the provisions of the Employment Security Amendments of 1970. Also included is a commentary explaining the suggested draft language which is intended as an aid to States in making appropriate and necessary modifications when they develop their own statutory amendments.

Simultaneously with the transmittal to the States of this compilation, copies are also being transmitted of a reprint of the Manual of State Employment Security Legislation, revised September 1950. The 1950 Manual is referred to extensively in this compilation, both in the text draft provisions and in the commentary. The text draft provisions have been numbered and lettered to key into the 1950 Manual provisions. Thus, both in this compilation and in the 1950 Manual, Section 2 is the "Definitions" section; section 3, the "Benefit Formula;" section 4, "Conditions for Receipt of Benefits;" section 7, "Coverage;" section 8, "Contributions;" section 12, "Administrative Organization;" section 13, "Administration;" section 15, "Reciprocal Arrangements." In using this compilation, reference will need to be made to the text and commentary of the 1950 Manual for full understanding.

The section on Extended Benefits has not been assigned a number because no comparable section was included in the 1950 Manual.

The material in this compilation is arranged so as to have the explanatory commentary follow the text language for each section. Thus the draft language provided for the several subsections of a single section is presented in one sequence followed by the commentary that relates to each part of the section that is included in the text. Text pages are marked, for easy identification, with a dark line at their outer margin. Commentary pages do not have such marking.

Not all of the provisions of H.R. 14705 are reflected in this compilation since a number of them relate to Federal action and do not involve or are not susceptible to implementation by State legislation. Among them are such provisions as those relating to: Servicemen's accrued leave; the effect on certain employers' tax credits of a State's failure to satisfy the conditions long required by section 3305 of the Federal Unemployment Tax Act; judicial review of adverse findings of the Secretary of Labor on a State's conformity or compliance with the requirements of Title III of the Social Security Act or of sections 3303, 3304 or 3305 of the Federal Unemployment Tax Act; a comprehensive unemployment compensation research program; training of unemployment compensation personnel; a Federal Advisory Council on unemployment compensation (but see section 12(d) of this compilation on State advisory councils); changed dates for the Secretary's certification of State laws; clarification of section 3304(c) of the FUTA (i.e., the Knowland Amendment);

direction of Federal payments to States of half the shareable regular and extended benefits paid under their laws and authorization of both advances and reimbursements for this purpose; financing provisions that raise the Federal unemployment tax rate by 0.l percent, revise the employment security administration account and the Federal unemployment account, establish the extended unemployment compensation account, set limits on the various accounts and govern the flow of funds among the various accounts.

One provision of the Employment Security Amendments of 1970 which affects State unemployment compensation laws as to which no draft legislation is included in this compilation and which is not discussed in the commentary is new section 3304(a)(9)(A) of the Federal Unemployment Tax Act. That provision requires as a condition of State law approval for tax credit to State employers that:

> "compensation shall not be denied or reduced to an individual solely because he files a claim in another State (or a contiguous country with which the United States has an agreement with respect to unemployment compensation) or because he resides in another State (or such a contiguous country) at the time he files a claim for unemployment compensation;"

To meet this requirement a very few of the States will need amendments to their laws such as removing benefit amount differentials between interstate and intrastate claimants or adding Puerto Rico (a State under the definition in section 3306(j) of the FUTA) to their laws' definition of "State." The great majority of State laws, however, need no amendment to meet this requirement. For this reason, nothing relating to this provision was included in the text or commentary of this compilation.

In using this compilation to aid in amending their laws to meet the provisions of H.R. 14705, States should recognize that despite the effort to make the compilation comprehensive, not all the variations in State laws can have been taken into account. The provisions of State laws are too diverse and ramified to permit this. States need to examine all features and aspects of their laws to determine both the direct effects and indirect implications of the provisions of H.R. 14705 for their needed legislation.

As already indicated, for reference purposes the 1950 Manual is being reissued as a companion volume to this compilation. This, however, is intended only as a temporary and stopgap arrangement. As soon as possible the Manpower Administration plans to revise and update the Manual of State Employment Security Legislation. That revision will incorporate draft legislative language and explanatory commentary for all aspects of State unemployment insurance laws, including those covered by this compilation.

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Section 2(i)

Definitions: “Employer”

(Section 3304(a)(6)(A), 3306(a), 3309(a)(1), FUTA)

(First definition)

(i) “Employer” means:

(1) Any employing unit which after December 31, 1971, for some portion of a day within the current calendar year has or had in employment one or more individuals; and

(2) For the effective period of its election pursuant to section 7, any employing unit which has elected to become subject to this Act.

(Second definition)

(i) “Employer” means:

(1) Any employing unit which, after December 31, 1971

(A) in any calendar quarter in either the current or preceding calendar year paid for service in employment wages of $1500 or more, or

(B) for some portion of a day in each of 20 different calendar weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year, had in employment at least one individual (irrespective of whether the same individual was in employment in each such day);

(2) Any employing unit for which service in employment, as defined in section 2(k)(1)(B), is performed after December 31, 1971;

(3) Any employing unit for which service in employment, as defined in section 2(k)(1)(c), is performed afer December 31, 1971;

Section 2(i)(4)

Definitions: “Employer”

(4) Any employing unit (whether or not an employing unit at the time of acquisition) which acquired the organization, trade, or business, or substantially all of the assets thereof, of another employing unit which at the time of such acquisition was an employer subject to this Act; or which acquired a part of the organization, trade, or business of another employing unit which at the time of such acquisition was an employer subject to this Act; Provided, 1/ That such other employing unit would have been an employer under section 2(i)(1) if such part had constituted its entire organization, trade, or business;

(5) 1/ Any employing unit which acquired the organization, trade, or business, or substantially all the assets of another employing unit if such employing unit subsequent to such acquisition, and such acquired unit prior to such acquisition, both within the same calendar quarter, together paid for service in employment wages totaling $_____ or more;

(6) 1/ Any employing unit which, together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interests, or which owns or controls (by legally enforceable means or otherwise) one or more other employing units, and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under section 2(i)(1);

1/ If the amount used in determining liability is low enough, paragraphs (5) and (6) and the proviso in paragraph (4) are not needed.

Section 2(i)(7)

Definitions: “Employer”

(7) Any employing unit not an employer by reason of any other paragraph of this subsection (i) for which, within either the current or preceding calendar year, service is or was performed with respect to which such employing unit is liable for any Federal tax against which credit may be taken for contributions required to be paid into a State unemployment fund; or (ii) which, as a condition for approval of this Act for full tax credit against the tax imposed by the Federal Unemployment Tax Act, is required, pursuant to such Act, to be an “employer” under this Act;

(8) 1/ Any employing unit which, having become an employer under paragraph (1), (2), (3), (4), (5), (6) or (7) of this subsection, has not, under section 7(d) ceased to be an employer subject to this Act; and

(9) For the effective period of its election pursuant to section 7(e), any employing unit which has elected to become subject to this Act.

(10) For purposes of paragraphs (1) and (3), employment shall include service which would constitute employment but for the fact that such service is deemed to be performed entirely within another State pursuant to an election under an arrangement entered into (in accordance with section 15(d)(1)) by the commissioner and an agency charged with the administration of any other State or Federal unemployment compensation law.

(11) For purposes of paragraphs (1)(B) and (3), if any week includes both December 31 and January 1, the days of that week up to January 1 shall be deemed one calendar week and the days beginning January 1 another such week.

1/ If the amount used in determining liability is low enough, paragraph (8) is not needed.

Section 2(K)(1)

Definitions: “Employment”

(Section 3306(i), FUTA)

(Short form)

(k)(i) “Employment” means:

(A) Any service performed prior to January 1, 1972 which was employment as defined in this subsection prior to such date and, subject to the other provisions of this subsection, service performed after December 31, 1971 by an employee, as defined in section 3306(i) of the Federal Unemployment Tax Act, including service in interstate commerce.

(Long form)

(k)(1) “Employment” means:

(A) Any service performed prior to January 1, 1972 which was employment as defined in this subsection prior to such date and, subject to the other provisions of this subsection, service performed after December 31, 1971, including service in interstate commerce, by

(i) any officer of a corporation; or

(ii) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

(iii) any individual other than an individual who is an employee under subdivision (i) or (ii) who performs services for remuneration for any person--

Section 2(k)(1)(A)(iii)(I)

Definitions: “Employment”

(I) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services, for his principal;

(II) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to , his principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations;

Provided, That for purposes of subparagraph (A)(iii), the term “employment” shall include services described in (I) and (II) above performed after December 31, 1971 only if:

1. The contract of service contemplates that substantially all of the services are to be performed personally by such individual;

2. The individual does not have a substantial investment in facilities used in connection with the performance of the services (other than in facilities for transportation); and

3. The services are not in the nature of a single transaction that is not part of a continuing relationship with the person for who the services are performed.

Section 2(k)(1)(B)

Definitions: “Employment”

(Sections 3304(a)(6) and 3309, FUTA)

(k)(1) “Employment” means:

(Alternative 1)

(B) service performed after December 31, 1971 in the employ of this State or any political subdivision thereof or any instrumentality of any one or more of the foregoing which is wholly owned by this State and one or more other States or political subdivisions or any service performed in the employ of any instrumentality of this State and one or more other States or political subdivisions;

(Alternative 2)

(B) service performed after December 31, 1971 by an individual in the employ of this State or any of its instrumentalities (or in the employ of this State and one or more other States or their instrumentalities) for a hospital or institution of higher education located in this State provided that such service is excluded from “employment” as defined in the Federal Unemployment Tax Act solely by reason of section 3306(c)(7) of that Act and is not excluded from “employment” under section 2(k)(1)(D) of this Act;

(Alternative 1)

(C)[1/] service performed after December 31, 1971 by an individual in the employ of a religious, charitable, educational or other organization which is excluded from the term “employment” as defined in the Federal Unemployment Tax Act solely by reason of section 3306(c)(8) of that Act, except as provided in section 2(k)(1)(D) of this Act;

1/ Present section 2(k)(1)(C) and (D) of the 1950 Manual are relettered as section 2(k)(1)(F) and (G).

Section 2(k)(1)(C)

Definitions: “Employment”

(Alternative 2)

(C) [1/] service performed after December 31, 1971 by an individual in the employ of a religious, charitable, educational or other organization but only if the following conditions are met:

(i) The service is excluded for “employment” as defined in the Federal Unemployment Tax Act solely by reason of section 3306(c)(8) of that Act; and

(ii) the organization had four or more individuals in employment for some portion of a day in each of 20 different weeks, whether or not such weeks were consecutive, within either the current or preceding calendar year, regardless of whether they were employed at the same moment of time.

(D) For the purposes of paragraphs (B) and (C) the term “employment” does not apply to service performed

(i) in the employ of (I) a church or convention or association of churches, or (II) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches; or

(ii) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

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1/ Present section 2(k)(1)(C) and (D) of the 1950 Manual are relettered as section 2(k)(1)(F) and (G).

Section 2(k)(1)(D)

Definitions: “Employment”

(iii) in the employ of a school which is not an institution of higher education; or

(iv) in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market by an individual receiving such rehabilitation or remunerative work; or

(v) 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, by an individual receiving such work relief or work training; or

(vi) for a hospital in a State prison or other State correctional institution by an inmate of the prison or correctional institution.

Section 2(k)(1)(E)

Definitions: “Employment”

Service Outside the United States

(E) The term “employment” shall include the service of an individual who is a citizen of the United States, performed outside the United States (except in Canada or the Virgin Islands), after December 31, 1971 in the employ of an American employer (other than service which is deemed “employment” under the provisions of subparagraphs (2) or (3) of this subsection or the parallel provisions of another State’s law), if:

(i) the employer’s principal place of business in the United States is located in this State; or

(ii) the employer has no place of business in the United States, but

(I) the employer is an individual who is a resident of this State; or

(II) the employer is a corporation which is organized under the laws of this State; or

(III) the employer is a partnership or a trust and the number of the partners or trustees who are residents of this State is greater than the number who are residents of any one other State; or

(iii) none of the criteria of divisions (i) and (ii) of this subparagraph is met but the employer has elected coverage in this State or, the employer having failed to elect coverage in any State, the individual has filed a claim for benefits, based on such service, under the law of this State.

Section 2(k)(1)(E)

Definitions: “Employment”

Service Outside the United States

(iv) An “American employer,” for purposes of this paragraph, means a person who is

(I) an individual who is a resident of the United States; or

(II) a partnership if two-thirds or more of the partners are residents of the United States; or

(III) a trust, if all of the trustees are residents of the United States; or

(IV) a corporation organized under the laws of the United States or of any State.

(F) Notwithstanding section 2(k)(2), all service performed after _____ [1/] by an officer or member of the crew of an American vessel on or in connection with such vessel, if the operating office, from which the operations of such vessel operating on navigable waters within, or within and without, the United States are ordinarily and regularly supervised, managed, directed and controlled is within this State; and

(G) notwithstanding any other provisions of this subsection, service with respect to which a tax is required to be paid under any Federal law imposing a tax against which credit may be taken for contributions required to be paid into a State unemployment fund or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required to be covered under this Act.

1/ Enter the effective date of the amendment.

Section 2(k)(6)

Definitions: “Agricultural Labor”

(Section 3306(k), FUTA)

(6) The term “employment” shall not include--

(Short form)

(A) Service performed by an individual in agricultural labor. For purposes of this subparagraph, the term “agricultural labor” means

(i) any service performed prior to January 1, 1972 which was agricultural labor as defined in this subparagraph prior to such date and

(ii) remunerated service performed after December 31, 1971 in agricultural labor as defined in section 3306(k), Federal Unemployment Tax Act.

(Long form)

(A) Service performed by an individual in agricultural labor. For purposes of this subparagraph, the term “agricultural labor” means any service performed prior to January 1, 1972 which was agricultural labor as defined in this subparagraph prior to such date, and remunerated service performed afer December 31, 1971:

(i) on a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

Section 2(k)(6)(A)(ii)

Definitions: “Agricultural Labor”

(ii) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(iii) in connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (46 Stat. 1550, sec. 3; 12 U.S.C. 1141j) or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(iv)(I) in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(II) in the employ of a group of operators of farm (or a cooperative organization of which such operators are members) in the performance of service described in subdivision (I), but only if such operators produced more than one-half of the commodity with respect to which such service is performed;

Section 2(k)(6)(A)(iv)(III)

Definitions: “Agricultural Labor”

(III) the provision of subdivisions (I) and (II) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(v) on a farm operated for profit if such service is not in the course of the employer’s trade or business or is domestic service in a private home of the employer.

(B) As used in subparagraph (A), the term “farm” includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

Section 2(k)(6)(R)

Definitions: Exclusions from “employment”

(Section 3306(c)(10)(B), (C) and (D), FUTA)

(6) The term ”employment” shall not include--

(R) service performed, in the employ of a school, college, or university, if such service is performed (i) by a student who is enrolled and is regularly attending classes at such school, college or university, or (ii) by the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that (I) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university, and (II) such employment will not be covered by any program of unemployment insurance;

(S) service performed by an individual under the age of 22 who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers;

(T) service performed in the employ of a hospital, if such service is performed by a patient of the hospital, as defined in section 2(v).

Section 2(u)

Definitions: “Institution of higher education”

(Section 3309(d), FUTA)

(u) “Institution of higher education,” for the purposes of this section, means an educational institution which

(1) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(2) is legally authorized in this State to provide a program of education beyond high school;

(3) provides an educational program for which it awards a bachelor’s or higher degree, or provides a program which is acceptable for full credit toward such a degree, a program of post-graduate or post-doctoral studies, or a program of training to prepare students for gainful employment in a recognized occupation; and

(4) is a public or other nonprofit institution.

(5) Notwithstanding any of the foregoing provisions of this subsection, all colleges and universities in this State are institutions of higher education for purposes of this section.

Section 2(v)

Definitions: "Hospital"

(Sections 330(c)(10)(D), 3309(a)(1)(B) and 3309(b)(6), FUTA)

(v) "Hospital" means an institution which has been licensed, certified or approved by _____[1/] as a hospital.

1/ Enter the name of the State agency which licenses, certifies or approves institutions as hospitals. Modifications in this provision should be made to accord with State practice.

Commentary - Section 2(1)

Definitions: "Employer"

(i) Employer.--The definition of "employer" in the Federal Unemployment Tax Act has been broadened by the 1970 amendment to section 3306(a) of that Act to include all employers who, in the current or preceding calendar year, paid wages of at least $1500 in any calendar quarter or employed at least one employee in each of 20 different calendar weeks. The alternative test of a payroll of $1500 in any quarter insures coverage of significant operations conducted in fewer than 20 weeks in any one calendar year. An example of such an operation is a contracting firm organized to do a particular job, employing many workers but completing the job in a short period. Relying on a 20 week test as in prior Federal law and many State laws has meant that in such cases the workers received no wage credits for unemployment compensation purposes and that the employer escaped unemployment tax on a large scale operation that could last as long as 38 weeks spread over two calendar years.

The following discussion compares the definitions of "employer" given in the text draft language with the first and second definitions contained in the 1950 Manual of State Employment Security Legislation, pages 5-7.

(The third definition of "employer" on page 7 of the 1950 Manual should be disregarded in developing amendments to State laws for consistency with the 1970 amendments.)

The fist definition of "employer" is the same as that on page 5 of the 1950 Manual. It provides the broadest possible coverage in including all employing units which have any covered service performed in their employ. This assures all workers engaged in covered employment of unemployment insurance protection and greatly simplifies administration. (For commentary relating to this definition, see Manual, pages C-6 and C-7.)

The draft language revises the second definition of "employer" on page 5 through 7, Manual of State Employment Security Legislation, revised 1950. As revised, it provides for minimum coverage of service which is subject to the Federal unemployment tax. It also provides for the coverage of State hospitals and institutions of higher education and for the minimum coverage of nonprofit organizations which the Federal Unemployment Tax Act requires to be covered as a condition for certification of the State law. The suggested provisions in subsection (i)(1) in the second definition are consistent with the new definition of "employer" in amended section 3306(a), Federal Unemployment Tax Act.

The provisions in subsection (i)(2) bring State hospitals and State institutions of higher education within the draft's definition of "employer". This is consistent with section 3309(a), providing coverage that is required for a State

law to be approvable under section 3304(a)(6)(A). Such employing units are employers if they have one or more employees at any time since these new Federal law provisions establish no minimum size for coverage of State hospitals and State institutions of higher education.

The provisions in subsection (i)(3) incorporate by reference (see section 2(k)(1)(C)) the minimum size coverage for nonprofit organizations (four workers in 20 weeks) set forth in section 3309(c) of the Federal Unemployment Tax Act, and, required for a State law to be approvable under section 3304(a)(6)(A).

Suggested subsection (i)(7) is similar to the draft language in section 2(k)(1)(F), except that the latter relates to the coverage of services and the former to coverage of employers. Subsection (i)(7)provides for automatic coverage under State law of all employers who are covered under the Federal law and of all employers that the Federal law requires to be covered under the State law. It would not only provide State law coverage consistent with that provided under the Federal law but also might aid in avoiding questions of conformity if the Federal law is interpreted to require the coverage of particular employers not specifically identified as subject to the State law.

Paragraphs (4), (5), (6) and (9) of subsection (i) are the same as paragraphs (2), (3), (4) and (7) of this subsection in the draft language on pages 5, 6, and 7 of the 1950 Manual. The provisions in subsection (i)(8) include undated draft language of provisions which are included in subsection (i)(6) on page 7 of the Manual. Paragraph (10) of subsection (i) includes provisions similar to those in the proviso in current section 2(i)(1) (second definition) on page 5 of the Manual. Because the definitions in paragraphs referred to in paragraph (11) of subsection (i) are based in part on service in a number of different calendar weeks within a year, the definition in this paragraph provides for treating as 2 separate weeks a week which falls partly within one calendar year and partly with another.

State law provisions on termination of coverage will need revision to reflect the 1970 amendments. These provisions usually provide for the termination of coverage of employers upon application or upon the initiative of the agency when certain findings are made with respect to the number of workers employed or the amount of wages paid, depending upon the coverage provisions in the State law. A specific provision will be needed to exclude State hospitals and State institutions of higher education from the termination provisions since coverage is extended to them without regard to number of employees, length of employment or a payroll test. However, termination of coverage for nonprofit institutions

required to be covered by the Federal Unemployment Tax Act would have to be distinguished from provisions applicable to other employers solely because of the different “size-of-firm” test applying to them. Other employer may be terminated upon a finding that there were not 20 different weeks during which, on some day, there was not one person employed or wages of $1500 in a calendar quarter were not paid. However, where a State provides only the minimum coverage for nonprofit organizations, the transitional provision would have to provide for termination only upon a finding that the organization had less than 4 employees in employment on each of 20 days in 20 different weeks. If wider coverage is provided for in the State law the termination provision concerning nonprofit organizations would have to provide for termination only when an organization had less than such specified employment.

A “transitional” clause will also be needed to recognize the changed coverage provisions particularly in those States which covered employees of 2 or more prior to the 1970 amendments. Such provisions would, in essence, provide that coverage could not be terminated unless with respect to calendar year 1972 the employing unit had less than the employment provided for coverage by the State under the 1970 amendments and with respect to 1971, less than the employment that was required under the State law provisions applicable to that calendar year.

Commentary - Section 2(k)(1)(A)

Definitions: “Employment”

(k) Employment.--Prior to the 1970 amendments to the Federal Unemployment Tax Act, only individuals who were employees under common law rules of master and servant were in employment covered by the terms of that Act. New provisions of the Federal Unemployment Tax Act have the effect of providing coverage for services by individuals as certain agent and commission drivers and traveling and city salesmen otherwise excluded under common law rules.

Short form definition.--The "short form" of the definition of employment is provided primarily for State laws using, or amended to use, the "ABC" test of coverage.

For services to be covered they must be performed by an "employee" in "employment". The most satisfactory definition of employment is contained in section 2(k)(5) of the Manual which utilizes the "ABC" test to distinguish between employment and self-employment. Although the 1970 amendments to the Federal Unemployment Tax Act broaden coverage provisions in certain areas, and thereby reduce the inequities inherent in defining employment exclusively on the basis of common law rules of master and servant, it is preferable to disregard the common law tests completely, since they are based on concepts which have no relationship to unemployment insurance and are inadequate to accomplish program objectives.

The common law doctrine developed primarily in cases dealing with the vicarious liability, of an employer for the tortious acts of his employees. The basic rationale was that liability should be imposed when the employer was in a position to reduce the risk by controlling the manner and means of work performance. Thus, the test which evolved relates largely to the extent of the employer's right of control over the performance of the work. But for unemployment compensation purposes, the economic realities of the relationship, not the degree of control, are determinative. The crucial test is: Can the employer separate the worker and thereby cause his unemployment?

Long form definition.--The "long form" definition specifically includes the services covered by the 1970 amendments to section 3306(i) and avoids the necessity for reference to another statute to determine the services covered after December 31, 1971. It is recommended for States using common law tests of master and servant. (See commentary above on section 2(k)(5) of the Manual discussing the "ABC" test and the common law rules of master and servant.)

Subparagraphs (A)(i) and (ii) provide that services are covered if they are performed by an officer of a corporation and any other individual who is an employee under the usual common law rules defining the employer-employee relationship.

Commentary - Section 2(k)(1)(A)

Definition: “Employment”

Subparagraph (A)(iii) is designed to conform with amendments to the Federal Unemployment Tax Act. It is intended to cover two specific groups of workers who are not employees under the common law employer-employee rules. The first such group, listed in subparagraph (A)(iii)(I), includes agent or commission drivers who distribute meat, vegetable, fruit, or bakery products or beverages (other than milk), or who distribute laundry or dry-cleaning services for a principal (employer). The second group, which is covered by subparagraph (A)(iii)(II), includes traveling or city salesmen (other than agent-drivers or commission-drivers) who are engaged on a full-time basis in the solicitation on behalf of a principal (employer) or the transmission to a principal (employer) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations. However, this provision does not cover services in sideline sales activities on behalf of some other person.

The proviso in subparagraph (A)(iii) contains the same conditions for coverage as are contained in the amended Federal Unemployment Tax Act. Thus although an individual may be a commission-driver or salesman described in subparagraph (A)(iii)(I) or (II), his services are in covered employment only if 1. the contract of service contemplates that substantially all of the services are to be performed personally by the individual; 2. the individual does not have a substantial investment in facilities used in connection with the performance of the services (other than the investment in facilities for transportation); and 3. the services are part of a continuing relationship with the person for whom the services are performed and not in the nature of a single transaction.

FICA definition.--As one means of broadening coverage, the Federal Unemployment Tax Act was amended to adopt the definition of the term “employee” in the Federal Insurance Contributions Act with two exceptions: (1) full-time insurance salesmen, and (2) homeworkers performing work according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him. If the State finds that adoption of the “ABC” test is not feasible, it is recommended that the definition of employee in section 3121(d) of the Federal Insurance Contributions Act be incorporated in its entirety in the State definition of “employment”.

Section 3306(c)(14), Federal Unemployment Tax Act, and most State laws, specifically exclude the services of an insurance agent or solicitor who is paid solely by commission. An insurance salesman, whether on a commission or a salaried basis, should be provided with unemployment insurance protection against job loss if he is, in reality, an employee under the “ABC” test.

Commentary - Section 2(k)(1)(A)

Definitions: “Employment”

There is no specific exclusion in the Federal Unemployment Tax Act for homeworkers and they are covered if they are employees under the usual common law rules. Many homeworkers would not qualify on this basis, however, because that degree of control over their work performance which is necessary to satisfy the common law definition is lacking in spite of the fact that the employee may be exposed to the risks of unemployment to the same extent as other workers.

It is therefore recommended that any specific exclusion of insurance agents, solicitors, or homeworkers in the State law be repealed and that the definition of employee in the Federal Insurance Contributions Act be adopted without deletions. This would effect coverage of both insurance salesman and homeworkers.

This could be accomplished by adding new subdivisions (III) and (IV) under subparagraph (A)(iii) to read as follows:

> “(III) as a full-time insurance salesman;
> (IV) as a homeworker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him;”

and by revising the proviso following subparagraph (A)(iii) to include reference to subdivisions (III) and (IV).

General--Legislation by reference

Those States which are barred by constitutional or statutory prohibition from legislating by reference would not be able to adopt alternative 2 for subparagraph (B) or alternatives 1 or 2 for subparagraph (C) without substantial modification since these provisions refer to sections 3306(c)(7) and 3306(c)(8), Federal Unemployment Tax Act. Additional draft provisions (including others with respect to coverage affected by H.R. 14705 such as section 2(K)(6)(A)) would also need revision because they also refer to provisions in Federal law or to regulations issued by the Secretary of Labor. Such States would have to include in the State law the substance if not the exact wording of the Federal provisions to which the draft language refers. With respect to regulations issued by the Secretary, it appears that such States would have to include them in the State rules and regulations. Care will need to be exercised in adapting Federal provisions to assure that the State law does not exclude more service than the Federal law permits with respect to State and nonprofit services which must be covered as a condition for approval of the State law for tax credit.

(B) Service for the State and its political subdivisions.--Effective January 1, 1972, the 1970 amendments to the Federal Unemployment Tax Act (sections 3304(a)(6) and 3309) make State law coverage of service performed by certain employees of State hospitals and institutions of higher education a requirement for tax credit under that Act. Each State is required to pay compensation on their services under the same terms and conditions as the State law provides for other covered services. (For an exception to this requirement, i.e., the prohibition of the payment of benefits, based on their services, during certain periods to individuals employed by institutions of higher education in an instructional, research or principal administrative capacity, see the text and commentary for section 4(a)(2).)

Under the 1970 amendments, the prescribed extension of coverage to certain services for nonprofit organizations, State hospitals and institutions of higher education is made a condition for certification of the State law by the Secretary. Thus the impact of this federally-mandated extension of coverage differs from an extension of FUTA coverage. If a State law fails to cover employment that is covered under FUTA, the employer must pay the full Federal tax on that employment, and the employees may get no benefits based on such employment, but the certifiability of the State law is unaffected. If, however, a State law fails to cover the services which the Federal law specifies the States must cover, or excludes such services

from coverage, the State law would not be approvable for purposes of tax credits against the Federal unemployment tax and no employer in the State would receive such credit for State contributions against the Federal unemployment tax.

The 1970 amendments require coverage of State hospitals and institutions of higher education only and do not affect employment for the State generally, or for its other instrumentalities. It should also be noted that under the 1970 amendments services in hospitals and institutions of higher education operated by one or more States or their instrumentalities must be covered in the State in which the hospital or institution of higher education is physically located.

New section 3304(a)(12) of the Federal Unemployment Tax Act also provides that a State law must allow the political subdivisions of the State to elect coverage on a reimbursable basis of the service performed in a hospital or an institution of higher education of any such subdivision, if such service is not otherwise covered. This means that States whose laws do not require the coverage of services performed for the hospitals and institutions of higher education of their political subdivisions must amend them either to require such coverage or to permit their political subdivisions to elect coverage for those services.

Existing provisions of the Federal Unemployment Tax Act, which exclude services by student nurses and interns, students employed by the school they are attending and services for less than $50 a quarter, are not changed. In addition, the 1970 amendments provide that certain services performed for hospitals and institutions of higher education may be excluded, as provided in section 2(k)(1)(D), regardless of whether these are State or private nonprofit hospitals or institutions.

Alternative 2 of subparagraph (3) provides only for the minimum coverage of State employment with the State law must cover as a condition of tax credit approval. States, however, are free to go beyond such limited coverage

extension and should extend coverage in both State and local government employees on as broad a base as practical. This could be accomplished by enacting Alternative 1 of Section 2(k)(1)(B) together with the exclusions contained in sections 2(k)(6)(J) and (K) of the 1950 Manual which exempt from coverage the service of elected public officials, public officials who are paid on a fee basis, and service performed on State or local government work-relief projects.

If the coverage of State and local government workers cannot be accomplished, States should consider covering State employees only by substituting the following provision for Alternative 1 of section 2(k)(1)(B) together with the exclusions in sections 2(k)(6)(J) and (K) and the same exceptions as provided in section 2(k)(1)(D):

> “service performed after December 31, 1971, in the employ of this State or any of its wholly owned instrumentalities;”

If so broad an extension of coverage is not feasible, it is recommended that coverage be extended to individuals employed not only by the State but also by its political subdivisions and instrumentalities in hospitals, institutions of higher education and secondary and primary schools, such coverage to be on the same basis and with the same exceptions as provided for State employees of State hospitals and institutions of higher education.

(C) [1/] Service for nonprofit organizations.--The 1970 amendments to the Federal Unemployment Tax Act did not change the Federal tax status of Federal unemployment tax exempt nonprofit organizations. By making State law coverage of services for such organizations a requirement for tax credit under the Federal Unemployment Tax Act, the amendments in effect extend unemployment insurance protection under State laws to certain employees of such nonprofit organizations. The State law must give each nonprofit organization which the Federal law says must be covered an option: To reimburse the State for unemployment benefits attributable to service for such organization or to pay contributions under the State law’s normal tax provisions. The State law must also provide that unemployment benefits based on service for nonprofit organizations will be paid under the same conditions that apply to benefits paid on the basis of other State covered services. (See Section 4(a)(2).)

1/ Present section 2(k)(1)(C) and (D) of the 1950 Manual are relettered as section 2(k)(1)(F) and (G).

Commentary - Section 2(k)(1)(C)

Definitions: “Employment”

States are not required to cover all services or all nonprofit organizations which previously could be excluded from coverage under the State law. Only those organizations which employ at least four workers on each of 20 days during either the current or the preceding calendar year, each day being in a different calendar week, must be covered. The services and organizations which the State law may continue to exclude are discussed in connection with section 2(k)(1)(D).

The provisions in Alternative 1 of subparagraph (C) would provide coverage of all service which is excluded from the definition of “employment” in the Federal Unemployment Tax Act solely by reason of the provisions in section 3306(c)(8) of that Act, with the exception of service which is exempt from coverage under the State law by section 2(k)(1)(D). Thus the provisions in this alternative would provide broader coverage than is required by Federal law because they would cover not only service for organizations which must be covered under the State law, but also service performed for organizations which employ less than four workers in 20 weeks. The provisions in Alternative 2 of subparagraph (C) on the other hand would cover service only for nonprofit organizations which the State law is required to cover (i.e., those employing four or more workers in 20 weeks) and would specifically except service which is exempt from coverage by section 2(k)(1)(D).

The coverage required is only of service which is excluded under section 3306(c)(8) of the Federal Unemployment Tax Act solely because it is performed for nonprofit organizations described in section 301(c)(3) of the Federal Internal Revenue Code of 1954 which are exempt form income tax under section 501(a) of the Code.

The inclusion of the phrase “within either the current or the preceding calendar year” in Alternative 2 of subparagraph (C)(ii) is required by Federal law and provides for continuous coverage from year to year. It thus prevents the existence of a substantial period at the beginning of each year during which no nonprofit organization would be subject to the law.

In determining whether an organization had four or more workers on a particular day, the services specified in section 2(k)(1)(D) need not be considered. Accordingly, if the organization had in employment on a particular day only four employees, one of whom was an ordained minister performing services “in the exercise of his ministry,” that day would not be counted in determining coverage of the organization.

States may go beyond the Federal requirements and cover as many additional nonprofit organizations as the State legislature considers appropriate. We recommend that States go beyond the Federal law requirements and enact provisions such as Alternative 1. If the State covers a nonprofit organization whose coverage the Federal law does not require, the State may permit the organization to reimburse the fund for its employees’ benefits. The State is not, however, required to offer this option to any nonprofit organization before January 1, 1972. If it wishes, however, the State may provide for reimbursement financing of nonprofit organization employees’ benefits at any time after the approval date of the Federal bill, but, under the provisions of new section 3303(e), such reimbursement must not apply to benefits paid before January 1, 1970.

States which now cover nonprofit organizations or those with standby legislation for covering nonprofit organizations on a reimbursable basis, effective upon certification by the Secretary, should review with provisions to determine whether they meet Federal requirements with respect to organizations which must be covered, the effective date of such coverage, and the option of electing contributions or reimbursement.

(D) Excluded services for nonprofit organizations, State hospitals and State institutions of higher education.--Section 2(k)(1)(D) describes the services which, under new section 3309(b) of the FUTA, may be excluded from the required State coverage of nonprofit organizations, State hospitals and State institutions of higher education.

Subparagraph (i).--As used in this subparagraph, the word “church” is used in its limited sense and is synonymous with an individual “house of worship” maintained by a particular congregation. “Convention” and “association” refer to formal and informal groups of churches, clergy or laymen, whether of a continuing nature or meeting periodically, whose purpose is primarily concerned with religious and denominational matters of the group or groups represented. Any service by an individual for a church, convention or association of churches is excluded from coverage. However, the exclusion does not apply to service performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled or principally supported by a church (or a convention or association of churches). Thus, the service of the janitor of a church is excluded, but the service of janitor for a separately incorporated college, although if may be church related, is covered.

Commentary - Section 2(k)(1)(D)(ii)

Definitions: “Employment”

Service for a college devoted primarily to the preparation of students for the ministry is exempt, as is service for a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church related (separately incorporated) charitable organization (such as an orphanage or a home for the aged) is not considered, under this subparagraph, to be operated primarily for religious purposes.

Subparagraph (ii).--The exclusion of service performed by ministers in the exercise of their ministry and by members of a religious order in performing the duties required by such order applies only when such service is performed for nonprofit organizations required to be covered by the State law.

A minister is “ordained, commissioned, or licensed” if he has been vested with ministerial status in accordance with the procedure followed by the particular church denomination. However, he does not have to be connected with a congregation. Ministerial authority continues until revoked by the church.

The term “exercise of the Ministry” includes: (1) the conduct of religious worship and the ministration of sacerdotal functions; (2) service performed in the control, conduct, and maintenance of (a) a religious organization under the authority of a religious body constituting a church or church denomination, or (b) an organization operated as an integral agency of such a religious organization or of a church or church denomination; (3) service performed for any organization under an assignment or designation by a church (not including cases in which a church merely helps a minister by recommending him for a position involving nonministerial services for an organization not connected with the church); and (4) missionary service or administrative work in the employ of a missionary organization. “Control, conduct, and maintenance” of an organization does not include services such as operating an elevator, or being a janitor, but refers to services performed in the directing, management, or promotion of the activities of the organization.

Accordingly, service of a clergyman as a chaplain in an orphanage or in an old-age home is excluded since his service is in the exercise of his ministry as is the service of members of a teaching or nursing order who are engaged in teaching or nursing. In the case of a member of a religious order, the criterion is whether the order requires the performance of such service.

Commentary - Section 2(k)(1)(D)(iii)

Definitions: “Employment”

Subparagraph (iii).--The exclusion of service performed in the employ of schools other than institutions of higher education applies to service for institutions below the level of a college, university, junior or community college or similar institution (see definition or “institution of higher education” in section 2(u) and Commentary relating thereto). Thus, all service for primary, secondary and most preparatory schools in excluded.

Subparagraph (iv).--This subparagraph excludes certain services performed for a facility which is itself covered as a State hospital, State institution of higher education or nonprofit organization or is a part of one of these kinds of covered employer. The facility may be one of two types, a rehabilitation facility or a sheltered workshop.

A rehabilitation facility as described in the draft language, is a facility whose purpose is to carry out a program of rehabilitating individuals whose age or physical or mental deficiency or injury has impaired their earning capacity. Such a facility undertakes to promote the development, to the greatest degree possible, of such faculties as the disabled or handicapped individual still possesses. The help it provides may include, but is not limited to, medical, psychological and social services, testing, fitting or training in prosthetic devices, and physical, occupational, speech and hearing therapy.

A sheltered workshop, as described in the draft language, is a facility whose purpose is no carry out a program of providing work for pay to individuals who cannot readily get jobs in the competitive labor market. Goodwill industries and many workshops for the blind are examples of sheltered workshops.

Some facilities combine both types of programs and are both rehabilitation facilities and sheltered workshops.

The services for the described facilities that are excluded are those performed for them by the beneficiaries of the programs that have been described. The exclusion does not apply to the service of individuals employed by the facility to operate or administer such a program rather than to benefit from its program objectives.

Commentary - Section 2(K)(1)(D)(v)

Definitions: “Employment”

Subparagraph (v).--Services performed by an individual receiving work relief or training for a nonprofit organization or a State hospital or State institution of higher education as part of an unemployment work relief or work-training program would be excluded but only if the program is assisted or financed, in whole or in part, by a Federal agency or by an agency of the State or any of its political subdivisions. For example, a disadvantaged individual works as a trainee for a nonprofit organization or a State hospital or institution of higher education. By the terms of the work program under which he is being trained, the employer receives payments from a government agency to compensate the employer for its added cost of employing the trainee. The trainee’s services are excluded.

The provision also excludes the services of the individual receiving the work-relief or work-training not only if the program is governmentally financed but also if it is “assisted . . . in whole or in part . . .” by a Federal or State agency or a State’s political subdivision. The “assistance” may be in the form of supervision, advice in organizing and operating the program, but it must be substantial and continuing. Occasional, intermittent or incidental services would not be sufficient to invoke the exclusion. Where other than incidental physical facilities, equipment or material are furnished the program by a Federal agency, the State or any of its political subdivisions, it would be considered that the program had been “assisted or financed.”

Subparagraph (vi).--The service of the non-inmate staff of a hospital in a State prison or other State correctional institution would be covered to the same extent as is such service were performed in any other hospital. The only service performed for such a hospital facility which would be excluded is that performed by an inmate of the prison or correctional institution in which the hospital is located. While the medical services offered are limited to the inmates of the prison or correctional institution, the facility is no less a State hospital than a hospital whose services are available to the population as a whole since it is part of the total State hospital system. Even though the medical facilities maintained in a particular prison or correctional institution may not offer as broad a range of medical services as are provided in hospitals generally, services that are provided as part of a State hospital would be covered under the State law except for services performed by an inmate of the prison or the correctional institution where the hospital is located. See also the definition of “hospital” in section 2(v).

Commentary - Section 2(k)(1)(E)

Definitions: “Employment”

Service Outside the United States

(E) Service by citizens of the United States outside the United States for American employers.--General.--The Employment Security Amendments of 1970 changed section 3306(c) of the Federal Unemployment Tax Act to include in the definition of “employment,” services performed after 1971 outside the United States by a citizen of the United States in the employ an American employer. Services performed in the Virgin Islands or in a “contiguous country with which the United States has an agreement relating to unemployment compensation” (i.e., Canada) continue to be excluded. A definition of the term “American employer” (identical with that contained in the draft provision) was also added to the FUTA.

But for the exception of services performed by a U.S. citizen for an American employer in Canada or in the Virgin Island, the added FUTA provision is the same as that used in the Federal Insurance Contributions Act for purposes of defining employment covered by the OASDHI program. The exceptions were intended to prevent an American employer from being taxed a second time on wages that are already subjects to unemployment taxes. In the case of Canada, the exception took account of the reciprocal coverage agreements between the States and Canada.

The FUTA change was made in order to provide an incentive to States to cover the services of U.S. citizens employed abroad by American employers so that such workers may become eligible for benefits when they are unemployed and such employers may qualify for credit against the Federal unemployment tax. In making the change, the Congress recognized that a substantial number of U.S. citizens are employed outside the United States by American employers, often on projects or contracts of limited duration. Under present State laws, when they complete their work and return to the United States, they are not eligible for benefits because their employment outside the United States was not covered.

Both the House and the Senate committees, in their reports on H..R. 14705, expressed their view that existing provisions of State laws dealing with the coverage of services performed for a single employer in more than one State can be adapted to effect coverage. The draft provision is written so as to reflect the same approach to coverage of the service abroad of U.S. citizens for American employers as the provisions of the 1950 Manual and of all of the State laws on the multi-State employment of a worker for a single employer (See Section 2(K)(2) and (3), 1950 Manual). As nearly as possible the same principles have been used. As in the case of those provisions, the effort has been to avoid conflicts and overlapping coverage between States with respect to the services of a single individual for a single employer. If such

conflicts are to be avoided, it is essential that all States adopt the same provisions on this subject. The Interstate Benefit Payment Committee of the ICESA has recommended that States adopt the draft provision.

Relationship to multi-State provisions.--Since the draft provision relates entirely to the service abroad 1/ of U.S. citizens for American employers, such service is necessarily performed outside the State. If such service abroad was already considered employment, however, under the existing “multi-State” provisions of a State’s law, the draft provision does not apply to it. This application of the draft provision recognizes that the existing “multi-State” provisions of State laws may include service abroad in the category of service performed “without the State.” The existing “multi-State” provisions already cover service without the State if it is incidental to service performed within the State or if some of the service was performed within the State and one of the tests specified in the “multi-State” provisions is met. (See section 2(k)(2) and (3) of the 1950 Manual). The draft outside the State (and otherwise satisfies its provisions) and does not meet the requirements of any State’s “multistate” provision.

Elements.--For an individual’s service to be covered under the terms of the draft provision, all the following elements must exist:

1. The individual who performed the service is a citizen of the United States. This includes both naturalized citizens and citizens by birth. It does not include any non-citizens of the United States even if he is a permanent resident.

2. The service is performed outside the United States (except in Canada or the Virgin Islands).

The definition of “United States” that appears in the Federal Unemployment Tax Act (sec. 3306(J)(2)) includes 52 jurisdictions, i.e., the 50 States, the District of Columbia and the Commonwealth of Puerto Rico. Under that definition, “outside the United States” refers not only to foreign countries and territories but also to American territories and possessions, e.g., Guam, Midway, American Samoa, etc. States should review their definition of United States to assure that it has the same meaning as in the Federal Unemployment Tax Act.

1/ Although the service to which the provision refers is designated here and elsewhere in this commentary for shorthand purposes as service abroad, both the FUTA and the draft provisions deal with “service outside the United States.” On this point see the discussion under the heading “Elements.”

3. The service is performed in the employ of an American employer. Division (iv) of the draft provision defines on “American employer.” This definition states four categories of employers and, with respect to each category, states the necessary condition for such an employer to be an “American employer.”

A. If the employer is an individual, he must be a resident of the United States.

B. If the employer is a corporation, it must be organized under the laws of a State or of the United States.

C. If the employer is a partnership, at least two-thirds of the partners must be residents of the United States.

D. If the employer is a trust, all of the trustees must be residents of the United States.

Note: None of these four categories includes a State or local governmental unit. A State which wishes to cover a U.S. citizen’s service abroad for any one of its agencies or political subdivisions can do so by amending the draft provision to insert (between the words “an American employer” and the parenthesis the following: “or of this State or of any of its instrumentalities or of any of its political subdivisions.”

Determining the State of Coverage.--Whether the service of an individual which combines the elements just described is covered under a State’s law is determined under the draft provision by a series of tests.

1. Principal place of business. The basic test applied is whether the employer’s principal place of business in the United States is located in the State. If it is, the service is covered in that State. Principal place of business in the United States refers to the employer’s headquarters in the United States, the

business address where its highest officers in the United States are located. The employers of the great majority of U.S. citizens working for American employers outside the United States have a place of business in the United States. In some cases, however, an American employer may be physically located entirely outside the United States and have no place of business in the United States.

2. Residence or legal situs in the United States. For American employers who have no place of business in the United States the draft provision provides for coverage in the State of residence of the employer if he is an individual, the State under whose laws it was organized if the employer is a corporation, and the State which has a plurality of the partners or trustees as its residents, if the employer is a partnership or trust. In effect, these tests provide that when the employer has no actual place of business in the United States, the individual’s services will be covered in the State to which the employer has a legal tie.

In a few cases, these tests might not avail. The American employer who has no place of business in the United States may be an individual who is a resident of the United States but not of any State. Or that employer may be a partnership or a trust and no State is the State of residence of more of the partners or trustees than any other.

3. Employer election. If the State covering the individual’s service is not established by one of the preceding tests, the draft provision provides for his services to be covered in the State in which the employer has elected coverage.

4. Claim filing. If the individual’s service is not covered in any State by reason of one of the foregoing (i.e., the employer involved satisfies none of the tests and has not elected coverage in any State) then his services are covered in the State under whose law he has filed a claim that is based on that service.

It should be noted that benefits based on service abroad that is “employment” within the meaning of this subparagraph will be payable only upon claims filed in the United States or in a jurisdiction with which the State has an agreement under the Interstate Benefit Payment Plan.

Commentary - Section 2(k)(1)(G)

Definitions: "Employment"

(G) Service covered, or required to be covered, by Federal legislation.--The present provision (in section 2(K)(1)(D) of the Manual would cover service covered by a Federal law imposing a tax against which credit may be taken for contributions required to be paid into a State unemployment fund. The purpose of the provision is to provide automatic coverage under the State law when changes are made in section 3306(c) of the Federal Unemployment Tax Act.

The suggested draft provision amends the current provision by adding the following language: "or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required to be covered under this Act." The additional language recognizes that the 1970 amendments achieved State law coverage for certain services for nonprofit organizations by making such coverage under State laws a condition for certification of such State law even though the services continue to be exempt from the Federal Unemployment Tax Act. By adopting the additional language a State will be able to preserve "automatic" coverage under State law in the event of future Federal legislation employing this approach in the extension of coverage. It also serves as a safeguard to assure that State coverage is consistent with that required by the Federal law.

(Note: Current section 2(K)(1)(C) has been renumbered as section 2(k)(1)(F).)

Commentary - Section 2(k)(6)(A)

Definitions: “Agricultural Labor”

(A) Agricultural Labor.--Agricultural Labor is excluded from coverage of the Federal Unemployment Tax Act (FUTA) by section 3306(c)(1). The 1970 amendments to section 3306(k) narrowed the definition of agricultural labor thereby extending coverage. Some borderline activities relating to agriculture were deleted and a distinction was drawn between activities which are clearly related to farm operation and activities which are removed from direct farm operations. Activities no longer included in the definition of “agricultural labor” are removed from the exclusion from “employment” specified in section 3306(c)(1).

The “short form” of subparagraph (A) is designed to adopt the amendments to the Federal Unemployment Tax Act by reference while the “long form” includes the specifics contained in the Federal provisions.

Subparagraph (A)(i) and (ii) of the “long form” contains listings of activities which have always been considered agricultural in nature and have therefore been excluded from coverage under the FUTA. The 1970 amendments did not change this part of the agricultural labor exclusion.

Prior to the 1970 amendments, paragraph (3) of section 3306(k) of that Act included as agricultural labor certain services which did not constitute agricultural labor under the definition in section 3121(g)(3) of the Federal Insurance Contributions Act (FICA). Such services were therefore not covered under the FUTA but were covered under FICA. New section 3306(k) incorporates section 3121(g)(3) by reference, and therefore no longer excludes these services from FUTA coverage. Subparagraph (A)(iii) of the draft language is designed to conform with amended section 3306(k) and excludes from the definition of agricultural labor services performed in connection with the production or harvesting of maple syrup or maple sugar, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry which services are not performed on a farm. As an example of the effect of this modification, services performed in connection with the operation of a hatchery which is not operated as part of a poultry or other farm are no longer excluded from coverage and would constitute employment.

Subparagraph (A)(iii) also has the effect of limiting the exclusionary provisions to nonprofit organizations if the service is performed in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways which are used for supplying and storing water for farming purposes. Thus an individual who is employed by an organization that is engaged in these types of businesses that are operated for profit would be in covered employment.

Commentary - Section 2(k)(6)(A)(iv)(I)

Definitions: “Agricultural Labor”

Subparagraph (A)(iv)(I) changes the test relating to services which are performed in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market, or to a carrier for transportation to market, of any agricultural or horticultural product. Under the FUTA prior to the 1970 amendments, such service was excluded as agricultural employment if performed in the employ of any person as long as the service was performed as an incident to ordinary farming operations, or, in the case of fruits and vegetables, as an incident to the preparation of fruits and vegetables for market. New section 3306(k), by incorporating section 3121(g)(4)(A) of the FICA into the FUTA definition of agricultural labor, limits the exclusion (under section 3306(c)(1)) to services of these types only if the service is performed in the employ of the owner-operator, tenant-operator, or other operator of a farm and if the commodity is in its unmanufactured state, and if the operator produced more than one-half of the commodity with respect to which the service was performed.

Thus the 1970 amendment adds three tests to the criteria for determining whether services of these types are excluded: (1) the status of the person for whom the service is performed--service must be performed in the employ of the operator of the farm; (2) the state of the commodity with respect to which the service is performed--the service must be performed with respect to such commodity in its unmanufactured state; and (3) the extent to which such commodity was produced by the operator in whose employ the service is performed--the operator must have produced more than one-half of the commodity with respect to which the service is performed.

If any one of the three tests is not met, the services are not considered be agricultural employment, and they are not excluded from coverage.

Subparagraph (A)(iv)(II) modifies the third part of the test to extend the exclusionary provision to services which are performed in the employ of a group of operators of farms or a cooperative organization of which such operators are members, but only if such operators produced more than one-half of the commodity with respect to which the service was performed. This modification results from new section 3306 (k) of the FUTA which is different from the one which appears in section 3121(g)(4) of the FICA. For the purposes of subparagraph (A)(iv)(II), it is immaterial whether a cooperative organization is incorporated, or unincorporated, and whether or not it is a farmers’ cooperative which is exempt from income taxation under section 521 of the Internal Revenue Code.

Subparagraph (A)(iv)(III) provides that services which are performed in connection with commercial canning or commercial freezing, or in connection

with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption, do not constitute agricultural labor as defined in subparagraph (A)(iv)(I) and (II), and are, therefore, covered employment. A similar provision was in former section 3306(k)(4) of the FUTA, and the provision was unchanged by the 1970 amendments.

Subparagraph (A)(v) was added to conform with an amendment to the FUTA which includes as agricultural labor, and excludes from coverage, service which is not in the course of the employer’s trade or business or domestic service in a private home of the employer, if such service is performed on a farm which is operated for profit.

Subparagraph (B) defines the term “farm” to include stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses, or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. The term was similarly defined prior to the 1970 amendments.

Commentary - Section 2(k)(6)(R)

Definitions: Exclusions from “employment”

(R) Service of students and spouses of students for a school, college or university.--Prior to the 1970 amendments, section 3306(c)(10)(B) of the Federal Unemployment Tax Act excluded from the definition of employment “service in the employ of a school, college, or university if such service is performed by a student who is enrolled and is regularly attending classes at such school, college or university.” The Employment Security Amendments of 1970 retained that exclusion and added provisions which also exclude from the definition of “employment,” after December 31, 1969, the service of the student’s spouse if all of the following conditions are met:

(1) The student’s spouse is employed by the school, college or university at which the student is enrolled and is regularly attending classes.

(2) The spouse’s employment is provided under a program designed to give financial assistance to the student.

(3) The spouse is advised at the beginning of such employment that:

(a) the employment is provided under such a student-assistance program, and

(b) the employment is not covered by any program of unemployment insurance.

If the information indicated in item (3) above is not given, the spouse’s services would be covered. A particular form for the notice is not required so long as it is reasonable and makes clear to the spouse that the employment is provided under a student-assistance program and that such employment is not covered for unemployment insurance purposes. (See Senate Finance Committee Report on H.R. 14705, page 50.)

The exclusions in this paragraph follow those in amended section 3306(c)(10)(B) and apply to service for all educational institutions which provide such employment, whether they are at, or below, the university level, public or private, and nonprofit or operated for profit. Although States may, they are not required to, exclude such service from coverage under the State law. If States wish, they may provide a narrower exclusion than that specified in the Federal provision, e.g., making the exclusion only with respect to certain categories of educational institutions. Since the character of service performed for an educational institution by a student’s spouse is not inherently different from such services for other employers, the soundest course would be to omit this exclusion entirely.

(S) Service of students in work-study programs.--This paragraph follows the provisions of section 3306(c)(10)(C) added to the Federal Unemployment Tax Act by the 1970 amendments. It excludes from the definition of “employment” service performed, after December 31, 1969, for an employer by a full-time student under the age of 22 in a work-study program if the institution at which he is enrolled in such program has certified to the employer that such service is an integral part of the program.

The exclusion reflects a response to a growing trend in schools and colleges of combining outside work experience with formal classroom study. In some of these programs, students alternate between full-time class study and full-time outside employment on a quarter or semester basis. In other programs, the students divide their time on a daily or weekly basis between classroom attendance and outside work. These work-study program are integrated into the regular school curriculum and form a part of the full-time education program.

The work part of these work-study programs is usually in employment covered under the unemployment insurance system. The exclusion reflects the view that the schools might have more success in persuading employers to participate in cooperative educational plans if the wages paid to the students were not taxable. The exclusion in this subparagraph applies to service of such students enrolled in all public or nonprofit educational institutions which provide such work-study programs, whether they are at, or below, university level. The exclusion does not apply to employee educational or training programs run by or for an employer or a group of employers. (See Senate Finance Committee Report on H.R. 14705, page 51, first paragraph.)

The States are not required to exclude the services of students in work-study programs. They may do so, however. Presumably the objective would be, as in the case of the Federal Unemployment Tax Act exclusion, to encourage employers to participate in cooperative educational plans.

(T) Service of patient for hospitals.--This paragraph follows new section 3306(c)(10)(D) of the Federal Unemployment Tax Act and excludes from the definition of “employment” services performed in the employ of a hospital, after December 31, 1969, by patients of the hospital, whether it is public, nonprofit or proprietary. Although States are not required to add this exclusion to their laws, some may wish to do so. The comments that follow are intended for their consideration.

Commentary - Section 2(k)(6)(T)

Definitions: Exclusions from “employment”

The exclusion reflects a recognition that remunerative work provided by a hospital for its patients is usually provided for therapeutic or rehabilitative purposes and terminates when the individual is discharged as a patient. The resulting unemployment, therefore, is not considered as being caused by the same economic forces as the unemployment against which the unemployment insurance program is intended to protect the individual.

The following examples illustrate the application of the provisions:

While a patient in a hospital, an individual is assigned certain duties for which he is paid. Such service would be excluded. However, the same services performed after the date of his release from the hospital would not be excluded.

A nurse in a hospital becomes a patient in that hospital, but she continues to perform nursing duties for which she is paid. Her employment status as a nurse has not changed. She has not been employed as a patient and the exclusion does not apply in her case. A different situation is presented by the nurse who enters as a patient, is required initially because of her patient status to stop performing nursing services but later, while still a patient, is permitted or requested to resume them on a part-time or full-time basis. In that case, her services while a patient might be excluded if the circumstances support the finding that her employment is based on her patient status, e.g., as part of her treatment or rehabilitation.

While a precise demarcation cannot be made of services performed by an individual as a patient, the determining factor should be whether the individual is employed because he is a patient. If the answer is “Yes” the services are excluded. If the individual’s patient status is incidental to his employment and he would have been employed in that capacity had he not been a patient, his services would not be excluded. Because the term “patient” includes both in-patients and out-patients who might be employed in the hospital in which they are receiving treatment.

Commentary - Section 2(u)

Definitions: “Institution of higher education”

(u) Institution of higher education.-- The 1970 amendments to the Federal Unemployment Tax Act require the extension of coverage under State law to service for institutions of higher education of the State and its instrumentalities and to nonprofit institutions of higher education, with the exceptions noted in section 2(k)(1)(D). The definition of an institution of higher education follows that in section 3309(d), Federal Unemployment Tax Act, with the additions discussed below, and applies to public and to private nonprofit institutions. Services performed for an institution which meets all of the criteria in paragraphs (1), (2) and (4) and one or more of the criteria in paragraph (3), except as noted below, must be covered under the State unemployment insurance law.

The institution must offer a program of study or instruction above the high school level and must have been certified by appropriate State authorities as authorized to provide such an education program. While the usual indication of graduation from high school is a diploma, States now award certificates of high school completion when an individual successfully completes a high school equivalence examination. Any institution admitting individuals as regular students with a document certifying to the equivalent of a high school education would satisfy the requirement in paragraph (1).

The definition includes the usual undergraduate degree granting schools as well as graduate schools. The definition of an institution of higher education in section 3309(d), Federal Unemployment Tax Act, does not include the phrase “a program of post-graduate or post-doctoral studies” and therefore does not include centers for advanced studies which are included in paragraph (3). Such centers provide individuals who have earned academic degrees with an opportunity for research and study which are not in pursuit of requirements for advanced academic degrees. The draft language of paragraph (3) is recommended so as to assure coverage for service in the employ of such generally recognized institutions of higher learning.

If a college (or any other educational institution) admitted as a “regular student” any individual who was not a high school graduate and did not have the equivalent of a high school education it would not meet the Federal definition. (A regular student in a college or university is usually one who has met the matriculation requirements and become a candidate for a degree, diploma, certificate or equivalent award.) Changes in admission practices of some colleges and universities indicate that some individuals may be admitted as regular students who do not have a high school graduation certificate or its equivalent. To avoid possible loss of coverage for this and other reasons(such

as institutions which vary from the manner in which higher education has been organized in the past), paragraph (5) of the draft language has been added to the Federal definition. This provision would include within the definition any institution in the State which is recognized by the State as a college or university regardless of whether the institution met the Federal definition. Adoption of this provision is recommended.

Junior or community colleges which offer Associate of Art degrees for terminal vocational education programs, as well as programs which contemplate that the student will transfer his credits to another institution at which he will complete his education, fall within the purview of the definition. The determination of whether the institution “provides a program which is acceptable for full credit toward such a degree” (emphasis supplied) would be based on whether the credits are acceptable by other institutions in the State or in other States and not on whether the individual student actually is granted credit for all the courses he has completed by the institution to which he transfers.

A high school which includes grades 13 and 14 in addition to the lower grades would not meet the definition of institution of higher education since it admits as “regular students” to its 10th, 11th, and 12th grades individuals who are not high school graduates. However, a separately organized and operated junior or community college that uses the building facilities of a high school and employs some of the high school’s teachers as part of the college faculty would be considered an institution of higher education so long as it met the definition. Its physical location and the composition of its faculty would not be determinative of its status as an institution of higher education.

It is recommended that the State law include a definition of institution of higher education substantially the same as that suggested in the draft language. Such a definition would provide a useful guideline for identifying institutions of higher education which must be covered. It is also recommended that the States extend coverage to schools, both public and nonprofit, other than the institutions of higher education included in the definition in subsection (u).

Commentary - Section 2(v)

Definitions: “Hospital”

(V) Hospital.-- A definition of the term “hospital” in the State law would be helpful in view of section 2(k)(1)(B), 2(k)(1)(D)(vi) and 2(k)(6)(T). Section 2(k)(1)(B) relates to the coverage of State hospitals and institutions of higher education which is required as a condition for certification of the State law by the Secretary for tax credit under the federal Unemployment Tax Act. Section 2(k)(1)(D)(vi) excludes from required State coverage the service for a hospital in a State prison or other State correctional institution by an inmate of the prison or correctional institution. Section 2(k)(6)(T) excludes from coverage service performed after December 31, 1969, in the employ of a hospital by a patient of the hospital.

Section 3(f)

Requalifying requirements for benefits
in successive benefits years

(Section 3304(a)(7), FUTA)

(f) No individual may receive benefits in a benefit year unless, subsequent to the beginning of the next preceding benefit year during which he received benefits, he performed service, whether or not in "employment" as defined in section 2, and earned remuneration for such service in an amount equal to not less than _____. 1/

1/ Enter language describing requalifying requirement desired.

Commentary - Section 3(f)

Requalifying requirements for benefits in successive benefit years

(f) Requalifying requirement for benefits in successive benefit years.--
The 1970 amendments to the Federal Unemployment Tax Act added a new paragraph (7) to section 3304(a), providing that, as a condition for approval of a State law, such law must require an individual who has received compensation during his benefit year to have had work since the beginning of such year in order to qualify for compensation in his next benefit year. It is designed to require a specific requalifying requirement only in those States where the lag period wages alone could qualify an individual, who had received benefits in one benefit year, for benefits in a second benefit year. It seeks to ensure more current evidence of recent labor force attachment than such lag period wages.

"Work" as used in section 3304(a)(7) means the performance of services for which remuneration is payable, but the provision does not specify how much work is to be required or whether it has to be in covered employment. In States affected, the State law must explicitly provide whether or not the work must be in covered or noncovered employment and the amount of work required in terms of days or weeks of work or amount of money. States with no lag period between the base period and the benefit year or a lag period too short for an individual to meet the regular qualifying requirement on the basis of only lag period wages or employment do not have to implement this provision. Although language for a requalifying requirement only is provided, it is recommended that those States which need to enact such a provision, meet the requirements of section 3304(a)(7) by eliminating or reducing the lag period between the base period and benefit year so that no individual can qualify for benefic solely on wages or employment in the lag period.

As indicated above, "work" means the performance of services for which remuneration is payable. Accordingly, an individual who received benefits during a benefit year must perform services for remuneration after the beginning of that year as a condition for receiving benefits in a second benefit year. Remuneration received after the beginning of a benefit year for service prior to that year cannot be used to satisfy the requalifying requirement. Disability benefits, vacation pay, separation pay or back pay would not meet the definition of "work" since none of these is remuneration for services performed. Report-in or stand-by pay would meet the definition since reporting for work or holding oneself in readiness to work for one's employer is considered performing service. These are examples, and merely illustrative rather than exhaustive of the kinds of remuneration which may fall within or without the definition of "work."

Commentary - Section 3(f)

Requalifying requirements for benefits in successive benefit years

The reporting of a sufficient amount of wages for an individual in wage record States should not in itself determine that the individual has met the requalifying test. Appropriate inquiry should be made of the employer or claimant to assure that the wages reported represent remuneration for services performed after the beginning of the benefit year.

In the light of the purpose of the requalifying requirement, the sufficiency of the individual's base period wages and work in covered employment having already been established, it should not be limited to covered work. Either covered or non-covered work should be acceptable.

The requirement should be devised so as to apply equitably to low and high wage workers alike by requiring as nearly as possible the same amount of work from each. States should take into account the benefit formula and the information available to the agency which would facilitate determination of whether an individual meets the requirement.

If an amount of money is used as the test, a multiple of the individual's weekly benefit amount, which is more readily met by high wage workers, is not as equitable as a multiple of the worker's average weekly wage. A flat amount of wages would not apply equally to low and high wage workers since the latter would be able to achieve the required amount more easily than the former.

In States using high quarter formulas and quarterly wage reports (where determining the claimant's average weekly wage would be administratively difficult), the requalifying requirement could be stated as a fraction of high quarter wages or an equivalent multiple of the individual's weekly benefit amount, whichever is the lesser. The requirement stated solely as a multiple of the weekly benefit amount would be inequitable to claimants at the lower end of the benefit schedule in those States using a weighted schedule since it would require more weeks of work than from claimants at the upper end. A fraction of high quarter wages alone might also require, although to a lesser extent, more weeks of work from low wage than from high wage claimants. To minimize these inequities, it is recommended that the requirement be stated as 3/13 of the high quarter wage or 6 times the individual's weekly benefit amount, whichever is the lesser. So stated, the requalifying requirement would also avoid inequities at the maximum weekly benefit amount level when a claimant had unusually large high quarter earnings. The lesser

alternative for him, of 6 times his weekly benefit amount, would enable him to qualify for benefits more readily and on more equal terms when a requirement of 3/13 of high quarter wages alone would be much more difficult of attainment and reflective of more weeks of work at his usual wage than is generally required of other claimants.

In summary, it is recommended that the test be expressed as follows, depending on the States's benefit formula and qualifying requirements:

1. not more than three times the individual's average weekly wage,
2. not more than three weeks of work as week of work is defined in the State law, or
3. the lesser of 3/13 of the individual's high quarter and 6 times his weekly benefit amount.

States should consider the relative effects of stating the requalifying requirement as a multiple of the weekly benefit amount in the first benefit year or in the second benefit year. One of the apparent advantages of requiring a multiple of the weekly benefit amount in the first benefit year is that it would permit the agency to decide first if the claimant has met the requalifying requirement, before the agency makes a monetary determination on the new claim and establishes a benefit year. The latter two actions would be avoided in any case where the individual has not met the requalifying test. Such a practice, however, could severely disadvantage a claimant particularly one who has had prolonged unemployment or has not been able to get steady employment. If a benefit year is not established when he files his new claim, the qualifying wages he has at that point may no longer fall within the base period applicable by the time he meets the requalifying requirement. Thus he would be monetarily ineligible. Also, in many cases the weekly benefit amount for the first benefit year will be greater than for the second benefit amount for the first benefit year will be greater than for the second benefit year making a weekly benefit amount multiple harder to achieve. It is recommended that a benefit year be established with the filing of a new claim, regardless of how the requalifying requirement is stated, so that the individual's eligibility may be preserved even if he cannot immediately meet this test for the receipt of benefits in a second benefit year.

Commentary - Section 3(f)

Requalifying requirements for benefits in successive benefit years

It is recognized the draft provision would not require additional requalifying work by an individual who, after establishing a benefit year, returns to work (and works and earns enough to meet the requalifying test), is separated, exhausts his benefits, and without additional work and wages, establishes a second benefit year in which he again exhausts his benefits. To require requalifying work after the receipt of benefits in a benefit year (rather than after the beginning of a benefit year during which benefits were received) as a condition for the receipt of benefits in a second benefit year is a more rigorous provision than set forth in section 3304(a)(7). However, such a provision is not precluded by the Federal law.

Section 4(a)(2)

Benefit payments for service with nonprofits and State hospitals and higher education institutions

(Section 3304(a)(6)(A), FUTA)

(2)[1/] Benefits based on service in employment defined in section 2(k)(1)(B) and (C) shall be payable 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 this Act; except that benefits based on service in an instructional, research, or principal administrative capacity in an institution of higher education (as defined in section 2(u)) shall not be paid to an individual for any week of unemployment which begins during the period between two successive academic years, or during a similar period between two regular terms, whether or not successive, or during a period of paid sabbatical leave provided for in the individual's contract, if the individual has a contract or contracts to perform services in any such capacity for any institution or institutions of higher education for both such academic years or both such terms.

1/ Current section 4(a) of the Manual is renumbered as section 4(a)(1) and items (1), (2) and (3) therein are redesignated as items (A), (B) and (C).

Section 4(b)(8)

Disqualification of individuals taking approved training prohibited

(Section 3304(a)(8), FUTA)

(8) Notwithstanding any other provisions in this subsection, no otherwise eligible individual shall be denied benefits for any week because he is in training with the approval of the commissioner, nor shall such individual be denied benefits with respect to any week in which he is in training with the approval of the commissioner by reason of the application of provisions in paragraph (1) of this subsection relating to availability for work, the provisions of section _____ [1/] relating to active search for work, or the provisions of paragraph (4) of this subsection relating to failure to apply for, or a refusal to accept, suitable work.

1/ Enter the number of section in State law which specifically provides for denial of benefits for failure to conduct an active search for work. If no such provision in the State law, the pertinent phrase should be omitted.

Commentary - Section 4

No cancellation of wage credits or total reduction of benefits

(Section 3304(a)(10), FUTA)

Prohibition against cancellation of wage credits or total reduction of benefit rights except for certain causes.--The 1970 amendments to the Federal Unemployment Tax Act added a new paragraph (10) to section 3304(a) requiring, as a condition for approval of a State law for credit against the Federal tax for a State's employers, that the State shall not cancel an individual's wage credits or totally reduce his benefit rights for any cause other than discharge for misconduct connected with his work, fraud in connection with a claim for compensation, or receipt of disqualifying income.

A draft provision to implement this requirement has not been provided because a specific affirmative provision is not necessary to implement the prohibition. It is necessary, however, that any provision permitting wage cancellation or total reduction of benefit rights for causes other than those specified be deleted from the State law.

This Federal provision prohibits any cancellation of wage credits, either in or out of the base period, except for the causes specified. This bar is applicable to cancellation of wage credits with a specific employer or with all employers.

New section 3304(a)(10) also prohibits the total reduction of an individual's original monetary entitlement for a single disqualifying act, other than for the excepted causes.

If a State reduces a claimant's benefits by the amount that he would have drawn in the weeks for which he was disqualified, the reduction must not be total, i.e., the State may not impose a disqualification that completely eliminates his original monetary entitlement. If, for example, an individual with 20 weeks of benefit entitlement is disqualified in a State that has a variable disqualification period of from one to 26 weeks with a corresponding reduction in benefits, the new requirement prohibits a reduction of the individual's benefit entitlement for a single disqualification by an amount equal to 20 times his weekly benefit amount. To be consistent with section 3304(a)(10) the reduction must equal an amount less than 20 times his weekly benefit amount. The prohibition against total reduction does not apply if the individual receives benefits in a benefit year and, because of a disqualification, is deprived of the rest of his entitlement either because of reduction or because he has not satisfied the disqualification before the benefit year ends. Such an individual's original monetary entitlement has not been totally eliminated for a single disqualifying act. This prohibition is not applicable to the cumulative effect of multiple disqualifications for separate and distinct acts. Accordingly, an individuals's original monetary entitlement may be totally reduced as a result of several disqualifications within the benefit year, regardless of the cause for which each disqualification is imposed.

No cancellation of wage credits or total reduction of benefits

Section 3304(a)(10) affects only the few States which cancel wage credits or totally reduce benefits. It does not restrict States from imposing disqualifications, or from specifying the conditions for disqualifications. Nor does it preclude "duration of unemployment" disqualifications in which a disqualified claimant is prevented from drawing compensation unless and until he is redeployed for some specified period or earns some specified amount, and is again unemployed for reasons which are not disqualifying. Further, the requirement does not preclude disqualifications which only postpone the receipt of benefits for a specified or flexible number of weeks, or which, in addition to the postponement, reduce monetary entitlement by the number of weeks of the postponement or by a specified amount, both less than the individuals's original monetary entitlement. In the example above, the individual could only be disqualified for less than 20 weeks or have his original monetary entitlement reduced by an amount equal to less than 20 times his weekly benefit amount.

Finally, the new Federal requirement in no way prevents States from having less severe disqualification provisions than those involving reduction of benefit rights, or disqualification for the duration of the individual's unemployment.

The new Federal provision permits States to reduce an individual's benefit rights totally because of disqualifying income. The provision does not restrict the kinds of income the States may consider as disqualifying. It is recommended that specific disqualifying or deductible income provisions be deleted from State laws and that each case involving the receipt of income be determined on its own merits. Income should be deducted or disqualifying only if it is determined that the claimant was not unemployed within the meaning of the unemployment insurance law with respect to the week claimed.

In general, it is recommended that there be no cancellation of wage credits or reduction of benefits for any cause. The period of disqualification should be limited to a postponement of benefits for a fixed period which is related to the average length of time ordinarily required for an employable worker to find suitable work under normal economic conditions, since this is the period of unemployment which may reasonably be considered to be the direct result of the disqualifying act. The continued unemployment of the disqualified claimant beyond this period may reasonably be considered no longer due to the disqualifying act, but rather to economic conditions. It should be compensable, therefore, since this is the risk against which unemployment insurance is intended to insure.

Commentary - Section 4(a)(2)

Benefit payments for service with nonprofits and State hospitals and higher education institutions

(2) Conditions for payment of benefits based on service with nonprofit organizations and State hospitals and institutions of higher education.-- The suggested draft provision is similar to new paragraph (6)(A) of section 3304(a), Federal Unemployment Tax Act, which is a condition for approval of State laws. That paragraph requires, with one exception, that all State law conditions for the payment of benefits apply to claimants who earned all or part of their base period wages in employment with nonprofit organizations or State hospitals and institutions of higher education. Accordingly, the same qualifying and eligibility requirements, disqualifications, etc., apply to such workers as apply to claimants whose benefit rights are based on covered work with private employers-for-profit. The one exception to the identical treatment requirement relates to individuals who are employed by an institution of higher education in an instructional, research or principal administrative capacity. It prohibits the payment of benefits during specified periods of time to those individuals on the basis of such service. The suggested draft language is basically that of the Federal provision. Additional wording has been included, however, to state expressly that the exception applies when the individual has separate contracts covering two successive academic years or two regular terms as well as when the individual is on sabbatical leave.

In explaining the application of section 3304(a)(6)(A), the Report of the Committee on Finance, U.S. Senate, to accompany H.R. 14705, states on page 16:

> "There is, however, one distinctive characteristic of the contractual employment relationship between the instructor, researcher or administrative employee and the institution which led the committee to include a special provision in the bill. It is common for faculty and other professional employees of a college or university to be employed pursuant to an annual contract at an annual salary, but for a work period of less than 12 months. The annual salaries are intended to cover the entire year, including the summer periods, a semester break, a sabbatical period or similar nonwork periods during which the employment relationship continues.

Benefit payments for service with nonprofits and State hospitals and higher education institutions

> ". . .The committee bill would, therefore, provide a mandatory limitation on the payment of compensation based on service in an instructional, research or principal administrative capacity for an institution of higher education. The committee bill would specifically prohibit the payment of compensation based on service in any such capacity during the summer semester break, sabbatical period, or a similar nonwork period during which the employment relationship continues."

Individuals employed in an "instructional" capacity include not only persons engaged in teaching undergraduate and graduate students in formal classroom and seminar situations but also individuals who teach in less formal arrangements, such as tutorial relationships and direction of students in independent research and learning.

Individuals employed in a "research" capacity are those who direct a research project and the staff directly engaged in gathering, correlating, evaluating information and making findings. The individuals who provide supportive services for the research, such as typists, clerks and electricians engaged in wiring the information processing equipment under the direction of the research staff, are not affected by the prohibition.

Individuals employed in a "principal administrative" capacity are officers of the institution (such as the president), the board of directors, business managers, deans, associate deans, university public relations directors, comptrollers, development officers, chief librarians, registrars and any individuals who, although they may lack official titles, actually serve in a principal administrative capacity. The duties performed by the individual rather than the title he holds should determine whether or not he is affected by the prohibition. Neither providing a title nor withholding it should be significant.

Only individuals who perform services in an instructional, research or principal administrative capacity are affected by the exception. For example, an individual who worked in an institution of higher education in a capacity outside these categories in one academic year but who contracted to perform services within these categories during the next ensuing academic year would not be affected by the prohibition during the "summer" period.

Commentary - Section 4(a)(2)

Benefit payments for service with nonprofits and State hospitals and higher education institutions

The contract or contracts which an individual has with an institution of higher education may take a number of forms. For example, an individual who has "tenure" and will resume his post when the next academic term or year begins is considered to have an ongoing contract even though he has no formal written contract. In some cases, the contract may be merely a notice of appointment or reappointment or a letter indicating that the individual's services have been accepted. Generally, so long as there is a mutual commitment between an individual and a particular institution, his services are considered to be covered by a contract. Generally established academic custom and tradition and those peculiar to the particular institution involved would be significant in determining whether there is an employment relationship between the institution and the individual and whether the prohibition is applicable in specific cases.

Benefit payments for service with nonprofits and State hospitals and higher education institutions

The period to which the prohibition against the payment of benefits applies may be an interval between two successive academic years during which the individual is in leave status from the institution, such as the summer vacation period in an institution with a fall-through-spring academic year. It may also be any period or term within an institution's academic year which occurs between two regular but not successive terms, and during which the individual is not required under his contract to perform services. For example, with respect to an individual whose contracts for each of two 12-month periods require him to teach during the spring, summer and winter terms in an institution with a 4-term academic year and do not require him to perform such services during the intervening fall term, no benefits may be paid to him during such fall term that are based on his teaching services during the preceding spring, summer and winter terms. For the purposes of section 4(a)(2), the fall term would clearly be a period "between two regular terms, whether or not successive, . . . provided for in the individual's contract.

Although the period to which the prohibition generally applies may be limited to one term or semester, it may also be longer, such as a year of sabbatical leave for which payment is made, where both the leave and the individual's resumption of work upon the termination of the leave are provided for in his contract. In the case of sabbatical leave, the period to which the prohibition applies would also include the period between the end of the sabbatical and the beginning of the next academic year or term. As in the last example, such period would also be one "between two regular terms, whether or not successive, . . . provided for in the individual's contract."

Implicit in the two preceding paragraphs is a reading of the phrase in section 3304(a)(6)(A), "a similar period between two regular but not successive terms" as intending to provide (a) for the case of sabbatical leave and (b) for institutions of higher education that do not follow the conventional 2-semester academic year. The language of the Senate Committee report, quoted earlier, is clear as to sabbatical periods. In the case of institutions operating on a 3-semester or 4-quarter basis that embrace the entire 12 months of the year, the counterpart of "the period between two successive academic years" is achieved, as indicated above, by viewing the semester or quarter in which services are not required as being in effect the equivalent. This view implements the expressed legislative intent described in the Senate Committee's report to meet the special situation of faculty and other professional employees of a college or university who are "employed pursuant to an annual contract at an annual salary, but for a work period of less than 12 months." Thus an individual who is employed under contract by a college or university for one semester or term only, in each of two years could not be considered to be under an annual contract at an annual salary.

Benefit payments for service with nonprofits and State hospitals and higher education institutions

The prohibition applies even though the individual's contracts for the two succeeding academic years or the two regular terms involved are with different institutions of higher education. It does not apply if, following the contracted period of employment with an institution of higher education, he has a contract with no employers or with an employer other than an institution of higher education.

In each of the following examples the individual is under contract to perform research for the State University of X (SUX) during the 1972-73 academic year, such services to be performed beginning September 1, 1972, and ending May 31, 1973.

Example 1. On May 1, 1973, he contracts with SUX to perform similar services during the 1973-74 academic year, beginning September 1, 1973. He may not be paid benefits for June, July, or August 1973 based on his services with SUX for the period ending May 31, 1973.

Example 2. On May 1, 1973, he contracts with the State University of Y to perform research services during the 1973-1974 academic year, beginning September 1, 1973. Same result as in Example 1.

Example 3. On August 1, 1973 (but not until then) his contract with SUX is renewed to apply to the 1973-74 academic year, services to begin September 1, 1973. He may be paid benefits for June and July, but not for August 1973, on the basis of his services with SUX for the period ending May 31, 1973.

Example 4. On May 1, 1973, he contracts with XYZ Associates, an employer that is not an institution of higher education, to undertake a 1-year research project, work to begin September 1, 1973. He may be paid benefits for June, July and August on the basis of his services with SUX for the period ending May 31, 1973,

The prohibition does not apply to benefits to the individual based on any other services than those performed in employment with a State or nonprofit institution of higher education in an instructional, research or principal administrative capacity. In each of the examples above, the State is not precluded from paying benefits to the individual during the June-August, 1973 period on the basis of other covered employment in his base period.

The statements in Examples 3 and 4 that benefits may be paid assume that the conditions in the State law for the receipt of benefits have been met by the claimant. State Law requirements with respect to availability, unemployment, etc., apply to these claimants as they do to all other claimants. For example,

if an instructor in a college has both industrial and college employment in his base period and the prohibition bars the payment of benefits based on the latter during the "summer" period, he could not be paid benefits based on his industrial employment unless he was able to work, available for work, unemployed within the meaning of the unemployment insurance law, etc.

The prohibition also does not apply to benefits paid to any individual who is employed by a State or nonprofit institution of higher education in any other capacity than the three specified.

To avoid problems that may arise in determining the exact amount of wages (of individuals employed in an instructional, research or principal administrative capacity) subject to the prohibition, States should include a provision comparable to section 2(k)(7) of the 1950 Manual which provides for determinations to be made on a pay period basis. The suggested provision should provide for determinations on a contract by contract basis. It would provide that if, during the life of a contract, an individual performs service in any of the excepted categories, as well as in any other capacity which is not affected by the exception, all of his service pursuant to that contract, would be deemed to be in the affected capacity if he spends in it at least half his time.

The following discussion indicates some of the major steps which need to be taken in administering this provision and which a State may wish to include in procedural instructions to its personnel. The exception provided applies only if the individual is employed is an instructional, research or principal administrative capacity. Accordingly, it must be determined whether he falls in one of these excepted categories. If it is so determined, it must be decided whether the period during which benefits are claimed is a period during which payment of benefits based on wages paid by an institution of higher education is prohibited. In those instances in which it is determined that benefits based on such wages are not payable, the agency would have to examine base period wages to determine whether the individual had wages in other employment. Where the individual has such wages, a new monetary determination would have to be issued on which the new weekly benefit amount and duration, if any, would be calculated. He could then be paid such benefits, if otherwise payable under other applicable State provisions (for example, those relating to availability, whether or not unemployed, etc.).

The identification of individuals and wages involved in these determinations should not present unusual problems. When an individual gives his last employer as an institution of higher education, his claim could be noted for further interview to determine whether he is in one of the excepted categories.

Commentary - Section 4(a)(2)

Benefit payments for service with nonprofits and State hospitals and higher education institutions

Separation notices would provide an indication of the nature of the period for which benefits are claimed. A distinction between wages for employment with an institution of higher education and wages in other employment could be made on the basis of wage reports so that further inquiry could be made to determine whether the prohibition applies to any part of the former. In instances in which the individual was employed by the institution of higher education both within and without the specified categories, the agency would have to allocate the institutional wages in the manner prescribed in the law or regulations. (See comments above suggesting one type of provision which could be enacted for this purpose.)

Periodic interviews, questionnaires, or inquiry at the time the individual files continued claims are suggested as a way of determining whether an individual who was employed under contract by an institution of higher education in one of the three categories has secured a contract for the next ensuing term or academic year.

States should consider issuing a list of significant guide questions to agency personnel responsible for making nonmonetary determinations to be used as a guide in applying this provision. A list of all schools in the State which meet the State law definition of an institution of higher education would also be helpful.

Disqualification of individuals taking approved training prohibited

(8) Disqualification of individuals taking approved training prohibited.--The 1970 amendments to the Federal Unemployment Tax Act include a new paragraph (8) in section 3304(a) requiring, as a condition for employers in a State to receive normal tax credit, that the State law provide that compensation shall not be denied to an otherwise eligible individual for any week during which he is attending a training course with the approval of the State agency. It is required also that an individual taking such training not be found ineligible for benefits on the ground that he is unavailable for work is not making an active search for work, or has refused suitable work. In summary, the provision requires a State to admit a trainee in an approved training course to benefits and to prohibit denial of benefits thereafter for the specified causes.

Thus the State law must provide not only that benefits shall not be denied because the claimant is taking approved training, but also that the claimant shall not be held ineligible or disqualified for being unavailable for work, for failing to make an active search for work, or for failing to accept an offer of, or for refusal of, suitable work. In our present complex industrial society, training in occupational skills has become important to the employability of the individual. It is, therefore, essential that the unemployment insurance system not impede training. By taking approved training, the individual is demonstrating his availability and active search for work since it represents for him the most reasonable approach to reemployment. Furthermore, if such a claimant-trainee is not to be discouraged from completing an approved training course, the fact that he is engaged in training must preclude his disqualification for refusing work.

Under the Federal requirements, each State is free to determine what training is appropriate for a claimant, what criteria are established for approval of training for an individual, and what safeguards are established to assure that the claimant for whom the training has been approved is actually attending such training. While the objective of the Federal provision is to assure that the unemployment insurance system is not an impediment to the training of claimants in occupational skills, the provision does not expressly limit the training to vocational training. Basic education, provided as a necessary prerequisite for skill training, or other short-term vocationally-directed academic courses may also be approved for claimants. Approved training should not be limited to

training under the Manpower Development and Training Act of 1962 or under other Federal Training programs. Courses under other programs such as those sponsored by the State or a nonprofit organization may be approved. A claimant cannot be referred to a course which would require him to pay for it. However, training arranged and paid for by the trainee can be approved if it meets the State's criteria for approval.

The State agency's responsibility with respect to the evaluation of training falls into two general areas: (1) Is there a need for a particular training course and will it accomplish its stated objective, and (2) is the individual an appropriate participant in a particular training course, i.e., does the training meet his needs and can he benefit from it.

State regulations should assure (a) that the training course is consistent with objectives of the unemployment insurance program, e.g., reemployment of the individual in stable employment which utilizes his skills and abilities to the greatest degree possible and (b) that the State agency will approve the training course only if it is approved by the State Department of Education with respect to curriculum, facilities, staff and other essentials necessary to achieve the training objective including appropriate standards and practices as to satisfactory attendance and performance of trainees.

With respect to whether a particular course is approvable for a particular individual, State regulations should provide that the approval must be based on the State agency's findings that the individual possesses aptitudes and skills which can be usefully supplemented by the training; that present or impeding demands for the claimant's present skills are minimal and are not likely to improve; that, in general, the individual's present occupational situation is one which could be improved by training. State regulations should also provide specifically for obtaining satisfactory evidence that an individual taking approved training is attending the training course regularly. (See BES No. U-212, Unemployment Insurance Legislative Policy, 1962, Pages 59-60.)

It is recommended that the provisions discussed in the two paragraphs above be included in regulations rather than incorporated in the statute since regulations can be more easily modified as experience requires

Section 7(g)

Elective coverage for hospitals and institutions of higher education operated by political subdivisions

(Section 3304(a)(12), FUTA)

(g) Elective coverage by political subdivisions.--(1) Any political subdivision of this State may elect to cover under this Act service performed by employees in all of the hospitals and institutions of higher education, as defined in sections 2(u) and 2(v), operated by such political subdivision. Election is to be made by filing with the commissioner a notice of such election at least 30 days prior to the effective date of such election. The election may exclude any services described in section 2(k)(1)(D). Any political subdivision electing coverage under this subsection shall make payments in lieu of contributions with respect to benefits attributable to such employment as provided with respect to nonprofit organization in paragraphs (2) and (4) of section 8(f). 1/

(2) The provisions in section 4(a)(2) with respect to benefit rights based on service for State and nonprofit institutions of higher education shall be applicable also to service covered by an election under this section.

1/ Those States wishing to provide for allocation of benefit costs on an "added cost" basis would adopt alternative paragraph (4)(A) or paragraph 4(B) of section 8(f). Those States wishing to provide for the "proportionate" methods would adopt draft provisions in paragraph (4)(A) and (B). Alternatives to reimbursement are indicated in the commentary. States adopting either of these alternatives should provide for election for a calendar year.

(3) The amounts required to be paid in lieu of contributions by any political subdivision under this section shall be billed and payment made as provided in section 8(f)(2) with respect to similar payments by nonprofit organizations.

(4) An election under this section may be terminated, by filing with the commissioner written notice not later than 30 days preceding the last day of the calendar year in which the termination is to be effective. Such termination becomes effective as of the first day of the next ensuing calendar year with respect to services performed after that date.

Commentary - Section 7(g)

Elective coverage for hospitals and institutions of higher education operated by political subdivisions

General

As one of the conditions for approval of the State law by the Secretary, new section 3304(a)(12), Federal Unemployment Tax Act, provides that each political subdivision of the State must have the right to elect coverage of service performed by its employees in the hospitals and institutions of higher education which the subdivision operates, unless such service is otherwise subject to the State law. The provision also specifies that political subdivisions that elect to cover such employees shall make payments (in lieu of contributions) into the State unemployment fund with respect to service of such employees.

In States that cover such service mandatorily, whether the benefits are financed on a contributory or a reimbursement basis, no change in the State law is necessary. For purposes of section 3304(a)(12), the services in question would be "otherwise subject to such [State] law".

The Senate Finance Committee referred to the bill's provisions extending coverage to State and nonprofit hospitals and institutions of higher education and then went on to say: "The Committee amendment [new section 3304(a)(12)] involves comparable coverage for municipal and county hospitals and institutions of higher education." The intention is to provide elective coverage on the local governmental level "comparable" to that required at the State level. This is the basis for the interpretation that all hospitals and institutions of higher education operated by the local subdivision must be included in the election. Since all State hospitals and institutions of higher education are required to be covered under the State law it follows that all hospitals and institutions of higher education operated by the subdivision must be included in the election if coverage is to be "comparable." Accordingly, State provisions for election of coverage by political subdivisions may permit the exclusion from coverage of only those employees of a political subdivision's hospitals and institutions of higher education that fall in the excludable categories of service in the case of service performed for State hospitals and institutions of higher education. (See new section 3309(b), Employment Security Amendments of 1970 and section 2(K)(1)(D) of the suggested draft provisions.)

With respect to those States in which there are constitutional barriers to enacting legislation consistent with section 3304(a)(12), the requirement would not be effective until January 1, 1975, to permit sufficient time for an appropriate constitutional amendment. In other States, the requirement is effective beginning with January 1, 1972.

Commentary - Section 7(g)

Elective coverage for hospitals and institutions of higher education operated by political subdivisions

Equal treatment requirement

Section 3304(a)(12) also provides that a State law under which such right of elective coverage is afforded to the subdivisions must provide that benefits payable to the employees thus covered are payable on the same basis, in the same amount, on the same terms and subject to the same conditions as apply to benefits that are payable on the basis of other services covered under the State law. One exception to this "equal treatment" requirement is prescribed for individuals who are employed in the political subdivisions' institutions of higher education in an instructional, research or principal administrative capacity. As in the case of individuals employed in these capacities for State or nonprofit institutions of higher education, individuals employed in such capacities by institutions of higher education of a political subdivision must be covered but are not eligible for benefits based on such service during any period between two successive academic years or between two regular but not successive terms or during a period of paid sabbatical leave when they have a contract with an institution of higher education for both terms or years involved. (For a more detailed discussion of this prohibition on the payment of benefits, see the text and commentary for section 4(a)(2).)

If the employees of the political subdivisions' hospitals and institutions of higher education are already mandatorily covered, the State law does not have to be amended to provide "equal treatment" with other covered services. Neither does the State law have to be amended to bar benefit payments to the instructional, research or principal administrative employees of the political subdivisions' institutions of higher education, as described in the preceding paragraph.

Election and termination of coverage

For administrative simplicity, the draft language for the filing of notices of intention to elect or terminate coverage generally follows that suggested with respect to nonprofit organizations. The draft language permits a political subdivision to elect coverage at any time so long as written notice is filed with the commissioner at least 30 days before the effective date of the election. The suggested provision does not require the election to be for a specified period of time. Those States wishing to provide for a minimum period for which coverage can be elected will have to modify paragraph (1) accordingly.

Elective coverage for hospitals and institutions of higher education operated by political subdivisions

Under paragraph (4), a political subdivision does not have to take any action to continue coverage after the initial election. Coverage would continue on the same basis unless written notice of intention to terminate is filed with the commissioner not later than 30 days before the last day of the calendar year in which the termination is to be effective. Note that while paragraph (1) provides that an election of coverage can be effective at any time, paragraph (4) permits termination only at the end of a calendar year.

Under the terms of section 3304(a)(12), the decision to elect coverage must rest solely with the political subdivision. The State agency may not be given, under the State law, the discretion to disapprove such an election as is usually given in cases of voluntary coverage.

Financing benefit costs

Section 3304(a)(12) provides that political subdivisions that elect to cover the service of their employees in hospitals and institutions of higher education shall make payments into the State unemployment fund in lieu of contributions. Thus a State may require a political subdivision that elects coverage for the employees of its hospitals and institutions of higher education to pay amounts equal to the benefits attributable to the service of the covered employees as is required in the case of nonprofit organizations. The State also, however, has two other approaches available to it that it may apply with respect to such political subdivisions that it may not apply to payments by the nonprofit organizations which it is required to cover. The State may require political subdivisions electing such coverage to make payments equivalent to the contributions of nongovernment employers for profit who are subject to the law. 1/ Or it may meet this provision of section 3304(a)(12) by requiring the coverage-electing political subdivision to pay an amount based on a percentage of the wages paid to the covered employees.

It should be noted in this connection that section 3304(a)(12) provides that political subdivisions "... shall pay into the state unemployment fund, with respect to the service of such employees, payments (in lieu of contributions) . . . " whereas section 3309(a)(2) provides that nonprofit organizations required to be covered be given the option ". . . 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. . . "

1/ A State whose law permits elective coverage of such services and requires the same contributory basis as applies to nongovernment employers for profit needs to amend its law to provide a method of payment in lieu of contributions for such coverage by political subdivisions. Such an amendment would require payments that are equivalent to the contributions of such employers.

Thus, the provision on payments by political subdivisions, unlike the provision on payments by nonprofit organizations which are required to be covered, does not require such payments to be equal to the amount of the benefits attributable to the services covered. The payments need only be "with respect to the service" covered.

The financing provisions applicable to political subdivisions are equally applicable to State hospitals and State institutions of higher education which are required to be covered by the State. Thus, consistently with Federal requirements, a State could impose a ceiling on the payments required from political subdivisions and State hospitals and State institutions of higher education. However, the State may not impose such a ceiling on the payments required from nonprofit organizations that elect to reimburse the State for the benefits paid to their employees.

The draft language provides for reimbursement either on a proportionate or added cost basis by reference to section 8(f)(4) in which are set forth the provisions concerning financing of benefit costs by nonprofit organizations. These provisions are equally applicable to reimbursement by political subdivisions.

The draft language also provides for electing political subdivisions to make the required payments in the same manner as reimbursing nonprofit organizations by incorporating the applicable provisions by reference.

Recommendation for mandatory coverage

The draft language is designed to meet the specific requirements of section 3304(a)(12) by making provision in the State law for elective coverage by political subdivisions of their employees in their hospitals and institutions of higher education. Experience, however, has shown that no significant extension of coverage results from State law provisions that permit local units of government to elect coverage for their employees. For this reason it is recommended that States provide mandatory (instead of elective) coverage of the employees of State political subdivisions who perform services in the subdivisions' hospitals and institutions of higher education. Such coverage would make it unnecessary to provide for elective coverage, as specified in section 3304(a)(12), for these services.

Section 8(c)

Contributions

(Section 3306(b)(1), FUTA)

(c) Base of contributions.--For the purposes of section 8(a) and (b) and subsequent to _____ [1/] wages shall not include that part of remuneration which, after remuneration equal to $4,200 has been paid in a calendar year to an individual by an employer or his predecessor with respect to employment during any calendar year, is paid to such individual by such employer during such calendar year unless that part of the remuneration is subject to a tax under a Federal law imposing a tax against which credit may be taken for contributions required to be paid into a State unemployment fund. For the purposes of this subsection, the term employment shall include service constituting employment under any unemployment compensation law of another State.

1/ Insert the date as of which the latest amendment to subsection (c) becomes effective.

Section 8(d)(2)

Reduced rate of not less than one percent for new and newly covered employers

(Section 3303(a), FUTA)

(First option)

(2) The standard rate of contributions shall be 2.7 percent, except that each employer newly subject to this Act shall pay contributions at the rate of _____[1/] until he has been an employer for not less than the twelve consecutive calendar quarters[2/] ending on the computation date; thereafter his contribution rate shall be determined in accordance with the provisions of Section _____[3/].

(Second option)

(2) The standard rate of contributions shall be 2.7 percent. Each employer who has not been subject to this Act for a sufficient period of time to have his rate computed under section _____[3/] shall pay contributions at a rate, not exceeding 2.7 percent, that is the higher of (a) 1.0 percent and (b) the State's five-year benefit cost rate. For purposes of this paragraph, the State's five-year benefit cost rate shall be computed annually and shall be derived by dividing the total dollar amount of benefits paid to claimants under this Act during the five consecutive calendar years immediately preceding the computation date by the total dollar amount of wages subject to contributions under this Act during the same period.

1/ The figure to be entered must be at least 1 percent and less than 2.7 percent.

2/ If a shorter period of experience is required under the State law before an employer's contribution rate is computed on the basis of his experience, this provision should be changed to reflect the length of that period.

3/ Enter number of section of State law which provides for computation of employers' contribution rates on the basis of experience.

Section 8(d)(2)

Reduced rate of not less than one percent for new and newly covered employers

(Third option)

(2) The standard rate of contributions shall be 2.7 percent. Each employer who has not been subject to this Act for a sufficient period of time to have his rate computed under section _____ 3/ shall pay contributions at a rate, not exceeding 2.7 percent, that is the higher of (a) 1.0 percent and (b) the 5-year benefit coat rate of the industrial classification to which the employer is assigned. For the purposes of this paragraph, the benefit cost rate of the industrial classification to which the employer is assigned shall be computed annually and shall be derived by dividing the total dollar amount of benefits paid to employees of employers in that industrial classification during the 5 consecutive calendar years immediately preceding the computation date by the total dollar amount of wages subject to contributions under this Act that were paid by all employers in that industrial classification, for purposes of this paragraph, shall be in accordance with established classification practices in the application of Standard Industrial Classification Manual 4/ to the _____ digit provided in the Standard Industrial Classification Code.

3/ Enter number of section of State law which provides for computation of employers' contribution rates on the basis of experience.

4/ Enter either 2nd or 3rd.

Section 8(f)

Financing benefits paid to employees of nonprofit organizations

(Sections 3303(e), 3304(a)(6) and 3309(a)(2), FUTA)

(f) Financing benefits paid to employees of nonprofit organizations.--Benefits paid to employees of nonprofit organizations shall be financed in accordance with the provisions of this subsection. For the purpose of this subsection and subsection (g), a nonprofit organization is an organization (or group of organizations) 1/ described in section 501(c)(3) of the U.S. Internal Revenue Code which is exempt from income tax under section 501(a) of such Code.

(l) Liability for contributions and election of reimbursement.--Any nonprofit organization which, pursuant to section 2(i)(3), is, or becomes, subject to this Act on or after January 1, 1972 shall pay contributions under the provisions of subsection (a), unless it elects, in accordance with this paragraph, to pay to the commissioner for the unemployment fund an amount equal to the amount of regular benefits and of one-half of the extended benefits paid, that is attributable to service in the employ of such nonprofit organization, to individuals for weeks of unemployment which begin during the effective period of such election.

(A) Any nonprofit organization which is, or becomes, subject to this Act on January 1, 1972 may elect to become liable for payments in lieu of contributions for a period of not less than one taxable year beginning with January 1, 1972 provided it files with the commissioner a written notice of

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1/ Since "nonprofit organization" is defined to include a group of such organizations, the term "nonprofit organization" is hereafter used in this draft to refer to both single nonprofit organizations and groups.

its election with the 30-day period immediately following such date or within a like period immediately following the date of enactment of this subparagraph, whichever occurs later.

(B) Any nonprofit organization which becomes subject to this Act after January 1, 1972 may elect to become liable for payments in lieu of contributions for a period of not less than 12 months beginning with the date on which such subjectivity begins by filing a written notice of its election with the commissioner not later than 30 days immediately following the date of the determination of such subjectivity.

(C) Any nonprofit organization which makes an election in accordance with subparagraph (A) or subparagraph (B) of this paragraph will continue to be liable for payments in lieu of contributions until it files with the commissioner a written notice terminating its election not later than 30 days prior to the beginning of the taxable year for which such termination shall first be effective.

(D) Any nonprofit organization which has been paying contributions under this Act for a period subsequent to January 1, 1972 may change to a reimbursable basis by filing with the commissioner not later than 30 days prior to the beginning of any taxable year a written notice of election to become liable for payments in lieu of contributions. Such election shall not be terminable by the organization for that and the next year.

(E) The commissioner may for good cause extend the period within which a notice of election, or a notice of termination, must be filed and may permit an election to be retroactive but not any earlier than with respect to benefits paid after December 31, 1969.

(F) The commissioner, in accordance with such regulations as he may prescribe, shall notify each nonprofit organization of any determination which he may make of its status as an employer and of the effective date of any election which it makes and of any termination of such election. Such determinations shall be subject to reconsideration, appeal and review in accordance with the provisions of section 7.

(2) Reimbursement payments.--Payments in lieu of contributions shall be made in accordance with the provisions of this paragraph including either subparagraph (A) or subparagraph (B).

(A) At the end of each calendar quarter, or at the end of any other period as determined by the commissioner, the commissioner shall bill each nonprofit organization (or group of such organizations) which has elected to make payments in lieu of contributions for an amount equal to the full amount of regular benefits plus one-half of the amount of extended benefits paid during such quarter or other prescribed period that is attributable to service in the employ of such organization.

(B)(i) Each nonprofit organization that has elected payments in lieu of contributions may request permission to make such payments as provided in

this subparagraph. Such method of payment shall become effective upon approval by the commissioner.

(ii) At the end of each calendar quarter, or at the end of such other period as determined by the commissioner, the commissioner shall bill each nonprofit organization for an amount representing one of the following:

(I) For 1972, _____ 1/ percent of its total payroll for 1971.

(II) For years after 1972, such percentage of its total payroll for the immediately preceding calendar year as the commissioner shall determine. Such determination shall be based each year on the average benefit costs attributable to service in the employ of nonprofit organizations during the preceding calendar year.

(III) For any organization which did not pay wages throughout the four calendar quarters of the preceding calendar year, such percentage of its payroll during such year as the commissioner shall determine.

(iii) At the end of each taxable year, the commissioner may modify the quarterly percentage of payroll thereafter payable by the nonprofit organization in order to minimize excess or insufficient payments.

(iv) At the end of each taxable year, the commissioner shall determine whether the total of payments for such year made by a nonprofit organization is less than, or in excess of, the total amount of regular benefits

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1/ The Figure entered should represent one-fourth of the reasonable estimate of the proportion of the annual payroll that each year reimbursable benefits will represent on the average for all covered nonprofit organizations.

plus one-half of the amount of extended benefits paid to individuals during such taxable year based on wages attributable to service in the employ of such organization. Each nonprofit organization whose total payments for such year are less than the amount so determined shall be liable for payment of the unpaid balance to the fund in accordance with subparagraph (c). If the total payments exceed the amount so determined for the taxable year, all or a part of the excess may, at the discretion of the commissioner, be refunded from the fund or retained in the fund as part of the payments which may be required for the next taxable year.

(C) Payment of any bill rendered under subparagraph (A) or subparagraph (B) shall be made not later than 30 days after such bill was mailed to the last known address of the nonprofit organization or was otherwise delivered to it, unless there has been an application for review and redetermination in accordance with subparagraph (E).

(D) Payments made by any nonprofit organization under the provisions of this subsection shall not be deducted or deductible, in whole or in part, from the remuneration of individuals in the employ of the organization.

(E) The amount due specified in any bill from the commissioner shall be conclusive on the organization unless, not later than 15 days after the bill was mailed to its last known address or otherwise delivered to it, the organization files an application for redetermination by the commissioner or

an appeal to the board of review, setting forth the grounds for such application or appeal. The commissioner shall promptly review and reconsider the amount due specified in the bill and shall thereafter issue a redetermination in any case in which such application for redetermination has been filed. Any such redetermination shall be conclusive on the organization unless, not later than 15 days after the redetermination was mailed to its last known address or otherwise delivered to it, the organization files an appeal to the board of review, setting forth the grounds for the appeal. Proceedings on appeal to the board of review from the amount of a bill rendered under this subsection or a redetermination of such amount shall be in accordance with the provisions of section 9(f), and the decision of the board of review shall be subject to the provisions of section 9(g).

(F) Past due payments of amounts in lieu of contributions shall be subject to the same interest and penalties that, pursuant to section _____ 1/ apply to past due contributions.

(First optional provision)

(3) Provision of bond or other security.--In the discretion of the commissioner, any nonprofit organization that elects to become liable for payments in lieu of contributions shall be required within _____ 2/ days

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1/ Enter the number of the section of the State law which requires the payment of interest and penalties with respect to past due contributions.

2/ Enter the number of days which would constitute a reasonable period in which the organization could obtain and deposit the bond and which period would be consistent with the State law pertaining to bonds.

after the effective date of its election, to execute and file with the commissioner a surety bond approved by the commissioner or it may elect instead to deposit with the commissioner money or securities. The amount of such bond or deposit shall be determined in accordance with the provisions of this paragraph.

(A) Amount.--The amount of the bond or deposit required by this paragraph shall be equal to _____ percent of the organization's total wages paid for employment as defined in section 2(K)(1)(C) for the four calendar quarters immediately preceding the effective date of the election, the renewal date in the case of a bond, or the biennial anniversary of the effective date of election in the case of a deposit of money or securities, whichever date shall be most recent and applicable. If the nonprofit organization did not pay wages in each of such four calendar quarters, the amount of the bond or deposit shall be as determined by the commissioner.

(B) Bond.--Any bond deposited under this paragraph shall be in force for a period of not less than two taxable years and shall be renewed with the approval of the commissioner, at such times as the commissioner may prescribe, but not less frequently than at two year intervals as long as the organization continues to be liable for payments in lieu of contributions. The commissioner shall require adjustments to be made in a previously filed bond as he deems appropriate. If the bond is to be increased, the adjusted bond shall be filed by the organization within _____ days of the date notice of the required

adjustment was mailed or otherwise delivered to it. Failure by any organization covered by such bond to pay the full amount of payments in lieu of contributions when due, together with any applicable interest and penalties provided for in paragraph (2)(F) of this subsection, shall render the surety liable on said bond to the extend of the bond, as though the surety was such organization.

(C) Deposit of money or securities.--Any deposit of money or securities in accordance with this paragraph shall be retained by the commissioner in an escrow account until liability under the election is terminated, at which time it shall be returned to the organization, less any deductions as hereinafter provided. The commissioner may deduct from the money deposited under this paragraph by a nonprofit organization or sell the securities it has so deposited to the extent necessary to satisfy any due and unpaid payments in lieu of contributions and any applicable interest and penalties provided for in paragraph (2)(F) of this subsection. The commissioner shall require the organization within _____ days following any deduction from a money deposit or sale of deposited securities under the provisions of this subparagraph to deposit sufficient additional money or securities to make whole the organization's deposit at the prior level. Any cash remaining from the sale of such securities shall be a part of the organization's escrow account. The commissioner may, at any time, review the adequacy of the deposit made by any organization. If, as a result of such review, he determines that an adjustment is necessary, he shall require the organization to

make additional deposit within _____ days of written notice of his determination or shall return to it such portion of the deposit as he no longer considers necessary, whichever action is appropriate. Disposition of income from securities held in escrow shall be governed by the applicable provisions of the State law.

(D) If any nonprofit organization fails to file a bond or make a deposit, or to file a bond in an increased amount or to increase or make whole the amount of a previously made deposit, as provided under this paragraph, the commissioner may terminate such organization's election to make payments in lieu of contributions and such termination shall continue for not less than the four-consecutive-calendar-quarter period beginning with the quarter in which such termination becomes effective; Provided, That the commissioner may extend for good cause the applicable filing, deposit or adjustment period by not more than _____ days.

(Second optional provision)

(3) Authority to terminate elections.--If any nonprofit organization is delinquent in making payments in lieu of contributions as required under paragraph (2) of this subsection, the commissioner may terminate such organization's election to make payments in lieu of contributions as of the beginning of the next taxable year, and such termination shall be effective for that and the next taxable year.

Section 8(f)(4)

Allocation of benefit costs

(4) Allocation of benefit costs.--Each employer that is liable for payments in lieu of contributions shall pay to the commissioner for the fund the amount of regular benefits plus the amount of one-half of extended benefits paid that are attributable to service in the employ of such employer. If benefits paid to an individual are based on wages paid by more than one employer and one or more of such employers are liable for payments in lieu of contributions, the amount payable to the fund by each employer that is liable for such payments shall be determined in accordance with the provisions of subparagraph (A) or subparagraph (B).

(A) Proportionate allocation (when fewer than all base-period employers are liable for reimbursement).--If benefits paid to an individual are based on wages paid by one or more employers that are liable for payments in lieu of contributions and on wages paid by one or more employers who are liable for contributions, the amount of benefits payable by each employer that is liable for payments in lieu of contributions shall be an amount which bears the same ratio to the total benefits paid to the individual as the total base-period wages paid to the individual by such employer bear to the total base-period wages paid to the individual by all of his base-period employers.

(B) Proportionate allocation (when all base-period employers are liable for reimbursement).--If benefits paid to an individual are based on wages paid by two or more employers that are liable for payments in lieu of contributions, the amount of benefits payable by each such employer shall

be an amount which bears the same ratio to the total benefits paid to the individual as the total base period wages paid to the individual by such employer bear to the total base period wages paid to the individual by all of his base period employers.

(Alternative subparagraph (A)
for added cost allocation)

(A) Added cost allocation (when fewer than all base period employers are liable for reimbursements.--If benefits paid to an individual are based on wages paid by one or more employers that are liable for payments in lieu of contributions and on wages paid by one or more employers that are liable for contributions, the amount of benefits payable by each employer that is liable for payments in lieu of contributions shall be the amount equal to the additional cost of benefit payments which would not have been paid but for the base period wages paid by such employer

(5) Group accounts.--Two or more employers that have become liable for payments in lieu of contributions, in accordance with the provisions of subsection (f)(1) and section _____ 1/, may file a joint application to the commissioner for the establishment of a group account for the purpose of sharing the cost of benefits paid that are attributable to service in the employ of such employers. Each such application shall identify and authorize a group representative to act as the group's agent for the purposes of this paragraph. Upon his approval of the application, the commissioner shall

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1/ Enter number of section (or sections) of the State law, if any, that permit election of reimbursement financing by State and local governmental units.

establish a group account for such employers effective as of the beginning of the calendar quarter in which he receives the application and shall notify the group's representative of the effective date of the account. Such account shall remain in effect for not less than _____ years and thereafter until terminated at the discretion of the commissioner or upon application by the group. Upon establishment of the account, each member of the group shall be liable for payments in lieu of contributions with respect to each calendar quarter in the amount that bears the same ratio to the total benefits paid in such quarter that are attributable to service performed in the employ of all members of the group as the total wages paid for service in employment by such member in such quarter bear to the total wages paid during such quarter for service performed in the employ of all members of the group. The commissioner shall prescribe such regulations as he deems necessary with respect to applications for establishment, maintenance and termination of group accounts that are authorized by this paragraph, for addition of new members to, and withdrawal of active members from, such accounts, and for the determination of the amounts that are payable under this paragraph by members of the group and the time and manner of such payments.

Section 8(g)

Transition provisions

(Section 3303(f), FUTA)

(g) Notwithstanding any provisions in subsection (f), any nonprofit organization that prior to January 1, 1969, paid contributions required by subsection (a) of this section, and, pursuant to subsection (f) of this section, elects, within 30 days after the effective date of such subsection (f), to make payments in lieu of contributions; shall not be required to make any such payment on account of any regular or extended benefits paid, on the basis of wages paid by such organization to individuals for weeks of unemployment which begin on or after the effective date of such election until the total amount of such benefits equals the amount

(First alternative)

of the positive balance in the experience rating account of such organization

(Second alternative)

(i) by which the contributions paid by such organization with respect to the _____ year period before the effective date of the election under subsection (f) exceed.

(First alternative of (ii))

(ii) the total amount of unemployment benefits paid for the same period that were attributable to service performed in the employ of such organization and were charged to the experience rating account of such organization.

Section 8(g)

Transition provisions

(Second alternative of (ii))

(ii) the total amount of unemployment benefits paid for the same period that were paid under this Act on the basis of wages paid or service performed in the employ of such organization.

Commentary - Section 8(c)

Contributions

While the language in the suggested draft provision differs from that in present section 8(c) of the 1950 draft law and that on page 3 of the attachment to Unemployment Insurance Program Letter No. 811 dated May 17, 1965, it continues the same provisions.

The first sentence establishes the taxable wage base as the greater of $4200 or the amount specified in the Federal Unemployment Tax Act as subject to unemployment insurance tax. Thus if the wage base in the Federal act is raised above $4200 that amount automatically becomes the State taxable wage base. This sentence also allows the successor credit for wages paid by the predecessor so that together they are not required to pay contributions on any amounts in excess of the State taxable wage base. Similarly, the second sentence provides that at employer who pays unemployment insurance tax on wages paid to an individual in one State, need not pay total contributions on more than the taxable wage base if that individual's services for that employer are transferred to another State.

Reduced rate of not less than one percent for new and newly covered employers

(2) Reduced rate of not less than one percent for new and newly covered employers.--Prior to the 1954 amendments, section 3303(a)(1), Federal Unemployment Tax Act, permitted a "reduced rate of contributions...to a person (or group of persons) having individuals in his (or their) employ...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..." The 1954 amendments relaxed the 3-year requirement and permitted States to assign a reduced rate based on their "experience" to new and newly covered employers who had at least one year of experience immediately preceding the computation date. This option, provided by the 1954 amendments, has not been changed and continues to be available to the States.

Section 3303(a), as amended by the Employment Security Amendments of 1970, however, for taxable years beginning on and after January 1, 1972, now provides States with a new and additional option. It permits States to assign reduced rates (not less than 1 percent) to new and newly covered employers on a reasonable basis, other than experience with unemployment, until they have the period of experience needed under the experience-rating provisions of the State law.

This amendment was adopted in order to lessen the financial impact of unemployment insurance taxes on new and newly covered employers. It does not specify how reduced rates are to be determined for such employers, but leaves this decision to the State. The rates assigned to all the employers need not be the same but may be varied on some reasonable basis, such as assigning each new employer the average rate applicable to the industry in which it is engaged, if such rate is not less than 1 percent.

The reduced rates permissible under the 1970 amendment are applicable to an employer only so long as he remains a new or newly covered employer. The length of that period depends on the provisions of the State law which specify the extent of "experience" required of an employer before he is assigned a contribution rate that is based on his experience. As already indicated, the 1954 amendments permit States to make that period of employer experience as short as one year immediately preceding the State's computation date, or as long as three consecutive years immediately preceding that date, or an intermediate length.

Reduced rate of not less than one percent for new and newly covered employers

As to whether and under what conditions an employer who terminates coverage and later becomes covered again is a new employer, see Unemployment Insurance Program letter No. 427, dated May 31, 1956. Issued after the 1954 amendments to section 3303(a), FUTA, UIPL No. 427 applies as well to the 1970 amendments. Briefly stated, such an employer may be treated as a new employer only if he does not recapture his prior "experience." If he does recapture, he may not be considered a new employer.

The "first option" draft language provides for the payment of a flat reduced rate by any new or newly covered employer from the beginning of the period of his subjectivity until he has accumulated 3 consecutive years of experience (or any lesser period which the State law prescribes) immediately preceding the computation date after which his rate is to be computed on the basis of his experience. As already indicated, such a flat reduced rate must be at least one percent.

Under the second optional provision, the rate applicable to new or newly covered employers would be linked to the statewide experience with benefit costs. Under the third optional provision, the rate would reflect the benefit cost experience within the employer's industry. Under these latter two provisions, the rate may not remain the same from year to year but could vary as statewide or industry-wide experience for the immediately preceding five-calendar-year period is computed each year.

The 1970 amendment of section 3303(a) does not set any maximum rate which States may assign to a new or newly covered employer. Certain industries, for example, may have benefit cost rates in excess of the standard rate or even in excess of the highest rate possible under the State law. Some States have had in the past benefit cost rates in excess of the State standard rate. If a new or newly covered employer had to pay such a high rate, the intent of the amendment to lessen the financial impact of unemployment insurance taxes on such employers would be nullified. For this reason the latter two draft provisions state that when the statewide or industry rate is more than 2.7 percent, the employer would not pay more than the State standard rate so that he would not be required to pay a higher rate than he would be subject to in the absence of implementation of the amendment.

The industrial classification used for purposes of the third option should be that provided for by the Standard Industrial Classification Manual and should accord with State classification practices. It is recommended that

classification be by at least 2 digits but not more than 3 digits. Classification by more than 3 digits would require unnecessarily refined groupings and computations.

The suggested draft provisions for implementing the 1970 amendment to section 3303(a), Federal Unemployment Tax Act, are illustrative of some of the approaches available to the States in implementing the new provisions. It is not intended to indicate that they include all the permissible ways of applying the new Federal provision. Any other State law provision which permits a reduced rate of not less than one percent on a reasonable basis to a new or newly covered employer until such time as he has acquired sufficient experience to pay a rate computed under the State experience rating provisions would be consistent with Federal requirements.

In considering whether and in what manner they should adopt provisions for reduced rates for new and newly covered employers, States will wish to take several considerations into account. It is pertinent, for example, how long an employer must be subject under the State law before he is eligible for a reduced rate based on his experience. The desirability of reduced rates for new and newly covered employers may also be affected by the kind of experience rating system the State has. Under a reserve ratio system, a reduced rate for some new or newly covered employers will mean that their reserve balances, when they became eligible for rates based on their experience, will not qualify them for reduced rates. Under other experience rating systems, however, this would not be the case. Many new and newly covered employers will want a reduced rate for their initial period of subjectivity even if, in later years, they may have to pay higher rates, either because the reduced rates would be a help to them for survival in business or as a competitive aid, or simply in order to place their accommodation to unemployment insurance contributions on a gradual basis.

Commentary - Section 8(f)

General discussion

The 1970 amendments added section 3309(a)(2) to the Federal Unemployment Tax Act (FUTA). This section provides that the States must allow any nonprofit organization (or group of such organizations) 1/ which they are required to cover under State laws the option to elect to make payments in lieu of contributions. It also provides that (a) such an election may be for such minimum period and at such time as is specified in the State law, (b) the payments required by such election must be in amounts equal to the amounts of unemployment benefits paid that are attributable under the State law to service in the employ of such organizations, and (c) the State law may provide safeguards to ensure that such organizations will make the payments required by such elections. (For a discussion of nonprofit organizations which are required to be covered under State laws, see the Commentary relating to sections 2(i)(3) and 2(k)(1)(c).)

The 1970 amendments also added section 3303(e) to the Federal Unemployment Tax Act. This section provides that a State may, without being deemed to violate the standards set forth in section 3303(a), FUTA, permit any organization described in section 501(c)(3) of the Internal Revenue Code which is exempt from income tax under section 501(a) of the Code, to elect to make payments in lieu of contributions. This amendment is effective as of January 1, 1970.

Prior to the 1970 amendments, the States were not permitted to allow nonprofit organizations to finance their employees' benefits on a reimbursement basis because of the experience-rating requirements in section 3303(a), FUTA. The word "person," as used in that section, was construed to include nonprofit organizations. The reimbursable method could result in a lower annual cost than that resulting from paying contributions at the standard rate. Reimbursement financing of employee benefits was considered therefore as in effect permitting "persons" (i.e., nonprofit organizations) to have reduced rates which were not based on their experience with the risk of unemployment, and thus inconsistent with the requirements of section 3303(a). The addition of new section 3303(e) removes this bar to reimbursement financing of benefits by nonprofit organizations.

1/ Hereafter in the Commentary the term "nonprofit organization" includes a group of such organizations.

Commentary - Section 8(f)

General discussion

To assure that States may extend to all nonprofit organizations which are covered under the State laws the option of financing benefits on a reimbursement basis, the exemption in section 3303(e) applies not only to the nonprofit organizations which the States are required to cover, but also to the nonprofit organizations which the States may, but are not required to, cover under their State laws. The experience-rating requirements of section 3303(a) continue to apply, however, to any employer, whether profit or nonprofit, that is not exempt from coverage under FUTA by reason of the provisions in section 3306(c)(8) of that Act.

Commentary - Section 8(f)(1)

Financing benefits paid to employees of nonprofit organizations

Paragraph (1) of subsection (f) requires any nonprofit organization which is or becomes subject to the State law on or after January 1, 1972 to pay contributions unless it elects to make payments in lieu of contributions under one of the subparagraphs in this paragraph. Thus under this provision any organization which does not elect the reimbursement method or benefit financing, or which elects but its election is later terminated, will be required to pay contributions.

Subparagraph (A) permits election of reimbursement financing by those nonprofit organizations which were covered under the State law on a contributory basis prior to, and continue to be so covered on, January 1, 1972, as well as by those organizations which the State law will cover for the first time as of such date. In either instance, the organizations which could make the election under this subparagraph could be those which the States are required to cover as of such date and those which the States may, but are not required to, cover under the State law, depending on the extent of coverage of nonprofit organizations under the State law. The specified 30-day limit for making the election would permit, in States that enact the subparagraph early in 1971 to be effective on January 1, 1972, an outside limit of January 31, 1972 for such elections to be made by nonprofit organizations whose coverage antedates 1972 and those whose coverage first becomes effective on January 1, 1972.

Subparagraph (B) is intended to permit election of reimbursement financing by nonprofit organizations whose subjectivity is determined after January 1, 1972. These could be organizations which do not meet the subjectivity requirements (e.g., employment of four or more workers in 20 weeks, if that is the minimum State law subjectivity requirement) until after the specified date. They could also be organizations whose subjectivity is "late discovered." As under subparagraph (A), the organizations which could elect reimbursement under such a provision could be those which the States are required to cover, as well as those which the States may, but are not required to, cover, depending on the extent of coverage of such organizations under the State law. The specified 30-day period for making the election takes into account that the organization must be given a sufficient time in which to make the election after it is informed of its subjectivity. It is recommended (and the suggested language so provides) that the election be for not less than 12-month period. However, States may prescribe whatever reasonable minimum period they consider appropriate. Although the period suggested is in terms of months, some States may prefer that the period be in terms of calendar quarters. Prescribing the initial period of election in terms of a taxable year might be troublesome to administer in some States where subjectivity may start at any time during the taxable year.

Subparagraph (C) provides that the election of reimbursement financing, in accordance with subparagraph (A) or (B), continues until the organization elects to terminate such election. Although the draft language does not so provide, a State may consistently with the Federal law's provisions, provide for a specified period of initial election and require renewal of the election at specified intervals (e.g., at the end of each subsequent 2-taxable-year period) with any failure to request renewal resulting in reversion to a contributory basis. Whichever provision a State adopts--elections that continue until terminated or elections requiring periodic renewal--it is recommended (and the suggested draft language so provides) that, for administrative simplicity, any termination of election be made effective at the end of a taxable year.

Subparagraph (D) permits an organization which paid contributions after January 1, 1972 to elect reimbursement financing. This subparagraph, would make election of reimbursement available (1) to nonprofit organizations which decide, when the Federally required provision on reimbursement financing first become available under the State law, to pay on a contributory basis but later want to change to a reimbursement basis and (2) to those organizations which terminate their election under subparagraph (C) and later want to revert to payment on a reimbursement basis. In States which enact the second optional provision of paragraph (3) of subsection (f), subparagraph(D) would also provide authority for election of reimbursement benefit financing by those organizations whose election was terminated in accordance with such paragraph (3) and the 2-taxable-year period specified in that paragraph has expired. Although section 3303(a)(2) does not prevent a State from terminating the reimbursement financing of a nonprofit organization that is delinquent in its reimbursement payments, this section is interpreted as not permitting a State to make that termination a permanent bar to a later election to reimburse, if the organization is one which the State is required to cover under the terms of section 3304(a)(6). It is recommended (and the suggested draft language provides) that an election permitted under subparagraph (D) be effective for not less than two taxable years in order to minimize the shifting by some organization to a reimbursement basis in years when low benefit costs are expected and to a contributory basis in years when high benefit costs are anticipated. The periods suggested are in terms of taxable years for ease of administration.

Subparagraph (E) authorizes the commissioner to extend for good cause the periods for filing of the notices of election and of the notices of termination which are specified in subparagraphs (A) through (D) of paragraph (1). It also authorizes the commissioner to allow retroactive election of reimbursement financing but not any earlier than with respect to benefits paid after December 31, 1969. This limitation on retroactive election of reimbursement is required by new section 3303(e), FUTA, which became effective as of January 1, 1970.

Subparagraph (F) requires the commissioner to notify, in accordance with his regulations, any nonprofit organization of any determination he may make with respect to the employer status of the organization, the effective date of any election made or termination applied for by the organization. For purposes of determinations relating to election and termination of reimbursement financing, the subparagraph also incorporates by reference the provisions of section 7 which provide for reconsideration, appeal and review of determinations made with respect to coverage.

Paragraph (2) includes provision which prescribe (a) methods for the determination of the amount of payments in lieu of contributions required of each nonprofit organization which elects reimbursement financing, (b) the time limit in which such payments are to be made after the organization is presented with the bill, (c) the review and redetermination process in the event of the organization’s project, (d) the applicable interest and penalty provisions, and (e) the prohibition against the deduction of payments from the remuneration of the workers in the employ of the organization.

Subparagraph (A) provides for billing each nonprofit organization at the end of each calendar quarter (or other period determined by the commissioner) for the full amount of regular benefits plus half of extended benefits paid during such quarter (or period) that are attributable to service in the employ of such organization.

Subparagraph (B) also provides for billing each nonprofit organization at the end of each calendar quarter (or other period determined by the commissioner), but the amount payable is determined on the basis of a percentage of the organization’s total payroll in the preceding calendar year rather than on the basis of the actual benefit costs in the quarter (or period) as required by subparagraph (A). Since the percentage used is linked to the average annual benefit cost rate for all nonprofit organizations covered under the State law and since the actual amount of benefits paid in the quarter (or period) is ignored, this method of apportioning the payments would appear to be less burdensome because it would spread the benefit costs more uniformly throughout the calendar year.

Reimbursement payments

This method of financing benefit costs would not be automatic but would have to be requested by the organization and approved by the commissioner.

Part III of subdivision (ii) authorizes the commissioner to modify the quarterly (or other periodic) percentage used when the organization did not have payroll throughout the four calendar quarters in the preceding calendar year. Subdivision (iii) also authorizes him to make modifications in such percentage at the end of each taxable year in order to minimize future excess or insufficient payments. Under subdivision (iv) the commissioner is required to make an annual accounting and is authorized to collect unpaid balances and dispose of overpayments.

Subparagraph (C) requires each organization to pay the quarterly (or other periodic) bill rendered under subparagraph (A) or (B) within 30 days after it is mailed or otherwise delivered to it unless it applies for review and redetermination under subparagraph (E).

Subparagraph (D) prohibits the deduction from employee’s remuneration of any portion of reimbursement payments which an organization is required to make under subsection (f).

Subparagraph (E) provides that the amount due that is specified in any bill is conclusive on the organization unless within the specified 15-day period it files an application for redetermination or an appeal. The subparagraph also prescribes the administrative and judicial review procedure which is to be followed in the event of such application or appeal.

Subparagraph (F) incorporates by reference the State law penalty and interest provisions that apply to past due contributions for purposes of past due payments in lieu of contributions.

Provision for bond or other security

(3) General discussion.--Section 3309(a)(2), Federal Unemployment Tax Act, provides that the States may enact safeguards to ensure that a nonprofit organization electing the reimbursement method of financing will make the payments required under such election. The Senate Finance Committee Report on H.R. 14705 states at page 48, third paragraph:

> "It authorizes a State to provide safeguards to insure that such payments will be made. For example, a State may require that a bond be furnished by a nonprofit organization (or group of organizations) or the State may refuse to permit such an organization (or group) which is delinquent in making reimbursement payments to continue to elect his method of payment."

(See also House Ways and Means Committee Report on H.R. 14705, page 44, first paragraph.)

The Federal provision permits, but does not require, the States to adopt safeguard provision. In determining whether to adopt such provisions and, if so, what provisions, consideration should be given to several factors: Are they needed? For example, will the usual methods available to assure collection of contributions be less effective or inapplicable in assuring collection of reimbursement payments? Will the safeguard provisions be unduly onerous for reimbursing nonprofit organizations or effectively discourage reputable and responsible nonprofit organizations from electing reimbursement payments? Will the proposed safeguard provisions be administrable?

In deciding whether to include safeguard provisions, consideration should be given to the effectiveness of quarterly payment plans such as those provided in paragraph (2)(B)(i) and (ii) as a sufficient safeguard for full reimbursement. The State agency's authority to terminate the election of a nonprofit organization that is delinquent in its reimbursement payments (paragraph (3), second optional provision) would also provide a deterrent to delinquency. (Note that such terminations must, in effect, be only suspensions of the right of reimbursement election for a reasonable period since a permanent revocation of the right would not be consistent with section 3309(a)(2).)

The draft provision included in section 8(f)(3) do not represent a recommendation that States should adopt special safeguard provisions for nonprofit organization electing reimbursement. They are intended only to outline reasonable provisions which States may wish to adopt if they decide that special safeguard provisions are needed.

Provision for bond or other security

Detailed discussion--First optional provision.--This provision permits an organization to file a surety bond or deposit money or securities to assure that the payments required under an election of reimbursement will be made. Only those organizations which the commissioner requires would have to do so.

Subparagraph (A) provides for the bond or deposit to be a certain percentage of the organization's total wages in covered employment for a 4-calendar-quarter period. In the case of an initial election of reimbursement, the four quarters are those immediately preceding the effective date of the election. In the case of a bond that is being renewed, it is the four quarters preceding the renewal date. If money or securities are deposited, the 4-quarter period is that preceding the completion of each 2-year period since the effective date of the initial election.

States may wish to establish different bond or deposit requirements or different percentages for different types of nonprofit organizations, but in any event, the bond or deposit requirement should not be set so high as to discourage organizations from electing the reimbursement rather than the contributory method of payment, or to reduce substantially the advantages which may otherwise accrue to an organization by electing that option. It should be noted that the cost of furnishing a bond could prove burdensome to small nonprofit organizations and that cash deposits could hamper their operations by "freezing" a part of their assets. The bond or deposit requirement should not, for example, exceed the maximum penalty rate applicable to rated employers under the State's experience-rating system.

Setting any bond or deposit as a percentage of the organization's payroll, rather than as a flat amount, is recommended since it would have the same relative impact in relation to the payrolls of both large and small organizations. The amount of the bond should be established as a percentage of total wages paid for subject employment, rather than total wages, since not all services for some nonprofit organizations will be covered and, consequently, not all wages can be used as a potential basis for benefits.

As written, this subparagraph would require all nonprofit organizations which post a bond or make a deposit to make the amount of the bond or deposit equal to the same percentage of their 4-calendar-quarter payroll. If it appears desirable to provide for the commissioner to establish individually for each organization electing reimbursement, the percentage of payroll to be furnished in a bond or in a deposit, the first sentence could be revised to read:

Provision for bond or other security

> "The amount of the bond or deposit required by this paragraph shall be a percentage, determined by the commissioner, of the organization's total wages...."

If an organization did not pay wages throughout the specified 4-calendar-quarter period, the commissioner would determine the amount of the bond or deposit. Under the draft provision, an organization which did not have some payroll in each of the four calendar quarters would have the amount of the bond or deposit set by the State agency.

Subparagraph (B) provides that bonds be in force or renewed for a minimum period of two taxable years and that they can be renewed for longer periods than two taxable years. The draft language authorizes the commissioner to reappraise, at least every two years, the amount of the bond and the qualifications of the surety and to require the changes deemed necessary to assure that the organization's unemployment insurance obligations will be fulfilled. If the organization fails to make the payments required, the surety on the bond will be liable for the amount due plus any applicable interest and penalty.

Subparagraph (C) provides for any deposit of money or securities to be held by the commissioner in an escrow account until the organization's liability for payments under reimbursement is terminated. At that time the deposit would be returned to the organization minus any amount, including interest and penalty, due the agency. The commissioner is authorized to sell securities (common and preferred stock, etc.) held in escrow to the extent necessary to satisfy any amount the organization owes the agency. Any cash remaining from such sale would be included in the organization's escrow account.

The annual review of the amount of the deposit is to assure its continued adequacy for payment of the organization's unemployment insurance obligations.

States should consider, in developing provisions with respect to deposits of securities, that a deposit of securities would present greater administrative difficulties than either a bond or a cash deposit, particularly in administering such an account and in holding such deposit liable for amounts due the agency. State law provisions in this area should be carefully examined.

Subparagraph (D) makes it discretionary with the commissioner whether to terminate the election of reimbursement of any organization which fails to post a bond or make a deposit or to make a required adjustment in either.

If the election is terminated the organization thereafter would be liable for contributions for the next ensuing 4-calendar-quarter period. Following such period, the organization could again elect reimbursement upon meeting State law conditions for such election. For administrative simplicity, it is recommended that terminations under this subparagraph be effective with the first day of a taxable year since bonds and deposits are related to taxable years and the review of the adequacy of the bond or deposit is with respect to taxable years following each annual review.

Second optional provision

(3) This provision dispenses with bonds and deposits as safeguards and provides only for the termination of the election of reimbursement of a delinquent nonprofit organization. The termination would be effective with the last day of the taxable year in which the organization became delinquent. Thereafter the organizations would be liable for contributions during the next 2-taxable-year period.

Under paragraph (2)(C), reimbursement payments are to be made not later than 30 days after the bill was mailed or delivered to the organization. Accordingly any bill for reimbursement which remains unpaid after 30 days from the date it was mailed or delivered would make the liable organization delinquent and subject to termination, unless the organization filed an application for review and redetermination of the amount for which it was billed.

The draft language makes termination of the election discretionary with the commissioner so as to avoid “automatic” terminations in instances in which an organization with an otherwise good record of making timely payments is, because of some unusual circumstance, delinquent in making a required payment. It would permit the commissioner to base his determination on an appraisal of all the circumstances surrounding the organization’s delinquency rather than on the bare fact of a single delinquency.

(4) Allocation of benefit costs.--A State may have as many as four different categories of employers who are financing their employees' benefits on a reimbursement basis:

a. Nonprofit organizations which the State law must cover and allow to elect to reimburse.

b. Other Federal unemployment tax exempt nonprofit organizations which the State may cover and allow to reimburse.

c. Political subdivisions which elect to cover the employees of their hospitals and institutions of higher education who are not otherwise covered under the State law. The State law may provide that the payments in lieu of contributions shall (or may) be benefit reimbursements.

d. Other State and local government units that the State law covers and makes benefit reimbursers. This category also includes political subdivisions as to the employees described in category "c" if they are covered on a mandatory basis by the State law or were covered on the basis of an election made before the effective date of new section 3304(a)(12) of the Federal Unemployment Tax Act.

Paragraph (4) deals with the allocation of benefit costs among base period employers when one or more of them is a reimbursing employer of whatever category. It provides for two options in the allocation of benefit costs, proportionate and added cost. Both methods are consistent with the provisions of the Federal law.

Subparagraphs (A) and (B) provide for proportionate allocation in two different situations: (A) when not all the base period employers are reimburses, and (B) when all the base period employers are on a reimbursement financing basis. Under both paragraphs, the ratio of total base period wages paid by a reimbursing employer to total base period wages paid by all the base period employers determines the proportion of the total benefits paid to an individual that is to be allocated to that reimbursing employer.

Alternative subparagraph (A) provides for an added cost method of allocation in situations where fewer than all of the base period employers are reimbursing employers. For purposes of this subparagraph, added benefit costs result when benefits are paid that would not have been paid if the base period wages from the reimbursing employer had not been included in the determination of the claimant's benefit rights. Thus added cost may be due to a higher weekly benefit amount that an individual receives or the longer period for which he

is paid benefits solely because the base period wages paid by the reimbursing employer are included in the monetary determination. Added cost may also result when benefits are paid to an individual who would not have qualified for benefits without the base period wages paid by the reimbursing employer.

Reimbursing employers and non-charging--Non-charging of benefits to employers reflects concepts that are not reasonably applicable or adaptable to reimbursing employers. When benefits paid to a former employee of a contributing employer are not charged to the employer's account, he escapes only the consideration of such benefit payments in the computation of his contribution rate. He does not avoid a potential liability to share with all other contributing employers, to the extent that the fund may require, in meeting such benefit costs. Minimum contribution rates, solvency accounts, socialized costs, etc., are devices that recognize this potential liability.

Reimbursing employers, who are required to pay into the State fund an amount equal to the benefit costs attributable to service in their employment, are in an inherently different position. They are self-insurers, fully liable for such benefit costs of their employees and not liable at all for the cost of any other benefits. If a reimbursing employer, for example, were relieved of the cost of post-disqualification benefits paid to a worker who had quit his employment, no other reimbursing employer could be required to pay into the fund to help meet that cost, as is in effect the case with a contributing employer whose account is non-charged for such a benefit payment.

(5) Group accounts.--This paragraph provides that two or more reimbursing employers may jointly apply to the commissioner for the establishment of a group account to pay the benefit costs attributable to service in their employ. The application is required to identify and authorize a group representative to act as the group's agent. It is contemplated that the statute, supplemented by the commissioner's regulations, would require this agent to take all actions in behalf of the group that under the law would otherwise be required from any member of the group. Any notices required to be given by the commissioner to a member would be given to the group representative. For all purposes of benefit reimbursement and benefit cost allocation, the group would be treated as a single employer. The commissioner's regulations would provide appropriate procedures governing the manner in which changes may be made in the membership of the group and the effect to be given such changes.

Transition provisions

(g) Transition provisions.--The 1970 amendments added section 3303(f) to the Federal Unemployment Tax Act. It is a transition provision which a State may follow and apply to nonprofit organizations which were covered under the State law, on a contributory basis before January 1, 1969, and which elect the reimbursement method of financing benefits attributable to service performed in the employ of such organizations at the first opportunity such method of financing is available under the State law. Under this section of the Federal law, a State may provide that any such nonprofit organization which elects the reimbursement method of financing need not make a reimbursement payment (after the election) until the amount of reimbursable benefits, regular and half of extended, paid after such election equals:

(1) the amount by which its past contributions exceed past unemployment benefits charged to its experience account (if its coverage was under a State which provides for such charging); or

(2) the amount by which its past contributions exceed past unemployment benefits paid under the State law on the basis of wages paid by it or service performed in its employ, whichever is appropriate (if its coverage was under a State law which does not provide for charging of benefits paid to employer accounts).

The nonprofit organizations which a State law may permit to take advantage of such transition provision are those which are referred to in section 3303(c)(8) of the Federal Unemployment Tax Act, irrespective of whether they are those which, pursuant to section 3304(a)(6) of the Act, must be covered under the State law (i.e., those employing 4 or more workers in 20 weeks).

The suggested draft language takes into account the different types of experience rating systems in effect in the various States and the unavailability of records in some States for some periods during which the organization involved were covered on a contributory basis.

The suggested language under the “first alternative” is designed for States with experience rating systems which use benefits charged as a factor in measuring employers’ experience with unemployment. The language would permit taking into account the entire coverage history of the organization involved and could be readily administered.

The suggested language in the “second alternative” and “first alternative of (ii)” is intended for those States which may wish to limit the period during which the contributions and benefits charged are to be compared in order to

arrive at the amount for which credit will be given after election of reimbursement method of financing.

The suggested language in the “second alternative” and in “second alternative of (ii)” is intended for those States with experience rating systems under which benefits paid are not used as a factor in measuring employers’ experience with unemployment. As in the case of provisions mentioned in the preceding paragraph, they would permit limiting the period during which contributions and benefits paid would be compared in arriving at the amount of credit to be given the organization after it elects the reimbursement method of financing. Presumably, the length of such period would depend on the availability of records from which the pertinent information could be extracted. The phrase “on the basis of wages paid or service performed in the employ of such organization” may have to be modified, depending on the provisions of the State law under which benefits are paid.

The time limit within which the nonprofit organization would have to apply for the reimbursement method of financing is 30 days after enactment of the provisions permitting such election. It is considered that such period would be consistent with the provisions of section 3303(f) which specify that such election must be made “when such election first becomes available under the State law.”

Section 12(d)

Unemployment Insurance Advisory Council

(Section 908, Social Security Act)

(d) Unemployment Insurance Advisory Council.--The commissioner shall appoint a State unemployment insurance advisory council, composed of men and women, including an equal number of employer representatives and employee representatives who may fairly be regarded as representative because of their vocation, employment, or affiliations, and of such members representing the general public as the commissioner may designate. Such council shall aid the commissioner in reviewing the unemployment insurance program as to its content, adequacy and effectiveness and to make recommendations for its improvement. Members of the unemployment insurance advisory council shall serve without compensation but shall be reimbursed for any travel and subsistence expense incurred, in accordance with the travel and subsistence regulations applicable to employees of the Bureau of Employment Security. The advisory council shall meet as frequently as the commissioner deems necessary but not less than twice each year. The advisory council shall make reports of its meetings which shall include a record of its discussions and its recommendations. The commissioner shall make such reports available to any interested persons or groups.

Commentary - Section 12(d)

Unemployment Insurance Advisory Council

Section 12(d) directs the commissioner to appoint an unemployment insurance advisory council. Most State laws now provide for an employment security advisory council whose scope includes both unemployment insurance and employment service. (See Section 12(c), 1950 Manual). Adoption of the draft proposal requires revising such present provisions so as to limit the present Council's functions to employment service or, preferably, manpower activities other than the unemployment insurance program.

An unemployment insurance advisory council should not be merely substituted for the State's employment security advisory council. The Wagner-Geyser Act (Section 11(a)) continues to require States to have an advisory council on employment service.

The usefulness of State advisory councils has been demonstrated in evaluating and improving the adequacy and effectiveness of the unemployment insurance program. Section 908 of the Social Security Act, added by the 1970 amendments, establishes a Federal Advisory Council to the Secretary of Labor on unemployment insurance and directs the Secretary to encourage States to organize similar State advisory councils.

Section 13(j)

Federal-State cooperation

(j) Federal-State cooperation.--(1)(A) In the administration of this Act, the commissioner shall cooperate with the Department of Labor to the fullest extent consistent with the provisions of this Act, and shall take such action, through the adoption of appropriate rules, regulations, administrative methods and standards, as may be necessary to secure to this State and its citizens all advantages available under the provisions of the Social Security Act that relate to unemployment compensation, the Federal Unemployment Tax Act, the Wagner-Geyser Act, and the Federal-State Extended Unemployment Compensation Act of 1970.

(B) In the administration of the provisions in section 1/ of this Act, which are enacted to conform with the requirements of the Federal-State Extended Unemployment Compensation Act of 1970, the commissioner shall take such action as may be necessary (i) to ensure that the provisions are so interpreted and applied as to meet the requirements of such Federal Act as interpreted by the U.S. Department of Labor, and (ii) to secure to this State the full reimbursement of the Federal share of extended and regular 2/ benefits paid under this Act that are reimbursable under the Federal Act.

1/ Enter the number of section in State law which provides for the payment of extended benefits under the Federal-State program.

2/ If under the State law the duration of regular benefits does not exceed 26 times the individual's weekly benefit amount (including dependents' allowances), the reference to regular benefits should be omitted.

Federal-State cooperation

(j) Federal-State cooperation.--Section 13(j) is an expression of the State's intention to give its citizens the full advantage of Federal legislation as enacted in the Social Security Act's unemployment compensation provisions, the Federal Unemployment Tax Act, the Wagner-Geyser Act, and the Federal-State Extended Unemployment Compensation Act of 1970. To insure these advantages, the section requires cooperation with the Federal Government and with other State agencies.

The provisions contained in the draft language are designed to provide specific support in the State law for interpreting and applying it in a manner that will assure consistency with Federal requirements, as to approval of the State law, grants for its administration and Federal reimbursement of sharable benefits paid under the State law.

Section 15(b)

Wage Combining

(Section 3304(a)(9)(B), FUTA)

(b) Combining wage credits.--The commissioner shall participate in any arrangements for the payment of compensation on the basis of combining an individual's wages and employment covered under this Act with his wages and employment covered under the unemployment compensation laws of other States which are approved by the United States Secretary of Labor in consultation with the State unemployment compensation agencies as reasonably calculated to assure the prompt and full payment of compensation in such situations and which include provisions for

(1) applying the base period of a single State law to a claim involving the combining of an individual's wages and employment covered under two or more State unemployment compensation laws, and

(2) avoiding the duplicate use of wages and employment by reason of such combining.

Wage Combining

(b) Combining wage credits.--New section 3304(a)(9)(B), Federal Unemployment Tax Act, provides that, as a condition for approval of the law for tax credit, the State law must provide that the State shall participate in a wage combining plan approved by the Secretary of Labor after consultation with the State unemployment compensation agencies. The only requirements specified in the Federal provision for the plan are that it shall be "reasonably calculated to assure prompt and full payment" of benefits when wages are combined, that benefits be paid using the base period and law of the paying State and that wages and employment which are transferred cannot thereafter again be used for benefit purposes.

Detailed provisions were not included in the Federal provision to allow the Secretary to approve modifications of the plan as experience indicates without having to resort to legislation. Like the initial plan, any such modification will require consultation with State agencies before it may be approved by the Secretary. The draft provisions, similarly, following the Federal bill's language closely, provide only a broad description of the characteristics of the plan approved by the Secretary that the commissioner will participate in. Such breadth of language is necessary in a State law provision on this subject to assure that, without further statutory amendment, the commissioner will be directed to participate in the wage combining plan or its later modifications that the Secretary may approve.

In the past, the problems of workers who have earned wages in employment covered by more than one State law have been dealt with through voluntary agreements between the States for combining such wages. Until recently, however, these agreements have provided for combining only those wages in a period common to the base periods of the States involved. The diversity of State base periods has meant that many workers either got no benefits at all or got less in benefits than they should have. The worst effects and the most frequent incidence of loss of protection have occurred among the highly skilled, highly motivated, and highly mobile workers, who, following employment opportunity, have worked in several States and often for several employers in the course of a year. The Federal provision was enacted to rectify these inequities.

Section _____ (a)(1)

EXTENDED BENEFITS PROGRAM

Definitions: “Extended benefit period”

(a) Definitions.--As used in this section, unless the context clearly requires otherwise–

(1) “Extended benefit period” means a period which

(A) begins with the third week after whichever of the following weeks occurs first:

(i) a week for which there is a national “no” indicator, or

(ii) a week for which there is a State “on” indicator; and

(B) ends with either of the following weeks, whichever occurs later:

(i) the third week after the first week for which there is both a national “off” indicator and a State “off” indicator; or

(ii) the thirteenth consecutive week of such period;

Provided, That no extended benefit period may begin by reason of a State “on” indicator before the fourteenth week following the end of a prior extended benefit period which was in effect with respect to this State; and

Provided further, That no extended benefit period may become effective in this State prior to the 61st day following the date of enactment of the Federal-State Extended Unemployment Compensation Act of 1970 and that, within the period beginning on such 61st day and ending on December 31, 1971,

an extended benefit period may become effective and be terminated in this State solely by reason of a State “on” and a State “off” indicator, respectively.

(2) There is a “national ‘on’ indicator” for a week if the U.S. Secretary of Labor determines that for each of the three most recent completed calendar months ending before such week, the rate of insured unemployment (seasonally adjusted) for all States equaled or exceeded 4.5 percent.

(3) There is a “national ‘off’ indicator” for a week if the U.S. Secretary of Labor determines that for each of the three most recent completed calendar months ending before such week, the rate of insured unemployment (seasonally adjusted) for all States was less than 4.5 percent.

(4) There is a “State ‘on’ indicator” for this State for a week if the commissioner determines, in accordance with the regulations of the U.S. Secretary of Labor, that for the period consisting of such week and the immediately preceding twelve weeks, the rate of insured unemployment (not seasonally adjusted) under this Act–

(A) equaled or exceeded 120 percent of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and

(B) equaled or exceeded 4 percent.

Section _____ (a)(5)

Definitions: “State ‘off’ indicator”; “rate of insured unemployment”

(5) There is a “State ‘off’ indicator” for this State for a week if the commissioner determines, in accordance with the regulation of the U.S. Secretary of Labor, that for the period consisting of such week and the immediately preceding twelve weeks, the rate of insured unemployment (not seasonally adjusted) under this Act–

(A) was less than 120 percent of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, or

(B) was less than 4 percent.

(6) “Rate of insured unemployment,” for purposes of paragraphs (4) and (5) of this subsection, means the percentage derived by dividing

(i) the average weekly number of individuals filing claims in this State for weeks of unemployment with respect to the most recent 13-consecutive-week period, as determined by the commissioner on the basis of his reports to the U.S. Secretary of Labor, by

(iii) The average monthly employment covered under this Act for the first four of the most recent six completed calendar quarters ending before the end of such 13-week period.

Section _____ (a)(7)

Definitions: "Regular benefits"; "extended benefits"; "additional benefits"; "eligibility period"

(7) "Regular benefits" means benefits payable to an individual under this Act or under any other State law (including benefits payable to Federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. chapter 85) other than extended benefits and additional benefits. 1/

(8) "Extended benefits" means benefits (including benefits payable to Federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. chapter 85) payable to an individual under the provisions of this section for weeks of unemployment in his eligibility period.

(9) "Additional benefits" means benefits payable to exhaustees by reason of conditions of high unemployment or by reason of other special factors under the provisions of section _____2/ of this Act.

(10) "Eligibility period" of an individual means the period consisting of the weeks in his benefit year which begin in an extended benefit period and, if his benefit year ends within such extended benefit period, any weeks thereafter which begin in such period.

1/ If the State law does not provide for a wholly State-financed program of benefits payable to exhaustees, the reference to "additional benefits" should be omitted.

2/ Include reference to section of the State law under which wholly State-financed benefits are payable to exhaustees. If the State law does not provide for a wholly State-financed program, this definition should be omitted.

Section _____ (a)(11)

Definitions: “Exhaustee”

(11) “Exhaustee” means an individual who, with respect to any week of unemployment in his eligibility period:

(A) has received, prior to such week, all of the regular benefits that were available to him under this Act or any other State law (including dependents’ allowances and benefits payable to Federal civilian employees and ex-servicemen under 5 U.S.C. chapter 85) in his current benefit year that includes such week;

Provided, That, for the purpose of this subparagraph, an individual shall be deemed to have received all of the regular benefits that were available to him although (i) as a result of a pending appeal with respect to wages and/or employment 1/ that were not considered in the original monetary determination in his benefit year, he may subsequently be determined to be entitled to added regular benefits, or (ii) 2/ he may be entitled to regular benefits with respect to future weeks of unemployment, but such benefits are not payable with respect to such week of unemployment by reason of the provisions in section _____ 3/; or

(B) his benefit year having expired prior to such week, has no, or insufficient, wages and/or employment 1/ on the basis of which he could establish a new benefit year that would include such week; and

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1/ The phrase “wages and/or employment” may need modification, depending on the qualifying requirements of the State law.

2/ This subdivision should be omitted in States in which the State law does not include restrictions on the payment of regular benefits to individuals employed in seasonal employment.

3/ Enter the number of section in the State law which restricts the payment of regular benefits to individuals with earnings in seasonal employment.

(C)(i) has no right to unemployment benefits or allowances, as the case may be, under the Railroad Unemployment Insurance Act, the Trade Expansion Act of 1962, the Automotive Products Trade Act of 1965 and such other Federal laws as are specified in regulations issued by the U.S. Secretary of Labor; and (ii) has not received and is not seeking unemployment benefits under the unemployment compensation law of the Virgin Islands or of Canada; but if he is seeking such benefits and the appropriate agency finally determines that he is not entitled to benefits under such law he is considered an exhaustee.

(12) “State law” means the unemployment insurance law of any State, approved by the U.S. Secretary of labor under section 3304 of the Internal Revenue Code of 1954.

(b) Effect of State law provisions relating to regular benefits on claims for, and the payment of, extended benefits.--Except when the result would be inconsistent with the other provisions of this section, as provided in the regulations of the commissioner, the provisions of this Act which apply to claims for, or the payment of, regular benefits shall apply to claim for, and the payment of, extended benefits.

(c) Eligibility requirements for extended benefits.--An individual shall be eligible to receive extended benefits with respect to any week of unemployment in his eligibility period only if the commissioner finds that with respect to such week:

(1) he is an “exhaustee” as defined in subsection (a)(11),

(2) he has satisfied the requirements of this Act for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits.

(d) Weekly extended benefit amount.--The weekly extended benefit amount payable to an individual for a week or total unemployment to his eligibility period shall be an amount equal to the weekly benefit amount [1/] payable to him during his applicable benefit year. For any individual who was paid benefits during the applicable benefit year in accordance with more than one weekly benefit amount, [1/] the weekly extended benefit amount shall be the average of such weekly extended benefit amounts.[1/]

(e) Total extended benefit amount.-- The total extended benefit amount payable to any eligible individual with respect to his applicable benefit year shall be the least of the following amounts:

1/ In States with statutory provisions under which dependents' allowances are provided, the phrase "weekly basic or augmented benefit amount, whichever is appropriate," should be substituted for the words "weekly benefit amount," and "weekly basic or augmented benefit amounts, whichever are appropriate," for the words "weekly benefit amounts."

Section _____ (e) (1)

Total extended benefit amount

(1) fifty percent of the total amount of regular benefits (including dependents' allowances) [1/] which were payable to him under this Act in his applicable benefit year;

(2) thirteen times his weekly benefits amount [2/] (including dependents' allowances) [1/] which was payable to him under this Act for a week of total unemployment in the applicable benefit year; or

(3) [3/] thirty-nine times his weekly benefit amount [2/] (including dependents' allowances) [1/] which was payable to him under this Act for a week of total unemployment in the applicable benefit year, reduced by the total amount of regular benefits which were paid (or deemed paid) to him under this Act with respect to the benefit year.

1/ In State laws with no provisions for payment of dependents' allowances references to such allowances should be omitted.

2/ If, under the State law, the weekly benefit amount may fluctuate during the benefit year, the word "average" should be added before the words "weekly benefit amount."

3/ This paragraph is necessary only in a State law which regular benefits payable to an individual in his benefit year may exceed 26 times his weekly benefit amount.

Section _____ (e)

Total extended benefit amount

Provided,[1] That the amount so determined shall be reduced by the total amount of additional benefits paid (or deemed paid) to the individual under the provisions of section _____[2] of this Act for weeks of unemployment in the individual's benefit year which began prior to the effective date of the extended benefit period which is current in the week for which the individual first claims extended benefits.

1/ This proviso is pertinent only in States in which the State law provides for the payment of wholly State-financed additional benefits. Such States, under the Federal law, may (but do not have to) provide for the reduction of the total amount of extended benefits payable to an individual by the amount of additional benefits which were paid (or deemed paid) to the individual in his applicable benefit year before he becomes entitled to extended benefits.

2/ Include reference to section of State law under which wholly State-financed additional benefits are payable.

Section _____ (f)

Beginning and termination of extended benefits period

(f)(1) Beginning and termination of extended benefit period.--Whenever an extended benefit period is to become effective in this State (or in all States) as a result of a State or a national "on" indicator, or an extended benefit period is to be terminated in this State as a result of State and national "off" indicators, 1/ the commissioner shall make an appropriate public announcement.

(2) Computations required by the provisions of subsection (a)(6) shall be made by the commissioner, in accordance with regulations prescribed by the U.S. Secretary of Labor.

1/ States which enact State law provisions implementing the Federal-State extended benefits program before January 1, 1972, should substitute the phrase "as a result of a State 'off' indicator or State and national 'off' indicators" for the phrase "as a result of a State and national 'off' indicators." This change would provide the commissioner with clear authority to make the announcement of the termination of an extended benefit period which ends before January 1, 1972, when only the State "off" indicator would be operative.

Commentary

EXTENDED BENEFITS PROGRAM

(General discussion)

The provisions in title UI of the Employment Security Amendments of 1970 -- the Federal State Extended Unemployment Compensation Act of 1970 -- established a new permanent Federal-State extended benefits program. The program is intended to provide extended benefits to workers who during periods of high unemployment in a State or in the nation (a) have exhausted their rights to regular benefits (including dependents' allowances and unemployment benefits payable to Federal civilian employees and to ex-servicemen) under the State law, (b) have no usable rights to regular benefits under such or any other State unemployment insurance Federal law, and (c) are not receiving unemployment benefits under the unemployment insurance law of the Virgin Islands or of Canada.

The enactment of appropriate legislation to implement the extended benefits program in a State is a necessary condition for the allowance of credits against the tax imposed by the Federal Unemployment Tax Act for taxable years after 1971. To meet this requirement, the State law must include provisions implementing the program not later than January 1, 1972, unless the State legislature does not meet in a regular session in 1971. In that event, the State has until July 1, 1972.

A State law may implement the program an any time after the 60th day following the enactment of the Federal-State Extended Unemployment Compensation Act of 1970. For weeks of unemployment beginning before January 1, 1972, extended benefit periods may be determined solely by reference to the State "on" indicator and the State "off" indicator. A state in which the program is implemented before January 1, 1972 is eligible for reimbursement of half the cost of extended benefits paid for weeks of unemployment beginning before such date only if the State law includes all of the provisions required by section 3304(a)(11) of the Federal Unemployment Tax Act.

The provisions of the Federal law under which an extended benefit period may become effective in a State as a result of a national "on" indicator do not become operative until January 1, 1972. (For an explanation of State and national "on" indicators, see Commentary relating to paragraphs (2) through (5) of subsection (a).)

Extended benefits provided under the Federal-State program are payable to eligible individuals only when periods, designated as "extended benefit periods," are in effect in the State. (For a discussion of the conditions under which such extended benefit periods become effective and are terminated in a State, as well as of the duration of such periods, see the Commentary relating to subsection (a)(1).)

Commentary

Extended Benefits Program

(General discussion)

In specifying the conditions for entitlement to extended benefits, the Federal law also provides that extended benefits must be paid under the terms and conditions of the State law which apply to claims for, and to the payment of, regular benefits unless the result would be inconsistent with the provisions in the Federal law.

(For a discussion of the State law provisions which would apply to the payment of extended benefits under the "same terms and conditions" requirement, and of provisions which would be considered inconsistent with the extended benefits program, see the Commentary relating to subsection (b).)

One of the conditions of the Federal law is that individuals entitled to extended benefits must have exhausted their regular benefit rights. However, in some situations, claimants of extended benefits may be treated as exhaustees even though they may be entitled to regular benefits later in the benefit year. (For a discussion relating to individuals in seasonal employment and to situations where an appeal is pending when an individual applies for extended benefits, see the Commentary relating to subsection (c).)

Weekly and maximum potential extended benefit amounts payable to eligible individuals are determined under specified provisions in the Federal law which require taking into account the weekly and maximum potential regular benefit amounts which were payable, or paid, to the individual in the applicable benefit year. (For a further discussion, see the Commentary relating to subsections (d) and (c).)

Section 204 of the Federal law defines sharable benefits, extended and regular, and provides for Federal reimbursement to the State of half of the sharable benefits paid under the State law. Sharable extended benefits consist of (a) all extended benefits paid with respect to weeks of unemployment beginning after December 31, 1971, and (b) all extended benefits paid with respect to weeks of unemployment beginning in the period commencing not earlier than the 61st day after the date of enactment of the Federal law and ending on December 31, 1971, provided that they are paid with respect to weeks of unemployment in an extended benefit period which became effective in the State as a result of a State "on" indicator. Sharable regular benefits are State benefits paid to an individual for weeks of unemployment which begin in the period in which an extended benefit period is in effect in the State, but only to the extent that, together with regular benefits paid (or deemed paid) to the individual for prior weeks of unemployment in his benefit year, they exceed 26 times, but are less than 39 times, the average weekly benefit amount (including dependents'' allowances) for weeks of total unemployment payable to the individual in the benefit year. No State provisions are necessary to implement these provisions of the Federal law.

Commentary

Extended Benefits Program

(General discussion)

The Department will issue instructions and procedures indicating how State agencies are to report on extended benefit payments for reimbursement purposes and how and when reimbursement will be made.

The States should review their laws to determine what impact the State-financed portion of extended benefits will have on the overall financing of the State program. For this purposes, they may also want to determine whether extended benefits paid should be charged to employer experience rating accounts. (For a discussion relating to the charging and noncharging of extended benefits, see the Commentary relating (b).)

States with provisions which trigger in prescribed rate schedules when the State fund balance reaches specified levels may wish to consider the desirability of redefining the fund balance in such provisions to include such accounts receivable as Federal reimbursements due the State for sharable benefit payments.

Commentary - Section _____ (a)(1)

(Detailed discussion)

Definitions: Extended benefit period

(a) Definitions.-- This subsection includes definitions of terms which have a special, limited, or purely technical meaning for purposes of the extended benefits program. State agencies may want to review the "definitions" section of the State law pertaining to the regular benefits program in order to determine whether any amendment or special provision is necessary to make clear to what extent that section also applies to the provisions enacting the extended benefits program.

(1) Extended benefit period.-- An extended benefit period is a period of a prescribed high level of national or State unemployment. Extended benefits are payable with respect to weeks of unemployment beginning in such period. An extended benefit period becomes effective in a State in the third week following the week in which a State or a national "on" indicator is reached, and stays effective until the third week following the first week in which both State and national indicator are "off"; in any case, it must be effective for at least 13 consecutive weeks. (For an explanation of national and State "on" and "off" indicators, see the Commentary relating to paragraphs (2) through (5) of subsection (a).)

If an extended benefit period continues beyond the 13 consecutive weeks, it will terminate in any week which is the third week after a week in which both the State and national indicators are "off". The fact that during an extended benefit period which originally became effective as the result of one "on" indicator, State or national, the other "on" indicator also became effective will not effect the continuity or the basis for termination of that extended benefit period. Even though the period begins with the effective date of the other "on" indicator, it is considered as one extended benefit period with respect to the State. Its date of termination is still defined in the same way; it is whichever occurs first, the end of the 13th consecutive week since the period first became effective, or the end of the third week following a week in which both the State and the national indicators are "off."

Except in States that amend their laws to provide for early implementation (see paragraph after the next), no extended benefit period may begin with a week beginning before January 1, 1972. The fist week to begin on or after that date is the week ending January 8, 1972. Since that week is the 3rd week after the week ending December 18, 1971, the earliest 13-week period as to which the State rate of insured unemployment could constitute a State "on" indicator will consist

of the 13 weeks ending December 18, 1971. As for the national “on” indicator, if the seasonally adjusted rate of insured unemployment for all States during each of the months of September, October, and November 1971 were to equal or exceeded 4.5 percent, each of the weeks beginning in December 1971 would be an “on” indicator (weeks ending December 11, 18, 25, and January 1). Thus there would be a national “on” indicator for the week ending December 18, 1971 on the basis of which an extended benefit period would become effective the third week afterwards, the week ending January 8, 1972.

No extended benefit period may become effective in a State by reason of a State “on” indicator before the 14th week after the close of a prior extended benefit period in such State, irrespective whether such prior period became effective as the result of a State or a national “on” indicator. This prohibition does not apply, however, to extended benefit periods which become effective by reason of a national “on” indicator. To illustrate: Assume that a State “on” indicator is reached in State X in week 1 (beginning January 2) of 1972. Therefore, the extended benefit period becomes effective in the State in week 4 of the same year. Assume further that the State “off” indicator is reached in week 13 (and the national indicator is “off” throughout the 13-week period). In that case, the extended benefit period is terminated with week 16, and no new extended benefit period may begin by reason of a State “on” indicator before week 30. However, if a national “on” indicator occurred for week 19, a new extended benefit period would become effective in week 22 in the State (as well as in all other States) even though only 5 weeks elapsed since the State’s previous extended benefit period.

A State law may provide for implementation of the extended benefits program in the State before January 1, 1972, and the Federal Government will reimburse the State for half of the sharable benefit costs if the program enacted meets the requirements of the Federal-State Extended Unemployment Compensation Act of 1970.

In such States, extended benefit periods, during which extended benefits are paid before January 1, 1972, may become effective solely by reason of a State “on” indicator and may not begin with a week that begins earlier than the 61st day following the enactment of that Act. States which want to make available the extended benefits provided under the Federal-State program before January 1, 1972 should enact appropriate State law provisions.

Whenever a determination is made by the commissioner or by the U.S. Secretary of Labor (or his representative) that an extended benefit period is to begin or end in a State (or in all States), the Secretary is to take the necessary action to assure that notice of such determination is published in the Federal Register. (See also subsection (f) and Commentary relating thereto.)

(2) and (3) National “on” and “off” indicators.-- A national “on” indicator is reached in the calendar week immediately following a 3-consecutive-calendar-month period if in each of the 3 months the rate of insured unemployment (seasonally adjusted) for all States equals or exceeds 4.5 percent. A national “off” indicator is reached in the calendar week immediately following a 3-consecutive-calendar-month period if in each of the 3 months the rate of insured unemployment (seasonally adjusted) for all States is less than 4.5 percent. Although an extended benefit period becomes effective with respect to all States as the result of a national “on” indicator, such a period may not be terminated in any State unless both the national and State indicators are “off.”

The computation of the rate of insured unemployment for all States is made by the U.S. Secretary of Labor or his designated representative (by reference to the average monthly covered employment for the first four of the most recent 6 completed calendar quarters ending before the month in question). The rate of insured unemployment is calculated to at least two decimal places and remains unrounded. No State law provisions indicating the method of this computation are necessary.

(4) and (5) State “on” and “off” indicators.-- A State “on” indicator is reached in the last week of the 13-week period when the rate of insured unemployment (not seasonally adjusted) in the State for such period (a) equals or exceeds 120 percent of the average of such rates for the corresponding period in each of

the preceding two calendar years, and (b) is not less than 4 percent. A State "off" indicator is reached in the last week of the specified 13-week period when the rate of insured unemployment (not seasonally adjusted) in the State for such period either (a) falls below 120 percent of the average of such rates for the corresponding period in each of the preceding two calendar years, or (b) is less than 4 percent.

Because the rate, as determined for the 13-week period, is compared with the corresponding periods in the 2 immediately preceding years, seasonal adjustment (which is required in the computation of the national rate of insured unemployment) is not necessary.

The 3-week intervals between the week of "on" indicator and the effective date of the extended benefit period and between the week of the "off" indicator and the week of termination of the period are necessary for the compilation of the data on the basis of which the pertinent rates of insured unemployment are determined.

(6) Rate of insured unemployment.-- This definition incorporates in the State law the formula for computing the rate of insured unemployment. The rate of insured unemployment determined under the formula is necessary for ascertaining the week in which a State "on" or "off" indicator is reached in order to determine the week (i.e., the third week after such "on" or "off" week) in which an extended benefit period is to become effective, or is to be terminated, as the case may be, in the State. Each State agency is required to make the computations in accordance with the regulations prescribed by the U.S. Secretary of Labor.

The rate of insured unemployment is computed on the basis of the average volume of insured unemployment in the entire 13-week period and is not an average of the rate of insured unemployment for each of the weeks in the period. The 13-week period is a moving period, i.e., each week, the first week of the immediately preceding 13-week period is dropped and the current week is added to constitute a new 13-week period.

To determine the "average number of individuals filing claims" as provided in paragraph (6) of subsection (a), the State agency may include only the weeks in the specified period that are claimed in intrastate and agent-State unemployment insurance continued claims filed in the State. Unemployment insurance interstate claims filed against the State and UCFE and UCX claims may not be used for this purpose. Any adjustments necessary as a result of bi-weekly claims, mail claims or partial claims will be made in accordance with the regulations prescribed by the U.S. Secretary of Labor.

Definitions: Regular benefits; extended benefits; additional benefits; eligibility period; exhaustee

The average monthly covered employment used in the computation of the rates is derived by reference to the first 4 of the most recent 6 completed calendar quarters ending before the close of the 13-week period.

No rounding is permitted in the computation necessary to determine whether the rate of insured unemployment equals or exceeds, or is less than, 4 percent.

(7) Regular benefits.--This definition is self-explanatory. States in which there is no provision for a wholly State-financed program of extended benefits should delete the reference to “additional benefits” from the definition.

(8) Extended benefits.--This definition is self-explanatory.

(9) Additional benefits.--The provisions in this paragraph distinguish benefits payable to exhaustees under a wholly State-financed program from the extended benefits payable under the Federal-State program. This definition need be included only when the State law provides for the payment of benefits under conditions different from those specified in the Federal-State Extended Unemployment Compensation Act of 1970, and the State wishes to continue to make such wholly State-financed benefits available under such conditions. Under the Federal law “additional benefits” are not limited to benefits paid to exhaustees during periods of high unemployment but also include those paid to exhaustees because of any other special factors, e.g., benefits paid to an exhaustee who is taking approved training.

(10) Eligibility period.--The purpose of this definition is to delimit the period in which an individual is entitled to claim extended benefits if he has exhausted his regular benefits. Whether extended benefits will be payable to him for any week of unemployment in this period will depend on whether he meets all of the State law eligibility requirements for the receipt of regular benefits that are applicable to individuals claiming extended benefits.

(11) Exhaustee.--The definition to this paragraph is intended to bring together in one place in the State law the various requirements of such law and personal circumstances of the individual which must be considered in determining whether or not he is an exhaustee for purposes of the extended benefits program.

The definition identifies the two principal types of exhaustees which are:

1. Exhaustee with a current benefit year (subparagraph (A)).--An individual who has a benefit year current is an exhaustee when he as received all the regular benefits which were available to him in such benefit year under

any State law (including benefits payable to Federal civilian employees and ex-servicemen under 5 U.S.C. chapter 85). For this purpose, an individual is considered to have received all available regular benefits if (a) he has been paid the total amount of his regular benefits specified in his monetary determination for that benefit year, or (b) he has been paid so much of the total amount as remained payable to him after application of any State law provision which required a reduction in such total amount.

There are, however, two situations (described in the proviso in subparagraph (A)) in which an individual is an exhaustee (as indicated in the House Ways and Means Committee's report relating to H.R. 14705) even though he may have actual or potential regular benefit rights on the-basis of which regular benefits may become payable to him at some future time:

a. Appeal pending.--The individual may be entitled to added regular benefits as a result of a pending appeal. If the issue in such appeal is with respect to wages or employment, or both, which were not taken into account in the prior monetary determination, the individual is, for purposes of extended benefits, an exhaustee until future adjudication of the case determines that he is entitled to additional regular benefits.

b. Seasonal restrictions.--In a State with special restrictions on regular benefits payable to an individual engaged in seasonal employment, an individual is considered an exhaustee during the "off" season when he is unable to receive any more benefits during such season even though, when the new operating season begins, he may be entitled to regular benefits based on seasonal employment. If the State law prohibits the payment, during the "off" season, of regular benefits which are based on seasonal wage credits, the State could not, in accordance with the "same terms and conditions" requirement, pay extended benefits in the "off" season based on regular benefits which were in turn based on such seasonal wage credits. Whether such an exhaustee may draw extended benefits then will depend on whether he received regular benefits based on nonseasonal wages or employment.

2. Exhaustee with an expired benefit year (subparagraph (B)).-- An individual whose benefit year has expired is an exhaustee if (a) such benefit year expired within an extended benefit period, and (b) he is unable, because of lack of qualifying wages or employment, to establish a new benefit year that would include the week for which he is claiming extended benefits. If, subsequently, such individual is able, either by reason of the passage of time or because of additional earnings or employment, to establish a new benefit year, he would cease, for purposes of extended benefits, to be an exhaustee. Should he exhaust his regular benefits in the new benefit year with in an extended benefit period he would then be an exhaustee with respect to his second benefit year and his rights to extended benefits would be determined by his regular benefits in that second benefit year.

Definitions: Exhaustee

Any individual whose benefit year expired before an extended benefit period became effective in the State would not be considered an exhaustee for purposes of the extended benefits program.

Subparagraph (C) provides a further test of individuals to whom the provisions of either subparagraph (A) or (B) also apply: An individual may be considered an exhaustee only if with respect to a week of unemployment for which he is seeking extended benefits (a) he has no rights to unemployment benefits or allowances, as the case may be, under any of the specified Federal laws, and (b) he has not received and is not seeking unemployment benefits under the unemployment compensation laws of the Virgin Islands or of Canada, except that if he is seeking such benefits and they are subsequently denied by the appropriate agency, he is considered an exhaustee.

The Federal laws specifically listed in this subparagraph are those which the House Ways and Means Committee's report on H.R. 14705 identified (on page 53) as the laws under which the receipt of compensation or allowances bars the recipient from being considered an exhaustee for purposes of the extended benefits program. The list is necessarily incomplete since there may be additional Federal enactments in the future that will need to be included. It is contemplated that such other pertinent against legislation incorporating the Secretary's regulation by reference may want to seek statutory authority under which the State agency could, by regulation, supplement the list of the Federal laws referred to in the suggested draft language as other laws are added by the Secretary's regulations.

Definition of week. The Federal law provides that, for purposes of Federal-State extended benefits, the term "week" means a week as defined in the State law. Necessarily, however, a calendar week must be used for purposes of the computations required by section 203 of H.R. 14705 with respect to State and national "on" and "off" indicators and the establishment of the beginning and ending dates of extended benefit periods.

Effect of State law provisions

(b) Effect of State law provisions relating to regular benefits on claims for, and the payment of, extended benefits.--Section 202(a)(2) of the Federal-State Extended Unemployment Compensation Act of 1970 provides that extended benefits provided under the Federal-State program are to be made available under the terms and conditions of the State law which apply to claims for, and to the payment of, regular benefits, except when the application of the pertinent State law provisions would be inconsistent with the provisions of the Federal-State program.

The provisions in subsection (b) are intended to assure that the pertinent provisions of the State law which apply to regular benefits are given the effect required by the Federal law with respect to claims for, and the payment of, extended benefits. The authority for adoption of a regulation is intended to enable the State agency to specify which State law provisions it considers to be inconsistent with the extended benefits program and, therefore, inapplicable.

The provisions in this subsection are in broad, general terms. Some States may prefer more specific provisions for this purpose. Either method is acceptable so long as it gives reasonable assurance that the requirement of the Federal law is met.

State law provisions which apply to extended benefits claims and payments include those which require that individuals claiming regular benefits (a) must be able to work, available for work, and actively seeking work, (b) must be disqualified for specified acts or in specified situations, (c) must follow the specified claim filing and reporting procedure, (d) must be given a notice of monetary determination and, when benefits are denied, a notice of nonmonetary determination, with notice of the right to appeal from such determinations, and (e) must be subject to disqualification or prosecution, or both, if they fraudulently obtain, or attempt to obtain, regular benefits. Applicable also would be the provisions which (a) require reduction of regular benefits by amounts of specified deductible income received by the claimant, (b) provide for administrative and judicial review of determinations and decisions rendered under the State law, and (c) provide for the recovery, recoupment, or offset against future benefits, of benefits which are overpaid. Whether overpayments of extended benefits may be offset against regular benefits to which an individual may subsequently be entitled is a matter of State law as interpreted by the appropriate State officials.

Commentary - Section _____ (b)

Effect of State law provisions

Some State law include provisions which may present problems when they are applied to claimants who file for extended benefits. Provisions in this category include, for example, those which require the cancellation of some or all of an individual's wage credits (or of only those from a specified base period or other employer) when he is disqualified for a misconduct discharge. Since an individual's extended benefits are based directly on a previously made monetary determination which established his rights to regular benefits in the applicable benefit year, rather than on wage credits as are regular benefits, it is doubtful that such provisions can be applied to an individual for the first time when he is claiming extended benefits.

State law provisions as to regular benefits which are inconsistent with and inapplicable to the Federal-State extended benefits program are provisions such as those which provide for (a) a waiting period, (b) monetary qualifying and requalifying requirements, and (c) computation of the weekly and total regular benefit amounts.

States are not required to (but may) charge extended benefits to employer accounts for experience-rating purposes. Noncharging of attended benefits has long been held to be consistent with the experience-rating requirements of section 3303(a)(1) of the Federal Unemployment Tax Act. Such noncharging seems the most reasonable course since extended benefits result from periods of high unemployment and consequently reflect costs that appropriately should be shared among all subject employers in the State.

If extended benefits are not charged, inapplicable provisions of the State law would include not only the specific charging provisions applied to regular benefits but also those that (a) require notifying the employers of such changes at specified intervals, and (b) permit employers to protest such charges and provide for administrative and judicial review in the event of such protest.

It is recommended that States which wish to charge extended benefits to individual employer experience-rating accounts limit such charging to that share of the extended benefits that is paid by the State. There is, however, no Federal requirement as to the proportion of such benefits that must be charged. Thus the States are free to charge all of them or only a specified portion.

Effect of State law provisions

States that pay regular benefits for weeks beyond the 26th and normally charge individual employer accounts with such benefit payments may not, when such regular benefits are sharable by the Federal Government because they were paid during an extended benefit period, cancel any part of such charges to the individual employer account. The charging of regular benefits that are payable at all times under the State law, regardless of the level of unemployment, cannot validly be differentiated on the basis of such unemployment levels. To do so would distort the relative experience of employers.

(c) Eligibility requirements for extended benefits.--This subsection includes all of the requirements of the State law (which are applicable pursuant to subsection (b)) and of the Federal law which the State agency must apply with respect to any given week for which an individual is claiming extended benefits.

Paragraph (1) requires that an individual must be an exhaustee with respect to any week of unemployment for which he is claiming extended benefits. Even though an individual may initially qualify as an exhaustee, there is no assurance that he will continue in this status in the following weeks for which he claims extended benefits. He may, for example, in any following week, become eligible to establish a new benefit year and therefore entitled to regular benefits. Or, he may, with respect to any such following week, become entitled to benefits or allowances, as the case may be, under the laws specified in subparagraphs (A) and (C) of subsection (a)(11). In either instance, the individual would sense to be an exhaustee, and extended benefits would not be payable to him for such week.

Paragraph (2) requires that an individual must, with respect to any week for which he is claiming extended benefits, satisfy all of the applicable State law requirements. Which State law provisions will be applicable will depend on the enacted statutory provisions which are patterned on suggested subsection (b) and on the regulations which the State agency may adopt pursuant to that subsection.

Such applicable State law provisions include those which require certain deductions form the payable weekly benefit amount. If a State law requires regular benefits to be reduced by the amount of retirement pay with respect to any week for which an individual is claiming regular benefits, such a provision must also be applied to extended benefits. Similarly, provisions requiring reduction of regular benefits by a specified amount of claimant's earnings in a week of partial unemployment must be given effect in the payment of extended benefits for weeks of such unemployment.

Paragraph (2) requires, as to any week for which an individual claims extended benefits, that he must be free of disqualifications for the receipt of benefits for that week. Such disqualifications may arise during the period in which he has been filing claims for extended benefits, e.g., he has refused suitable work without good cause during his extended benefit claim period. The "same terms and conditions" provision requires that in such cases the same disqualification provisions should apply to extended benefit claimants as to regular benefit claimants.

The provisions of paragraph (2) also relate to disqualifications which have been applied to an individual during his regular benefit claims period and to

which he is still subject when he claims extended benefits. The extend to which disqualifications that an individual has not completed serving when he becomes an exhaustee continue to apply to his extended benefit claims is a matter of State law for interpretation by appropriate State officials. For example, in some States the State law specifies that a disqualification for the duration of the unemployment following the disqualifying act continues to apply in the next benefit year. In such States, it would seem clear that such a disqualification would continue to apply to the weeks in an individual's eligibility period that extend beyond the end of his benefit year. Other State laws are silent on the question of whether a "duration" disqualification extends beyond the benefit year. In such States, whether or not and to what extent a "duration" disqualification applies to an individual's extended benefit claim would require interpretation by the State of its own law.

(d) Weekly extended benefit amount.-- The Federal bill does not include any provisions specifically directing the amount of the weekly payments that are to be paid to individuals who claim extended benefits. However, the report of the House Ways and Means Committee on H.R. 14705 states clearly (on page 29) that this amount is to be determined on the basis of the weekly regular benefit amount (including dependents' allowances) which was payable to an individual for a week of total unemployment for the weeks for which he was paid regular benefits in his applicable benefit year. The report also indicates that in States where the regular weekly benefit amount may vary during the benefit year, the weekly extended benefit amount payable could be an amount equal to the average of the regular weekly benefits amounts (including dependants' allowances) that were payable with respect to weeks for which the individual was paid benefits in the benefit year.

States in which the regular weekly benefit amount, as initially computed and set forth in the monetary determination, remains the same throughout the claimant's benefit year would need only the first sentence of subsection (d).

States which may prefer, because the regular weekly benefit amount payable under their laws may vary during the claimant's benefit year, to determine the weekly extended benefit amount on the basis of the average of the amounts that were payable with respect to the weeks for which the claimant was paid regular benefits should enact the entire subsection (d).

Instead of basing the weekly extended benefit amount on the average regular weekly benefit amount, such States have a choice of adopting any method which would result in extended weekly benefit amounts that would be reasonably representative of the weekly benefit amounts that were payable to the individual in the applicable benefit year. This could, for example, be an amount equal to the individual's last regular weekly benefit amount during the benefit year,

a method that is especially appropriate when that amount was the result of a State law change during the year or in a State with dependents' allowances that vary during the benefit year. A State may also use the average weekly benefit amount which it determines for purposes of subsection (e)(2).

(e) Total extended benefit amount.--The provisions in this subsection are based on section 202(b)(l) and (2) of the Federal-State Extended Unemployment Compensation Act of 1970 which provides how the three amounts used in the determination of an individual's total extended benefit amount are to be computed. Of these three amounts, the smallest amount constitutes the individual's total extended benefit amount payable to him in his eligibility period with respect to any one applicable benefit year.

Commentary - Section ____ (e)(1)

Total extended benefit amount

Subsection (e)(1): One-half of the total regular benefits (including dependent's allowances) which were payable to the individual in the pertinent benefit year.

The pertinent benefit year is an individual's current benefit year if he has exhausted all regular benefits available to him in such year, or his most recent benefit year that expired in the extended benefit period.

In States which provide dependents' allowances, but specifically limit the total amount of such allowances that may be paid in an individual's benefit year, or in States which do not provide for such allowances, the amount defined by paragraph (1) can be readily ascertained by taking half of the potential total entitlement as established in the individual's monetary determination of regular benefits prior to any cancellation or reduction by reason of a disqualification.

Some State laws provide for dependent's allowances, but specifically exclude such allowances from consideration in the determination of total regular benefits. In States with such provisions, an individual's total regular benefit amount (including dependents' allowances) cannot be determined accurately at the beginning of his benefit year, or before he has become an exhaustee. The reason for this uncertainty is that such amount is dependent on the extent of partial unemployment which will be compensated (with full dependents' allowances) in the benefit year. In such States if the individual has received all his regular benefits before he applies for extended benefits, then determining his maximum regular benefit amount offers no problem. There is a problem in ascertaining this amount, however, if the individual's benefit year expires before he receives all his regular benefits. Since some individuals will become entitled to extended benefits because their benefit years have expired before they have been paid all their regular benefits, the State law should specify how the maximum regular benefit amount should be determined in such cases. For such cases, it is suggested that, for purposes of this subsection, the total regular benefit amount should be considered to be that amount (including dependents' allowances) as provided in the individual's monetary determination or the amount of regular benefits (including dependents' allowances) that he actually received, whichever is the greater.

In some States also the weekly regular benefit amount may vary because the weekly dependents' allowance may fluctuate from week to week. In such States, some prescribed method is also needed for determining the total regular benefit amount of individuals whose benefit years have expired before they exhausted their regular benefits. A suggested provision is one under which such amount would be derived by multiplying the weekly regular benefit amount (including the individual's most recent dependents' allowance), by the number of weeks of total unemployment for which the individual would have been entitled to be paid regular benefits in his benefit year. One-half of the amount so obtained would then be used for purposes of paragraph (1).

Subsection (e)(2): Thirteen times the individual's average weekly regular benefit amount (including dependent's allowances) which was payable to him for a week of total unemployment in the applicable benefit year. In States with provisions under which the weekly benefit amount for a week of total unemployment remains the same throughout the benefit year, the amount used for purposes of paragraph (2) would, of course, be the weekly regular benefit amount as determined in the individual's monetary determination.

In States where the weekly regular benefit amount may fluctuate during the benefit year consideration should be given to the adoption of the most equitable and practicable method of determining the average weekly benefit amount which could be applied whether or not the individual exhausted all of his regular benefits in the pertinent benefit year. Such an average should be based on a weighting of each of the different weekly amounts on the basis of the number of weeks of total unemployment in the benefit year to which it applies. (See also the Commentary relating to subsection (e)(1).)

In States in which half of the total regular benefit amount could never exceed 13 times the individual's weekly benefit amount, the enactment of paragraph (2) is not necessary.

Subsection (e)(3): (As indicated in the text footnote, this paragraph is necessary only in a State law which provides for regular benefit duration in excess of 26 times the individual's weekly benefit amount. In such a State, the total amount of extended benefits determined under this paragraph could be less than the amounts determined under paragraphs (1) and (2) when, for example, an individual was paid regular benefits equal to 30 times his weekly benefit amount.)

The third amount used in the determination of an individual's total extended benefit amount is obtained by multiplying his average weekly benefit amount (as determined for the purposes of subsection (e)(2)) by 39 and subtracting from the resulting amount the total amount of regular benefits which were paid (or deemed paid) to him in the applicable benefit year.

For this purpose, regular benefits "deemed paid" are benefits to which the individual was initially determined to be entitled but which were not paid because of a reduction in his entitlement pursuant to a disqualification provision which required such reduction. Such reduction could occur, for example, under (1) a provision which requires a disqualification for a specified number of weeks with a corresponding reduction of benefits, or (2) a provision which requires the deduction of a specified payment, such as retirement pay, from the weekly and the total regular benefit amounts.

States with "additional benefits" programs.--States which already provide for "additional benefits," i.e., a program of wholly State-financed benefits to individuals who have exhausted their regular benefits, may continue such program when they enact the provision implementing the Federal-State extended benefits program. A State which decides to retain its additional benefits program may (but is not required to) enact provisions which would require the reduction of the total extended benefit amount determined under the provisions of paragraphs (1), (2), and (3) of subsection (e) by the total amount of the additional benefits paid (or deemed paid) under the wholly State-financed program for weeks of unemployment in the applicable benefit year which began before the pertinent extended benefit period became effective in the State. For this purpose, "deemed paid" has the same meaning as that with respect to regular benefits. The proviso at the end of subsection (e) includes provisions under which States that so desire could reduce the extended benefits.

(f) Beginning and termination of extended benefit period.--The State law should provide how the potential beneficiaries of extended benefits are to be notified of the beginning or the end of an extended benefit period. It could provide, for example, that the commissioner have published an appro-private notice in a newspaper (or newspapers) of general circulation in the State. Or, it could provide him with authority under which he could adopt a regulation which would spell out not only how notice of the beginning or end of the extended benefit period is to be given to the potential benefi-ciaries, but also what action they must take to protect their extended

benefit rights. Since the State law availability-to-work and ability-to-work requirements will apply to individuals who claim extended benefits, such a regulation should provide that an individual must file an extended benefit claim within a specified number of days after notice that an extended benefit period is effective in the State and that, if he fails to file within such period of days, good cause for the delay is necessary for backdating the claim. Any method adopted should be designed to achieve prompt notice so as to minimize the filing of retroactive claims at the beginning of the extended benefit period and of overpayments after the end of such period.