

# **Report on Unemployment Compensation and Newspaper Carriers**

**January 14, 2014**

*Prepared by:*

*David Huber, Esq.  
Office of Legislative Council  
State House, Montpelier, VT 05633  
(802) 828-2231  
[DHuber@leg.state.vt.us](mailto:DHuber@leg.state.vt.us)*

## TABLE OF CONTENTS

	Page
<b>I. Statutory Directive and Responsibilities .....</b>	<b>1</b>
<b>II. Summary of Findings .....</b>	<b>1</b>
<b>III. Background: The Creation and Purpose of the Unemployment Insurance Program .....</b>	<b>1</b>
<b>IV. How the UI Program Works .....</b>	<b>3</b>
<b>V. Vermont’s Newspaper Industry and Unemployment Insurance .....</b>	<b>8</b>
<b>VI. Potential Economic Impacts of the Rule .....</b>	<b>10</b>
<b>VII. Approaches Taken by Other States Regarding Unemployment Insurance for Newspaper Carriers .....</b>	<b>11</b>
<b>VIII. Analysis of State and Federal Exemptions to the Unemployment Compensation Statutes.....</b>	<b>12</b>
<b>IX. Applying the Unemployment Statutes to Individuals Who Do Not Earn Enough Wages to Qualify for Unemployment Benefits .....</b>	<b>13</b>
<b>Appendix 1 .....</b>	<b>14</b>
<b>Appendix 2 .....</b>	<b>19</b>
<b>Appendix 3 .....</b>	<b>20</b>
<b>Appendix 4 .....</b>	<b>21</b>
<b>Appendix 5 .....</b>	<b>27</b>
<b>Appendix 6 .....</b>	<b>30</b>
<b>Appendix 7 .....</b>	<b>32</b>
<b>Appendix 8 .....</b>	<b>34</b>

## I. Statutory Directive and Responsibilities

The Office of Legislative Council was directed in 2013 Acts and Resolves No. 82 with undertaking a study of unemployment compensation, its application to newspaper carriers, and the relationship between State and federal exemptions to the unemployment compensation statutes.<sup>1</sup>

## II. Summary of Findings

1. A 2006 bulletin issued by the Vermont Department of Labor exempting wages paid to newspaper carriers from the unemployment insurance tax was based on an incorrect reading of the existing law embodied in 2006 Acts and Resolves No. 136 and known as the “direct sellers” bill.<sup>2</sup>
2. The decision whether to exempt newspaper carriers from the unemployment statutes is a decision that carries with it real economic costs affecting the newspaper industry, the carriers, and the unemployment trust fund.
3. The decision whether to exempt the carriers is a policy decision to be made by the General Assembly. However, if the General Assembly chooses to exempt the carriers, the exemption should be specifically enacted in statute.

## III. Background: The Creation and Purpose of the Unemployment Insurance Program

The federal-state unemployment insurance (UI) system was enacted by Congress pursuant to the Social Security Act of 1935. UI was created in response to a series of economic downturns, including the Great Depression. When jobless rates soared as high as 25 percent in 1933, a political consensus began to evolve that a worker’s unemployment might not be the worker’s fault, but rather the result of greater economic forces.

As described by the United States Supreme Court, the Social Security Act received its impetus from the Report of the Committee on Economic Security, which was established by executive order of President Franklin D. Roosevelt to study the whole problem of financial insecurity due to unemployment, old age, disability, and health.<sup>3</sup> As the Court explained, the Committee recommended a program of unemployment insurance compensation as a first line of defense for a worker, who ordinarily is steadily employed, for a limited period during which there is an expectation that he or she will soon be

---

<sup>1</sup> See Appendix 1.

<sup>2</sup> See Appendix 2.

<sup>3</sup> *California Dept. of Human Resources Development et al. v. Java*, 402 U.S. 121, 130 (1971).

reemployed. The Committee concluded that this compensation should be a contractual right not dependent upon any means test.<sup>4</sup> The Court's further analysis of the Act's legislative history is informative.

Unemployment benefits provide cash to a newly unemployed worker at a time when otherwise he or she would have nothing to spend, serving to maintain the recipient at subsistence levels without the necessity of turning to welfare or private charity. Further, providing for security during the period following unemployment was thought to be a means of assisting a worker to find substantially equivalent employment. The Federal Relief Administrator testified that the Act covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job. Finally, Congress viewed unemployment insurance payments as a means of exerting an influence upon the stabilization of industry. Their only distinguishing feature is that they will be specially earmarked for the use of the unemployed at the very times when it is best for business that they should be so used. Early payment of insurance benefits serves to prevent a decline in the purchasing power of the unemployed, which in turn serves to aid industries producing goods and services. The following extract from the testimony of the Secretary of Labor, in support of the Act, describes the stabilization mechanism contemplated:

“I think that the importance of providing purchasing power for these people, even though temporary, is of very great significance in the beginning of a depression. I really believe that putting purchasing power in the form of unemployment-insurance benefits in the hands of the people at the moment when the depression begins and when the first groups begin to be laid off is bound to have a beneficial effect. Not only will you stabilize their purchases, but through stabilization of their purchases you will keep other industries from going downward, and immediately you spread work by that very device.”<sup>5</sup>

Vermont enacted its unemployment compensation program in 1936. Over the years, the Vermont Supreme Court has echoed the purposes of the program as stated by the federal courts. In addition, the Vermont Supreme Court has noted the humanitarian objectives of the unemployment insurance statutes which require the Court to give a liberal construction of the statutes in favor of the employee in order to achieve the legislation's compensatory goals. As stated by the Court:

[T]he underlying purposes of unemployment legislation are to remove economic disabilities and distress resulting from involuntary unemployment, and to assist those workers who become jobless for reasons beyond their control. Thus, since the Unemployment Compensation Act is remedial legislation, a claimant should not be excluded from the provisions of the Act unless such an exclusion is clearly intended by law.<sup>6</sup>

---

<sup>4</sup> *Id.* at 130-31.

<sup>5</sup> *Java* at 131-32.

<sup>6</sup> See *Donahue v. Department of Employment Security*, 142 Vt. 351, 354 (1982) (internal citations, quotations omitted).

Recently, the Vermont Department of Labor (VDOL) has described the purposes of Vermont's UI program as follows<sup>7</sup>:

- To alleviate the hardship of lost wages by providing partial wage replacement to workers who become involuntarily unemployed, and who are able and willing to accept suitable jobs which are available.
- To provide economic stability for a community when major unemployment occurs and to prevent secondary unemployment which would result if the total amount of wages lost through unemployment was completely withdrawn from circulation.
- To encourage workers to remain in the community and to be available for work recalls by employers when business improves.

#### **IV. How the UI Program Works**

In brief, UI is temporary income for eligible workers who become unemployed through no fault of their own and who are ready, willing, and able to work. Eligibility is contingent upon a worker's having sufficient hours and wages in covered employment. In Vermont, the money for UI benefits comes from taxes paid by employers and interest payments received on any trust fund balance. No deductions are made from a worker's paycheck. The employer also pays a tax to the federal government. The federal tax is used to pay for administering the program, to make loans to replenish State trust funds, and to pay for the federal share of the cost of any extended benefits program that may be in effect. VDOL determines whether an unemployed worker qualifies for unemployment benefits.

The UI system is overseen by the U.S. Department of Labor, but each state administers its own program. The Social Security Act (SSA) and the Federal Unemployment Tax Act of 1939 (FUTA) establish the framework of the system.

##### Revenue (Federal Tax)

FUTA imposes a 6.0 percent gross tax rate on the first \$7,000.00 paid annually by covered employers to each employee. This tax rate is reduced by a credit of 5.4 percent for state taxes paid. This equates to a net FUTA tax rate of 0.6 percent, or \$42.00 for each employee earning at least \$7,000.00 annually. When a state's trust fund is insolvent, the FUTA tax credit is reduced by 0.3 percent each year the fund remains insolvent. The federal revenue finances administration of the system, one-half of the federal-state Extended Benefits (EB) program, and a federal account for state loans. The individual states finance their own programs, as well as their one-half of the federal-state EB program.

---

<sup>7</sup> See VDOL's *Broad Overview of Vermont's Unemployment Insurance Program*, dated July 23, 2009, and *Employer Information Manual: A Guide to Vermont's Unemployment Insurance Program*.

### Revenue (Vermont Tax: Rates and Schedules)

States generally determine the state tax structure used to finance all of the regular state benefits and one-half of the extended benefits. The money is deposited in an account in the U.S. Treasury and can only be used to pay unemployment benefits. In Vermont, a State tax (SUTA) is paid on the first \$16,000.00 of income paid to each employee. After January 1, 2012, whenever the Unemployment Compensation Fund has a positive balance and all advances made to the State Unemployment Compensation Fund pursuant to Title XII of the Social Security Act have been repaid as of June 1, the base of contribution amount shall be adjusted on January 1 of the following year by the same percentage as any increase in the State annual average wage as calculated by 21 V.S.A. § 1338(g). When the unemployment contribution rate schedule established by 21 V.S.A. § 1326(e) is reduced to Schedule III, the base of contribution amount shall be reduced by \$2,000.00 on January 1 of the following year and shall be adjusted annually thereafter on January 1 by the same percentage as any increase in the State annual average wage as calculated by 21 V.S.A. § 1338(g). When the unemployment contribution rate schedule established by 21 V.S.A. § 1326(e) is reduced to Schedule I, the base of contribution amount shall be reduced by \$2,000.00 on January 1 of the following year and shall be adjusted annually thereafter on January 1 by the same percentage as any increase in the State annual average wage as calculated by 21 V.S.A. § 1338(g).

Two factors determine an employer's Vermont SUTA rate:

- A ratio (experience rating) is calculated each year that reflects the benefits charged to the employer's account in relationship to wages paid by the employer. The experience rating is used to allocate cost among employers.
- The adequacy of Vermont's trust fund reserves determines which of five possible tax schedules shall be applied for the next year.

The experience rating ensures that employers with a higher percentage of former employees receiving unemployment benefits pay a higher tax rate. In other words, it acts as an incentive for an employer to take steps to help stabilize employment (that is, not regularly lay off workers) and also to supply information needed to prevent benefit payments to ineligible persons.

Vermont has five tax schedules, each with 21 tax rates. An employer with a zero benefit ratio (i.e., no benefits were charged to that employer's account over the last three years) is assigned the lowest tax rate in effect for that year (rate class 0). Rate class 20 comprises employers with the highest benefit ratios.

The tax schedules are designed so that rate Schedule III provides an "equilibrium" of funding across the business cycle. Schedules I and II raise less money than the equilibrium, and Schedules III and IV raise more than the equilibrium. At current wage and employment levels, the difference in the total amount raised under each schedule is approximately \$10 million. The trust fund is "forward funded," which means that the tax schedules are designed to raise funding during good economic times to ensure that there is adequate funding during recessions.

### Benefits

Unemployment benefits are paid to workers who are unemployed, either totally or partially, through no fault of their own and who are able to work and available for suitable work and, if required to do so, are actively seeking work. Unemployment benefits are an entitlement, provided the individual filing the claim meets all eligibility requirements.

*Monetary Eligibility* for benefits depends upon the worker's being employed for a specified period of time and earning a specified amount of money. Specifically,

- The worker must have earned covered wages in at least two of the four calendar quarters (base period) prior to applying for benefits; and
- The worker must have earned at least \$2,312.00 in the highest wage quarter and at least 40 percent of the wages from the highest quarter in the remaining quarters of the base period.

The *weekly benefit* is calculated by dividing the two highest quarters' wages by 45. Eligible employees in Vermont currently receive an average weekly benefit of about \$325.92, or 42 percent of average weekly wages.

Federal law permits states to set a *maximum weekly benefit*. In Vermont, the maximum weekly benefit increases annually at the same rate as the average wage of all workers. However, under 2009 Special Session Acts and Resolves No. 2, Sec. 2, 21 V.S.A. § 1338(f) was amended to freeze the maximum weekly benefit at \$425.00 until June 30, 2010. In addition, the maximum weekly benefit is frozen when the trust fund is insolvent. Once the fund maintains a positive balance, the maximum benefit is indexed annually by the same percentage as the growth in the average weekly wage. When the unemployment tax schedule attains Schedule III, the maximum benefit will be 57 percent of the average weekly wage.

Benefits are paid if a worker is laid off due to lack of work or quits with good cause attributable to the employer. The worker, however, must be able and available for work, which is demonstrated by making at least three job contacts a week.

Benefits are delayed if a worker is fired for misconduct or if the worker quits because a health condition prevents the worker from doing the specific job but is able to do other work.

A worker is disqualified from receiving benefits if he or she was fired for gross misconduct, such as theft or violence at the workplace, or the worker quit without good cause attributable to the employer. In the event of a discharge for gross misconduct, any wages earned from the separating employer are removed from the claimant's base period for purposes of calculating monetary eligibility.

### Coverage<sup>8</sup>

In general, in order for services to be covered by UI law, they must be performed in an employer-employee relationship. Vermont uses the “ABC” test to determine where there is sufficient absence of control by an employer such that the worker is not an employee, but an independent contractor.

The ABC test provides that services performed by an individual for wages shall be deemed to be employment subject to UI law unless and until it is shown to the satisfaction of the commissioner that:

- Such individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact; and
- Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside all the places of business of the enterprise for which such service is performed; and
- Such individual is customarily engaged in an independently established trade, occupation, profession, or business.

### Disregarded Earnings<sup>9</sup>

A worker who is employed part-time may file for unemployment benefits provided he or she reports all weekly gross wages earned for each week worked less than full-time. The first \$40.00 earned by the worker or 30 percent of the worker’s weekly wage, whichever is greater, will not be deducted from the weekly benefit amount. Any amount above the disregarded earning amount is deducted on a dollar-for-dollar basis from the individual’s weekly benefit amount, and the worker is paid a partial benefit for that week.

The earnings disregard was established in 1991 Acts and Resolves No. 62 and replaced the dependent allowance, which had allowed a \$15.00 reduction for the worker and a \$3.00 reduction for each dependent, up to a maximum of \$30.00.

Incidentally, all states have disregarded earnings and some also have dependent allowances.

### Duration of Benefits

Most eligible workers in Vermont receive benefits for up to 26 weeks, except that workers who have been determined to have been fired for misconduct receive a maximum of 23 weeks. Also, some seasonally employed workers may receive less than 26 weeks if 26 times their weekly benefit amount is greater than 46 percent of their base period wages.

---

<sup>8</sup> 21 V.S.A. § 1301(6)(B).

<sup>9</sup> 21 V.S.A. § 1338a.



### Extended Benefits (EB) Program

Additional weekly payments beyond the 26-week limit for regular unemployment benefits are triggered by high unemployment levels, and are called extended benefits (EB). Under Vermont's EB program, up to 13 extra weeks of full benefits may be payable to workers after they exhaust their regular payments if they continue to remain eligible for the receipt of benefits; the actual amount may be limited by the duration of the EB period. These benefits are payable only during periods of higher unemployment and are not payable unless a determination is made that the State program has triggered "on."

An EB period exists in a state when the three-month average unemployment rate exceeds 6.5 percent and the total unemployment rate is at least 10 percent higher than in the last two years; the three-month insured unemployment rate is at least six percent; or the three-month insured unemployment rate is at least five percent and is at least 20 percent higher than the average of such rates for the corresponding time period in the prior two calendar years.

And, when there is exceptionally high unemployment—a total unemployment rate exceeding eight percent—the EB program provides benefits for 20 weeks.

### Short-Time Compensation Program (Worksharing)

In Vermont, the short-time compensation program was created in 1988 Acts and Resolves No. 135, and amended in 2011 Acts and Resolves No. 162. The program allows employers to submit plans permitting workers to "share" a layoff through reduced hours and get a proportional benefit.

### Negative Balance Employers

Negative balance employers are those whose experience rating accounts are charged more in benefits than the employer paid in contributions. It is reasonable that there are some negative balance employers in the UI program because, as an insurance system, it is designed to pool risks. In Vermont, however, approximately 49 percent of negative balance employers have been in that category for three or more years, and most are paying the highest tax rates allowed under the law. In 2008, there were 4,432 negative balance employers in Vermont. Some negative balance employers are found in seasonal industries, but they are also found in other sectors, including private households and nonprofit social service agencies.

### Seasonal Employers

As indicated above, the seasonal nature of some business sectors, such as the construction and ski industries, contributes to the number of negative balance employers in Vermont. Seasonal employers often benefit from being able to "rehire" their skilled workforce. In general, benefits based on seasonal work are limited to unemployment occurring during the operating period of the seasonal industry. Vermont does not have such provisions. However, seasonal workers who have a return to work date more than ten weeks from the date of layoff are required to search for work during their layoff period.

### Reimbursable Employers

Government and nonprofit (IRC 501(c)(3)) entities with four or more employees may elect to reimburse VDOL the cost of benefits paid their workers. If they elect to reimburse, they do not pay quarterly taxes into the trust fund, but they are not relieved of benefit costs. These employers reimburse the trust fund for any payments made to laid-off employees. They repay the fund dollar-for-dollar for what is paid out. Additionally, except for those entities that pay the FUTA tax (which includes an administrative charge), they do not pay any of the administrative costs of the UI program.

### Waiting Period

In most states, workers who are otherwise eligible for benefits must first serve a waiting period. The typical waiting period is one week. Vermont currently has a waiting week. The so-called “waiting week,” was repealed in 2000 Acts and Resolves No. 127, in response to a request from Barre granite workers. However, it was reimposed by the Trust Fund Reform Act (2010 Acts and Resolves No. 124) effective July 1, 2012. That same act sunsets the waiting week effective July 1, 2017.

### Cash Severance Payments

In Vermont, employers were formerly allowed to determine whether severance payments postpone the collection of benefits. Specifically, a worker was disqualified from receiving benefits for any week he or she had received remuneration in the form of a cash severance payment, unless and to the extent the paying employer elected to treat it as nondisqualifying.<sup>10</sup> The option to treat severance pay as nondisqualifying was done away with by the Trust Fund Reform Act (2010 Acts and Resolves No. 124).

### Reporting Requirements

Presently, Vermont law requires the Commissioner of Labor to submit an annual report to the Governor on July 1, detailing the administration and operation of the UI program. 21 V.S.A. § 1309. That report includes a balance sheet of the monies in the trust fund and data as to reserve requirements based upon accepted actuarial principles, with respect to business activity, and other relevant factors for the longest available period. The report also includes recommendations for amendments to the program. In addition, the Commissioner is required to inform the Governor promptly whenever he or she believes the solvency of the fund is in danger and make recommendations with respect thereto.

## **V. Vermont’s Newspaper Industry and Unemployment Insurance**

The question of whether newspaper carriers are considered employees for the purpose of receiving unemployment insurance benefits was first addressed in *Times Argus v. Department of Employment and Training*, 146 VT 320 (1985). In *Times Argus*, the Vermont Supreme Court held that newspaper carriers were employees under the “ABC” test. Specifically, the newspapers could not show that the carriers met the second prong of the test, that the activity was outside the usual course of the business for which such

---

<sup>10</sup> 21 V.S.A. § 1344(a)(5)(F).

service is performed, or that such service was performed outside all the places of business of the enterprise for which such service was performed. The nature of the newspaper business is to publish newspapers; the delivery of the papers to consumers is in the nature of the newspaper business.

In 2006, the General Assembly passed H.717, enacted into law as 2006 Acts and Resolves No. 136 and known as the “direct sellers” bill.<sup>11</sup> The bill was referred to as the “Mary Kay cosmetics” bill, denoting a type of business in which an individual purchases consumer goods with the goal of selling the goods to consumers, and in which the individual bears the risk of profit or loss.

Testimony from members of the House and Senate Committees that passed H.717 differs on whether the bill was intended to apply to newspaper carriers.

Further muddying the waters, in 2006, the Internal Revenue Service interpreted direct seller language in the federal tax code to apply to newspaper carriers. This interpretation appears to have been the basis of the VDOL bulletin exempting newspaper carriers from the UI statutes.<sup>12</sup> By issuing the bulletin based on the IRS interpretation, a fine distinction was lost; namely, that under law an individual may be an employee for one purpose and an independent contractor for another.

The federal UI Act allows for specific exemptions for both direct sellers and newspaper carriers; they are considered to be distinct entities. VDOL in using the IRS interpretation of a tax statute appears to be incorrect in its interpretation of the governing law. VDOL used the tax statutes to interpret the UI statutes.

Despite the disagreeing testimony of members of the House and Senate Committees, there is evidence that the General Assembly did not intend for the “direct sellers” bill to include newspaper carriers; namely, the large number of bills introduced specifically excluding newspaper carriers from the unemployment compensation statutes.<sup>13</sup>

In 2012, VDOL proposed a new rule that would reverse its 2006 bulletin, conceding that it was a misinterpretation of the law.<sup>14</sup> 2013 Acts and Resolves No. 82 postponed the implementation of this rule and directed Legislative Council to study the issue of the application of the unemployment statutes to newspaper carriers.<sup>15</sup>

---

<sup>11</sup> See Appendix 3.

<sup>12</sup> See Appendix 2.

<sup>13</sup> 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.

<sup>14</sup> See Appendix 4.

<sup>15</sup> See Appendix 1.

**Finding: Newspaper carriers were considered employees for UI purposes from 1985 until 2006. A plain reading of the “direct sellers” bill, along with evidence of the introduction of numerous bills specifically exempting carriers from the UI statutes, indicates that the 2006 bulletin issued by VDOL was a misinterpretation of the governing law.**

**The decision to exempt carriers is a policy choice to be made by the General Assembly. If carriers are to be exempted, they should be exempted through specific statutory language.**

## **VI. Potential Economic Impacts of the Rule<sup>16</sup>**

VDOL was asked by Representative Richard Marek, Vice Chair of the Legislative Committee on Administrative Rules, to prepare an economic impact study as it relates to this proposed rule; specifically, any additional potential unemployment insurance costs to newspapers and potential benefits to employees. VDOL subsequently sent Vermont daily newspaper publishers a spreadsheet requesting information on quarterly payments made to carriers on an individual basis. VDOL was provided with the gross revenues paid to 420 carriers. This amount totaled \$4,927,110.00. This represents the total payments made to carriers by all Vermont daily newspapers except the St. Albans Messenger, whose publisher was unavailable.

This limited information does not provide adequate data for completing a comprehensive impact study. As such, VDOL could only draw approximate conclusions on the economic impact and use general rate models to project the impact of the proposed rule.

### Simple model

Using the data provided without details of earnings per carrier, any accounting for expenses or cost of goods sold, mileage, or net earnings, VDOL was able to infer only the following:

\$4,927,110.00 divided by 420 = \$11,731.00 gross per carrier. VDOL recognized that not all carriers deliver the same number of newspapers, but made that assumption purely for purposes of this model.

With the taxable base of \$16,000.00, the entire amount would be subject to UI tax based on the employers’ current tax rate, which could range from 1.3 –8.4 percent, yielding potential taxes of \$152.50–\$985.40 per employee.

For the 420 identified carriers, this would yield a minimum tax for the industry of \$64,050.00 and a maximum of \$413,868.00. The maximum number infers the highest tax rate for all publishers, and, according to VDOL, is unlikely.

---

<sup>16</sup> For VDOL’s complete report, see Appendix 5.

Preferred model

Publisher (A) pays employee (B) \$X,XXX.XX (actual wages per contractor up to \$16,000.00) which is multiplied by XX percent (actual UI tax rate) yield actual tax. This is totaled for all employees and the impact calculated.

Departmental models

Depending on the UI tax rate, the actual tax varies from a minimum of \$26.00 to a maximum of \$1,344.00.<sup>17</sup>

Eligibility to collect unemployment

With only the gross payments and total carriers reported, there is no way to determine who would be eligible for benefits. To determine eligibility, VDOL would need reportable wages by individual. These wages would need to be in the quarter paid with identifying Social Security numbers. An individual's wages from his or her newspaper carrier work would be added to wages earned from other employers in order to calculate the individual's unemployment benefit amount, if any. The information provided to VDOL was not sufficient to make this type of determination for any of the carriers.

Claims for benefits

VDOL regularly receives unemployment claims from individuals indicating their separating employer or a previous employer is a newspaper publisher. In each case, the claim is assigned to the Field Audit Union to determine if wages are useable for the claim or exempt under the current UI Bulletin 482. Most identify themselves as independent contractors and do not apply for benefits on separation. Likewise, they may not file for benefits as their newspaper route is merely supplemental employment.

Impact by publisher

VDOL cannot identify benefit charges and UI tax rates by publisher due to the confidentiality requirements in 21 V.S.A. § 1314(d). VDOL's records show a large variation ranging from publishers with minimum benefit charges well under their tax contribution to those with benefit charges far in excess of their annual contribution to VDOL. VDOL speculates that those employers with a lower tax rate could be more affected by these potential new claims, while those with the higher rates and accounts with benefits exceeding contribution will likely see the least effect from additional claims on their experience rating in the future.

## **VII. Approaches Taken by Other States Regarding Unemployment Insurance for Newspaper Carriers**

All states fall under one of the following categories regarding unemployment insurance for newspaper carriers:

- (1) Statutory exemption of newspaper carriers under 18 years of age;
- (2) Statutory exemption of newspaper carriers regardless of age;

---

<sup>17</sup> For the various VDOL Departmental models, see Appendix 5.

- (3) No statutory exemption for newspaper carriers regardless of age; or
- (4) No mention of exemptions for newspaper carriers in the statutes.

Vermont is unusual in that it is one of seven states that make no statutory mention of newspaper carriers in their unemployment statutes.

Excluding Vermont, the remaining 49 states' approach to this question is as follows:<sup>18</sup>

- (1) 22 states exempt newspaper carriers who are under 18 years of age.
- (2) 19 states exempt newspaper carriers regardless of their age.
- (3) 1 state does not exempt newspaper carriers regardless of their age.
- (4) 7 states do not mention exemptions for newspaper carriers.

### **VIII. Analysis of State and Federal Exemptions to the Unemployment Compensation Statutes**

Vermont's employment exemptions are outlined in 21 V.S.A. § 1301(6)(C)(i)–(xxi).<sup>19</sup> Many of Vermont's employment exemptions are similar to the federal employment exemptions, which are contained in 26 U.S.C. § 3306(c)(B).<sup>20</sup>

Vermont exempts direct sellers, by name, from the definition of employee for unemployment compensation purposes. As of July 1, 2006, wages paid to a direct seller are exempt from the unemployment compensation statute, provided that the direct seller is an individual who sells or solicits the sale of consumer products or services in a nonpermanent retail establishment, or sells any of those products on a buy-sell or a deposit-commission basis for resale in a nonpermanent retail establishment. This definition also included individuals who deliver or distribute newspapers or shopping news. To be covered under this definition, substantially all of the direct seller's pay for services or goods must be directly related to sales or other output. This includes the performance of services rather than to the number of hours worked. Lastly, the services must be performed under a written contract between the individual and the person for whom the services are performed.

The federal statute specifically mentions newspaper carriers under 18 years of age as a type of employee that is exempt from unemployment compensation. Under 26 U.S.C. § 3306(c)(B)(15)(A), service performed by an individual under 18 years of age in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution, is exempt from unemployment compensation. Under 26 U.S.C. § 3306(c)(B)(15)(B), service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by the individual at a fixed price, where the individual's compensation is based on

---

<sup>18</sup> See Appendix 6.

<sup>19</sup> See Appendix 7 for a summary of the employment exemptions listed in 21 V.S.A. § 1301(6)(C)(i)–(xxi).

<sup>20</sup> See Appendix 8 for a summary of the employment exemptions listed in 26 U.S.C. § 3306(c)(B).

the retention of the excess of such price over the amount at which the newspapers or magazines are charged to the individual, whether or not the individual is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back, is exempt from unemployment compensation.

### **IX. Applying the Unemployment Statutes to Individuals Who Do Not Earn Enough Wages to Qualify for Unemployment Benefits**

Unemployment benefits are only available to active members of the labor force. As described more fully in Part IV of this Report, a worker must have earned covered wages in at least two of the four calendar quarters (base period) prior to applying for benefits, and must have earned at least \$2,312.00 in the highest wage quarter and at least 40 percent of the wages from the highest quarter in the remaining quarters of the base period. Therefore, those members of the workforce who do not earn enough wages to qualify for unemployment benefits are not entitled to receive unemployment benefits.

## Appendix 1

### No. 82. An act relating to relieving employers' experience-rating records.

(H.169)

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 21 V.S.A. § 1325 is amended to read:

§ 1325. EMPLOYERS' EXPERIENCE-RATING RECORDS;

~~DISCLOSURE TO SUCCESSOR ENTITY; EMPLOYEE PAID~~

~~\$1,000.00 OR LESS DURING BASE PERIOD~~

(a)(1) The ~~commissioner~~ Commissioner shall maintain an experience-rating record for each employer. Benefits paid shall be charged against the experience-rating record of each subject employer who provided base-period wages to the eligible individual. Each subject employer's experience-rating charge shall bear the same ratio to total benefits paid as the total base-period wages paid by that employer bear to the total base-period wages paid to the individual by all base-period employers. The experience-rating record of an individual subject base-period employer shall not be charged for benefits paid to an individual under any of the following conditions:

~~(1)~~(A) The individual's employment with that employer was terminated under disqualifying circumstances.

~~(2)~~(B) The individual's employment or right to reemployment with that employer was terminated by retirement of the individual pursuant to a retirement or lump-sum retirement pay plan under which the age of mandatory



retirement was agreed upon by the employer and its employees or by the bargaining agent representing those employees.

~~(3)~~(C) As of the date on which the individual filed an initial claim for benefits, the individual's employment with that employer had not been terminated or reduced in hours.

~~(4)~~(D) The individual was employed by that employer as a result of another employee taking leave under subchapter 4A of chapter 5 of this title, and the individual's employment was terminated as a result of the reinstatement of the other employee under subchapter 4A of chapter 5 of this title.

~~(5)~~(E) [Repealed.]

(2) If an individual's unemployment is directly caused by a major natural disaster declared by the President of the United States pursuant to 42 U.S.C. § 5122 and the individual would have been eligible for federal disaster unemployment assistance benefits but for the receipt of regular benefits, an employer shall be relieved of charges for benefits paid to the individual with respect to any week of unemployment occurring due to the natural disaster up to a maximum amount of four weeks.

\* \* \*

Sec. 2. UNEMPLOYMENT COMPENSATION; EMPLOYERS AFFECTED  
BY NATURAL DISASTERS OCCURRING IN 2011

(a) The Department of Labor shall establish a system to provide unemployment compensation tax relief to employers paying a higher rate of

contributions due to layoffs directly caused by federally declared natural disasters occurring in 2011.

(b) Unemployment compensation tax relief shall be available to an employer provided that the employer's employees were separated from employment as a direct result of the disaster. Benefits paid beyond eight weeks shall remain chargeable to the employer.

(c) The relief described in subsection (b) of this section shall not be available to employers electing to make payments in lieu of contributions pursuant to 21 V.S.A. § 1321.

(d) Benefit charge relief provided under subsections (a) and (b) of this section shall not result in the recalculation of previously assigned rate classes for nondisaster-impacted employers.

(e) The Department shall notify employers in the counties covered by the federal disaster relief declaration of the provisions of this section. An employer seeking relief shall apply to the Department within 20 days of notification by the Department. The application shall be made in a manner prescribed and approved by the Commissioner and shall be accompanied by a certified statement of the employer that the employees were separated from employment as a direct result of the disaster and would have not been otherwise. False statements made in connection with the certification shall subject the employer to the provisions of 21 V.S.A. § 1369. The employer shall provide the Department with the name, address, last known phone

number, and Social Security number of each employee alleged to have been separated from employment as a result of the disaster.

(f) If an employer's application for relief is denied, the employer may appeal the decision pursuant to 21 V.S.A. §§ 1348 and 1349.

### Sec. 3. APPROPRIATION

Of the appropriations made to the Department of Labor in Sec. B.400 of House Bill 530 (An act relating to making appropriations for the support of government), the amount of \$60,000.00 is appropriated for the costs of postage and for hiring temporary positions necessary to implement the unemployment compensation tax relief program described in Sec. 2 of this act.

### Sec. 4. DEPARTMENT OF LABOR; ENFORCEMENT OF

#### UNEMPLOYMENT INSURANCE COVERAGE RULE

The Department of Labor shall not implement proposed rule 12P044, unemployment insurance coverage for direct sellers and newspaper carriers, and shall not propose or adopt any rule, issue any bulletin, or take any other action regarding unemployment compensation and newspaper carriers prior to July 1, 2014.

### Sec. 5. STUDY COMMITTEE; UNEMPLOYMENT COMPENSATION

(a) The Office of Legislative Council shall study the issue of unemployment compensation, its application to newspaper carriers, and the relationship between state and federal exemptions to the unemployment compensation statutes.

(b) The Office of Legislative Council shall examine:

(1) the history of how newspaper carriers have been treated for purposes of unemployment compensation in Vermont and the newspaper industry practice of utilizing independent contractors to distribute newspapers or shopping news and the history and rationale behind the 2006 Department of Labor bulletin treating newspaper carriers as direct sellers;

(2) the potential economic impacts the proposed rule would have on newspaper publishers, newspaper carriers, and the unemployment compensation trust fund;

(3) the approaches taken by other states regarding unemployment compensation for newspaper carriers;

(4) an analysis of both state and federal exemptions to the unemployment compensation statutes; and

(5) how the unemployment compensation statutes should apply to individuals who do not earn enough wages to qualify for unemployment benefits.

(c) The Office of Legislative Council shall report its findings to the House Committee on Commerce and Economic Development and the Senate Committee on Finance on or before January 15, 2014.

Sec. 6. EFFECTIVE DATE

This act shall take effect on passage.

Date the Governor signed the bill: June 10, 2013

## Appendix 2

State of Vermont  
Department of Labor  
Montpelier

U.I. Bulletin 482  
July 3, 2006

SUBJECT: The Exemption of Services Performed by Direct Sellers from the Definition of Employment

The intent of this bulletin is to implement the provisions of Act 136 of the 2006 Vermont Legislature, which exempt the services performed by direct sellers from the definition of employment. As a result, businesses that contract with direct sellers will no longer be assessed unemployment insurance taxes on the basis of wages paid to those direct sellers.

### DEFINITION OF DIRECT SELLER

A direct seller must meet *all* of the following conditions.

1. An individual engaged in one of the following trades or businesses.
  - a. 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. Delivering or distributing newspapers or shopping news (including any services directly related to that trade or business).
2. Substantially all the individual's pay for the services described in (1) is directly related to sales or other output (including the performance of services rather than to the number of hours worked).
3. The services are performed under a written contract between the individual and the person for whom the services are performed, and the contract provides that the individual will not be treated as an employee for federal and state tax purposes.

This law became effective July 1<sup>st</sup>, 2006.

### Appendix 3

#### NO. 136. AN ACT RELATING TO DIRECT SELLERS AND UNEMPLOYMENT INSURANCE.

(H.717)

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 21 V.S.A. § 1301(6)(C)(xxi) is added to read:

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

(I) The individual is engaged in the trade or business of selling or soliciting the sale of consumer products, including services or other intangibles, in the home or a location other than in a permanent retail establishment, including whether the sale or solicitation of a sale is to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis for resale by the buyer or any other person.

(II) Substantially all the remuneration, whether or not received in cash, for the performance of the services described in subdivision (I) of this subdivision (C)(xxi) is directly related to sales or other output, including the performance of services, rather than to the number of hours worked.

(III) The services performed by the individual are performed pursuant to a written contract between the individual and the person for whom the services are performed, and the contract provides that the individual will not be treated as an employee for federal and state tax purposes.

Approved: May 6, 2006

## Appendix 4

### 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 68<sup>th</sup> 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:

(1) 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.

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 Act of the 2005 Adi. 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 ~~all of the following three criteria~~ 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.

**Appendix 5****ECONOMIC IMPACT OF RULE 12-P44****NEWSPAPER CARRIERS****February 20, 2013**

The Vermont Department of Labor (VDOL) was asked by Representative Richard Marek, Vice Chair of the Legislative Committee on Administrative Rules to prepare an economic impact study as it relates to this proposed rule; specifically any additional potential unemployment insurance costs to newspapers and potential benefits to employees. VDOL subsequently sent Vermont daily newspaper publishers a spreadsheet requesting information on quarterly payments made to carriers on an individual basis. The publishers elected to not complete the spreadsheets, citing confidentiality concerns for their contract carriers. Instead the publishers, through their representative the Zinser Law Firm, provided VDOL with only the gross revenues paid to 420 carriers. This amount totaled \$4,927,110.00. This represents the total payments made to carriers by all Vermont daily newspapers except the St. Albans Messenger, whose publisher was unavailable.

This limited information does not provide adequate data for completing a comprehensive impact study. As such, VDOL can only draw approximate conclusions on the economic impact and use general rate models to project the impact of the proposed rule.

**Simple model**

Using the data provided without details of earnings per carrier, any accounting for expenses or cost of goods sold, mileage or net earning, we are able to infer only the following:

\$4,927,000 divided by 420 = \$11,731 gross per carrier. We recognize that not all carriers deliver the same amount of newspapers, but make that assumption purely for purposes of this model.

With the taxable base of \$16,000 the entire amount would be subject to UI Tax based on the employers' current tax rate, which could range from 1.3% to 8.4%, yielding potential taxes of \$152.50 to \$985.40 per employee.

For the 420 identified carriers this would yield a minimum tax for the industry of \$64,050.00 and a maximum of \$413,868.00.

Based on the information provided on behalf of the publishers, the maximum exposure would be \$413,868.00. This infers the highest tax rate for all publishers, and is not likely.

**Preferred Example** - Publisher (A) pays employee (B) \$X,XXX (actual wages per contractor up to \$16,000.00) which is multiplied by XX% (actual UI tax rate) yield actual tax. This is totaled for all employees and the impact calculated.

### Departmental Models

For example purposes, taxable wages will set as follows:

- A. \$2,000
- B. \$5,000
- C. \$10,000
- D. \$16,000

These will be used to calculate tax at various rates:

- 1. Rate of 1.3%
- 2. Rate of 2.7%
- 3. Rate of 5.7%
- 4. Rate of 8.4%

#### 1. Unemployment Tax at 1.3% (Minimum)

A.	\$2,000	x 1.3% =	\$26.00
B.	\$5,000	x 1.3% =	\$65.00
C.	\$10,000	x 1.3% =	\$130.00
D.	\$16,000	x 1.3% =	\$208.00

#### 2. Unemployment Tax at 2.7%

A.	\$2,000	x 2.7% =	\$54.00
B.	\$5,000	x 2.7% =	\$135.00
C.	\$10,000	x 2.7% =	\$270.00
D.	\$16,000	x 2.7% =	\$432.00

#### 3. Unemployment Tax at 5.7%

A.	\$2,000	x 5.7% =	\$114.00
B.	\$5,000	x 5.7% =	\$285.00
C.	\$10,000	x 5.7% =	\$570.00
D.	\$16,000	x 5.7% =	\$912.00

#### 4. Unemployment Tax at 8.4% (Maximum)

A.	\$2,000	x 8.4% =	\$168.00
B.	\$5,000	x 8.4% =	\$420.00
C.	\$10,000	x 8.4%	\$840.00
D.	\$16,000	x 8.4% =	\$1,344.00

The examples above use four arbitrary taxable wages calculated by the minimum, maximum and two random tax rates. To correctly calculate the impact would require reported wages per carrier by employer using their individual tax rates.

#### **Eligibility to Collect Unemployment**

With only the gross payments and total carriers reported, there is no way to determine who would be eligible for benefits. To determine eligibility, the department would need reportable wages by individual. These wages would need to be in the quarter paid with identifying social security numbers. An individual's wages from his or her newspaper carrier work would be added to wages earned from other employers in order to calculate the individual's unemployment benefit amount, if any. Information provided is not sufficient to make this type of determination for any of the carriers.

#### **Claims for Benefits**

The department regularly receives unemployment claims from individuals indicating their separating employer or a previous employer is a newspaper publisher. In each case the claim is assigned to the Field Audit Unit to determine if wages are useable for the claim or exempt under the current UI Bulletin 482. Most identify themselves as independent contractors and do not apply for benefits on separation. Likewise, they may not file for benefits as their newspaper route is merely supplemental employment.

#### **Impact by Publisher**

VDOL cannot identify benefit charges and UI tax rates by publisher due to the confidentiality requirements in 21 V.S.A. §1314(d). Our records show a large variation ranging from publishers with minimum benefit charges well under their tax contribution to those with benefit charges far in excess of their annual contribution to VDOL. One could make the assertion those employers with a lower tax rate could be more impacted by these potential new claims, while those with the higher rates and accounts with benefits exceeding contribution will likely see the least effect from additional claims on their experience rating in the future.

## Appendix 6

State	Exempt under 18 years of age	Exempt regardless of age	No exemption regardless of age	No statutory mention of exemption
Alabama	X			
Alaska	X			
Arizona		X		
Arkansas		X		
California		X		
Colorado		X		
Connecticut	X			
Delaware				X
Florida	X			
Georgia	X			
Hawaii	X			
Idaho	X			
Illinois		X		
Indiana		X		
Iowa				X
Kansas	X			
Kentucky	X			
Louisiana	X			
Maine		X		
Maryland	X			
Massachusetts	X			
Michigan	X			
Minnesota	X			
Mississippi		X		
Missouri		X		



<b>Montana</b>		<b>X</b>		
<b>Nebraska</b>		<b>X</b>		
<b>Nevada</b>	<b>X</b>			
<b>New Hampshire</b>		<b>X</b>		
<b>New Jersey</b>				<b>X</b>
<b>New Mexico</b>	<b>X</b>			
<b>New York</b>				<b>X</b>
<b>North Carolina</b>	<b>X</b>			
<b>North Dakota</b>		<b>X</b>		
<b>Ohio</b>	<b>X</b>			
<b>Oklahoma</b>		<b>X</b>		
<b>Oregon</b>		<b>X</b>		
<b>Pennsylvania</b>	<b>X</b>			
<b>Rhode Island</b>				<b>X</b>
<b>South Carolina</b>	<b>X</b>			
<b>South Dakota</b>	<b>X</b>			
<b>Tennessee</b>		<b>X</b>		
<b>Texas</b>		<b>X</b>		
<b>Utah</b>		<b>X</b>		
<b>Virginia</b>				<b>X</b>
<b>Washington</b>		<b>X</b>		
<b>West Virginia</b>				<b>X</b>
<b>Wisconsin</b>			<b>X</b>	
<b>Wyoming</b>	<b>X</b>			

## Appendix 7

### **Under the unemployment compensation statute (21 V.S.A. § 1301(6)(C)(i)–(xxi)), employment does not include:**

1. Service performed in agriculture.
2. Domestic service in a private home.
3. Service performed by an employee that is not in the course of an employer's trade or business, unless the pay is more than \$50.00.
4. Service performed in the employ of a son, daughter, or spouse, or performed by a minor child for the parent.
5. Service performed in the employ of the U.S. government or of an instrumentality of the United States.
6. Services by elected officials to State and local governments, members of a legislative body or the judiciary, members of the State National Guard or Air National Guard, and certain temporary "emergency employment" and major policy-making positions.
7. Service performed in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches; or by a duly ordained, commissioned, or licensed minister of a church in the exercise of his or her ministry or by a member of a religious order in the exercise of duties required by such order, or in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market by an individual receiving such rehabilitation or remunerative work; or as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving such work relief or work training.
8. When unemployment compensation is payable under an unemployment compensation system established by an act of Congress.
9. Service covered under any railroad unemployment compensation program.
10. Service performed on an "American vessel."
11. Service performed on or in connection with a vessel not an "American vessel" by an individual, if the individual performs services on and in connection with such vessel when outside the United States.
12. Service performed harvesting various aquatic animals and vegetables.
13. Service performed in any calendar quarter in the employ of any organization exempt from income tax if the pay is less than \$50.00.
14. Service performed at a college by a student or student's spouse if that student is enrolled at that college.
15. Work-study at public or nonprofit schools.
16. Service performed by a patient in a hospital.

17. Service performed in insurance sales, if paid by commission.
18. Service performed in sales, or solicitation, if licensed by the State.
19. Service performed as loggers and stone artisans, if they provide their own tools.
20. Service performed by full-time students at summer camps.
21. As of July 1, 2006, wages paid to a direct seller, provided all of the following conditions are met:
  1. An individual engaged in one of the following trades or businesses.
    - A. selling or soliciting the sale of consumer products, including services, either:
      - I. in a home or other place that is not a permanent retail establishment;
      - or
      - II. 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. delivering or distributing newspapers or shopping news (including any services directly related to that trade or business).
  2. Substantially all the individual's pay for the services described in (1) is directly related to sales or other output (including the performance of services rather than to the number of hours worked).
  3. The services are performed under a written contract between the individual and the person for whom the services are performed, and the contract provides that the individual will not be treated as an employee for federal and State tax purposes.

## Appendix 8

### **Under the unemployment compensation statute (26 U.S.C. § 3306(c)(B)), employment does not include:**

1. Service performed in agriculture, unless the farm pays \$20,000.00 in wages during a calendar quarter or employs 10 or more people.
2. Domestic service in a private home, unless the employer paid \$1,000.00 or more in wages.
3. Service performed by an employee that is not in the course of an employer's trade or business, unless the pay is more than \$50.00.
4. Service performed on a vessel not an "American vessel" if the employee is employed on and in connection with such vessel when outside the United States.
5. Service performed in the employ of a son, daughter, or spouse, or performed by a minor child for the parent.
6. Service performed in the employ of the U.S. government or of an instrumentality of the United States which is wholly or partially owned by the United States or exempt from the tax imposed by 26 U.S.C. § 3301.
7. Service performed in the employ of a state, or any political subdivision thereof, or in the employ of an Indian tribe; and any service performed in the employ of any instrumentality of one or more states or political subdivisions to the extent that the instrumentality is immune under the U.S. Constitution from the tax imposed by 26 U.S.C. § 3301.
8. Service performed in the employ of a religious, charitable, educational, or other organization described in Section 501(c)(3).
9. Service covered under any railroad unemployment compensation program.
10. Service performed in any calendar quarter in the employ of any organization exempt from income tax under Section 501(c)(3) if the remuneration is less than \$50.00, or service performed at a college by a student or student's spouse if that student is enrolled at that college, or work-study at public or nonprofit schools, or service performed by a patient in a hospital.
11. Service performed in the employ of a foreign government.
12. Service performed in the employ of an instrumentality wholly owned by a foreign government if the service is of a character similar to that in foreign countries by employees of the U.S. government or of an instrumentality thereof; and if the Secretary of State shall certify to the Secretary of the Treasury that the foreign government grants an equivalent exemption with respect to similar services performed in the foreign country by employees of the U.S. government and of instrumentalities thereof.
13. Services performed as a student nurse in the employ of a hospital and service performed as an intern in the employ of a hospital by an individual who has completed a four years' course in a state-approved medical school.
14. Service performed in insurance sales, if paid by commission.
15. (A) Service performed by an individual under 18 years of age in the delivery or distribution of newspapers or shopping news, not including delivery or

distribution to any point for subsequent delivery or distribution;  
(B) service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him or her at a fixed price, his or her compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him or her, whether or not he or she is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back.

16. Service performed in the employ of an international organization.
17. Service performed harvesting various aquatic animals and vegetables.
18. Service described in 26 U.S.C. § 3121(b)(20) relating to chartering fishing boats.
19. Service which is performed by a nonresident alien individual for the period he or she is temporarily present in the United States as a nonimmigrant.
20. Service performed by full-time students at summer camps.
21. Service performed by a person committed to a penal institution.