LEGISLATION

The Pennsylvania Unemployment Compensation Law

On December 5, 1936, Governor Earle signed the Pennsylvania Unemployment Insurance Act[1] "to provide moneys for the payment of compensation to certain unemployed persons . . . ."[2] Neither the legislature nor the Governor was entirely satisfied with this law,[3] but it readily met the approval of the Social Security Board established under the Social Security Act[4] to certify the compliance of state statutes[5] with the federal act.

Coverage

Specifically excluded from the definition of employment under this Act are:[6]

"(1) Agricultural labor;[7]
(2) Domestic service in a private home;[8]
(3) Service performed on a vessel on the navigable waters of the United States;[9]
(4) Employment of parents, spouse, or minor children of the employer;[10]
(5) Service performed for the United States government, for a state government, or for a political subdivision thereof;[11]
(6) Service performed in the employ of religious, educational, and charitable organizations.[12]

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1. House Bill No. 1, 2d extraordinary session of 1936.
2. Preamble of the Act.
3. Philadelphia Inquirer, Dec. 2, 1936, p. 16, col. 6-8; Dec. 4, 1936, p. 1, col. 1; Dec. 5, 1936, p. 1, col. 1.
4. 49 STAT. 620 (1935), 42 U. S. C. A. §§ 301-1305 (Supp. 1936). The approval of this board was necessary to permit employers in Pennsylvania to credit the tax they pay to the state against the amount due the federal government under the Social Security Act.
5. Alabama, Arizona, California, Colorado, Connecticut, District of Columbia, Idaho, Indiana, Louisiana, Massachusetts, Mississippi, New Hampshire, New York, Oregon, Rhode Island, South Carolina, Texas, Utah, Washington, and Wisconsin preceded Pennsylvania in enacting unemployment insurance legislation. Iowa, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, Vermont, Virginia, and West Virginia have enacted such legislation since December 5, 1936. 2 Prentice-Hall Labor and Unemployment Ins. Serv. (1936).
6. Section 4 (j) of the Act. These excluded occupations are exactly the same as those excluded under the Social Security Act.
7. Because of the difficulty of establishing administrative machinery to enforce the provisions of this Act upon widely scattered farms. It is probable that an amendment to the Act in the near future will include agricultural laborers. See Philadelphia Inquirer, November 27, 1936, p. 1, col. 6.
8. Because of the stability of employment in private homes; if contributions were exacted from this industry, the rate proposed would be much higher than insurance should cost in service of such stability. To establish different rates for different occupations would be an actuarial task that has never before been attempted, and for which there is little existent data. See Williamson, *State Actuarial Problems in Unemployment Compensation* (1936) 3 LAW & CONTEMP. PROB. 36.
9. Because a vessel in navigable waters of the United States is not considered within the territorial jurisdiction of any state. Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 (1920); Washington v. Dawson & Co., 264 U. S. 219 (1924).
10. For the purpose of forestalling possible fraud in filing returns and demanding compensation.
11. Since the state may not tax federal employees, nor may the federal government tax state employees.
12. It is difficult to understand why employees of eleemosynary institutions are not included within the scope of this Act. There seems to be no relation between the employer's

Included within employments governed by the Pennsylvania Act are services which are rendered outside the commonwealth if (a) the base for operations is in Pennsylvania, or (b) the service performed outside the commonwealth is incidental to that performed within the commonwealth, and the base for operations is not in any state in which part of the service is performed and the individual's residence is in the commonwealth.[13] Obviously, this is an attempt to tax interstate commerce, and in the absence of other provisions would be an unconstitutional exercise of power. But the Social Security Act specifically authorizes the state to tax interstate commerce if the money is to be paid into an unemployment fund,[14] and under Supreme Court rulings such a delegation of power is valid.[15]

Undecided as yet by the Supreme Court, and unconsidered in both the Social Security Act and the Pennsylvania Unemployment Compensation Act is the responsibility of an employer who becomes subject to the taxes of two states because his base of operations is in one state and the bulk of his business is carried on in another,[16] and the liability of the state to pay benefits to an employee who is eligible for unemployment compensation from another state.[17] Arbitrary rules would work many injustices. Therefore, an excellent solution to this question would lie either in the appointment by the Social Security Board of a federal body to coordinate the states by deciding interstate cases, or in the appointment of a committee in each state to confer with the comparable committee in the other state whenever a dispute arises.

Method of Raising Revenue

In order to raise the money necessary to pay the compensation required under this Act, it is provided that all employers shall contribute to the Unemployment Compensation Fund:

9/10 of 1 per cent for the calendar year 1936
1 8/10 per cent for the calendar year 1937
2 7/10 per cent for every calendar year thereafter[18].

Of course, under the Social Security Act, employers of eight or more will be required to pay an additional one-tenth of one per cent in 1936, two-tenths of one per cent in 1937, and three-tenths of one per cent thereafter[19] to the federal

profit motive, and the employees' need for assistance during their idleness. But the Act was rushed through with the understanding that many provisions might be reconsidered at a future session. Philadelphia Inquirer, Nov. 30, 1936, p. 1, col. 3; Dec. 4, 1936, p. 1, col. 1; Dec. 5, 1936, p. 1, col. 1.

13. Section 4 (j).

14. Section 906.

15. *In re* Raher, 140 U. S. 545 (1890); Clark Distilling Co. v. Western Md. Ry., 242 U. S. 311 (1917).

16. See HARDING, DOUBLE TAXATION OF PROPERTY AND INCOME (1933); Brown, *Multiple Taxation by the States—What Is Left of It?* (1935) 48 HARV. L. REV. 407.

17. Under analogous workmen's compensation laws there has been permitted recovery in more than one state for the same injury. Texas Employers Ins. Ass'n v. Price, 117 Tex. 173, 300 S. W. 672 (1927). One state required the amount received in another state to be deducted from the amount due. Interstate Power Co. v. Industrial Comm., 203 Wis. 466, 234 N. W. 889 (1931). Another state refused to award compensation because there had already been recovery in a second state. Finkley v. Saenger Tailoring Shop, 100 Ind. App. 549, 196 N. E. 536 (1935).

18. Sections 301, 302.

19. The Social Security Act provides that there shall be a one per cent tax in 1936, a two per cent tax in 1937, and a three per cent tax thereafter. 49 STAT. 639 (1935), 42 U. S. C. A. § 1101 (Supp. 1936). But there is permitted a credit of ninety per cent of this tax to those states which have enacted an acceptable unemployment insurance law. 49 STAT. 639 (1935), 42 U. S. C. A. §§ 1102, 1103 (Supp. 1936). Thus, the federal tax will only be the amount stated, because Pennsylvania has enacted an acceptable unemployment insurance law.

government to cover the cost of administering title IX of the Social Security Act.[20] In requiring unemployment insurance contributions from employers of less than eight the Pennsylvania law extends the benefits of the Act to many more people than those contemplated in the Social Security Act.[21] The wisdom of this policy is undoubted,[22] for if the rationale for the enactment of this legislation is that it will serve to alleviate the burden of unemployment, there would seem to be no reason for distinguishing between employees who have more than six co-workers and employees who have six or less co-workers.[23]

The money thus collected by the state treasurer is deposited in an Unemployment Compensation Fund, which is to be kept separate from all other public funds, and whenever it is necessary, money is requisitioned from this fund to pay compensation.[24] Separate accounts for each employer are not maintained, but all of the moneys collected from employers' contributions, interest on these contributions, and penalties for late payment are pooled together into a lump sum reserve.

The wisdom of this procedure is debatable.[25] Advocates of the so-called individual reserve plan point out that it effectively allocates to the individual employer the cost of his own lay-offs. If any employer should succeed in stabilizing his employment to such an extent that he can employ the same number of employees throughout the entire year, no money need be drawn from his reserve; hence he will not be called upon to contribute any more money, and one of the charges upon the operation of his business will be dissolved. This, it is said, would serve as an incentive to cause employers to stabilize their employment.

On the other hand, there are several objections to this method. First, only a few large organizations will be able to accumulate a reserve large enough to withstand even a minor depression. In effect, such a system establishes each employer as an insurance company without sufficiently diversified risks, because all of the policyholders may demand compensation at the same time (as would probably be the case when the company becomes insolvent or suffers from a substantial loss of business). Secondly, the individual reserve plan assumes that unemployment is an occupational hazard within the control of the employer.[26] Even without this system there is an incentive to maintain a stabilized system of employment in the employer's interest in a well-trained, contented personnel, for labor turnover is always an expense to business, and to permit workers to

20. Title III of the Social Security Act authorizes the federal government to appropriate to the states which have enacted Unemployment Compensation Laws funds that will cover the cost of administration.

21. The report of the Committee on Economic Security suggested a tax "upon all employers who have employed four or more employees for a reasonable period of time" (p. 18). This was reiterated by President Roosevelt in his message to Congress (p. 15).

22. Idaho and the District of Columbia are the only two other jurisdictions whose laws cover employers who only employ one worker. Arizona's law specifies three or more workers. Other states require contributions from employers of four or more workers, and a majority of states require contributions only from employers of at least eight workers. 1 Prentice-Hall Labor and Unemployment Ins. Serv. (1936) ¶ 20,401.

23. If only employers of eight or more were covered by this Act, employers could easily make use of devices, such as employing independent contractors, and thus reduce their contributions. Some states tried to prevent such devices by including contractors, sub-contractors, and their employees in the definition of an "employee of an employer" under their Act.

24. Section 601.

25. See Brandeis, *The Employer Reserve Type of Unemployment Compensation Law* (1936) 3 LAW & CONTEMP. PROB. 54; Rubinow, *State Pool Plans and Merit Rating* (1936) 3 LAW & CONTEMP. PROB. 65.

26. See WOLFENDEN, THE REAL MEANING OF SOCIAL INSURANCE (1932) 102 *et seq.*; Abbott, *The Social Security Act and Relief* (1936) 4 U. OF CHI. L. REV. 45, 53.

go unemployed augments the rate of labor turnover.[27] Therefore, it would seem that Pennsylvania has adopted a desirable policy in setting up reserves under a state pooling system, instead of individually crediting employers with their contribution.[28]

Not so worthy of commendation is the Act's failure to provide for contributions by the employee,[29] and by the state.[30] If the base of the unemployment fund were enlarged by employee and state participation, increased benefits would be likely, the wealthy leisure class would not escape liability for the social welfare of the commonwealth, and the employee would not be in his present position of receiving a direct grant in the nature of a dole in time of unemployment.[31] Consequently, the morale of the employee would be higher, really effective compensation could be paid, and the present burden of taxation would be shifted more equitably.

Disbursements

In order to permit the Unemployment Reserve Fund to acquire enough money to be on a sound financial basis, benefits are not payable until January 1st, 1938.[32] This permits two years of payments by the employer. After January 1, 1938, upon proper application for compensation, the employee is entitled to receive fifty per cent of his most recent weekly wage, providing the amount does not exceed $15. per week, and with a minimum compensation of $7.50 per week.[33] However, if the Department of Labor and Industry finds that the compensation, if computed by dividing the most recent weekly wage by two, is unreasonable or arbitrary, they may use as his usual weekly wage one-thirteenth of the total wages paid during the most remunerative of the first eight out of the last nine calendar quarters preceding unemployment.[34] Much injustice may thus be avoided, for it is conceivable that the last week's wage may have been paid while the employer was slashing costs of production, a condition which usually takes place before unemployment, and by permitting the Department of Labor and Industry to average his wage while the employee was being paid his usual salary is to temper the steel of an arbitrary rule of thumb by a process which permits sufficient flexibility of this rule to accommodate obvious inequities.[35]

27. There is a third type of law called a "guaranteed employment plan", under which the employer need pay no taxes if he guarantees a certain number of weeks per year employment to his employees. This is open to the obvious objection that some force beyond his control may compel a breach of this guarantee.

28. Even under the pooling system the employer may be given credit for reducing his unemployment to a minimum by the so-called system of "merit-rating", whereby he will be called upon to contribute less and less to the unemployment reserve fund if he can prove he is decreasing his employment fluctuation. The chief disadvantage of such a system is that it prevents the accumulation of a reserve sufficient to weather really severe depressions because once the employer achieves reasonable stability he need contribute no more. This lowers the amount of money in the reserve, and unduly benefits employers whose occupation is stable at the expense of inherently unstable businesses.

29. Of the first thirty-six states to enact unemployment insurance legislation ten provided for employee contribution. 1 Prentice-Hall Labor and Unemployment Ins. Serv. (1936) ¶ 20, 403.

30. The Lundeen Bill, H. R. 2827, 74th Cong., 1st Sess. (1935) placed the entire cost of unemployment insurance upon the state, under the theory that unemployment insurance was but another method of effecting relief to the indigent, and that therefore the state should bear the entire burden.

31. See JACKSON, SOCIAL SECURITY BY COMMON LAW (1936).

32. Section 401 of the Act.

33. Section 403 of the Act.

34. Section 4 (1).

35. The maximum total amount which the employee may receive during any fifty-two week period shall not exceed thirteen times his weekly compensation or "one-eighth of his total wages . . . during the first eight out of the last nine completed calendar quarters . . . whichever is the lesser." Section 404.

Before he is eligible to receive benefits, an employee must (1) have earned at least thirteen times his weekly compensation amount [36] during his base year [37] and (2) have been totally unemployed for at least three weeks, during which he received no compensation, of the preceding fifty-two weeks.[38] Both qualifications are in accord with sound actuarial principles. If a policy holder of an insurance contract does not pay his premium, he is not entitled to any benefits. The premium under this act is a percentage of the insured's wages. If this percentage has not been paid on at least thirteen times the amount of the weekly compensation, so low a premium will have been paid that the insurance plan could not long continue.

Mitigating the possibility of injury to poorly paid employees who have no savings at all is the provision that "the three weeks of total unemployment need not be consecutive, but may be accumulated over the period of fifty-two consecutive weeks preceding any week for which he claims compensation." [39] Thus, the employee will not suffer unduly because of short working intervals between periods of unemployment. This provision represents a compromise between those who insist that the primary purpose of this Act is to insure against total unemployment over a long period of time, and that therefore there should be long waiting periods which must be consecutive, and those who believe that this Act was passed to provide benefits to victims of any unemployment, and that therefore benefits should be paid instantly in the event of any loss of work.[40]

The Act as originally drafted refused compensation to anyone who (1) voluntarily left his work, (2) was discharged for dishonesty or gross carelessness, or (3) was involved in a strike.[41] All three provisions, however, were eliminated in the final draft. Now an employee can be declared ineligible only if he has voluntarily left his work and even then if he has done so because he refused "to join or remain a member of a company union . . . or to resign from or refrain from joining any bona fide labor organization, or to accept wages, hours, or conditions of employment not desired by a majority of the employees, . . .",[42] he may still receive benefits after a waiting period of three additional weeks.[43]

Administration

The Department of Labor and Industry is charged with the duty of administering and enforcing this Act, and must render a biennial report covering its operation.[44] In that way, it is hoped, the present imperfections will be exposed to light as quickly as they appear. The actuarial detail is little better than guesswork, and in the event that the Unemployment Compensation Fund proves

36. Section 401 (a). The only provision relating to seasonal and part-time employment is that contained in Section 205, which expresses the intention of the legislature to provide for seasonal and part-time workers as soon as possible.

37. Base year is defined as "the first four of the last five completed calendar quarters immediately preceding" unemployment. Section 4 (a).

38. Section 401 (e). This limitation on the right to receive compensation is effective as a bar to the prosecution of claims for wages due when little hardship has been suffered, because it is assumed that the worker can accumulate sufficient savings to tide him over one or two idle weeks. And by eliminating these short periods of idleness the Unemployment Reserve Fund is so increased that more money is available for the payment of benefits to those who suffer for a longer period of time. Furthermore, administration is greatly facilitated when the Department of Labor and Industry is not required to consider such brief intervals of unemployment.

39. Section 401 (e).

40. See Gray, *Unemployment Insurance in the State of New York* (1935) 13 N. Y. U. L. Q. Rev. 19, 22.

41. House Bill, No. 1, 2d extraordinary session of 1936, § 402 (b), (c), (d).

42. Section 402 (b).

43. Section 401 (e).

44. Section 201.

insufficient to meet the demands upon it, the contributions must either be increased or the benefits curtailed. In no event does the state bind itself to pay deficits in this fund out of the general treasury.[45]

An outgrowth of this gigantic experiment in federal-state cooperation in the administration of unemployment insurance is the prominence which will hereafter be accorded state employment agencies.[46] In order to be eligible to receive benefits the insured must register for work at a public employment office, and the office is required to try to place him in suitable [47] employment. This means that employment exchanges must play an important part in the administration of the Act. Consequently, the system of public exchanges for which there has long been considerable agitation seems to be in the process of formation.[48] Under the Pennsylvania Unemployment Compensation Act the state employment service is charged as the medium through which the Act is to be administered.[49] Therefore, there is now the opportunity to develop the unemployment service to the point where it acquires the confidence of both employers and employees, and so serves to discharge the needs of private employment as well as the needs of the compensation program.

Constitutionality

The only case which has thus far considered the constitutionality of title IX of the Social Security Act, which provides for the establishment of state unemployment insurance systems, is that of *Davis v. Boston & Maine R. R.*[50] Plaintiff in this action sued to enjoin the defendant corporation, of which he was a stockholder, from paying the unemployment compensation taxes, alleging that title IX of the Social Security Act is violative of the Fifth Amendment.[51] The government was permitted to intervene, and by stipulation of the parties the Massachusetts Unemployment Compensation Law and all sections except title IX of the Social Security Act were not involved.[52]

District Judge Sweeney ruled that this act was constitutional, relying upon Supreme Court cases upholding the constitutionality of other excises, and showing that if it be admitted that Congress has the power to levy this tax, then on

45. Section 406.

46. The state employment agencies, by virtue of this Act, are now incorporated as a part of the state civil service. Section 208.

47. Suitable work is defined as excluding (1) positions vacant due to a labor dispute, and (2) "as a condition of being employed the employe would be required to join a company union or to resign from or refrain from joining a union." Section 4 (r). This is in accord with the present tendency of the state and federal government to recognize the employee's inferior bargaining power.

48. See LAIDLER, UNEMPLOYMENT AND ITS REMEDIES (1931) 23. True, the Wagner-Peyser Act of 1933 provided for the creation of a system of state employment services supported by both the federal and state governments, but an absence of a sufficient number of governmental duties retarded widespread acceptance of it. 48 STAT. 114 (1933), 29 U. S. C. A. § 49 (Supp. 1936). Its greatest utility was as administrative agency of the Public Works Program.

49. Section 201.

50. D. C. Mass. (1936) 4 U. S. L. WEEK 416; see (1937) 85 U. OF PA. L. REV. 530. One-tenth of the employers are still defying the Social Security Act taxes, and Secretary of the Treasury Morgenthau is hesitant about enforcing them because the Supreme Court has not yet ruled on the constitutionality of the Act. Philadelphia Record, Dec. 23, 1936, p. 17, col. 8.

51. If the Social Security Act is violative of the Fifth Amendment, the Executive Council of the American Federation of Labor has gone on record as favoring a constitutional amendment to permit the Act. Philadelphia Inquirer, Nov. 16, 1936, p. 1, col. 4.

52. See (1937) 4 U. S. L. WEEK 673, for a complete summary of rulings of the Bureau of Internal Revenue under title IX of the Social Security Act. Other sections of the Social Security Act provide for old age assistance (§§ 1-6); aid to the blind (§§ 1001-1006), aid to dependent children (§§ 401-406), maternal and child health (§§ 501-505), crippled children (§§ 511-515), child welfare (§ 521), public health (§§ 601-603), and vocational rehabilitation (§ 531).

no ground can the tax be invalidated. There is no confiscation if the government stays within its rights to tax, and since the tax is laid on every business in the United States, it possesses the attributes of uniformity.[53] This case was docketed, on a petition for certiorari, before the Supreme Court,[54] and it is probable that they will pass upon it in the near future.

But even if the Supreme Court decides that the Social Security Act is unconstitutional, that decision will not in any way affect the validity of the Pennsylvania Unemployment Compensation Act. The final draft of the Pennsylvania Act includes the clause, "In the event that title IX of the Social Security Act shall be amended or repealed by the Congress or held unconstitutional by the Supreme Court of the United States [this Act shall continue to be administered] . . . ." [55] Therefore, in order to invalidate the Pennsylvania Act the Supreme Court must rule unemployment insurance a power outside the delegated powers of the federal government and not within the reserved powers of the states.[56] However, it would seem that if the state may use its police power to establish a system of workmen's compensation, providing for the payment of insurance premiums by the employer,[57] a similar system can be used to establish a reserve to compensate unemployed workmen.[58]

Conclusion

Pennsylvania's Unemployment Insurance Law is a liberal interpretation of the congressional intent as expressed in the Social Security Act. That there are still many inequities [59] is to be expected. But it is equally true that the Act will adequately serve its fundamental purpose of relieving the "insecurity due to unemployment" and lighten "its resulting burden of indigency",[60] and thus serve to eliminate hazards of temporary [61] unemployment.[62]

M. F.

53. The requirement of uniformity is the only limitation of the federal government's power to levy excise taxes. U. S. CONST. ART. I, § 8. See Armstrong, *The Federal Social Security Act* (1935) 21 A. B. A. J. 786, 792.

54. (1936) 4 U. S. L. WEEK 429, *pet. for cert. refused,* (1937) 4 U. S. L. WEEK 477.

55. Section 302. This clause was added after the Supreme Court had affirmed, by a four to four decision, the ruling of the New York Court of Appeals which held the New York Unemployment Insurance Law valid. (1936) 4 U. S. L. WEEK 301. However, Attorney General Margiotti expressed the opinion that the Pennsylvania Unemployment Compensation Law was enacted: "First, in order to allow Pennsylvania employers to obtain full credits against the Federal excise tax, and Second, to provide an adequate financial reserve for subsequent compensation for workers who become unemployed." Thus, the primary purpose of this law was to cooperate with the federal government. HISTORY OF SENATE BILLS, 2d EXTRAORDINARY SESS. OF 1936, p. 18.

56. For a discussion of the validity of state statutes see Chamberlain v. Andrews, 159 Misc. 124, 286 N. Y. Supp. 242 (1936) (holding the New York Act constitutional), *aff'd,* 271 N. Y. 1, 2 N. E. (2d) 22 (1936), *aff'd without an opinion,* 57 Sup. Ct. 122 (1936); Associated Industries v. Department of Labor, 286 N. Y. Supp. 459 (1936) (holding the New York Act unconstitutional), *rev'd,* 271 N. Y. 1, 2 N. E. (2d) 22 (1936), *aff'd without an opinion,* 57 Sup. Ct. 122 (1936); Gulf States Paper Corp. v. Carmichael, M. D. Ala. (1936) 4 U. S. L. WEEK 450 (holding the Alabama Act unconstitutional); *cf.* Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492 (1935); Johnson v. State, 60 P. (2d) 681 (Wash. 1936).

57. PA. STAT. ANN. (Purdon, 1931) tit. 77, § 501.

58. Section 3 describes the Pennsylvania Unemployment Compensation Law as having been enacted for the "health, morals, and welfare" of the commonwealth.

59. See *supra* note 41.

60. Section 3.

61. This Act was evidently not meant to be a panacea for all the evils of unemployment, for it only takes care of short intervals of idleness in the life of the usually employed person.

62. The Act does not attempt to take care of those who are unable to work due to poor health. Such legislation would seem to be the next logical step.