severance to which the employees would otherwise be entitled).

L. Until the Divestiture Assets are divested to an Acquirer(s) acceptable to plaintiff United States upon consultation with any relevant plaintiff state, defendants shall provide to the Divestiture Assets, at no cost, support services needed to maintain the Divestiture Assets in the ordinary course of business, including but not limited to:

(1) Federal and state regulatory policy development and compliance;

(2) Human resources administrative services;

(3) Environmental, health and safety services, and developing corporate policies and ensuring compliance with federal and state regulations and corporate policies;

(4) Preparation of tax returns;

(5) Financial accounting and reporting services;

(6) Audit services;

(7) Legal services;

(8) Routine network maintenance, repair, improvements, and upgrades;

(9) Switching, call completion, and other services necessary to allow subscribers to use mobile wireless services and complete calls; and

(10) Billing, customer care and customer service related functions necessary to maintain the subscriber account and relationship.

M. Within twenty (20) days after the filing of the Complaint, defendants will notify plaintiff United States and plaintiff states in writing of the steps defendants have taken to comply with this Section.

N. This Preservation of Assets Stipulation and Order shall remain in effect until consummation of the divestitures required by the proposed Final Judgment or until further order of the Court.

Dated: October 25, 2004

Respectfully submitted,

For Plaintiff United States

/s/ _____

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Signature by the State of Texas on Preservation of Assets Stipulation and Order in *United States of America, State of Connecticut and State of Texas* v. *Cingular Wireless Corporation, SBC Communications Inc., BellSouth Corporation and AT&T Wireless Services Inc.*

For Defendants Cingular Wireless Corporation and SBC Communications Inc.

/s/ _____

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/s/ _____

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Order

It is so ordered by the Court, this ____ day of _____, 2004.

/s/ _____

United States District Judge

[FR Doc. 04–25323 Filed 11–12–04; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF LABOR

Employment and Training Administration

Workforce Security Programs: Unemployment Insurance Program Letter Interpreting Federal Law

The Employment and Training Administration interprets Federal law requirements pertaining to unemployment compensation. These interpretations are issued in Unemployment Insurance Program Letters (UIPLs) to the State Workforce Agencies. UIPL 30–04, Change 1 is published in the **Federal Register** in order to inform the public.

This UIPL provides additional guidance to the states regarding enacting legislation which conforms to the ''SUTA Dumping Prevention Act of 2004,'' which was signed by the President on August 9, 2004.

Dated: November 8, 2004.

Emily Stover DeRocco,

Assistant Secretary of Labor.

Employment and Training Administration, Advisory System, U.S. Department of Labor, Washington, DC 20210

Advisory: Unemployment Insurance Program Letter No. 30–04 Change 1

To: State Workforce Agencies.

From: Cheryl Atkinson, Administrator, Office of Workforce Security.

Subject: SUTA Dumping—Amendments to Federal Law Affecting the Federal-State Unemployment Compensation Program—Additional Guidance.

1. *Purpose.* To provide additional guidance to states concerning the amendments to Federal law designed to prohibit ''SUTA Dumping.''

2. *References.* Public Law (Pub. L.) 108–295, the ''SUTA Dumping Prevention Act of 2004,'' signed by the President on August 9, 2004; the Social Security Act (SSA); the Internal Revenue Code (IRC), including the Federal Unemployment Tax Act (FUTA); and Unemployment Insurance Program Letters (UIPLs) 30–04, 14–84, and 29–83, Change 3.

3. *Background.* UIPL 30–04 informed states of the amendments to Federal unemployment compensation (UC) law made by Pub. L. 108–295, the ''SUTA Dumping Prevention Act of 2004.'' Pub. L. 108–295 amended the SSA by adding section 303(k) to establish a nationwide minimum standard for curbing SUTA dumping. States will need to amend their UC laws to conform with the new legislation.

Since the issuance of UIPL 30–04, the Department of Labor has received requests for clarification and other questions on the Federal SUTA dumping requirements. This UIPL is issued to respond to these requests and questions. As was UIPL 30–04, it is a question and answer (Q&A) format. States are especially directed to Q&As 1, 2, 14, and 15, which include additions and modifications to the draft legislative language provided with UIPL 30–04.

4. *Action.* State administrators should distribute this advisory to appropriate staff. States must adhere to the requirements of Federal law contained in this advisory.

5. *Inquiries.* Questions should be addressed to your Regional Office.

6. *Attachment.*

Questions and Answers (Q&As)

Mandatory Transfers—Section 303(k)(1)(A), SSA

1–1. Question: In anticipation of a major layoff, Employer A transfers the portion of its business and workforce which it will be laying off to a small company, Employer B. Since there is substantially common ownership, experience is also transferred. Employer B then lays off all of the transferred workforce and is charged for the resulting UC payments. Employer B then either ceases operating or operates with a greatly reduced workforce, thereby minimizing its UC costs. May the transfer of experience from Employer A to Employer B be voided in this case? If not, what can be done to avoid this type of SUTA dumping?

Answer: Since there is substantially common ownership, experience must be transferred from Employer A to Employer B under the mandatory transfer provisions.

Although Federal law does not require states to prevent this type of SUTA dumping, states may take action. (States which charge benefits to the separating employer may be particularly vulnerable to this type of SUTA dumping.) If the state determines that a substantial purpose of the transfer of trade or business was to obtain a lower rate, then both Employer A and Employer B's accounts could be treated as a single account for experience rating purposes. This will prevent Employer A from escaping its poor experience. It is consistent with Federal law both because Section 303(k)(2)(B), SSA, permits states to define ''employer'' and because Section 3303(a)(1), FUTA, has long permitted the establishment of joint accounts. To this end, the draft legislative language contained in Attachment II to UIPL 30–04 is revised as follows:

• By inserting ''(1)'' after ''(a)'' in the provision addressing mandatory transfers, and

• By inserting the following new language:

(2) If, following a transfer of experience under paragraph (1), the Commissioner determines that a substantial purpose of the transfer of trade or business was to obtain a reduced liability for contributions, then the experience rating accounts of the employers involved shall be combined into a single account and a single rate assigned to such account.

The Department recommends that states consider addressing this matter.

Alternatively, nothing prohibits a state from revisiting its determination that Employer B was a separate legal entity for UC purposes. If, for example, the state determines that Employer B has no business existence separate and apart from Employer A, and, therefore, under its law should not have been established as a separate employer for UC purposes, then its establishment as a separate employer may be voided and its experience will revert to Employer A. (Note this approach would not cover transfers to a long-established business that has a separate business identity.)

1–2. Question: Although the answer to Q&A 5 of UIPL 30–04 provides that an ''employer's workforce is necessarily a part of its business,'' the draft legislative language attached to that UIPL does not specifically address transferring workforce. Instead, it simply refers to transfers of trade or business. May the draft legislative language be modified to specifically cite transfers of workforce or employees?

Answer: Yes. The draft legislative language is just that—draft language. It may, therefore, be modified to explicitly provide that transfers of trade or business include situations where employees are transferred. The following language is added at the end of subsection (a) of the draft legislative language as optional language that the state may consider using:

The transfer of some or all of an employer's workforce to another employer shall be considered a transfer of trade or business when, as the result of such transfer, the transferring employer no longer performs trade or business with respect to the transferred workforce, and such trade or business is performed by the employer to whom the workforce is transferred.

Care should be taken to assure the state law does not require transfers of experience where an employee is ''moved'' from one employer to another, without any transfer of trade or business. See Q&A 1–7.

1–3. Question: The answer to Q&A 6 in UIPL 30–04 indicates that the Department is not defining a ''bright line'' test of what constitutes ''substantially common ownership, management, or control.'' Does this mean state law may contain a test of ''substantially common'' that requires more than 90 percent commonality? Or more than 50 percent commonality?

Answer: No, a 90 percent test would be a ''substantial majority'' test, while a 50 percent test would be a simple ''majority'' test. Congress could have specified either of these tests, but it instead chose a test of ''substantial'' commonality. Therefore, ''substantially'' could include less than 50% common ownership, management, or control. ''Substantial'' common management, for example, might even occur where Company A and Company B share only one manager, but that one manager exercises pervasive control as the chief executive officer of both companies.

1–4. Question: The answer to Q&A 8 in UIPL 30–04 ''strongly recommends that states reassign rates immediately upon completion of the transfer'' of experience to avoid a SUTA dump between the completion of a transfer and assignment of a new rate. If a state currently lacks the capability to assign two different rates to the same employer for the same year, may it retroactively change the employers' rates to the beginning of the rate year to reflect the transferred experience?

Answer: No. Section 3303(a)(1), FUTA, requires that ''reduced rates'' be assigned to an employer based on ''his'' experience during ''not less than the 3 consecutive years immediately preceding the computation date.'' If a rate based on transferred experience is assigned to an employer for a period before it becomes ''his'' experience, the employer cannot be said to be receiving a rate based on ''his'' experience for that period.

States have other options to address this concern. States may establish a different employer account number for the employer(s) and assign the recalculated rate to that new account number.

States may also retroactively impose the state's standard rate of contributions or the state's highest rate of contributions since these rates are not ''reduced rates'' subject to FUTA. (*See* UIPL 14–84 for guidance in determining the state's standard rate. Caution should be taken in using standard rates since in some states the standard rate may be lower than the employer's experience rate, either prior to or after any transfer.) Although this approach is consistent with FUTA, states should consider whether retroactively imposing higher rates on employers is equitable since employers will not have budgeted for retroactive costs and because the rates are not based on experience.

1–5. Question: Recalculating an employer's reduced rate in the middle of the rate year may be administratively cumbersome. May a state simply assign the employer the higher of the two rates for the remainder of the rate year? For example, assume Employer A has a rate of 5.0 percent and is purchased by Employer B which has a rate of 4.0 percent. May the state assign a rate of 5.0 percent to Employer B for the remainder of the rate year? (This method is authorized by UIPL 29–83, Change 3, which discusses transfers of experience, but only when Employer B is not an existing employer.)

Answer: Yes, the state may assign the higher of the two rates. FUTA's experience rating requirements apply to ''reduced rates.'' This approach always serves to increase the employer's rate. As noted in UIPL 29–83, Change 3, ''Since assigning the highest rate results in an increased rate (even though it may be less than the standard rate), there is no conflict with FUTA.'' Although UIPL 29–83, Change 3, addressed only cases where the successor was not an existing employer, this principle also applies to cases where the successor is an employer.

States should note that this approach may raise fairness issues. For example, assuming substantial commonality of ownership, management, or control at the time of the transfer or trade or business, an employer with a workforce of 10 individuals and an experience rate of 5.4 percent could have its trade/business and experience transferred to an employer with a workforce of 1,000 individuals and an experience rate of 2.0 percent. The result of assigning a higher rate would be a significantly higher rate on a significantly larger workforce.

1–6. Question: The answer to Q&A 8 in UIPL 30–04 provides for the option of ''immediately'' recalculating an employer's rate ''after the completion of the transfer of trade or business.'' This could be problematic since this rate change could occur in the middle of a quarter. May the recalculated rate take effect with the start of the quarter following the transfer?

Answer: Yes. Since nothing in the SUTA dumping amendments requires rates be

recalculated prior to the next time the state calculates rates for all employers, states have latitude in this matter.

1–7. Question: The answer to Q&A 9 in UIPL 30–04, says that where ''[a]n employee of one legal entity is moved to another legal entity,'' no transfer of experience is required. (Emphasis added.) However, the answer to Q&A 13 in that UIPL says the SUTA Dumping amendment applies to ''all transfers, large and small.'' What is the distinction between the two?

Answer: Q&A 13 applies to cases where there is a transfer of trade or business. (Q&As 5 and 14 in UIPL 30–04 and 1–2 in this UIPL also apply to situations where trade or business is transferred.)

The answer to Q&A 9 applies to cases where an employee is ''moved'' from one legal entity to another, but where there is no transfer of trade or business. For example, an owner of two separate legal entities ''moves'' an individual from head of widget making for Entity A to head of graphic design for Entity B, but does not transfer any of the widget-making trade/business to Entity B. In this case, no trade or business is transferred and the ''move'' of the individual is in the nature of a reassignment.

In cases where no trade or business has been transferred, experience may not be transferred. Therefore, when an employee's ''move'' is merely in the nature of a reassignment, the state may not transfer experience.

1–8. Question: State law allows employers to voluntarily combine their experience rating histories into joint accounts under certain conditions. Does the SUTA dumping legislation affect this?

Answer: No. Joint accounts may continue to be established in accordance with state law.

The SSA's mandatory transfer provisions affect joint accounts in the same way they affect individual employer accounts. That is, if an employer participating in a joint account transfers trade or business to another employer and a transfer of experience is required under provisions of state law implementing the SSA's mandatory transfer provisions, then any subsequent calculation of the experience rate of the joint account must take into account this transfer.

1–9. Question: Do the amendments mandating a transfer of experience affect what constitute taxable wages?

Answer: The amendments address the transfer of experience and of rates based on that experience. They do not affect determinations of what constitute taxable wages under the state's law. As a result, after trade and business is transferred, the state may either give effect to taxable wages paid by the predecessor in determining whether the taxable wage base is met, or ''restart'' the taxable wage base for the individual at zero.

1–10. Question: Do the mandatory transfer provisions for SUTA Dumping apply when an employer is ''reorganized?''

Answer: The keys under section 303(k)(1)(A), SSA, are whether there is a transfer of trade or business and whether there is substantially common ownership, management, or control. Thus, the answer depends on whether the reorganization involves a transfer of trade or business between entities under substantially common ownership, management or control.

As used in bankruptcy law, a reorganization is a ''financial restructuring of a corporation, esp. in the repayment of debts, under a plan created by a trustee and approved by a court.'' (Black's Law Dictionary (8th edition, 2004).) Thus, if a single employer simply ''financially restructures'' itself, without transferring trade or business, then the mandatory transfer provisions do not apply.

In other cases, reorganizations are mergers of corporations which involve a transfer of trade or business. For example, a reorganization may be a ''restructuring of a corporation, as by a merger or recapitalization, in order to improve its tax treatment under the Internal Revenue Code.'' (Black's Law Dictionary (8th edition, 2004).) When there is a merger, the mandatory transfer provisions will apply if there is substantially common ownership, management, or control at the time of the transfer of trade or business.

Note the mandatory transfer provision of Section 303(k)(1)(A), SSA, does not speak in terms of ''acquisitions.'' In many reorganizations, there may be mergers involving stock swaps or stock-for-asset exchanges, and it may be argued that no ''acquisition'' has occurred, even though workforce has been moved to another legal entity within a corporate umbrella. For purposes of the mandatory SUTA dumping amendments, whether there has been an ''acquisition'' is immaterial. What is significant is whether trade or business was transferred when, at the time of the transfer, there is substantially common ownership, management, or control. If this occurs, then the experience must also be transferred.

Required Penalties—Section 303(k)(1)(D), SSA

1–11. Question: The draft legislative language attached to UIPL 30–04 provides that, in addition to any civil penalty, ''any violation of this section *may be* prosecuted as a'' criminal offense. (Emphasis added.) Does this mean that inclusion of criminal penalties is optional on the part of the state?

Answer: No, section 303(k)(1)(D), SSA, clearly requires that state law must provide that ''meaningful civil and criminal penalties'' are imposed under certain circumstances. (*See* Q&A 19 in UIPL 30–04.) The draft legislative language quoted in the question merely indicates that the state has discretion to apply criminal penalties as appropriate. As noted in Q&A 20 in UIPL 30–04, ''States will take into account the amounts at issue and the likelihood of successful prosecution in determining which cases will result in criminal prosecutions.''

1–12. Question: State law must provide for the imposition of penalties for persons who ''knowingly'' violate or attempt to violate those provisions of state law that implement section 303(k), SSA, and for those who ''knowingly'' advise another person to violate such provisions. Since it is often difficult to prove that an action is done ''knowingly,'' may state law provide that penalties may be imposed using a lower level of proof?

Answer: Yes. The ''knowingly'' test is the minimum standard that state law must contain to meet the requirements of Section 303(k)(1)(D), SSA. States must assure that any such test is at least as encompassing as the ''knowingly'' standard.

Statute of Limitations

1–13. Question: Assume a ''SUTA dump'' occurred five years before the state identified it. The state's statute of limitations prevents the state from assessing contributions more than three years prior to the date of detection. Does this statute of limitations conflict with the SUTA dumping amendments?

Answer: No. Nothing in the SUTA dumping legislation overrides a state's statute of limitations. As a result, in the above example, the state may limit its assessment of contributions to the three-year period provided in its statute of limitations.

Draft Legislative Language

1–14. Question: Subsection (c)(1) of the draft legislative language attached to UIPL 30–4 provides for civil penalties for persons knowingly violating or attempting to violate ''subsections (a) *and* (b) or any other provision of this Chapter related to determining the assignment of a contribution rate? (Emphasis added.) Should the ''and'' be an ''or''?

Answer: Yes. The word ''and'' could be read to mean that the person must have violated, or attempted to violate, both the mandatory transfer provision and the prohibited transfer provision. Therefore the draft legislative language should be corrected by changing ''and'' to ''or''.

Also, note there is a typo in subsection (e)(2) of the draft legislative language. ''Trade *of* business'' should be corrected to ''Trade *or* business.'' (Emphasis added.)

1–15. Question: Subsection (c)(4) of the draft legislative language attached to UIPL 30–4 provides that ''In addition to the penalty imposed by paragraph (1), any violation of this section may be prosecuted.* * *'' May ''section'' be changed to ''Chapter''?

Answer: Yes. Using the word ''chapter'' will have the effect of making the criminal penalties applicable to any other provision of the state's UC law related to determining the assignment of a contribution rate. Note that states are not required to apply the penalties they develop for SUTA dumping to other violations of state law. (*See* Q&A 24 in UIPL 30–04.)

[FR Doc. E4–3162 Filed 11–12–04; 8:45 am]

BILLING CODE 4510–30–P

MISSISSIPPI RIVER COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: Mississippi River Commission.

TIME AND DATE: 1 p.m., December 15, 2004.

PLACE: Mississippi River Commission Headquarters Building, 1400 Walnut Street, Vicksburg, MS.