

# Conformity Requirements for State UC Laws

## *Coverage*

### **Background**

The coverage provisions of state UC laws determine the employers who are liable for contributions and workers who accrue benefit rights under the state law. State coverage provisions, in general, are influenced by the taxing provisions of the Federal Unemployment Tax Act ([FUTA](#)) because employers who pay contributions under an approved state law may credit their state contributions against the Federal tax.

State coverage provisions are also influenced by [§3304\(a\)\(6\)\(A\)](#), FUTA, which requires that certain services that are excluded from the FUTA tax must be covered under state law. These are services performed for state and local governmental entities, federally recognized Indian tribes, and for certain nonprofit organizations.

### **Frequently Asked Questions**

#### 1. Who is an employee under FUTA?

"Employee" is defined under [§3306\(i\)](#), [FUTA](#), by reference to [§3121\(d\)](#) of the Internal Revenue Code (IRC). In general, employees are individuals who have employee status under usual common law rules.

The Internal Revenue Service (IRS) administers FUTA. According to IRS rules, an individual is an employee if the relationship between the individual and the person for whom the service is provided has the legal relationship of employer and employee. That is, the employer has the right to control and direct the employee, not only as to the work to be done, but also as to the details and means by which the work is done.

#### 2. What is employment under FUTA?

Employment means any services performed by an employee for the person employing him unless specifically excluded from the definition of employment in FUTA. Exclusions from the definition of employment, and thus from Federal tax, are found in [§3306\(c\)](#), FUTA.

#### 3. What are wages under FUTA?

Wages means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash, unless specifically excluded from the definition of wages in [§3306\(b\)](#), [FUTA](#). For purposes of the payment of the FUTA tax, only the first \$7000 must be reported as wages.

4. What services are required to be covered under state law?

Section 3304(a)(6)(A), [FUTA](#), requires that all services performed by employees of state and local governmental entities, certain nonprofit organizations, and federally recognized Indian tribes must be covered by state law unless specifically exempted by Federal law. Exemptions from the definition of employment for these entities are found in §3309(b), FUTA. What constitutes a governmental entity is generally controlled by state statutes creating the entities and controlling their scope.

More specifically, states must cover services to which §3309(a)(1), [FUTA](#), applies. Section 3309(a)(1) applies to services excluded from the FUTA tax (that is, from the term "employment" solely by reason of either §3306(c)(7) or (8), FUTA). Section 3306(c)(7) applies to services performed "in the employ of a state or any political subdivision thereof or in the employ of an Indian tribe. . . ." Section 3306(c)(8) applies to services performed "in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) [IRC] which is exempt from income tax under section 501(a)," of the IRC. [Note: The term "Indian tribe" refers to only those tribes that have been recognized as such by the Federal government.]

The determination as to which services must be covered under §3304(a)(6)(A), [FUTA](#), is based on Federal - not state - law. Therefore, if a state law contains an exclusion from the definition of "employment" that is not found in FUTA, then that exclusion may not be applied to §3304(a)(6)(A), [FUTA](#), services. Similarly, if a state law definition of employee results in more exclusions from coverage than would occur under the Federal common law test, then the state may not apply that test to §3304(a)(6)(A), [FUTA](#), services.

5. What are the consequences if a state law fails to cover services that are not excepted from the definition of employment in FUTA?

If state law does not cover services performed for state and local governmental entities, federally recognized Indian tribes and certain nonprofit organizations as required by Federal law, the result is the loss of certification for tax credits for all employers (mostly private sector) liable for the §3301 [FUTA](#) tax. There is also the potential for loss of federal administrative funding.

If only services for FUTA taxable employers are excluded from coverage, aside from permissible exceptions, the employer must pay the full FUTA tax (currently 6.2 percent) on the exempted services without the benefit of offset credit. The workers will not be able to collect UI benefits. No conformity issue is raised.

6. May state law require coverage of services that are exempted in FUTA?

Yes. FUTA does not require the exemption of any services. As a result, states are free to expand coverage requirements under state law.

5. Are independent contractors covered by the UC program?

Federal law only requires employees to be covered. An independent contractor is an individual who is not an employee. Federal law uses a common law test (see Q&A 1) to determine this. Most states use the “ABC test” or a variant of it to define an employee and this sometimes results in individuals considered independent contractors under the common law test being considered employees under state law. That is, an individual is considered an employee unless all (or some) of the following criteria are met:

- A. The individual is free from direction and control over performance of the work;
- B. The service is performed either outside the usual course of the business for which it is performed or is performed outside of all places of business of the enterprise for which it is performed; and
- C. The individual is customarily engaged in an independent trade, occupation, profession, or business.

Independent contractors who are employers in their own right could be covered under state law as such.

**References**

[UIPL 24-75](#). New York Conformity Decision involving required coverage under §3304(a)(6)(A), FUTA.

[UIPL 14-01, Change 1](#). Coverage of services for federally recognized Indian tribes.

[UIPL 20-04](#). Localization of Work Provisions – Principles for Determining Where Wages Should Be Reported When Work is Performed Entirely in One State or in a Number of Different States