REPORT OF THE
VIRGINIA EMPLOYMENT COMMISSION ON

THE UNEMPLOYMENT INSURANCE COVERAGE OF IN-STATE EMPLOYMENT OF VIRGINIA CITIZENS BY OUT-OF-STATE EMPLOYERS

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 58

COMMONWEALTH OF VIRGINIA
RICHMOND
1997

COMMONWEALTH of VIRGINIA

Virginia Employment Commission

Dr. Thomas J. Towberman
Commissioner

703 East Main Street

Post Office Box 1358
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December 31, 1996

TO: The Honorable George Allen, Governor,

and

Members of the General Assembly of Virginia

I am pleased to submit the Virginia Employment Commission's report on the unemployment insurance coverage of in-state employment of Virginia citizens by out-of-state employers, as required by House Joint Resolution 232 enacted by the 1996 General Assembly. I hope you will find it helpful and responsive.

Sincerely,

Thomas J. Towberman

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PREFACE

The national employment security system is a federal-state partnership designed to provide temporary assistance to workers who are unemployed through no fault of their own. The Virginia Employment Commission is entrusted with the administration of the Virginia Unemployment Compensation Act, Title 60.2 of the Code of Virginia.

An issue has been raised, particularly in one case, concerning the unemployment insurance coverage of services performed by Virginians working for employers who are not in Virginia. This report is in response to House Joint Resolution No. 232 enacted by the 1996 Session of the General Assembly addressing this concern. The report was prepared by Amy K. Averill, Policy Assistant, with the assistance of Otis C. Dowdy, Chief of Tax and M. Coleman Walsh, Chief Administrative Law Judge.

EXECUTIVE SUMMARY

The 1996 Session of the General Assembly enacted House Joint Resolution No. 232, which requested the Virginia Employment Commission to examine the application of the unemployment compensation laws of the Commonwealth to the in-state employment of Virginia citizens by out-of-state employers (Appendix A). The resolution also requested that the Commission make recommendations concerning whether modifications should be made to the Virginia Unemployment Compensation Act to ensure that these workers are not unreasonably denied unemployment insurance benefits.

The Commission examined the current statute and the requirements of federal law as they relate to such employment. It was determined that a federal standard has been followed by all states in determining the coverage of in-state services for out-of-state employers and that the particular case which prompted the General Assembly's request was unique due to extraordinary circumstances. The Commission recommends that no legislative changes be sought to address an individual situation.

BACKGROUND of the EMPLOYMENT SECURITY SYSTEM

The unemployment insurance program was created under Title IX of the Social Security Act of 1935 as a joint federal-state system to provide temporary financial assistance to workers who are unemployed through no fault of their own. Employers report and pay a state tax quarterly on the wages of their employees; these revenues are deposited into a trust fund solely for the payment of unemployment benefits. Through the Federal Unemployment Tax Act (FUTA), employers also pay a tax to the federal government on the first $7,000 of an employee's wages. A portion of these funds are then returned in grant form to the states for the administration of their programs.

FUTA has given states vast discretion in the operation of their employment security systems, particularly in the area of establishing benefit eligibility requirements and employer tax structures. Congress and the United States Department of Labor have set forth, however, certain basic requirements that states must follow in order to enjoy the benefits of federal certification of their programs. One such requirement is that all wages which are taxable under FUTA must also be treated as taxable by the states.

Employment for which taxes must be paid and wages must be reported to a state's employment security agency is considered "covered." Once covered employment has been established in a state, an employee's reported wages are used in determining monetary eligibility for benefits on an unemployment insurance claim pursuant to the laws of that state. Any other eligibility issues arising from the claim also will be determined and adjudicated according to that state's law.

LOCALIZED and NON-LOCALIZED EMPLOYMENT

The policy which governs the establishment of tax liability and, therefore, unemployment insurance coverage of services performed by a worker employed by an out-of-state employer dates back to 1952. In a letter of the same year from the U.S. Department of Labor, a test to be used by states in determining the status of employment within and without their boundaries was articulated (Appendix B). Since that time states have adhered to these parameters by incorporating them into their statutes, in the interest of extending benefits to as many workers as possible.

Section 60.2-217.A of the Code of Virginia states that:

"The term 'employment' shall include an individual's entire service, performed within or both within and without this Commonwealth if:

1. The service is localized in this Commonwealth; or
2. The service is not localized in any state but some of the service is performed in this Commonwealth and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this Commonwealth; or (ii) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this Commonwealth."

The Code continues in section 60.2-217.D.1 to state:

"Service shall be deemed to be localized within a state if:

a. The service is performed entirely within such state; or
b. The service is performed both within and without such state, but the service performed without such state is incidental to the individual's service within the state, for example is temporary or transitory in nature or consists of isolated transactions.

In the event that services may be considered to be localized in more than one state, Section 60.2-217.C.3 gives the Virginia Employment Commission authority to enter into a reciprocal agreement with another state's employment security agency, allowing the employer to localize the services in only one state.

Additionally, Section 60.2-217.B provides that:

"Services performed within this Commonwealth and not covered under subsection A of this section shall be deemed to be employment subject to this title if taxes are not required and paid with respect to such services under an unemployment compensation law of any other state or of the federal government."

These provisions, like the unemployment compensation statutes of all other states, closely follow the guidance set out in the Program Letter. Through the consistent application of these standards, the national employment security system attempts to extend coverage to the greatest number of workers.

The particular case referenced by House Joint Resolution No. 232, however, was unique. Although the resolution mentions that the employee's work was performed on military installations within Virginia, this fact had no bearing on the localization of her employment. The distinguishing factor in this case was that the employing unit was an out-of-state university doing business in Virginia. The claimant who was denied benefits in this instance was an employee of a sovereign state. The Federal Unemployment Tax Act excludes from the definition of employment "service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions..." [26 U.S.C.A. 3306 (c)(7)].

By prohibiting the Commonwealth from taxing another sovereign state on the wages of its employees, whether or not they perform their services in Virginia, this statute precludes any such employment from being covered by the provisions of the Virginia Unemployment Compensation Act. In the cited case, the claimant did file a claim for benefits with the state by which she was employed.

CONCLUSION and RECOMMENDATION

The Virginia Employment Commission was asked by the General Assembly in House Joint Resolution No. 232 to make recommendations regarding any modifications to the Code of Virginia which may allow more coverage by the Virginia Unemployment Compensation Act to Virginia citizens employed by out-of-state employers.

While in one unfortunate instance extenuating circumstances prevented coverage under the laws of the Commonwealth, the claimant was covered by the statutes of the state for which she worked. Through the extensive means provided by the Department of Labor and echoed in Section 60.2-217 of the Code, the Commission is able to work in cooperation with employers in other states to ensure the proper treatment of the services performed by their employees in Virginia.

Any desire to change Virginia law would require a change in federal law, which could have the unintended consequence of allowing other states to impose unemployment insurance taxes on Virginia. We do not recommend pursuing such an amendment to address an isolated situation.

GENERAL ASSEMBLY OF VIRGINIA -- 1996 SESSION

HOUSE JOINT RESOLUTION NO. 232

Requesting the Virginia Employment Commission to examine the application of the unemployment compensation laws of this Commonwealth to the in-state employment of Virginia citizens by out-of-state employers.

Agreed to by the House of Delegates, February 8, 1996
Agreed to by the Senate, March 6, 1996

WHEREAS, the unemployment compensation program is a critical safety net for the Commonwealth's workforce; and

WHEREAS, such program is intended to furnish a temporary source of income to those individuals who become unemployed through no fault of their own; and

WHEREAS, in some cases where citizens of Virginia perform services within the Commonwealth for out-of-state employers, such employment may be subject to the laws of another state; and

WHEREAS, some Virginia citizens in such circumstances have been denied unemployment compensation benefits because of the application of such other states' laws, but would have been granted benefits if the laws of the Commonwealth had been applied; and

WHEREAS, in at least one case the laws of another state were applied to a Virginia citizen's unemployment compensation claim when such individual's wages were earned in Virginia on federal military installations, resulting in a loss of benefits; and

WHEREAS, whether such employments are subject to Virginia law governing employer liability for Virginia unemployment compensation taxes and the payment of benefits or subject to the laws of another state is critical to individuals in such circumstances; and

WHEREAS, the citizens of the Commonwealth would benefit from a clarification of such laws; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Virginia Employment Commission be requested to examine the application of the unemployment compensation laws of this Commonwealth to the in-state employment of Virginia citizens by out-of-state employers. The Commission shall make recommendations concerning whether modifications should be made to Virginia's unemployment compensation laws to ensure that Virginia citizens working for out-of-state employers are not unreasonably denied unemployment compensation benefits.

The Virginia Employment Commission shall complete its work in time to submit its findings and recommendations to the Governor and the 1997 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

In reply refer to ULSL.

U. S. DEPARTMENT OF LABOR
Bureau of Employment Security
Washington 25, D. C.

Unemployment Insurance Program
Letter No. 291
July 1, 1952

TO: ALL STATE EMPLOYMENT SECURITY AGENCIES

SUBJECT: Adoption of Uniform Interpretation of the Definition of Employment With Respect to Service Performed Within and Without a State.

A statement of principles for applying the statutory provisions on localization of work to actual situations in making coverage determinations was sent for comment to all State agencies with Unemployment Insurance Program Letter No. 273. The comments received from State agencies were overwhelmingly in favor of adopting the recommended principles. The replies were discussed with the Interstate Benefit Payments Committee at its April 1952 meeting, and the statement is now being reissued, with minor changes as agreed on by the Bureau and the Committee. We ask that all State agencies adopt it, and put it into operation as soon as possible.

The attached statement, as revised, has been strengthened by:

(1) Pointing out that a State agency must determine whether the application of a test results in coverage under its law, or under the law of some other State, before deciding that the test does not apply and before using the next test.

(2) Adding a fourth illustration to the types of factors to be considered in determining whether service is incidental or transitory (i.e., is the work performed outside the State of the same nature as, or is it different from, the work performed within the State).

(3) Suggesting that, while no fixed length of time can be used to determine whether service performed outside the State is incidental to that within the State, the calendar year can be used as a guide, taking into consideration also the circumstances under which the work is performed.

Although some question was raised concerning coverage of musicians, the majority of State agencies did not disagree with the special criteria suggested for determining the State of coverage of "name" bands when the leader is held to be the employer, and no change is made in the method recommended.

If any questions arise in applying to specific cases the principles recommended in the statement, please send them to the Bureau as a clearing house so that we may clarify and revise the statement as necessary to keep it abreast of actual

situations. We appreciate the help that has been given us by the State agencies in developing the statement, and we hope that it will be useful in reducing differences in interpretation on coverage questions. After there has been sufficient experience under these principles, we shall incorporate them in the Employment Security Manual.

Please let us know, through the appropriate regional office, when you adopt the principles recommended and, as provided in the Employment Security Manual, part I, sections 1203 and 1260, send us the required number of copies of any policy statement procedures, and training or other material which you issue on this subject.

Sincerely yours,

/s/ ROBERT C. GOODWIN

Robert C. Goodwin
Director

Attachment

U. S. DEPARTMENT OF LABOR
Bureau of Employment Security
Washington 25, D. C.
July 1, 1952

UNEMPLOYMENT INSURANCE COVERAGE OF SERVICE PERFORMED BOTH WITHIN AND WITHOUT A STATE

Interpretation of "Localization of Work" Provisions

The objective of the localization provisions in State unemployment insurance laws is to cover under one State law all of the service performed for one employer by an individual, wherever it is performed. Because the importance of uniformity was recognized early in the unemployment insurance program, the provisions in the State laws on localization of work are in generally uniform terms. These uniform provisions, however, have not always been uniformly interpreted, and some conflicts have arisen. In some cases, dual coverage has resulted in double taxation of the employer for the same service, and in other cases some service that should have been covered has not been covered by any State law and has resulted in a loss of benefit rights to the worker.

The following principles for applying the statutory provisions are recommended as a guide for all State agencies. All the examples are actual State decisions or have been taken from State manuals of interpretation or instruction.

The localization provision as it appears in section 2(k)(2) and (3) of the September 1950 edition of the Manual of State Employment Security Legislation is as follows:

"(2) The term 'employment' shall include an individual's entire service, performed within, or both within and without, this State if the service is localized in this State. Service shall be deemed to be localized within a State if:

"(A) the service is performed entirely within such State; or

"(B) the service is performed both within and without such State but the service performed without such State is incidental to the individual's service within the State; for example, is temporary or transitory in nature or consists of isolated transactions.

"(3) The term 'employment' shall include an individual's entire service, performed within, or both within and without, this State if the service is not localized in any State but some of the service is performed in this State and

"(A) the individual's base of operations is in this State; or

"(B) if there is no base of operations, then the place from which such service is directed or controlled is in this State; or

"(C) the individual's base of operations or place from which such service is directed or controlled is not in any State in which some part of the service is performed, but the individual's residence is in this State."

The provisions in the State laws generally follow the text are recommended in the 1937 draft bill, and this language, as ordinarily interpreted, requires application of the tests in the following prescribed sequence:

(1) Is the individual's service localized in this State or some other State?

(2) If his service is not localized in any State, does he perform some service in the State in which his base of operations is located?

(3) If he does not perform any service in the State in which his base of operations is located, does he perform any service in the State from which his service is directed and controlled?

(4) If he does not perform any service in the State from which his service is directed and controlled, does he perform any service in the State in which he lives (has his residence)?

Thus, a State agency must first determine whether an individual's service is localized in that State. That is, it must find out whether his service performed outside the State is incidental to that performed in the State. If so, his service is localized in the State making the determination. If not, it is necessary before going to the second test to find out whether his service is localized in some other State. Is the service which he performed in the State making the determination incidental to that he performed in some other State? If so, all his service is localized in the other State and is subject to the law of that State. It may be found, however, that part of his service is localized in one State, part in another. In such a case, it may be desirable for the employer to elect to cover all of such individual's service in one State under the reciprocal coverage arrangement.

Only if the service is not localized in any State is any other test necessary. If the service is not localized, it is necessary to determine where the individual's base of operations is and whether he performs any service in that State

The person who makes the coverage determination will have to ask "Does the i vidual have his base of operations in this State and does he perform any ser here?" If the answer to either question is "No," the next question is "Is h base of operations in any State in which he performs some service?" If it i all of his service is covered by the law of that State.

If the individual has no base of operations or if he performs no service in State in which his base of operations is located, and his coverage is not de mined by this test, then it is necessary to apply the third test, that of di tion and control in the same manner. If the individual performs no service the State from which his service is directed and controlled and his service therefore not covered by this test in the State making the determination or any other State, then it is necessary to apply the fourth test, that is to f out whether the individual performs any service in the State in which he liv Here again, all the service may be found to be covered in the State making t determination, or in some other State.

I. Place Where Work Is Localized

It is necessary to determine first whether the service in question is localized in any State. Service is localized in a State if it is perf entirely within the State, or, if it is performed both within and th the State and the service performed outside the State is incident to the individual's service performed within the State. Service is consi incidental, for example, if it is temporary or transitory in nature, c consists of isolated transactions.

A. In determining whether the service of a worker is incidental or transitory in nature, some of the factors to be considered are:

1. Is it intended by the employer and the employee that the service is an isolated transaction or a regular part of the employee's work?

2. Does the employee intend to return to the original State upon completion of the work in the other State, or is it his intention to continue to work in the other State?

3. Is the work performed outside the State of the same nature as, or is it different from, the tasks and duties performed within the State?

4. How does the length of service with the employer within the State compare with the length of service outside the State?

Because of the wide variation of facts in each particular situation, no fixed length of time can be used as a yardstick in determining whether the service is incidental or not. The calendar year should, however, be used as a guide, provided that it is applied with some flexibility, taking into consideration the various circumstances under which the work is performed, such as the terms of the contract of hire, whether written or oral.

B. Examples of services which are localized:

1. All service performed in one State:

A salesman for a New York corporation, who lives in Indiana and performs all his service in Illinois, is subject to the Illinois law because all his service is performed in Illinois, even though the corporation for which he performs the service is located in New York and his residence is in Indiana.

2. Service performed within and without a State:

A contractor had a place of business in California where he maintained his records and stored his equipment, and from which he directed his various jobs wherever located. All of his jobs had been in California but he obtained a contract for a single job in Nevada which took 7 months to complete. During and after the completion of his work in Nevada, the contractor continued his activities in California.

a. A resident of California was hired in California to work on the Nevada job. When the work in Nevada was completed, he was laid off and not rehired by this employer. His service in traveling from California to Nevada was incidental to his service in Nevada. All his service was localized in Nevada and was subject to the Nevada law.

b. A resident of California had been a foreman on the employer's payroll for several years. He was moved from a California job to the Nevada job where he performed service until the completion of the job, at which time he came back to California for continued work with the same employer. Although this employee was in Nevada for 7 months, his regular work was in California, and the Nevada service was temporary in nature and incidental to the California service. His service, therefore, was localized in California, and his service in Nevada was subject to the California law.

I. B. 2. c. A resident of Nevada was hired for the Nevada job only. After the end of several months of employment in Nevada, he continued performing service for this employer for an equal length of time on another job in California. While the employee was working in Nevada, his service was localized there and was covered by the Nevada law because that was the only job the individual was hired for, and the Nevada contract was an isolated transaction of the employer with no likelihood of future Nevada employment for the individual. Since his move to California was considered permanent, his service in California is localized there and is subject to the California law.

II. Base of Operations

If an individual's service is not localized in any State, it is necessary to apply the second test in the statute: Does the individual perform some service in the State in which his base of operations is located? The individual's base of operations should not be confused with the place from which his service is directed or controlled.

The "base of operations" is the place or fixed center of more or less permanent nature from which the employee starts work and to which he customarily returns in order to receive instructions from his employer, or communications from his customers or other persons, or to replenish stocks and materials, to repair equipment, or to perform any other functions necessary to exercise his trade or profession at some other point or points. The base of operations may be the employee's business office which may be located at his residence, or the contract of employment may specify a particular place at which the employee is to receive his directions and instructions. This test is applicable principally to employees, such as salesmen, who customarily travel in several States.

A. Examples of nonlocalized service, where coverage is decided by the base-of-operations test:

1. A salesman, a resident of California, sold products in California, Nevada, and Oregon for his employer whose place of business was in New York. The salesman operated from his home where he received instructions from his employer, communications from his customers, etc. Once a year the salesman went to New York for a two-week sales meeting. His base of operations was in California and he performed some service in California. Therefore, all of his service was covered by the California law.

II. A. 2. An employee worked for a company whose home office was in Pennsylvania. He was made a regional director working out of a branch office in New York. He worked mostly in New York but spent considerable time also in Pennsylvania and New Jersey. The individual's base-of-operations was in New York. Since he performed some service in New York and his base of operations was in New York, it is immaterial that the source of direction and control was in Pennsylvania, and all of the individual's service was covered by the New York law.

B. The base-of-operations test may also be used to determine the State of coverage of service performed by traveling bands and orchestras. When the owners or executive officers remain in the State where the main office is maintained, the application of the test to an organization other than a sole proprietorship creates no problem. In applying the test to a sole proprietorship, when the owner (usually the leader) travels with the band, factors to be considered are:

1. Residence and mailing address of the owner

2. Location of accountant or business manager who acts as the owner's agent

3. State in which income tax returns are filed by the owner

4. State in which the owner has a traveling card from a musician's union

5. State from which the band starts and to which it returns after the completion of a tour

Examples involving bands and orchestras:

a. The leader, the sole proprietor of a traveling independent band, resides in California, receives mail in California, carries a traveling card from a California musician's union, and has a business agent in California. The band performs in several States, and its services are not localized in any State. All services of any employee who performs services in California as well as in other States are in employment in California under the base-of-operations test. Even though the leader travels with the band, the principal base-of-operations for the leader and individual musicians remains fixed in California where the leader maintains his headquarters while in travel status.

II. B. 5. b. The band leader in the preceding example, while in Oregon, hired a resident of Oregon as a permanent member of the band. Under the contract of hire, the employee was to travel with the band in California and other States. Under the base-of-operations test, this employee's services are in employment in California during all periods. It is recognized that there may be a reporting period during which this employee performs services only in the State of Oregon. Furthermore, there may be a reporting period or periods during which this employee may be performing services in several States but not as yet in California. However, because of the period and location of employment expressed in the contract of hire, the services are considered in employment in California.

III. Place From Which the Service Is Directed or Controlled

If the individual has no base-of-operations, or if he has such a base but does not perform any service in the State in which it is located, or if the base-of-operations moves from State to State, it is necessary to find out whether any of the individual's service is performed in the State from which his service is directed or controlled. The place from which an individual's service is directed or controlled is the place at which the basic authority exists and from which the general control emanates, rather than the place at which a manager or foreman directly supervises the performance of services under general instructions from the place of basic authority.

Examples of service which is not localized in any State, where coverage is decided by the place-of direction-and-control test:

A. A contractor whose main office is in California is regularly engaged in road construction work in California and Nevada. All operations are under direction of a general superintendent whose office is in California. Work in each State is directly supervised by field supervisors working from field offices located in each of the two States. Each field supervisor has the power to hire and fire personnel; however, all requests for manpower must be cleared through the central office. Employees report for work at the field offices. Time cards are sent weekly to the main office in California where the payrolls are prepared. Employees regularly perform services in both California and Nevada. It is determined that neither the localization nor the base-of-operations test applies. Since the basic authority of direction and control emanates from the central office in California, the services of the employees are in employment in California under the place-of-direction-and-control test.

III. B. A salesman residing in Cleveland, Ohio, works for a concern whose factory and selling office are in Chicago, Illinois. The salesman's territory is Kentucky, Arkansas, Oklahoma, Illinois, and Missouri. He does not use either the Chicago office or his home in Ohio as his base of operations. Since his work is not localized in any State and he has no base of operations, all his service is covered by the Illinois law because his work is directed and controlled from his employer's Chicago office and some of his service is in Illinois.

IV. Place of Residence

If coverage cannot be determined by any of the tests above, it is necessary to apply the test of residence. Residence is a factor in determining coverage only when the individual's service is not localized in any State and he performs no service in the State in which he has his base of operations (if he has such a base) and he performs no service in the State from which his service is directed and controlled.

If none of the other tests apply, all of an individual's service is covered in the State in which he lives, provided that some of his service is performed in that State.

Examples of coverage determined by State of residence:

A. A salesman employed by an Indiana company lives in Illinois. His territory covers Iowa, Kentucky, and Illinois. His service is not localized in any State. He uses his employer's Indiana office as his base of operations, and his service is directed from that office. He performs no service in that State in which his base of operations is located nor in the State from which his service is directed and controlled. He does perform service in the State in which he lives--Illinois. Consequently, all of his service is subject to the Illinois law.

B. An individual who lives in California was hired as a member of a traveling circus to perform in California, Arizona, and New Mexico. The circus was directed and controlled from Florida. The employee performed in California and Arizona before quitting. Because none of the first three tests apply, and because he performed some service in the State in which he lived, all of his service is subject to the law of that State, California.

If, after applying all of these tests to a given set of circumstances, the individual's service is found not to be subject to any one State law, under most State laws the employer may elect to cover all of the individual's service in one State either under a provision for election of coverage or under the reciprocal coverage arrangement. Under the reciprocal coverage arrangement, the service may be covered in any one of the following States: (1) a State in which some part of the individual's service is performed, (2) the State in which he lives, or (3) a State in which the employer maintains a place of business. e section 15(c) of the September 1950 edition of the Manual of State Employment ecurity Legislation for draft legislative provision, and page C-123 for a discussion of the reciprocal coverage arrangement.