U.S. DEPARTMENT OF LABOR Employment and Training Administration Washington, D.C. 20213	CLASSIFICATION UI/FUTA CORRESPONDENCE SYMBOL TEURL DATE April 30, 1988

DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 22-87

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : DONALD J. KULICK
Administrator
for Regional Management

SUBJECT : Pension Offset Requirements Under the Federal Unemployment Tax Act

1. Purpose. To consolidate the numerous directives interpreting the pension offset requirements under Section 3304(a)(15), Federal Unemployment Tax Act (FUTA) into a single directive and to rescind previous guidance on this subject.

2. References. Section 3304(a)(15), Section 3304(a)(10), FUTA.

3. Background. Section 3304(a)(15), FUTA, enacted in 1976, became effective as a requirement for State certification on April 1, 1980. As originally enacted, Section 3304(a)(15), FUTA, required the States to include in their laws specific provisions for dollar-for-dollar deductions in unemployment benefits for pensions and certain other types of retirement income received by a claimant.

On September 26, 1980, Congress amended Section 3304(a)(15), FUTA. The 1980 amendment was intended to ameliorate the one hundred percent offset imposed by the 1976 law. The 1980 amendment provided, among other things, for deduction only when a base period or chargeable employer had contributed to the fund from which the retirement benefit was being paid, and permitted States to take into account contributions made by the claimant. The 1980 amendment permitted States to refrain from offsetting substantial amounts of pension and other retirement income, but it did not prohibit the States from adhering to the original offset requirement or an offset requirement in excess of the minimum offset requirement.

4. Effect on Previous Issuances. Over the years a number of UIPLs have been issued concerning the pension offset requirements. This has resulted in some confusion and misunderstanding as to the basic requirements of Section 3304(a)(15), FUTA.

RESCISSIONS	EXPIRATION DATE
UIPL 24-80; UIPL 43-80; UIPL 1-81; Change 2 of UIPL 7-81; UIPL 23-83	April 30, 1988

Accordingly, this UIPL is being issued to consolidate our interpretation of Section 3304(a)(15), FUTA, into a single directive. This UIPL does not modify or change our interpretation of Section 3304(a)(15), FUTA. The previous UIPLs which have been incorporated into this UIPL and are hereby rescinded are indicated below.

a. UIPL 24-80, dated March 17, 1980, was issued to inform State Employment Security Agencies (SESAs) of the requirements of Section 3304(a)(15), FUTA.

b. UIPL 43-80, dated July 28, 1980, transmitted to the SESAs information and instructions relating to the implementation of Section 3304(a)(15), FUTA.

c. UIPL 1-81, dated October 23, 1980, was issued to inform SESAs of Federal law requirements prohibiting the total reduction of benefit rights as a result of a disqualification imposed where an individual is only "eligible for" or has only "applied for" pension benefits.

d. UIPL 7-81 Change 2, (Revised), dated March 11, 1983, reinstated the interpretation of subparagraph (B) of Section 3304(a)(15), FUTA, provided in UIPL 7-81. (Note: UIPL 7-81, Change 1 was previously revoked by this Change 2.)

e. UIPL 23-83, dated April 14, 1983, was issued to provide clarification on the effect of military pensions on UCFE benefits.

5. Federal Requirements. Section 3304(a)(15), FUTA, reads as follows:

> (15) the amount of compensation payable to an individual for any week which begins after March 31, 1980, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week except that-
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> > (A) the requirements of this paragraph shall apply to any pension, retirement or retired pay, annuity, or other similar periodic payment only if-

(i) such pension, retirement or retired pay, annuity, or similar payment is under a plan maintained (or contributed to) by a base period employer or chargeable employer (as determined under applicable law), and
(ii) in the case of such a payment not made under the Social Security Act or the Railroad Retirement Act of 1974 (or the corresponding provisions of prior law), services performed for such employer by the individual after the beginning of the base period (or remuneration for such services) affect eligibility for, or increase the amount of, such pension, retirement or retired pay, annuity, or similar payment, and

(B) the State law may provide for limitations on the amount of any such a reduction to take into account contributions made by the individual for the pension, retirement or retired pay, annuity, or other similar periodic payment;

6. Interpretation of Federal Requirements

a. Basic Requirement. Section 3304(a)(15), FUTA, provides that if an individual is receiving retirement income, then the amount of unemployment compensation that might otherwise be claimed for any given week shall be reduced (but not below zero) by an amount equal to such income which is reasonably attributable to that week. This deduction is conditioned, however, by the requirements contained in clauses (i) and (ii) in Subparagraph (A) of Section 3304(a)(15), FUTA. In addition, States may use the discretionary authority they have under subparagraph (B) to reduce the deduction otherwise required for the offset by taking into account employee contributions to retirement plans or programs.

Section 3304(a)(15), FUTA, reflects the minimum requirements for deduction which must be contained in State law. Although a State may broaden the scope of deduction for pension payments beyond the requirements of the FUTA, it may not adopt less stringent conditions.

b. Payments to Which Section 3304(a)(15), FUTA, Apply. Because Section 3304(a)(15), FUTA, specifies that the reductions in unemployment compensation must occur for retirement payments "based on the previous work of such

individual," the reduction applies only to retirement income collected by the person who actually earned this income. It does not apply, for example to, a survivor's or widow's or widower's benefit that is payable to a survivor, and is not based on the previous work of that individual. Amounts equal to other types of disability compensation such as temporary disability insurance and worker's compensation (including Black Lung benefits), which are not payable as retirement or pension payment, also are not required by Section 3304(a)(15), FUTA, to be deducted. No exhaustive list of all of the kinds of payments that are deductible is available. Based on the broad language of Section 3304(a)(15), FUTA, payments provided for under the programs or plans listed below are subject to the pension offset requirements:

1. Primary social security old age and disability retirement benefits, including those based on self-employment;
2. State and local government pensions of all types;
3. Federal Civil Service pensions, including disability pensions;
4. Private for-profit employer pensions;
5. Non-profit employer pensions;
6. Military retirement pensions and disability retirement pensions;
7. Railroad Retirement annuities
8. Benefits derived from Individual Retirement Accounts;
9. Benefits based on Keogh plans.

c. Limitation for Base Period or Chargeable Employers. Under clause (i) of Section 3304(a)(15)(A), FUTA, the requirement that unemployment compensation be offset by retirement benefits is limited to such benefit paid under a plan maintained or contributed to a base period or chargeable employer. Whether or not the employer is a chargeable or a base period employer is determined under provisions of State law. The employer does not need to be both a base period employer and also the employer chargeable with benefits payable under the State law. But, where the base period or chargeable employer did not maintain or contribute to the plan under which the individual is receiving the retirement benefit, the benefit is not deductible under the Federal law. For example, if an individual at Company A retires and collects retirement benefits under a particular plan maintained by that employer, but then goes to work for Company B, which has an entirely different plan, and this person is subsequently laid-off, the retirement benefit from Company A would not be deductible under Federal law (unless Company A is also a base period employer).

In relation to clause (i) questions have arisen as to whether Federal law requires deduction of military pensions from UCFE benefits when:

a. The claimant's military service, which supported the pension, was before the State's base period, and

b. The claimant's military pension was not affected by the Federal civilian employment, which supported the UCFE claim. Under these circumstances, Federal law does not require the deduction of military pensions from UCFE benefit payments, since the UCFE service and wages in the State's base period had no effect upon the military pension that was supported by military service, which occurred before the State's base period. However, if a State law requires the deduction of all pensions, based on an individual's previous work, then military pensions would be deductible from UCFE benefits as they are from State UI.

Under clause (ii) of Section 3304(a)(15), FUTA, amounts equal to Social Security and Railroad Retirement are always deductible if a base period or chargeable employer contributed to the pension plan. But, for other types of pension or retirement income, deductions are required only if the services performed for the base period or chargeable employer affect "eligibility for, or increase the amount of" the pension or retirement income.

"Eligibility for" refers to whether the individual satisfies the conditions necessary to first qualify for the pension or retirement income. For example, if the individual qualifies for a pension only by using some of the wages for services performed for a base period or chargeable employer, the pension payment is deductible. Similarly, if the amount of a pension payment is increased as a result of performing such services, then an amount equal to the pension payment is also deductible.

States may, of course, disregard the clause (i) requirement that the deduction be made only if the retirement income is derived under a plan that a base period or chargeable employer contributed to or maintained, and, instead, provide that all such retirement income be deductible from unemployment compensation benefits. However, States may not exempt any retirement income that meets the requirements of subparagraph (A) from deduction, except when they are limiting deductions under the authority of subparagraph (B).

d. Employee Contributions. Under subparagraph (B) in Section 3304(a)(15), FUTA, States have very broad latitude in reducing the amount of any offset in order to take account of employee contributions. But it must be set forth in State law that the offset is reduced because of employee contributions to the retirement program or plan. If a State elects to exercise this option under subparagraph (B), there is no requirement that the amount of employee contributions taken into account not exceed the proportions of an employee's contribution to the retirement plan or program.

Any retirement plan or program to which a claimant has made contributions may be included in the subparagraph (B) reduction in offset, regardless of the relative proportions of employee and employer contributions, and, similarly, the broad discretion of the State law may permit any reduction in the offset (from 1 percent to 100 percent), regardless of the relative proportions of employee and employer contributions. Similarly, States have broad latitude in determining which types of retirement plans or programs to include or exclude from the subparagraph (B) reduction. Specifically, it is not required that public and private plans be treated identically or even similarly.

e. Treatment of Lump-Sum and Retroactive Payments. Under Section 3304(a)(15), FUTA, the amount of unemployment compensation payable for any week shall be subject to deductions for retirement income "reasonably attributable to such week." In the case of lump-sum retirement payments, States have the option whether to treat them as "similar periodic payments" which are deductible under their laws, and if they treat them as such they have the further option of providing in their laws whether the payments shall apply only to the week in which they were paid, or to the week following the last week worked prior to retirement, or whether they shall be allocated to the weeks or months or other applicable periods following the last week worked prior to retirement.

Severance pay and separation payments are not required to be treated as lump sum retirement payments, or as any other form of retirement, pension, or annuity required by Section 3304(a)(15), FUTA, to be deducted from unemployment compensation.

7. Disqualification Due to "Eligibility For" Rather Than "Receipt Of" Retirement Income. Section 3304(a)(10) of the FUTA provides that under an approved State law:

> Compensation shall not be denied to any individual by reason of cancellation of wage credits or total reduction of his benefit rights for any cause other than discharge for misconduct connected with his work, fraud in connection with a claim for compensation, or receipt of disqualifying income. (Emphasis Supplied.)

A disqualification based on "eligibility for" payments covered under Section 3304(a)(15), FUTA, is inconsistent with Section 3304(a)(10), FUTA, in those cases in which the disqualification results in a total reduction of benefit rights. In addition, if the individual has only "filed for" or "applied for" such pension or other retirement payment, but where no determination of entitlement has been made, it is inconsistent with Section 3304(a)(10), FUTA, to totally reduce benefit rights. This would occur where the prospective payment exceeds the unemployment benefit amount, and the denial is applied on a week-to-week basis with the result that the individual never receives unemployment compensation during the benefit year because of deductions. However, if the disqualification imposed in these circumstances allows some residual payment of unemployment benefits (e.g., if a pension payment is an amount less than the unemployment benefit), then such deduction would be consistent with Section 3304(a)(10), FUTA, because no total reduction of unemployment benefits occurred.

While an assumption that an individual is entitled to receive some type of retirement payment covered under Section 3304(a)(15), FUTA, is not a sufficient basis under Section 3304(a)(10), FUTA, for totally reducing unemployment benefits, benefits may be totally reduced if there is a finding of "constructive receipt." This occurs when an individual has applied for a payment or benefit covered by Section 3304(a)(15), FUTA, and has been determined by responsible authorities to be entitled to such payment or benefit in specified amounts for the same period that unemployment compensation is payable. Such a determination or award of entitlement constitutes "constructive receipt" for the purposes of Section 3304(a)(10), FUTA, and total reduction of unemployment benefit would be permissible. This is only true, however, if the State law also provides, or is interpreted to provide, that should such individual not receive a pension or other retirement payment that covers such period, then this individual must be entitled to the unemployment benefit previously denied.

8. Action Required. Administrators are requested to advise appropriate staff of the information contained in this letter.

9. Inquiries. Questions should be directed to appropriate regional staff.