

new york state society of

NYSSCPA

certified public accountants

530 fifth avenue, new york, ny 10036-5101

www.nysscpa.org

May 28, 2004

Mr. Andrew S. Eristoff, Commissioner
New York State Department of Taxation and Finance
W.A. Harriman Campus – Building #9
Albany, NY 12227

Ms. Linda Angello, Commissioner
New York State Department of Labor
State Office Building Campus, Room 500
Albany, NY 12240-0003

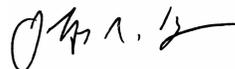
Re: Comments and Suggestions Regarding the New York State Unemployment Insurance Regulations

Dear Ms. Angello and Mr. Eristoff:

The New York State Society of Certified Public Accountants, the oldest state accounting association, representing approximately 30,000 CPAs, periodically has brought to your attention concerns and suggestions expressed by members of its technical committees.

The NYSSCPA New York, Multistate and Local Taxation Committee has prepared the attached suggestions relating to the New York State Unemployment Insurance Regulations. If you would like additional discussion with the committee, please contact Mark Levin, chair of the New York, Multistate and Local Taxation Committee at (212) 736-4222, or Ernie Markezin, NYSSCPA staff, at (212) 719-8303.

Sincerely,



Jeffrey R. Hoops
President

Attachment

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**NEW YORK STATE SOCIETY OF
CERTIFIED PUBLIC ACCOUNTANTS**

**COMMENTS AND SUGGESTIONS ON THE
NEW YORK STATE UNEMPLOYMENT INSURANCE REGULATIONS**

May 28, 2004

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Steve Valenti**

**Unemployment Tax Subcommittee of the
New York, Multistate and Local Taxation Committee**

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New York State Society of Certified Public Accountants

Comments and Suggestions on the New York State Unemployment Insurance Regulations

May 28, 2004

Background and General Comments

Based on a review of the New York State Unemployment Tax Regulations and our experience in applying them, there are instances where the regulations fail to provide guidance. Some of those instances are procedural, while others involve issues where informal guidance or existing internal policy is applied.

The following comments suggest additions to the regulations to address areas that neither the New York State Unemployment Insurance Law nor the regulations currently cover:

Specific Comments and Suggestions

- 1. Employee Leasing Companies** – Currently, there are no clearly defined rules regarding experience transfers for employee leasing companies. Informal departmental advice regarding Professional Employment Organizations (PEO) generally specifies that a copy of the contract between the client and the PEO should be provided to the Department of Labor (DOL), no Form NYS-100 should be filed, and no experience transfer should occur. Additionally, when related party transfers of employees occur, such as in a captive leasing company (CLC), current informal advice recommends an experience transfer.

Since these transactions are still fairly common, we recommend that there be some formalized information regarding experience transfers, taxable wage base carryovers, and other relevant rules regarding PEOs and CLCs. The following should give some ideas about the items to include, issues to address, and requirements of such PEOs or CLCs.

- o Captive Leasing Companies (CLC)

Definition: A CLC is defined as any employer who contracts with a related party (defined by common ownership, common officers, same corporate group) to enter into an employee leasing arrangement. Under such arrangement, all or part of an employer's workforce is transferred to the CLC, regardless of the transfer of assets to such CLC and are subsequently "leased" back to the transferring employer. Further, under

such arrangement, an applicable arm's length markup for the provision of such "leasing or employment or management" services should be applied.

Experience transfer rules: A transfer of unemployment experience from an employer to a CLC will be mandated and effectuated in accordance with Section 581.4 of the New York State Unemployment Insurance Law.

Requirements: In order for a CLC agreement to be recognized as a bona fide arrangement, the following items of substance must exist and be shown to exist to the satisfaction of the DOL:

- ? An agreement between the parties that outlines the responsibilities of both parties, the existence of an appropriate fee for services, and any other items that reflect this relationship.
- ? Employer/employee relationship between the CLC and the employees. Sufficient substance must be shown to indicate the right of direction and control by the CLC, not the transferring employer.
- ? Unemployment taxes, wages, and withholdings of the employees would be reported on the Form NYS-45 of the CLC as it would be deemed the employer of such employees.
- ? Bonding requirements: For a CLC, there is not a requirement to post a bond or to register as a "leasing company" and as such CLC is not deemed to be in the business of leasing employees.

o Professional Employment Organizations (PEOs)

Definition: A PEO is defined as any employer who contracts with an unrelated third party client (defined by lack of common ownership, common officers, same corporate group) to enter into an employee leasing arrangement. Under such arrangement, all or part of an employer's workforce is transferred to the PEO, with no transfer of assets to such PEO. Such employees are subsequently "leased" back to the third party client employer.

Experience transfer rules: A transfer of unemployment experience from an employer to a PEO will not be permitted under such arrangement. No experience transfer will occur upon the commencement or the termination of such arrangement. A copy of the leasing contract must be provided to the DOL within 30 days of the effective date of such arrangement.

Upon the termination of such arrangement, the unemployment experience of the client employer will be calculated based on the contributions, benefits and taxable payrolls in its reserve account. If the client employer's unemployment reserve account has been inactive for more than 12 quarters, such client will be assigned a standard new employer tax rate under the provisions in the Unemployment Insurance Law.

Requirements: In order for a PEO agreement to be recognized as a bona fide arrangement, the following items of substance must exist and be shown to exist to the satisfaction of the DOL:

- ? An agreement between the parties that outlines the responsibilities of both parties, the existence of an appropriate fee for services and any other items that reflect this relationship.
- ? Employer/employee relationship between the PEO?? and the employees. Sufficient substance must be shown to indicate the right of direction and control by the PEO, not the transferring employer.
- ? Unemployment taxes, wages and withholdings of the employees would be reported on the Form NYS-45 of the PEO.
- ? Bonding and other reporting requirements: For a PEO, there is not a requirement to post a bond, however, a PEO must provide a list to the DOL on or before January 31 of each year indicating the following information:
 - o Names of client employers for previous calendar year
 - o Addresses of such client employers;
 - o Date agreement commenced and terminated (if applicable); and
 - o ER numbers assigned to client employers.

Such information must be provided on a form prescribed by the Department.

- 2. Worker Classification**– This is an area where there are a lot of internal guidelines that exist, but for which there is no published public information regarding the treatment of employees and independent contractors. Additionally, there have been instances where auditors' determinations are inconsistent with internally published policies or guidelines.

The following items of importance should be addressed in order to bring consistency to this area:

- Expanded definition of employee to address the state audit guidelines, the relation to IRS guidelines (or lack thereof), as well as certain factors of importance that would point, in general, towards employee status.
- Characteristics of independent contractor status, including the following:
 - ✍ “Hit list” of qualities or factors that is more indicative of independence (similar to the 20 factor test and categories of evidence tests by the IRS, as well as the NYS published guidelines in this area).
 - ✍ Examples of documentation or general/basic factors that apply to all workers.
- Publication of industries where rules have been drafted and links to such rules. There have been a number of industries for which the DOL has formulated guidance concerning the factors that are indicative of employee or independent contractor status. A summary of these industries and a reference to the guidelines should be included as part of this section.
- Safe harbor rules, if applicable. Any defenses that may be utilized (similar to the Federal Section 530 safe harbor rules) by employers should be published in order to “level the field”.

3. Common Pay Agent Reporting – There are currently informal provisions regarding the utilization of a common pay agent for wage reporting and withholding tax. However with the combined reporting of such information with the unemployment tax on the NYS-45, formal procedures should be issued. The following gives an overview of the items to be addressed:

- Notifications upon election: Upon receipt of formal approval to act as common pay agent by the IRS, a copy of such approval notification, along with copies of Federal Form 2678, *Employer Appointment of Agent*, must be forwarded to the Department of Taxation and Finance (DTF). Additionally, the electing employers must include in the notification their names, addresses, FEINs and New York State unemployment ER.
- Coordination of tax allocation between DOL and DTF: The state withholding tax number is the same as the FEIN, but the unemployment ER number is different. For wage reporting and withholding tax, the wages should all be reported under the agent’s name and ID on its NYS-45, but for state unemployment tax the wages should be reported on each employer’s NYS-45 utilizing its assigned unemployment ER number and tax rate.
- Other combined reporting issues: Magnetic tape or electronic deposits
 - ✍ Clarification for information in required fields
 - ✍ Formatting of tape/electronic version of NYS-45 information
 - ✍ Publishing of requirements and procedures already formulated by NYS (*Our committee has a copy of a 2001 internal NYS DTF document that can be provided as a guide*)

- 4. Unemployment Benefits** – The following items should be incorporated into the existing laws and regulations regarding eligibility for unemployment benefits:
- Employees who live out of state and are reported to NY for unemployment tax purposes, and vice versa.
 - Procedures for filing for benefits: Employee’s wages are reported to the state in which their services are performed in accordance with Section 511 of the Unemployment Insurance Law. A claimant can either file for unemployment benefits in the state where such claimant lives or where the services were performed.
- 5. Coordination of Department of Taxation and Finance with Department of Labor** – Currently, the NYS-45 reports the unemployment wages and tax (DOL responsibility) as well as wage reporting and withholding tax (DTF responsibility). However the process of allocating the taxes and sharing the information is not fully coordinated.
- ? The regulations should address these issues and, if possible, the ability to allocate overpayments of unemployment tax or withholding tax from one account to another without the issuance of a refund or credit to one tax and an assessment with interest and penalties for the other tax.
 - ? Additionally, a conforming to the Federal household employment rules (i.e., year end reporting of wages and taxes similar to the Federal Form 1040 Schedule H) is recommended in order to reduce the compliance burden on household employers. This form would be able to incorporate the same information that is contained in the NYS-45s, and may increase compliance since the reporting burdens on household employers would be reduced and streamlined.