

**UNEMPLOYMENT INSURANCE - NATIVE
AMERICAN TRIBAL UNITS**

2001 GENERAL SESSION

STATE OF UTAH

Sponsor: Ed P. Mayne

This act modifies the Workforce Services Code to reflect federal law exempting American Indian tribes and tribal units from the Federal Unemployment Tax Act. This act provides that services performed in the employ of tribes are covered under state unemployment compensation, and provides for retrospective operation.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

35A-4-201, as last amended by Chapter 375, Laws of Utah 1997

35A-4-202, as last amended by Chapter 375, Laws of Utah 1997

35A-4-204, as last amended by Chapter 375, Laws of Utah 1997

35A-4-311, as renumbered and amended by Chapter 240, Laws of Utah 1996

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **35A-4-201** is amended to read:

35A-4-201. General definitions.

As used in this chapter:

(1) "Base-period" means the first four of the last five completed calendar quarters next preceding the first day of the individual's benefit year with respect to any individual whose benefit year commences on or after January 5, 1986.

(2) "Benefit year" means the 52 consecutive week period beginning with the first week with respect to which an individual files for benefits and is found to have an insured status.

(3) "Benefits" means the money payments payable to an individual as provided in this chapter with respect to the individual's unemployment.

(4) "Calendar quarter" means the period of three consecutive months ending on March 31, June 30, September 30, or December 31, or the equivalent, as the department may by rule prescribe.

(5) "Contribution" means the money payments required by this chapter to be made into the Unemployment Compensation Fund by any employing unit on account of having individuals in its employ.

(6) "Division" means the Division of Workforce Information and Payment Services.

(7) "Employment office" means a free public employment office or branch operated by this or any other state as a part of a state-controlled system of public employment offices or by a federal agency charged with the administration of an unemployment compensation program or free public employment offices.

(8) "Employment Security Administration Fund" means the fund established by Section 35A-4-505, and from which administrative expenses under this chapter shall be paid.

(9) "Extended benefits" has the meaning specified in Subsection 35A-4-402(7)(f).

(10) "Fund" means the Unemployment Compensation Fund established by this chapter.

(11) "Insured average annual wage" means on or before the 15th day of May of each year, the total wages of insured workers for the preceding calendar year, divided by the average monthly number of insured workers, determined by dividing by 12 the total insured workers for the preceding calendar year as determined under the rules of the department calculated to two decimal places, disregarding any fraction of one cent.

(12) "Insured average fiscal year wage" means on or before the 15th day of November of each year, the total wages of insured workers for the preceding fiscal year, divided by the average monthly number of insured workers, determined by dividing by 12 the total insured workers for the preceding fiscal year as determined under the rules of the department calculated to two decimal places, disregarding any fraction of one cent.

(13) "Insured average fiscal year weekly wage" means the insured average fiscal year wage determined in Subsection (12), divided by 52, calculated to two decimal places, disregarding any fraction of one cent.

(14) "Insured average weekly wage" means the insured average annual wage determined in Subsection (11), divided by 52, calculated to two decimal places, disregarding any fraction of one cent.

(15) "Insured status" means that an individual has, during the individual's base-period, performed services and earned wages in employment sufficient to qualify for benefits under Section 35A-4-403.

(16) "Insured work" means employment for an employer, as defined in Section 35A-4-203.

(17) "Monetary base period wage requirement" means 8% of the insured average fiscal year wage for the preceding fiscal year, for example, fiscal year 1990 for individuals establishing benefit years in 1991, rounded up to the next higher multiple of \$100.

(18) "State" includes the Commonwealth of Puerto Rico, the Virgin Islands, and the District of Columbia.

(19) "Tribal unit" means a subdivision, subsidiary, or business enterprise wholly owned by an American Indian tribe.

~~[(19)]~~ (20) "Week" means the period or periods of seven consecutive calendar days as the department may prescribe by rule.

Section 2. Section **35A-4-202** is amended to read:

35A-4-202. Employing units.

As used in this chapter:

(1) (a) "Employing unit" means:

(i) any individual or type of organization that has or subsequent to January 1, 1935, had one or more individuals performing services for it within the state including any:

- (A) partnership;
- (B) association;
- (C) trust;
- (D) estate;
- (E) joint stock company;
- (F) insurance company;
- (G) limited liability company;
- (H) limited liability partnership;
- (I) joint venture;

(J) corporation, whether domestic or foreign;

(K) the receiver, trustee in bankruptcy, trustee or successor of any entity listed in Subsections (1)(a)(i)(A) through (J); [~~or~~]

(L) the legal representative of a deceased person; or

(M) a tribal unit; or

(ii) any properly and legally licensed employee leasing company as defined by Section 58-59-102.

(b) The department may adopt rules specific to employee leasing companies pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(c) All individuals performing services within this state for any employing unit that maintains two or more separate establishments within this state are considered to be performing services for a single employing unit for all the purposes of this chapter.

(d) Each individual employed to perform or to assist in performing the work of any person in the service of an employing unit is considered to be engaged by the employing unit for all the purposes of this chapter whether the individual was hired or paid directly by the employing unit or by the person, provided the employing unit had actual or constructive knowledge of the work.

(2) "Hospital" means an institution that is licensed, certified, or approved by the Department of Health as a hospital.

(3) "Institution of higher education," for the purposes of this section, means an educational institution that:

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

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

(iii) provides:

(A) an educational program for which it awards a bachelor's or higher degree;

(B) a program that is acceptable for full credit toward a bachelor's or higher degree;

(C) a program of postgraduate or postdoctoral studies; or

(D) a program of training to prepare students for gainful employment in a recognized

occupation; and

(iv) is a public or other nonprofit institution.

(b) All colleges and universities in this state are institutions of higher education for purposes of this section.

Section 3. Section **35A-4-204** is amended to read:

35A-4-204. Definition of employment.

(1) Subject to the other provisions of this section, "employment" means any service performed for wages or under any contract of hire, whether written or oral, express or implied, including service in interstate commerce, and service as an officer of a corporation.

(2) "Employment" includes an individual's entire service performed within or both within and without this state if one of Subsections (2)(a) through (k) is satisfied.

(a) The service is localized in this state. Service is localized within this state if:

(i) the service is performed entirely within the state; or

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

(b) (i) The service is not localized in any state but some of the service is performed in this state and the individual's base of operations, or, if there is no base of operations, the place from which the service is directed or controlled, is in this state; or

(ii) the individual's base of operations or place from which the 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.

(c) (i) (A) The service is performed entirely outside this state and is not localized in any state;

(B) the worker is one of a class of employees who are required to travel outside this state in performance of their duties; and

(C) (I) the base of operations is in this state; or

(II) if there is no base of operations, the place from which the service is directed or

controlled is in this state.

(ii) Services covered by an election under Subsection 35A-4-310(3), and services covered by an arrangement under Section 35A-4-106 between the division and the agency charged with the administration of any other state or federal unemployment compensation law, under which all services performed by an individual for an employing unit are considered to be performed entirely within this state, are considered to be employment if the division has approved an election of the employing unit for whom the services are performed, under which the entire service of the individual during the period covered by the election is considered to be insured work.

(d) (i) The service is performed after December 31, 1977, in the employ of this state or any of its instrumentalities or any county, city, town, school district, or any political subdivision thereof or any of its instrumentalities or any instrumentality or more than one of the foregoing or any instrumentality of any of the foregoing and one or more other states or political subdivisions or Indian tribes or tribal units if:

(A) the service is excluded from employment as defined in the Federal Unemployment Tax Act, 26 U.S.C. 3306(c)(7);

(B) the service is not excluded from employment by Section 35A-4-205; and

(C) as to any county, city, town, school district, or political subdivision of this state, or any instrumentality of the same or Indian tribes or tribal units, that service is either:

(I) required to be treated as covered employment as a condition of eligibility of employers in this state for Federal Unemployment Tax Act employer tax credit;

(II) required to be treated as covered employment by any other requirement of the Federal Unemployment Tax Act, as amended; or

(III) not required to be treated as covered employment by any requirement of the Federal Unemployment Tax Act, but coverage of the service is elected by a majority of the members of the governing body of the political subdivision or instrumentality or tribal unit in accordance with Section 35A-4-310.

(ii) Benefits paid on the basis of service performed in the employ of this state shall be financed by payments to the division instead of contributions in the manner and amounts prescribed

by Subsections 35A-4-311(2)(a) and (4).

(iii) Benefits paid on the basis of service performed in the employ of any other governmental entity or tribal unit described in this Subsection (2) shall be financed by payments to the division in the manner and amount prescribed by the applicable provisions of Section 35A-4-311.

(e) The service is performed by an individual in the employ of a religious, charitable, educational, or other organization, but only if:

(i) the service is excluded from employment as defined in the Federal Unemployment Tax Act, 26 U.S.C. 3306(c)(8), 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 the weeks were consecutive, within either the current or preceding calendar year, regardless of whether they were employed at the same moment of time.

(f) (i) The service is performed outside the United States after December 31, 1971, except in Canada, in the employ of an American employer, other than service that is considered employment under the provisions of Subsection (2) or the parallel provisions of another state's law if:

(A) the employer's principal place of business in the United States is located in this state;

(B) the employer has no place of business in the United States but is:

(I) an individual who is a resident of this state;

(II) a corporation that is organized under the laws of this state; or

(III) a partnership or trust in which the number of partners or trustees who are residents of this state is greater than the number who are residents of any one other state; or

(C) none of the criteria of Subsections (2)(f)(i)(A) and (B) is met but:

(I) the employer has elected coverage in this state; or

(II) the employer fails to elect coverage in any state and the individual has filed a claim for benefits based on that service under the law of this state.

(ii) "American employer" for purposes of this Subsection (2) means a person who is:

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

(B) a partnership if [~~two-thirds~~] 2/3 or more of the partners are residents of the United States;

(C) a trust if all of the trustees are residents of the United States;

(D) a corporation organized under the laws of the United States or of any state;

(E) a limited liability company organized under the laws of the United States or of any state;

(F) a limited liability partnership organized under the laws of the United States or of any state; or

(G) a joint venture if [~~two-thirds~~] 2/3 or more of the members are individuals, partnerships, corporations, limited liability companies, or limited liability partnerships that qualify as American employers.

(g) The service is performed after December 31, 1971:

(i) by an officer or member of the crew of an American vessel on or in connection with the vessel; and

(ii) the operating office from which the operations of the vessel, operating on navigable waters within, or within and without, the United States, is ordinarily and regularly supervised, managed, directed, and controlled within this state.

(h) A tax with respect to the service in this state 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 that, as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act, is required to be covered under this chapter.

(i) (i) Notwithstanding Subsection 35A-4-205(1)(t), the service is performed:

(A) 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 the driver's principal; or

(B) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged on a full-time basis in the solicitation on behalf of and the transmission to the salesman's principal, except for sideline 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.

(ii) The term "employment" as used in this Subsection (2) includes services described in Subsection (2)(i)(i) performed after December 31, 1971, only if:

(A) the contract of service contemplates that substantially all of the services are to be performed personally by the individual;

(B) 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

(C) the services are not in the nature of a single transaction that is not part of a continuing relationship with the person for whom the services are performed.

(j) The service is performed after December 31, 1977, by an individual in agricultural labor as defined in Section 35A-4-206.

(k) The service is domestic service performed after December 31, 1977, in a private home, local college club, or local chapter of a college fraternity or sorority performed for a person who paid cash remuneration of \$1,000 or more during any calendar quarter in either the current calendar year or the preceding calendar year to individuals employed in the domestic service.

(3) Services performed by an individual for wages or under any contract of hire, written or oral, express or implied, are considered to be employment subject to this chapter, unless it is shown to the satisfaction of the division that:

(a) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of hire for services; and

(b) the individual has been and will continue to be free from control or direction over the means of performance of those services, both under the individual's contract of hire and in fact.

(4) If an employer, consistent with a prior declaratory ruling or other formal determination by the division, has treated an individual as independently established and it is later determined that the individual is in fact an employee, the department may by rule provide for waiver of the employer's retroactive liability for contributions with respect to wages paid to the individual prior to the date of the division's later determination, except to the extent the individual has filed a claim for benefits.

(5) Notwithstanding any other provisions of this chapter, and in accordance with rules made by the department, if two or more related corporations concurrently employ the same individual and compensate the individual through a common paymaster that is one of the corporations, each

corporation:

(a) is considered to have paid as remuneration to the individual only the amounts actually disbursed by it to the individual; and

(b) is not be considered to have paid as remuneration to the individual amounts actually disbursed to the individual by another of the other related corporations.

Section 4. Section **35A-4-311** is amended to read:

35A-4-311. Coverage and liability of governmental units or Indian tribal units -- Payments in lieu of contributions -- Delinquencies -- Payments to division.

(1) Notwithstanding any other provisions of this chapter, benefits paid to employees of counties, cities, towns, school districts, political subdivisions, or their instrumentalities or Indian tribes or tribal units shall be financed in accordance with the following provisions:

(a) Any county, city, town, school district, political subdivision, or instrumentality thereof or Indian tribes or tribal units that is or becomes subject to this chapter may pay contributions under the provisions of Section 35A-4-302, or may elect to pay to the division for the unemployment fund an amount equal to the amount of regular benefits and, as provided in Subsection (4), the extended benefits attributable to service in the employ of such organization, and paid to individuals for weeks of unemployment that begin during the effective period of such election.

(b) Any county, city, town, school district, political subdivision, or instrumentality thereof or Indian tribes or tribal units of the state, or combination of the foregoing, that is or becomes subject to this chapter may elect to become liable for payments in lieu of contributions for a period of not less than one contribution year beginning with the date on which the organization becomes subject to this chapter by filing a written notice of its election with the division not later than 30 days immediately following the date that the division gives notice to the organization that it is subject to this chapter.

(c) Any county, city, town, school district, political subdivision, or instrumentality thereof, or Indian tribes or tribal units, or combination of the foregoing, that makes an election in accordance with Subsections (1)(a) and (b) shall continue to be liable for payments in lieu of contributions until it files with the division a written notice terminating its election. A notice terminating such election

must be filed by January 31 of the year in which the termination is to be effective.

(d) Any county, city, town, school district, political subdivision, or instrumentality thereof of the state, or Indian tribes or tribal units, or combination of the foregoing which have been paying contributions under this chapter may change to a reimbursable basis by filing with the division, no later than 30 days prior to the beginning of any contribution year, a written notice of election to become liable for payments in lieu of contributions; the organization may not terminate such election for a period of two contribution years.

(e) The division 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.

(f) The division, in accordance with department rules, shall notify each county, city, town, school district, political subdivision, or Indian tribes or tribal units, or their instrumentalities of any determination that it may make of its status as an employer, or the effective date of any election which it makes, and of any termination of such election. The determinations shall be subject to reconsideration, appeal, and review in accordance with the provisions of Section 35A-4-508.

(2) Payments in lieu of contributions shall be made in accordance with the provisions of this Subsection (2).

(a) At the end of each calendar month, or at the end of any other period as determined by the division, the division shall bill each county, city, town, school district, political subdivision, or instrumentality thereof, or combination of the foregoing, that has elected to make payments in lieu of contributions for an amount equal to the full amount of regular benefits and, as provided in Subsection (4), the amount of extended benefits paid during such month or other prescribed period that is attributable to service in the employ of such county, city, town, school district, political subdivision, or instrumentality thereof.

(b) Payment of any bill rendered under Subsection (2)(a) shall be made not later than 30 days after such bill was mailed to the governmental unit or tribal unit or was otherwise delivered to it, unless there has been an application for review and redetermination in accordance with Subsection (2)(c).

(c) (i) The amount due specified in any bill from the division shall be conclusive on the

governmental unit or tribal unit unless, no later than 15 days after the bill was mailed or otherwise delivered to it, the governmental unit or tribal unit files an application for redetermination by the division or an appeal, setting forth the grounds for such application or appeal.

(ii) Upon an application for redetermination the division shall promptly review and reconsider the amount due specified in the bill and shall thereafter issue a redetermination.

(iii) Any such redetermination shall be conclusive on the governmental unit or tribal unit unless, no later than 15 days after the redetermination was mailed to its last known address or otherwise delivered to it, the governmental unit or tribal unit files an appeal, setting forth the grounds for the appeal.

(iv) Proceedings on appeal from the amount of a bill rendered under this Subsection (2) or a redetermination of the amount shall be in accordance with the provisions of Section 35A-4-508.

(d) Past due payments of amounts in lieu of contributions shall be subject to the same interest and penalties that, under Subsection 35A-4-305(1), attach to past due contributions.

(3) (a) If any governmental unit or tribal unit is delinquent in making payments in lieu of contributions as required under Subsection (2), the division may terminate the governmental unit's or tribal unit's election to make payment in lieu of contributions as of the beginning of the next contribution year, and the termination shall be effective for that and the next contribution year.

(b) (i) Failure of the Indian tribe or tribal unit to make required payments, including assessments of interest and penalty, within 90 days of receipt of a billing notice will cause the Indian tribe to lose the option to make payments in lieu of contributions, as described in Subsection 35A-4-311(1), for the following tax year unless payment in full is received before contribution rates for the next tax year are computed.

(ii) Any Indian tribe that loses the option to make payments in lieu of contributions due to late payment or nonpayment, as described in Subsection (3)(b)(i), shall have the option reinstated if, after a period of one year:

(A) all contributions have been made timely; and

(B) no contributions, payments in lieu of contributions for benefits paid, penalties, or interest remain outstanding.

(iii) Notices of payment and reporting delinquency to Indian tribes or their tribal units shall include information that failure to make full payment within the prescribed time frame:

(A) will cause the Indian tribe to be liable for taxes under the Federal Unemployment Tax Act; and

(B) will cause the Indian tribe to lose the option to make payments in lieu of contributions.

(4) Each governmental unit or tribal unit liable for payments in lieu of contributions shall pay to the division for the fund the amount of regular benefits plus the amount of extended benefits paid that are attributable to service in the employ of such governmental unit or tribal unit. Provided, that governmental units or tribal units electing payments in lieu of contributions shall, with respect to extended benefit costs for weeks of unemployment beginning prior to January 1, 1979, pay an amount equal to 50% of such costs and with respect to extended benefit costs for weeks of unemployment beginning on or after January 1, 1979, shall pay 100% of such costs. 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 liable for the payments shall be determined in accordance with Subsection (4)(a) or (4)(b).

(a) If benefits paid to an individual are based on wages paid by one or more employers who 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 that 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) If benefits paid to an individual are based on wages paid by two or more employers who are liable for payments in lieu of contributions, the amount of benefits payable by each such employer shall be an amount that 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.

(5) (a) Two or more Indian tribe or tribal unit employers who have become liable for payments in lieu of contributions, in accordance with the provisions of this section and Subsection

35A-4-204(2)(d), may file a joint application to the division 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 these employers. Each application shall identify and authorize a group representative to act as the group's agent for the purpose of this Subsection (5).

(b) Upon approval of the application, the division shall establish a group account for these employers effective as of the beginning of the calendar quarter in which it receives the application and shall notify the group's representative of the effective date of the account. This account shall remain in effect for not less than one contribution year and thereafter until terminated at the discretion of the division or upon application by the group.

(c) 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 the quarter 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 the quarter bear to the total wages paid during the quarter for service performed in the employ of all members of the group.

Section 5. Retrospective operation.

This act has retrospective operation to December 21, 2000.