

State of Vermont**Department of Labor**

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July 24, 2014

Legislative Committee on Administrative Rules

Attn: Katie Pickens

115 State Street

Montpelier, VT 05633-5301

Re: Department of Labor, Rule 12-P44
Unemployment Insurance Coverage for Direct Sellers and Newspaper Carriers

Dear Members of the Committee:

On May 30, 2013, LCAR voted to extend the deadline for the adoption of the above-referenced rule to September 1, 2014, pursuant to 3 V.S.A. § 843(c). The committee then deferred further action on the rule to a future meeting.

Since then, Legislative Council prepared a report on the proposed rule, which was submitted to the legislature on January 14, 2014. That report can be found here:

<http://www.leg.state.vt.us/reports/2014ExternalReports/296113.pdf>

A copy of the report, as well as the final proposed rule, is included with this letter.

It is the Department's intention to adopt the final proposed rule without further amendment, absent any objection by the Committee. We look forward to discussing this matter with you at your August 7, 2014 meeting. If the committee would like anything further from the Department prior to the meeting, please let me know.

Sincerely,



Dirk Anderson
General Counsel

Cc: Anne M. Noonan, Commissioner
Tracy Phillips, Director of Unemployment Insurance and Wages



Administrative Procedures – Final Proposed Rule Coversheet**Instructions:**

In accordance with Title 3 Chapter 25 of the Vermont Statutes Annotated and the “Rule on Rulemaking” adopted by the Office of the Secretary of State, this final proposed filing will be considered complete upon the submission and acceptance of the following components to the Office of the Secretary of State and to the Legislative Committee on Administrative Rules:

- Final Proposed Rule Coversheet
- Adopting Page
- Economic Impact Statement
- Public Input Statement
- Scientific Information Statement (if applicable)
- Incorporated by Reference Statement (if applicable)
- Clean text of the rule (Amended text without annotation)
- Annotated text (Clearly marking changes from previous rule)
- Copy of ICAR acceptance e-mail
- A copy of comments received during the Public Notice and Comment Period.
- Responsiveness Summary (detailing agency’s decisions to reject or adopt suggested changes received as public comment).

All forms submitted to the Office of the Secretary of State, requiring a signature shall be hand signed original signatures of the appropriate adopting authority or authorized person, and all filings are to be submitted, no later than 3:30 pm on the last scheduled day of the work week.

Certification Statement: As the adopting Authority of this rule (see 3 V.S.A. § 801 (b) (11) for a definition), I approve the contents of this filing entitled:

Rule Title: Unemployment Insurance Coverage for Direct Sellers and Newspaper Carriers

Anne M. Noonan, on 12/21/12
 (signature) (date)

Printed Name and Title:

Anne M. Noonan
 Commissioner of Labor

RECEIVED BY: _____

- Final Proposed Rule Coversheet
- Adopting Page
- Economic Impact Statement
- Public Input Statement
- Scientific Information Statement (if applicable)
- Incorporated by Reference Statement (if applicable)
- Clean text of the rule (Amended text without annotation)
- Annotated text (Clearly marking changes from previous rule)
- ICAR Approval received by E-mail.
- Copy of Comments
- Responsiveness Summary

1. TITLE OF RULE FILING:

Unemployment Insurance Coverage for Direct Sellers
and Newspaper Carriers

2. PROPOSED NUMBER ASSIGNED BY THE SECRETARY OF STATE

12P-044

3. ADOPTING AGENCY:

Vermont Department of Labor

4. PRIMARY CONTACT PERSON:

(A PERSON WHO IS ABLE TO ANSWER QUESTIONS ABOUT THE CONTENT OF THE RULE).

Name: Dirk Anderson

Agency: Vermont Department of Labor

Mailing Address: PO Box 488 Montpelier VT 05601

Telephone: 802 828 - 4391 ext. Fax: 802 828 - 4046

E-Mail: dirk.anderson@state.vt.us

Web URL *(WHERE THE RULE WILL BE POSTED)*:

<http://labor.vermont.gov>

5. SECONDARY CONTACT PERSON:

(A SPECIFIC PERSON FROM WHOM COPIES OF FILINGS MAY BE REQUESTED OR WHO MAY ANSWER QUESTIONS ABOUT FORMS SUBMITTED FOR FILING IF DIFFERENT FROM THE PRIMARY CONTACT PERSON).

Name: Melissa Kesterson

Agency: Vermont Department of Labor

Mailing Address: PO Box 488 Montpelier VT 05601

Telephone: 802 828 - 4390 ext. Fax: 802 828 - 4046

E-Mail: melissa.kesterson@state.vt.us

6. LEGAL AUTHORITY / ENABLING LEGISLATION:

(THE SPECIFIC STATUTORY OR LEGAL CITATION FROM SESSION LAW INDICATING WHO THE ADOPTING ENTITY IS AND THUS WHO THE SIGNATORY SHOULD BE. THIS SHOULD BE A SPECIFIC CITATION NOT A CHAPTER CITATION).

21 VSA sections 1, 1301(6)(C)(xxi), 1307

7. THE FILING HAS CHANGED SINCE THE FILING OF THE PROPOSED RULE.

8. THE AGENCY HAS INCLUDED WITH THIS FILING A LETTER EXPLAINING IN DETAIL WHAT CHANGES WERE MADE, CITING CHAPTER AND SECTION WHERE APPLICABLE.

9. SUBSTANTIAL ARGUMENTS AND CONSIDERATIONS WERE RAISED FOR OR AGAINST THE ORIGINAL PROPOSAL.
10. THE AGENCY HAS INCLUDED COPIES OF ALL WRITTEN SUBMISSIONS AND SYNOPSES OF ORAL COMMENTS RECEIVED.
11. THE AGENCY HAS INCLUDED A LETTER EXPLAINING IN DETAIL THE REASONS FOR THE AGENCY'S DECISION TO REJECT OR ADOPT THEM.
12. **CONCISE SUMMARY (150 WORDS OR LESS):**
This rule clarifies the status of newspaper carriers as employees for purposes of unemployment insurance tax liability.
13. **EXPLANATION OF WHY THE RULE IS NECESSARY:**
The department has been petitioned to initiate rulemaking on this subject pursuant to 3 V.S.A. 831(c); accordingly rule adoption is mandatory.
14. **LIST OF PEOPLE, ENTERPRISES AND GOVERNMENT ENTITIES AFFECTED BY THIS RULE:**
Newspaper publishers, newspaper carriers, the Vermont Department of Labor.
15. **BRIEF SUMMARY OF ECONOMIC IMPACT(150 WORDS OR LESS):**
This rule will require newspaper publishers to pay unemployment insurance assessments on wages paid to newspaper carriers. In turn, such wages will be usable by the newspaper carriers for establishing monetary eligibility for unemployment insurance.
16. A HEARING WAS HELD.
17. HEARING INFORMATION
(THE FIRST HEARING SHALL BE NO SOONER THAN 30 DAYS FOLLOWING THE POSTING OF NOTICES ONLINE).

IF THIS FORM IS INSUFFICIENT TO LIST THE INFORMATION FOR EACH HEARING PLEASE ATTACH A SEPARATE SHEET TO COMPLETE THE HEARING INFORMATION.

Date: 10/4/2012

Time: 02:00 PM

Location: Vermont Interactive Television, Bennington, Brattleboro, Montpelier, Newport, Randolph Center, Rutland, Springfield II, Williston II.

Date:

Time: PM

Location:

Date:

Time: PM

Location:

Date:

Time: PM

Location:

18. DEADLINE FOR COMMENT (NO EARLIER THAN 7 DAYS FOLLOWING LAST HEARING):

10/15/2012

19. KEYWORDS (PLEASE PROVIDE AT LEAST 3 KEYWORDS OR PHRASES TO AID IN THE SEARCHABILITY OF THE RULE NOTICE ONLINE).

unemployment insurance

unemployment benefits

newspaper carriers

direct sellers

Run Spell Check

Administrative Procedures – Economic Impact Statement

Instructions:

In completing the economic impact statement, an agency analyzes and evaluates the anticipated costs and benefits to be expected from adoption of the rule. This form must be completed for the following filings made during the rulemaking process:

- Proposed Rule Filing
- Final Proposed Filing
- Adopted Rule Filing
- Emergency Rule Filing

Rules affecting or regulating public education and public schools must include cost implications to local school districts and taxpayers in the impact statement (see 3 V.S.A. § 832b for details).

The economic impact statement also contains a section relating to the impact of the rule on greenhouse gases. Agencies are required to explain how the rule has been crafted to reduce the extent to which greenhouse gases are emitted (see 3 V.S.A. § 838(c)(4) for details).

All forms requiring a signature shall be original signatures of the appropriate adopting authority or authorized person.

Certification Statement: As the adopting Authority of this rule (see 3 V.S.A. § 801 (b) (11) for a definition), I conclude that this rule is the most appropriate method of achieving the regulatory purpose. In support of this conclusion I have attached all findings required by 3 V.S.A. §§ 832a, 832b, and 838(c) for the filing of the rule entitled:

Rule Title: Unemployment Insurance Coverage for Direct Sellers and Newspaper Carriers

Anne M. Noonan, on 12/21/2012.
(signature) (date)

Printed Name and Title:

Anne M. Noonan
Commissioner Of Labor

BE AS SPECIFIC AS POSSIBLE IN THE COMPLETION OF THIS FORM, GIVING FULL INFORMATION ON YOUR ASSUMPTIONS, DATABASES, AND ATTEMPTS TO GATHER OTHER INFORMATION ON THE NATURE OF THE COSTS AND BENEFITS INVOLVED. COSTS AND BENEFITS CAN INCLUDE ANY TANGIBLE OR INTANGIBLE ENTITIES OR FORCES WHICH WILL MAKE AN IMPACT ON LIFE WITHOUT THIS RULE.

1. TITLE OF RULE FILING:

Unemployment Insurance Coverage for Direct Sellers and Newspaper Carriers

2. ADOPTING AGENCY:

Vermont Department of Labor

3. CATEGORY OF AFFECTED PARTIES:

LIST CATEGORIES OF PEOPLE, ENTERPRISES, AND GOVERNMENTAL ENTITIES POTENTIALLY AFFECTED BY THE ADOPTION OF THIS RULE AND THE ESTIMATED COSTS AND BENEFITS ANTICIPATED:

This rule affects the publishers of newspapers and the individuals who distribute those newspapers.

4. IMPACT ON SCHOOLS:

INDICATE ANY IMPACT THAT THE RULE WILL HAVE ON PUBLIC EDUCATION, PUBLIC SCHOOLS, LOCAL SCHOOL DISTRICTS AND/OR TAXPAYERS:

This rule is unlikely to have any effect on schools. Students who are still in public schools and deliver newspapers would be unlikely to qualify for unemployment benefits, regardless of whether newspaper delivery was considered covered employment under the unemployment law.

5. COMPARISON:

COMPARE THE ECONOMIC IMPACT OF THE RULE WITH THE ECONOMIC IMPACT OF OTHER ALTERNATIVES TO THE RULE, INCLUDING NO RULE ON THE SUBJECT OR A RULE HAVING SEPARATE REQUIREMENTS FOR SMALL BUSINESS:

The Federal Unemployment Tax Act does not allow states to differentiate between small and large employers for purposes of establishing tax liability or tax rates. All employers are taxed according to their unemployment benefit experience rating record. No rule would result in a continuation of existing practice, which does not tax employers for wages paid to certain newspaper carriers. It would also continue to prevent those newspaper carriers from using such wages to establish unemployment eligibility. However, it is the

department's belief that such continuation would be contrary to the intent of the statute.

6. FLEXIBILITY STATEMENT:

COMPARE THE BURDEN IMPOSED ON SMALL BUSINESS BY COMPLIANCE WITH THE RULE TO THE BURDEN WHICH WOULD BE IMPOSED BY ALTERNATIVES CONSIDERED IN 3 V.S.A. § 832a:

The Federal Unemployment Tax Act does not allow states to differentiate between small and large employers for purposes of establishing tax liability or tax rates. All employers are taxed according to their unemployment benefit experience rating record.

7. GREENHOUSE GAS IMPACT: *EXPLAIN HOW THE RULE WAS CRAFTED TO REDUCE THE EXTENT TO WHICH GREENHOUSE GASES ARE EMITTED, EITHER DIRECTLY OR INDIRECTLY, FROM THE FOLLOWING SECTORS OF ACTIVITIES:*

A. TRANSPORTATION —

IMPACTS BASED ON THE TRANSPORTATION OF PEOPLE OR PRODUCTS (e.g., "THE RULE HAS PROVISIONS FOR CONFERENCE CALLS INSTEAD OF TRAVEL TO MEETINGS" OR "LOCAL PRODUCTS ARE PREFERENTIALLY PURCHASED TO REDUCE SHIPPING DISTANCE."):

The Rule is limited to taxing authority and benefit eligibility in the newspaper industry, which does not impact travel.

B. LAND USE AND DEVELOPMENT —

IMPACTS BASED ON LAND USE AND DEVELOPMENT, FORESTRY, AGRICULTURE ETC. (e.g., "THE RULE WILL RESULT IN ENHANCED, HIGHER DENSITY DOWNTOWN DEVELOPMENT." OR "THE RULE MAINTAINS OPEN SPACE, FORESTED LAND AND/OR AGRICULTURAL LAND."):

The Rule is limited to taxing authority and benefit eligibility in the newspaper industry, which does not impact land use or development.

C. BUILDING INFRASTRUCTURE —

IMPACTS BASED ON THE HEATING, COOLING AND ELECTRICITY CONSUMPTION NEEDS (e.g., "THE RULE PROMOTES WEATHERIZATION TO REDUCE BUILDING HEATING AND COOLING DEMANDS." OR "THE PURCHASE AND USE OF EFFICIENT ENERGY STAR APPLIANCES IS REQUIRED TO REDUCE ELECTRICITY CONSUMPTION."):

The Rule is limited to taxing authority and benefit eligibility in the newspaper industry, which does not impact electricity consumption.

D. WASTE GENERATION / REDUCTION —

IMPACTS BASED ON THE GENERATION OF WASTE OR THE REDUCTION, REUSE, AND RECYCLING OPPORTUNITIES AVAILABLE (e.g., “THE RULE WILL RESULT IN REUSE OF PACKING MATERIALS.” OR “AS A RESULT OF THE RULE, FOOD AND OTHER ORGANIC WASTE WILL BE COMPOSTED OR DIVERTED TO A ‘METHANE TO ENERGY PROJECT’.”):

The Rule is limited to taxing authority and benefit eligibility in the newspaper industry, which does not impact waste generation or reduction.

E. OTHER —

IMPACTS BASED ON OTHER CRITERIA NOT PREVIOUSLY LISTED:

N/A

Run Spell Check

Administrative Procedures – Public Input Statement

Instructions:

In completing the public input statement, an agency describes what it did do, or will do to maximize the involvement of the public in the development of the rule. This form must be completed for the following filings made during the rulemaking process:

- Proposed Rule Filing
- Final Proposed Filing
- Adopted Rule Filing
- Emergency Rule Filing

1. TITLE OF RULE FILING:

Unemployment Insurance Coverage for Direct Sellers and Newspaper Carriers

2. ADOPTING AGENCY:

Vermont Department of Labor

3. PLEASE LIST THE STEPS THAT HAVE BEEN OR WILL BE TAKEN TO MAXIMIZE PUBLIC INVOLVEMENT IN THE DEVELOPMENT OF THE PROPOSED RULE:

The implementation of this rule is in response to a public rulemaking request from representatives of the Vermont labor community which led the Department to conclude that the UI policy VDOL had adopted and instituted is contrary to the statute and legislative intent. Prior to the filing of a final proposed rule, additional comment and input will be sought from the newspaper industry in Vermont, from employees, and from labor organizations. We intend to hold a public hearing(s) on the proposed rule.

4. BEYOND GENERAL ADVERTISEMENTS, PLEASE LIST THE PEOPLE AND ORGANIZATIONS THAT HAVE BEEN OR WILL BE INVOLVED IN THE DEVELOPMENT OF THE PROPOSED RULE:

Input will be solicited directly from Vermont's daily and weekly newspapers and from employees and labor organizations.

Run Spell Check

Administrative Procedures – Adopting Page

Instructions:

This form must be completed for each filing made during the rulemaking process:

- Proposed Rule Filing
- Final Proposed Filing
- Adopted Rule Filing
- Emergency Rule Filing

Note: To satisfy the requirement for an annotated text, an agency must submit the entire rule in annotated form with proposed and final proposed filings. Filing an annotated paragraph or page of a larger rule is not sufficient. Annotation must clearly show the changes to the rule.

When possible the agency shall file the annotated text, using the appropriate page or pages from the Code of Vermont Rules as a basis for the annotated version. New rules need not be accompanied by an annotated text.

1. TITLE OF RULE FILING:

Unemployment Insurance Coverage for Direct Sellers and
Newspaper Carriers

2. ADOPTING AGENCY:

Vermont Department of Labor

3. AGENCY REFERENCE NUMBER, IF ANY:

4. TYPE OF FILING (*PLEASE CHOOSE THE TYPE OF FILING FROM THE DROPDOWN MENU BASED ON THE DEFINITIONS PROVIDED BELOW*):

- **AMENDMENT** - Any change to an already existing rule, even if it is a complete rewrite of the rule, it is considered an amendment as long as the rule is replaced with other text.
- **NEW RULE** - A rule that did not previously exist even under a different name.
- **REPEAL** - The removal of a rule in its entirety, without replacing it with other text.

This filing is **A NEW RULE** .

5. LAST ADOPTED (*PLEASE PROVIDE THE TITLE AND LAST DATE OF ADOPTION FOR THE EXISTING RULE*):

Run Spell Check

INTERAGENCY COMMITTEE ON ADMINISTRATIVE RULES

To: Louise Corliss, SOS
Brian Leven, SOS
Katie Pickens, LCAR
ICAR Members

Date: August 14, 2012

Proposed Rule: Unemployment Insurance Coverage for Direct Sellers and Newspaper Carriers
(Department of Labor)

The following official action was taken at the August 13, 2012 meeting of ICAR.

Present: Mark Oettinger (chaired in Michael's absence), Steve Knudson, Diane Zamos, Susan Harritt, David Englander, and John Kessler
Absent: Chair Michael Clasen, Bob McLeod (voted electronically), Karen Songhurst (voted electronically)
Abstain: Bob McLeod
Staff: Karen Pallas

The Committee has no objection to the proposed rule being filed with the Secretary of State.

The Committee approves the rule with the following recommendations:

1. Coversheet #10: change to "will be scheduled;"
2. Economic Impact Statement #5: correct spellings in second to last sentence: the word "form" s/b "from" and correct the spelling of the word "eligibility;"
3. Public Input Statement #3: first sentence should read "...public rule making" rather than "...public records;"
4. Website should indicate rule will be posted; and
5. Rule Section 3d: change the word "income" to "remuneration."

Motion to approve with recommendations was moved by Steve Knudson, seconded by Susan Harritt and passed unanimously.

The Committee opposes filing of the proposed rule.

cc: Annie Noonan
Dirk Anderson
Melissa Kesterson

VERMONT DEPARTMENT OF LABOR

UNEMPLOYMENT INSURANCE AND WAGES DIVISION

UNEMPLOYMENT INSURANCE COVERAGE RULE FOR DIRECT SELLERS AND
NEWSPAPER CARRIERS

Section 1. Authority

This rule is issued by authority of the commissioner of labor, as conferred by 21 V.S.A. §§ 1, 1301(6)(C)(xxi), 1307.

Section 2. Purpose of Rule

Pursuant to No. 136 of the Acts of the 2005 Adj. Session (2006), 21 V.S.A. § 1301(6)(C)(xxi) was added to Vermont's Unemployment Compensation law. The purpose of the act was to exempt a class of individuals known as "direct sellers" from the definition of "employment," as that term is defined by § 1301(6). Doing so rendered the remuneration paid to such individuals neither taxable to the employer, nor available to the individual for purposes of establishing benefit eligibility. Since passage of the law, the department of labor has been questioned and proposed to amend its application of the exemption to certain newspaper carriers. This rule is intended to clarify the scope of the statutory exemption.

Section 3. Application of Exemption

In accordance with 21 V.S.A. § 1301(6)(C)(xxi), and for the purpose of assessing unemployment contributions against employers, services provided by direct sellers shall not be considered employment. In order to be considered a direct seller, an individual must meet the requirements of a), b) and c) below:

- a) Be engaged in the trade or business of:
 - 1) Selling or soliciting the sale of consumer products, including services, either
 - A) In a home, or other place that is not a permanent retail establishment, or
 - B) To any buyer on a buy-sell basis or a deposit-commission basis for resale in a home or other place that is not a permanent retail establishment.
 - b) Substantially all of the individual's pay for the services described in subsection a) is directly related to sales or other output (including the performance of services) rather than to the number of hours worked.

- c) The services performed by the individual must be performed under a written contract between the individual and the person for whom the services are performed, and the contract must provide that the individual will not be treated as an employee for federal and state tax purposes.

- d) Individuals engaged in the delivery or distribution of newspapers or shopping news (including any services directly related to that trade or business) shall not be considered direct sellers, unless it can be demonstrated that their remuneration is substantially derived from their solicitation of the sale, subscription, or renewal of subscription of such newspapers or shopping news.

Summary of Public Comment and Recommendation of Final Proposed Rule

Vermont Department of Labor Administrative Rule Unemployment Insurance Coverage for Direct Sellers and Newspaper Carriers

December 24, 2012

A public hearing on this proposed rule was held on October 4, 2012, via Vermont Interactive Television, at sites around the state. A list of attendees is attached to this summary. The deadline for public comment on the proposed State of Vermont Minimum Wage Rules was October 15, 2012. By notice published by the Secretary of State, as well as on the Department's website, the public was invited to comment on the proposed rule. The Department received 10 written comments, all of which are attached to this filing.

SUMMARY OF PROPOSED RULE

This rule was filed in response to a petition for rulemaking to clarify an internal policy of the Department of Labor. The proposed rule, as originally filed, would reverse a six year old policy of the Department exempting wages paid to certain newspaper carriers from being subject to unemployment insurance tax. The Departmental policy in question was adopted subsequent to the passage, in 2006, of Act 136 (H.717), known as the Direct Sellers bill.

SUMMARY OF PUBLIC COMMENTS

All comments received can be divided into two camps: Those who believe that wages paid to newspaper carriers should be subject to unemployment tax, and those who do not.

Speaking in favor of the proposed rule at the public hearing were David Mickenberg, Esq., representing the International Brotherhood of Teamsters, and Representative Warren Kitzmiller. Speaking in opposition were Emerson Lynn of the St. Albans Messenger, Ed Woods of the Bennington Banner and Brattleboro Reformer, Bob Dematties of the Caledonian Record, John Mitchell of the Rutland Herald and Montpelier Times-Argus, and Michael Zinser, representing the Vermont Press Association.

All of the above-named individuals, with the exception of Representative Kitzmiller, also submitted written comment, which is summarized below. Representative Kitzmiller commented that when H.717 passed the House, there were express representations made to his committee (House Commerce) that the direct seller exemption was not intended to implicitly include newspaper carriers, and his committee passed the bill out with that understanding. He refers to the Department's current interpretation as a "rogue ruling." Rep. Kitzmiller also commented that the numbering scheme assigned to the sub-paragraphs of the rule, specifically the reference to

“the following three criteria” was confusing. The Department agrees with this comment, and the final proposed rule is amended accordingly.

Of the ten written comments received, seven came from Vermont newspaper publishers, one from the Vermont Press Association, one from the International Brotherhood of Teamsters, and one from Senator Vince Illuzzi. Only the Teamsters wrote in support of the proposed rule; the others wrote requesting that the Department’s current practice of exempting certain newspaper carriers from coverage continue unchanged. While the comments are attached to this filing in their entirety, they are summarized as follows:

Summary of arguments in favor of the proposed rule

- The Vermont Supreme Court has held that newspaper carriers are employees and not independent contractors. Times Argus v. Department of Employment and Training, 146 Vt. 320 (1985)
- Since the holding in Times Argus, numerous bills have been introduced in the Vermont legislature to explicitly exempt newspaper carriers from coverage, and all have been unsuccessful.
- Many other states that exclude newspaper carriers from coverage do so explicitly, not by implication. The federal tax exemption for direct sellers also includes newspaper carriers explicitly.
- A plain reading of Vermont’s direct seller law does not show an intent to exclude newspaper carriers from coverage.
- Newspaper carriers and direct sellers have distinctly different job duties; direct sellers’ income is entirely dependent on actually selling a product whereas newspaper carriers primarily deliver product that has already been purchased.
- The legislative history of both the direct seller bill (H.717) and one specifically excluding newspaper carriers from coverage (S.30) supports a finding that the legislature did not intend to exclude newspaper carriers from coverage. Both bills were introduced during the 68th biennial session; H. 717 passed both houses, S.30 did not.

Summary of arguments opposed to the proposed rule

- Federal law, specifically the federal tax code, considers newspaper carriers to be direct sellers, and the Department’s current interpretation of Vermont’s own direct seller law is consistent with the federal law.
- The Department of Labor made express representations, following the passage of H.717, that it would be interpreted to exempt newspaper carriers from unemployment insurance tax, and newspaper publishers have acted in reliance on that representation in running their businesses.

- The chair of the Senate Economic Development Committee at the time, Senator Vince Illuzzi, states that when the Senate passed the direct seller bill H.717, it understood the exemption to extend to newspaper carriers.
- Adoption of the proposed rule would constitute a crippling economic hardship on Vermont's newspaper publishers.
- Newspaper carriers in Vermont do in fact act independently. They are (at least by some publishers) paid a fixed price per paper rather than by the hour. They expressly contract with the newspapers not to be considered employees. They are rewarded for soliciting new or renewed subscriptions. They are free to contract with other, competing newspapers.
- There is a fundamental unfairness in taxing wages paid to newspaper carriers, since the majority of them would not qualify for unemployment benefits based on the minimal hours that they work.

RESPONSE AND RATIONALE

The Department has decided not to change the final proposed rule, other than as to form. The Department is fully aware of the potential hardship that this represents to Vermont's newspaper publishers. The Department is also aware that its past practice is inconsistent with this proposed rule, and its current legal interpretation of the underlying statute. However, past practice alone cannot justify an interpretation that does not stand up to legal scrutiny.

The VAPA requires that proposed rules be consistent with the underlying law on which they are based, and the intent of the legislature. 21 V.S.A. § 842(b)(2). In this case, we believe that the rules of statutory construction favor adoption of the proposed rule over the continuation of the Department's internal policy excluding newspaper carriers from coverage.

First, there is the plain meaning of the statute itself. 21 V.S.A. § 1301(6)(C)(xxi) exempts from the definition of covered employment:

Service performed by a direct seller if the individual is in compliance with all the following:

(l) The individual is engaged in the trade or business of *selling or soliciting the sale of consumer products . . .*

The primary job duty of newspaper carriers is to deliver newspapers, not sell them. While the sale or renewal of subscriptions may be incidental to the delivery of newspapers, carriers are paid to deliver newspapers that have already been subscribed to. In order to comply with the plain meaning of the statute, newspaper carriers would have to set out each day with a supply of unsold newspapers, and convince people to buy them. This is clearly not the case.

Second, there is the fact that the legislature, in passing H.717, did so with the knowledge that the Vermont Supreme Court had expressly ruled that newspaper carriers ought to be considered employees, subject to coverage under Vermont's unemployment law. It follows, then, that the legislature would have expressly included newspaper carriers in the definition of direct seller in H.717 if it intended to overrule the holding in Times Argus v. Department of Employment and Training. As the Supreme Court held recently, "we presume that the legislature is familiar with our interpretation of statutes, and does not overrule this interpretation unless it does so explicitly." Kapusta v. Department of Health, 186 Vt. 276 (2009).

Finally, at the time of the passage of H.717, eight separate bills exempting newspaper carriers from unemployment coverage had been presented to the legislature since the Times Argus decision, and none had been passed. During the biennium that H.717 was being considered, two other bills specifically exempting newspaper carriers had been introduced: H.154 and S.30. If it had been the Legislature's intent to exclude newspaper carriers from coverage, it could easily have added the provisions of either H.154 or S.30 to H.717 by amendment.

The issue of newspaper carriers was clearly a topic of discussion during the biennium. We have heard from members of the House Commerce committee that, when they originally passed H.717 out of committee, it was with the understanding that it was not intended to include newspaper carriers. Since it passed the Senate without amendment, there was no reason to believe that newspaper carriers had somehow been included in the exemption. All in all, the legislative history of H.717 overwhelmingly supports a conclusion that the "direct sellers" exemption from unemployment coverage was not intended to extend to newspaper carriers.

The Department's decision not to amend the proposed rule as requested by the Vermont Press Association is based on its legal interpretation of 21 V.S.A. § 1301(6)(C)(xxi), and our review of the legislative history of this issue, as set forth above. The Department has not taken a position either for or against the underlying policy issue.