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RELUCTANT REFORM: RECENT CHANGES IN UNEMPLOYMENT COMPENSATION IN FLORIDA

KATHLEEN PHILLIPS

I. INTRODUCTION

Florida's unemployment compensation (UC) law¹ underwent significant modification during the 1977 legislative session. Four bills were the vehicles for the major revisions.² The so-called "mandatory bill" assured that Florida's unemployment compensation law complies with new provisions of the Federal Unemployment Tax Act.³ The other three bills essentially provided for revised disqualification standards,⁴ uniform treatment of income from pensions and Social Security,⁵ and a temporary, less stringent method of establishing unemployment compensation eligibility.⁶ The implications of these revisions will be more comprehensible in the light of the history of unemployment compensation in the United States.

II. UNEMPLOYMENT COMPENSATION—ORIGINS

Compulsory unemployment insurance was a product of the Great Depression. Prior to that time there were only a few voluntary unemployment insurance plans, generally joint union-management plans to which both employer and employee contributed.⁷ The widespread poverty and unemployment of the 1930's encouraged the introduction of state unemployment insurance laws, but still there

1. FLA. STAT. ch. 443 (1977).

2. Ch. 77-262, 1977 Fla. Laws 1220; ch. 77-399, 1977 Fla. Laws 1673; ch. 77-420, 1977 Fla. Laws 1731; ch. 77-424, 1977 Fla. Laws 1739. One other senate bill was also passed during the 1977 session; its provisions, however, are contained entirely within Fla. SB 1231 (1977) and Fla. SB 1262 (1977). The bill provided for a contributory option for financing to public employers, as opposed to the reimbursement method previously allowed. Further, it established the Public Employer Unemployment Compensation Benefits Account, to be separate from the Florida Unemployment Trust Fund from which benefits for public employees will be paid. Ch. 77-393, 1977 Fla. Laws 1649.

3. Ch. 77-262, 1977 Fla. Laws 1220, contains provisions which meet the requirements of the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667 (amending I.R.C. §§ 3301-3309).

4. Ch. 77-399, 1977 Fla. Laws 1673.

5. Ch. 77-424, 1977 Fla. Laws 1739.

6. Ch. 77-420, 1977 Fla. Laws 1731.

7. Larson & Murray, *The Development of Unemployment Insurance in the United States*, 8 VAND. L. REV. 181, 183 (1955) [hereinafter cited as *Development*]. Under the present unemployment compensation system, the employer is taxed and employees generally do not contribute. Note, however, that Alabama, Alaska, and New Jersey provide for an unemployment insurance tax on employees. W.E. UPJOHN INSTITUTE FOR EMPLOYMENT RESEARCH, *STRENGTHENING UNEMPLOYMENT COMPENSATION: PROGRAM IMPROVEMENTS 12* (1975) [hereinafter cited as *PROGRAM IMPROVEMENTS*].

was only one state unemployment compensation law in existence by 1935.⁸ The absence of a uniform system of unemployment insurance, made states hesitant to enact programs because of the potential anticompetitive effect on those states having no such plan.⁹

In response to the growing need for some kind of economic security, President Franklin D. Roosevelt in 1934 appointed the Commission on Economic Security to study the problem of economic insecurity due to unemployment, old-age, disability, and death.¹⁰ The commission's report resulted in the Social Security Act of 1935.¹¹ The Social Security Act included two incentives for states to develop a federal-state system of unemployment insurance. The first inducement was in the form of a federal excise tax on payrolls of all employers covered by the act, which could be offset up to 90% by employer contributions into a state unemployment compensation fund.¹² The rationale behind encouragement of state-formulated systems was to allow each state to establish a system best suited to its particular economic needs. The second incentive provided for federal funds to cover costs of administering state unemployment compensation and employment services funds.¹³

The tax incentive met with opposition from some employers. Their primary contention was that the excise tax was an unconstitutional form of coercion exerted unequally on certain employers by the federal government.¹⁴ The United States Supreme Court upheld

8. Wisconsin adopted its state unemployment insurance statute in 1932. *Development, supra* note 7, at 181.

9. REPORT OF THE COMMITTEE ON ECONOMIC SECURITY, SOCIAL SECURITY IN AMERICA (presented to Congress Jan. 15, 1935), reprinted in R. STEVENS, STATUTORY HISTORY OF THE UNITED STATES: INCOME SECURITY 88, 94 (1970) [hereinafter cited as STATUTORY HISTORY].

10. Established by Exec. Order No. 6757 (June 1934). The Commission was composed of the Secretaries of Labor, the Treasury, and Agriculture; the Attorney General; and the Federal Emergency Relief Administrator. *Development, supra* note 7, at 64.

11. STATUTORY HISTORY, *supra* note 9, at 88.

12. The Federal Unemployment Tax Act (FUTA), Title IX of the Social Security Act (current version at I.R.C. §§ 3301-3308). Covered employers are those who employ four or more employees for employment one day in each of twenty different weeks. The definition appears simple enough, except that the term "employment" is defined more by exception than by rule. Prior to the 1976 amendments, for example, there were eighteen enumerated exceptions to the definition of employment. I.R.C. § 3306.

13. Title III, Grants to States for Unemployment Compensation Administration, 42 U.S.C. § 502(a) (1970), provides that the federal government will pay the entire cost of administering state UC laws. In 1935, however, the Wagner-Peyser Act, ch. 49, § 5, 48 Stat. 114 (1933) (current version at 29 U.S.C. § 49d(b) (1970)) was in force and required a federal/state cost-sharing system for establishing employment offices. To the extent that these employment offices were utilized in administering the UC law, states did foot a portion of the bill. That portion of the Wagner-Peyser Act requiring state matching funds was repealed in 1950, leaving the federal government liable for the total administrative cost. Act of Sept. 8, 1950, ch. 933, § 2, 64 Stat. 822 (current version at 29 U.S.C. § 49d(b) (1970)).

14. The contention of the employers, as stated in *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937), was that because the tax did not apply to all employers, specifically exempting

the tax act as being within the powers of Congress to promote the general welfare of the nation, as well as within the broad congressional taxing powers.¹⁵ Constitutional questions having been laid to rest, by 1937 every state had enacted an unemployment compensation act.

In enacting their laws, states were allowed the choice of benefit, eligibility, and disqualification provisions in order to adjust for local economic conditions. To secure approval by the Secretary of Labor and thus qualify for benefits, the state laws had to comply with certain provisions set forth in the Social Security Act.¹⁶ Title III of the Act generally covers administrative criteria which the states must meet, such as allowance for hearings where claims have been denied, and payment of benefits through employment offices.¹⁷ The Federal Unemployment Tax Act (FUTA), originally title IX of the Social Security Act, controls the scope of state coverage by defining such terms as "employer," "employment," and "employee."¹⁸ The state, of course, may extend coverage beyond the minimum requirements of the federal law. Florida, however, remains within the federal parameters and generally does not extend gratuitous coverage.¹⁹

Unemployment compensation laws, with their attendant federal regulations and provisions, impose cumbersome administrative responsibilities. The system was originally established in contemplation of the needs of a middle class suffering from the temporary effects of a depression.²⁰ In fact, when the original Employment

certain types of employment, was not uniform throughout the United States, and was not for the purpose of raising revenue, it therefore was not an excise tax but an "invasion of the reserved powers of the state." *Id.* at 578.

15. *Id.* Justice Cardozo, writing for the majority, outlined the background of the Social Security Act and cited unemployment statistics of that time in his rationale for upholding the tax.

16. Compliance is ascertained by the Bureau of Employment Security, which annually reviews state laws for uniformity with these federal provisions.

17. 42 U.S.C. § 503 (1970).

18. I.R.C. § 3306.

19. Florida has generally maintained a narrow construction for purposes of UC coverage. In the determination of "employees" for UC coverage, common law concepts of master-servant apply. In *Florida Indus. Comm'n v. Peninsula Life Ins. Co.*, 10 So. 2d 793 (Fla. 1942) (en banc), the court held that when Florida enacted its original unemployment compensation act, it adopted the Social Security Act provisions as to who are employers and employees and did not enlarge upon the common law concept of master-servant in making such determinations. In *Gentile Bros. Co. v. Florida Indus. Comm'n*, 10 So. 2d 568 (Fla. 1942), the court chose a narrow construction of common law precepts of master-servant (and therefore employer-employee), despite the contention that these definitions were intended to be liberally construed to "extend the beneficent purpose of the Unemployment Compensation Act." *Id.* at 570. In 1971, however, Florida extended coverage to state and local government employees—not mandated by the federal government until the 1976 amendments to the Federal Unemployment Tax Act (FUTA), Pub. L. No. 94-566, 90 Stat. 2667 (1976).

20. STATUTORY HISTORY, *supra* note 9, at 11-15. Stevens provides a thorough overview of

Security Bill was reported out of the House Ways and Means Committee, the definition of "employer" was narrowed—resulting in the exclusion of farmworkers, domestics, employees of hospitals and religious, charitable and educational institutions and thereby eliminating 15% of those who were originally covered.²¹ The committee indicated that the underlying policy of unemployment compensation was two-fold: (1) to provide workers who are ordinarily steadily employed with some manner of maintaining their standard of living while involuntarily unemployed; and (2) to have a stabilizing influence on the economy by maintaining the purchasing power of those workers.²²

Because of frequent and prolonged periods of recession, however, the unemployment compensation system is now straining to meet the needs of persons whose attachment to the work force is tenuous and who are subject to both periodic and prolonged unemployment. The national system is increasingly encompassing a labor force quite different from that originally contemplated—the most recent initiates being farmworkers and domestics.²³ Florida's law is also adjusting to accommodate these new demands.

III. FLORIDA'S UNEMPLOYMENT COMPENSATION LAW

The Unemployment Compensation Act of Florida has undergone many changes since its original enactment in 1937. Many of these changes, which relate primarily to conditions of coverage, have been in response to amendments in the federal law.²⁴ Florida's program

the rationale of the Social Security Act and, in particular, of the unemployment insurance program.

21. Letter of Dr. E.E. Witte, Member of the Committee on Employment Security, to FERA Administrator Harry Hopkins (Feb. 26, 1935), reprinted in *STATUTORY HISTORY*, *supra* note 9, at 143. The effect was to eliminate 3,500,000 workers.

22. *STATUTORY HISTORY*, *supra* note 9, at 149.

23. The federal government has had to legislate temporary programs, generally in the form of extended benefits programs, to deal with the problems of high unemployment. The Senate Finance Committee in its report on the Temporary Extended Unemployment Compensation Act of 1961 stated:

For the most part State Unemployment compensation programs at the present time are not designed to deal with long-term recession-created unemployment and the protracted period of seeking reemployment that typically exists in times of recession [T]his second extension of unemployment compensation benefits on a temporary basis is justified because generally the States have not dealt with the special problems involved in periods of protracted and high unemployment.

S. REP. NO. 69, 87th Cong., 1st Sess. 4 (1961).

For an in-depth discussion of the problems of dealing with unemployment during periods of recession under the present unemployment insurance program, see Stewart, *Unemployment Compensation—Response to a Crisis*, 61 *CORNELL L. REV.* 823 (1976) [hereinafter cited as *Response*].

24. Federal law mandates coverage of certain employers by defining those who will be

is administered by the Division of Employment Security within the Department of Commerce.²⁵ Although the division distributes unemployment compensation benefits under other programs,²⁶ this discussion will be confined to the regular state program.²⁷

Basically, Florida's unemployment compensation program operates on a "tax and transfer" system of contributions. The UC fund, from which benefits are drawn, is established by employer contributions.²⁸ The contribution amount is based on the federal tax on covered employers' payrolls.²⁹ Presently, the excise tax is 3.2% of up to \$6,000 of wages per year paid to each employee.³⁰ The employer may offset up to 90% of this tax by contributing to the state UC fund.³¹

The federal tax provides an additional incentive for the employer to refrain from terminating employees for other than good cause. When the employer's account has been liable for contributions to the state fund for two years, the division computes a benefit ratio.³² This is a ratio of the total benefits chargeable to the employer's account (*i. e.*, total benefits paid to claimants who were terminated from his employ) to the employer's total annual payroll. This benefit ratio then serves as the basis for the employer's contributions to the state fund. The fewer benefits charged to the employer's account, the lower the ratio and thus the lower the tax.³³

When a person becomes "involuntarily unemployed,"³⁴ applica-

taxed under the Federal Unemployment Tax Act. I.R.C. § 3306(a).

25. FLA. STAT. § 443.12(1) (1977); *see* FLA. ADMIN. CODE ch. 8B-1 (organizational chart).

26. *E.g.*, Federal Supplemental Benefits, Disaster Unemployment Assistance, Special Unemployment Assistance, Comprehensive Employment and Training Assistance, Work Incentive Program Assistance, Trade Act of 1974. FLORIDA BUREAU OF UNEMPLOYMENT COMPENSATION, NARRATIVE FOR THE 1976 U.C. ANNUAL REPORT (1977) [hereinafter cited as 1976 U.C. ANNUAL REPORT].

27. There is a permanent state-extended benefits program which is triggered via provisions of FLA. STAT. ch. 443 (1977). This program will also be dealt with to the extent that the regular state system is involved.

28. FLA. STAT. § 443.10(1), (3) (1977).

29. *Id.* § 443.08(2)-(3).

30. I.R.C. § 3301.

31. *Id.* § 3302(a). The present rate of contribution is 2.7% in Florida for employers who have not established a benefit ratio. This initial rate of contribution was reduced to 1.0% in 1976 as an incentive for new businesses. The rate was changed back to 2.7% in 1977. Ch. 77-399, § 5, 1977 Fla. Laws 1673 (codified at FLA. STAT. § 443.08(2)(a) (1977)).

32. When a claimant files a claim, each employer within the claimant's base period is chargeable on a pro rata basis for benefits paid to the claimant. FLA. STAT. § 443.08(3)(a) (1977).

33. Section 3302(b) of the Federal Unemployment Tax Act has a deeming provision whereby an employer will be presumed to have contributed 2.7% to the state fund if the reason for such reduced contributions is based on "experience rating," or benefit ratio. I.R.C. § 3302(b).

34. A person is deemed involuntarily unemployed when unemployment occurs through no

tion for UC benefits must be made at the nearest Florida State Employment Office.³⁵ There the claimant's eligibility is ascertained.³⁶ The claimant's base period employers³⁷ are then notified of the claim and are given an opportunity to explain the circumstances under which the claimant left their employ. If the separation was under disqualifying conditions, the claim will be denied.³⁸ Otherwise, the claimant will begin receiving benefits according to his or her base period wages.³⁹ The employers in the claimant's base period will then have the employees' benefits charged to their accounts, thus establishing their benefit ratio or "experience rating."^{39.1}

Having briefly outlined the logistics of claiming unemployment compensation benefits, it is appropriate to delve into the intricacies of one of Florida's most complicated statutes, by way of examining the changes made by the 1977 legislature. This discussion is intended to explain the changes and their significance, as well as to explain some of the rather subtle provisions of the statute.

IV. FLORIDA'S UC LAW—1977 REVISIONS

A. *The Mandatory Changes*

1. *Coverage*

Senate Bill 1231⁴⁰ was a direct response to amendments in the

fault of the worker: for example, in a layoff situation. A worker may quit a job voluntarily and still be eligible for benefits if the separation was due to illness or to good cause attributable to the employer. This latter basis is very narrowly construed. Consequently, the employee must tolerate employer behavior, however extreme, unless it is such that the average person would resign under the same circumstances. For example, frequent "yelling and screaming" by an employer has not been deemed good cause for quitting. *Uniweld Prods., Inc. v. Industrial Relations Comm'n*, 277 So. 2d 827 (Fla. 4th Dist. Ct. App. 1973).

35. This is one of the administrative requirements of 42 U.S.C. § 503 (1970).

36. FLA. STAT. § 443.05 (1977). The eligibility conditions refer to certain administration requirements, as well as to one of the major obstacles—the minimum base period wages to be earned.

37. Base period employers are those covered employers for whom the claimant worked during the first four of the last five completed calendar quarters preceding the claim. FLA. STAT. § 443.03 (1977).

38. FLA. STAT. § 443.06 (1977), sets forth disqualifying conditions, among which are misconduct, voluntarily leaving employment, failure to seek suitable work, participation in a labor dispute, or failure to register as an alien.

39. FLA. STAT. § 443.04(2)(a) (1977). The weekly benefit amount is one-half of the claimant's average weekly wages earned during his or her base period. The rationale behind the 50% factor is to prevent a work disincentive effect, which is presumed to occur when benefits are at higher ratios. For an expanded discussion of the problem, see W.E. UPJOHN INSTITUTE FOR EMPLOYMENT RESEARCH, *THE WORK DISINCENTIVE EFFECTS OF UNEMPLOYMENT INSURANCE* (1974).

39.1 FLA. STAT. § 443.08(3) (1977).

40. Ch. 77-262, 1977 Fla. Laws 1220. Fla. SB 1231 (1977) contained, in toto, the provisions contained in Fla. HB 2268 (1977), which did not pass. The house bill was the outgrowth of

Federal Unemployment Tax Act.⁴¹ The label "mandatory" was attached to indicate that these provisions of the bill were required in order to protect Florida's interest in the federal tax offset and reimbursement for administrative costs. Generally, Senate Bill 1231 redefined "employment" to include agricultural labor, domestic services, and services in non-profit elementary and secondary schools. Covered employers will feel its effects by way of an increased taxable wage base—from \$4,200 to \$6,000. Additionally, government employers will now be allowed to choose the contributory financing system.⁴²

(a) *Farmworkers*

Probably the most significant change effected by Senate Bill 1231 was the coverage of agricultural workers. From the outset of the UC program, farmworkers have been exempted from coverage.⁴³ Generally, the rationale for this exemption was attributed to the seasonal nature of their work, which was said to indicate less than a "genuine attachment" to the labor force.⁴⁴ In addition, it was considered administratively unfeasible to try to cover such seasonal workers, since the costs of doing so appeared clearly prohibitive.⁴⁵

Tied in with the farmworker problem too was the assumed migratory nature of the group.⁴⁶ However, the United States Department

the work of the Unemployment Insurance Advisory Council, established via FLA. STAT. § 443.12(5) (1977), in conjunction with the Division of Employment Security. The bill contained only those amendments made necessary by Pub. L. No. 94-566, 90 Stat. 2667 (1976) (amending I.R.C. §§ 3301-3308). Fla. H.R., Commerce Committee Staff Report, Proposed Committee Bill # 33—Unemployment Compensation (April 7, 1977) (on file with committee).

41. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667 (amending I.R.C. §§ 3301-3308).

42. Contributory versus reimbursible systems of financing UC benefits are discussed in text accompanying notes 63-66 *infra*.

43. When the U.S. House Ways and Means Committee reported out the Economic Security Bill (to become § 606 of the Social Security Act of 1935), farmworkers were deleted from coverage. STATUTORY HISTORY *supra* note 9, at 140.

44. For a reflection of the rather hostile attitude which has prevailed toward seasonal workers, see *Florida Indus. Comm'n v. Ciarlante*, 84 So. 2d 1, 5 (Fla. 1955), in which Justice B.K. Roberts noted for the court that UC benefits were not intended to provide a "vacation with pay" for seasonal workers. In *Ciarlante*, the court upheld the denial of benefits to a 67-year-old custom tailor who was always laid off during the summers.

45. One of the administrative problems anticipated was that of enforcing reporting provisions. Employers are required to report employment and wage information for tax purposes, as well as for claims verification. Given the unorthodox methods of wage payment to farmworkers, sometimes by way of crew leaders, ensuring accountability appeared to be a difficult task. Opponents of the program argued this point. The argument, however, was less than persuasive in light of successful farmworker coverage in other social insurance programs. California, for example, covers farmworkers under Social Security and Temporary Disability Insurance. PROGRAM IMPROVEMENTS, *supra* note 7, at 12.

46. In the United States, *migrant* laborers account for approximately 7% of the agricul-

of Labor, after years of studying the farmworker situation, concluded that the costs of administering benefits to farmworkers would be no more prohibitive than the costs of administering benefits to any other seasonal workers, such as apparel or construction employees, nor would it strain the budget of the overall program.⁴⁷ On the national level, the impact of this increased coverage should bring 459,000 previously uncovered farmworkers under federal coverage.⁴⁸ For Florida, this means that potentially 100,000 agricultural workers will be protected.⁴⁹

As a result of Senate Bill 1231, Florida law now provides that agricultural workers employed by employers with ten or more workers during each of twenty different calendar weeks, or paying \$20,000 or more in wages for such service in any calendar quarter, are within covered employment.⁵⁰ The "farm operator," or grower, is deemed the employer for tax liability purposes if the common law rules of master and servant would indicate such a relationship.⁵¹ If the worker is provided to the grower by a crew leader who is not an employee of the grower and who is registered under the Farm Labor

tural labor force. In Florida, however, they account for about 29%. This vast difference is due to Florida's disproportionate share of *agricultural* labor. INSTITUTE FOR SOCIAL POLICY STUDIES, SPECIAL REPORT: FLORIDA FARMWORKERS 3 (1977) [hereinafter cited as FLORIDA FARMWORKERS].

47. PROGRAM IMPROVEMENTS, *supra* note 7, at 13-14. In 1969, it was estimated that the difference in the benefit cost rate (benefits paid as a percent of taxable wages) would increase only from .43% to .55% by including farmworkers. *Id.* This figure was based on a coverage provision of four or more workers, or \$5,000 or more in wages per quarter. In fact, the present coverage provision is more restrictive. Thus, the impact on the benefit cost rate is less significant than indicated in the 1969 report.

48. U.S. EMPLOYMENT TRAINING ADMINISTRATION, DEP'T OF LABOR, DRAFT LANGUAGE AND COMMENTARY TO IMPLEMENT THE UNEMPLOYMENT COMPENSATION AMENDMENTS OF 1976—P. L. 94-566 (1976) [hereinafter cited as DRAFT LANGUAGE].

49. FLORIDA FARMWORKERS, *supra* note 46, at 3.

50. Ch. 77-262, § 1, 1977 Fla. Laws 1220 (codified at FLA. STAT. § 443.03(5)(n) (1977)).

51. The master-servant or employer-employee relationship is defined as one which "exists when one person who employs another to do certain work exercises control over the performance of the work to the extent of prescribing the manner in which it is to be executed." 21 FLA. JUR. *Master and Servant* § 2, at 539 (1958). The employer determines the manner, method, time, and tenure of service. *Boca Raton v. Mattef*, 91 So. 2d 644 (Fla. 1956).

The common law test used to determine whether the employment relationship exists is one of the most amorphous measures available and is fraught with inconsistency. In 1947, the United States Supreme Court pointed out that the Social Security Act required a liberal and realistic interpretation and that the same approach should be used in examining employer-employee relationships for unemployment compensation purposes. Applying a previous holding on a related issue, the Court stated: "We concluded that . . . 'employees' included workers who were such as a matter of economic reality. . . . We rejected the test of the 'technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants.'" *United States v. Silk, Inc.*, 331 U.S. 704, 712-14 (1947) (citing *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944)). See also *Bartels v. Birmingham*, 332 U.S. 126 (1947). For a full discussion of such coverage provisions, see Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 YALE L.J. 76 (1945).

Contractor Registration Act; or, if the workers, supplied by the crew leader, operate or maintain tractors, harvesting equipment, crop-dusting equipment, or other mechanized equipment, and are *not* employees of the grower under the common law definition, then the crew leader is considered the employer for tax purposes.⁵²

The agricultural worker is still, however, covered under the definition of employment. Ascertaining employer status goes only to the question of tax liability.⁵³ The statute creates a preference for *grower* employers by its more stringent definition of the crew leader employer. This preference is to the farmworker's advantage for, given the rather transient nature of crew leaders, they will probably be less reliable record-keepers than growers for purposes of verifying workers' claims.

The coverage provision for farmworkers went into effect on December 31, 1977. Unfortunately, problems arose regarding the transition period. In 1974 Congress established the Special Unemployment Assistance program (SUA), to be effective through March 31, 1976, and later extended to March, 1977, with no new SUA claims to be made after December, 1976.⁵⁴ The act provided for temporary assistance to unemployed workers not covered under any state or other federal law—thus covering agricultural workers—and was subsidized by federal funds.⁵⁵ Benefits became available to such workers in geographical areas where the rate of unemployment was 6.5% or greater for three consecutive months.⁵⁶ The provisions of the state UC laws applied, except that the base period was computed as the fifty-two weeks *immediately* preceding the claim (as opposed to Florida's fixed "quarter" computation).⁵⁷ After December 31,

52. Crew leaders operate to gather farmworkers—generally migrant workers—and provide them for use by farm operators. The crew leaders pay the crew, and there is no written agreement between the crew leader and the farm operator designating the leader as employee of the operator. Ch. 77-262, § 1, 1977 Fla. Laws 1220 (codified at FLA. STAT. § 443.03(5)(n)3 (1977)).

53. It should be noted that the federal provision for farmworker coverage ties in the 20 weeks or \$20,000 wages requirement for covered employment even when the crew leader is deemed the employer for tax purposes. Thus, where the crew leader meets the criteria to be deemed the employer, he must still be furnishing workers to a grower who meets the 20 weeks or \$20,000 wage condition. Florida has no such tie-in provision. Thus, regardless of grower status, the farmworker is in covered employment if the crew leader meets the employer criteria.

54. Title II, Emergency Jobs and Unemployment Assistance Act of 1974, Pub. L. No. 93-567, 88 Stat. 1845 (current version at I.R.C. § 3304).

55. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 121, 90 Stat. 2667 (amending I.R.C. § 3304).

56. *Id.*

57. Florida's base period is computed on a fixed quarter system. Thus, quarter I is January-March, etc. FLA. STAT. § 443.03(1), (4) (1977).

1976, SUA coverage was to switch to the state base period computation, and no base period used in a prior SUA claim could be re-used.⁵⁸ Thus, farmworkers would be required to reach back to the first four of the five quarters immediately preceding their claims without being able to calculate any wage credits previously used in a SUA claim. Further, it was not at all unlikely that the lag quarter (the fifth quarter, not computed in the base period) would fall in a harvest season—generally a farmworker's peak earning period. This combination of variables would virtually prohibit a farmworker from meeting eligibility conditions regarding minimum earned wage credits.⁵⁹

To counteract the impact of superimposing SUA provisions onto Florida's UC law, the Senate proposed Senate Bill 48B⁶⁰ as an amendment to Senate Bill 1262.⁶¹ Senate Bill 48B provided that wages earned in the base period need only be ten times the average weekly wages rather than the normal twenty times. Although this measure did not totally eliminate the problem, it did afford some relief to farmworkers in establishing claims during the transition period.

(b) *Domestics and Public Employees*

Senate Bill 1231 extended coverage to another long-excluded segment of the labor force—domestics.⁶² As of December 31, 1977, domestic services performed in a private home, college club, fraternity, or sorority, paying \$1,000 or more per quarter for such services, are deemed "employment" for UC purposes.⁶³ The \$1,000 figure is

58. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 121, 90 Stat. 2667 (amending I.R.C. § 3304).

59. FLA. STAT. § 443.05(1)(e) (1977). The claimant is required to have earned wages for insured work equal to 20 times his average weekly wages during the base period, provided that the average weekly wage is not less than \$20 per week. (The average weekly wage is equal to the total wages in the base period, divided by the number of weeks of insured work.) Objections have been raised regarding this method of attaining eligibility. Wage credit computations based on a minimum weekly average discriminate against workers in lower wage brackets. Such workers must work longer to reach the minimum. However, it is these workers, in the unskilled, lower wage brackets, that also have the most problems obtaining employment.

60. Ch. 77-420, § 1, 1977 Fla. Laws 1731 (codified at FLA. STAT. § 443.05(1)(e) (1977)). The designation "B" indicates that the bill was passed during the special session of the legislature.

61. Ch. 77-399, 1977 Fla. Laws 1673 (codified at FLA. STAT. ch. 443 (1977)).

62. Ch. 77-262, § 1, 1977 Fla. Laws 1220 (codified at FLA. STAT. § 443.03(5)(o) (1977)). As of 1975, only Arkansas, the District of Columbia, Hawaii, and New York covered domestics to some degree. New York has done so since the inception of its UC program, with coverage provisions requiring a quarterly payroll of \$500 or more. This provision, adopted in 1956, increased coverage from 2,200 to 22,500 domestics; beneficiaries increased from 520 to 1,510. PROGRAM IMPROVEMENTS, *supra* note 7, at 15-16.

63. Ch. 77-262, § 1, 1977 Fla. Laws 1220 (codified at FLA. STAT. § 443.03(5)(o) (1977)).

pursuant to federal requirements⁶⁴ and is intended to exclude the more "casual" workers and those households employing a single worker one day each week. The legislative intent was to include those domestics who, had they been working in commercial or non-profit establishments, would be covered.⁶⁵

Public Law No. 94-566 (1976 FUTA amendments) brought into the ambit of "employment" work in state and local governments and nonprofit educational institutions.⁶⁶ Florida law had already extended coverage to state and local government employees in 1971. Excluded from coverage by the federal law, however, are elected officials, members of a legislative body or the judiciary, national guard members, emergency employees hired in case of disaster, and inmates in custodial or penal institutions.⁶⁷ Although federal law requires coverage of government employees, it provides that employers shall be exempt from the payroll tax. Rather, provision was made for reimbursement by government employers to the UC fund for UC benefits actually paid to their former employees.⁶⁸ Florida law, however, does provide for election of the contribution financing method.⁶⁹

Senate Bill 1231 included several technical provisions regarding financing of benefits for these newly covered employees. Generally, the federal fund will reimburse those benefits paid to claimants who are newly covered under state law pursuant to Public Law No. 94-566, but whose base periods extend to periods prior to their coverage. Thus, the base period employers would not have their accounts charged for benefits paid during the period of transition.⁷⁰

(c) *Exceptions and Exclusions*

Pursuant to Public Law No. 94-566, Senate Bill 1231 denied benefits between academic terms to professionals in both higher and

64. The U.S. House version required only \$600 per quarter, but when the final bill came out of the conference committee, the qualifying figure was raised to \$1,000. CONF. REP. No. 19-1745, 94th Cong., 2d Sess. 10 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6034.

65. DRAFT LANGUAGE, *supra* note 48, at x.

66. There was a question as to the constitutionality of such coverage in light of the decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which invalidated the minimum wage coverage of state and local government under the Fair Labor Standards Act. However, the Solicitor of the Department of Labor issued an opinion indicating that the case was not applicable to UC coverage. S. REP. No. 94-1265, 94th Cong., 2d Sess. 9 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5997.

67. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 115(b), 90 Stat. 2667 (amending I.R.C. § 3306).

68. Ch. 77-262, § 5, 1977 Fla. Laws 1220 (codified at FLA. STAT. § 443.08(5)(b) (1977)).

69. *Id.* § 3 (codified at FLA. STAT. § 443.08(5)(c) (1977)).

70. *Id.* (codified at FLA. STAT. § 443.05(7) (1977)).

lower educational institutions if a reasonable expectation of employment exists for the next academic year. While nonprofessionals in higher educational institutions may receive UC benefits between terms, nonprofessionals in lower educational institutions may not, if a reasonable expectation of employment exists for the following year.

It is difficult to trace the legislative intent behind this apparent inequity.⁷¹ A possible explanation is that the 1970 Employment Security Amendments, which required coverage of state institutions of higher education, were passed to eliminate a competitive disadvantage for private nonprofit schools, which also were brought within unemployment insurance coverage.⁷²

Senate Bill 1231 applied a similar between-terms denial of benefits to athletes where there is reasonable assurance of continued service in the following season.⁷³

Again complying with Public Law No. 94-566, Senate Bill 1231 denied benefits to illegal aliens,⁷⁴ providing that (1) information about alien status will be uniformly required of all applicants, and (2) a preponderance of evidence is necessary in order to deny benefits because of alienage.⁷⁵ Florida law already had a provision regarding aliens who, without good cause, failed to register with the appropriate agency.⁷⁶ It disqualified aliens from UC benefits for as long as they failed to register and for not more than ten weeks following registration.⁷⁷ The provision did not, however, indicate how the commission would determine illegal alien status. Because no cases have been reported dealing with the existing provision, it is difficult to predict what impact the new federally mandated provision will have. However, because the federal law contemplates that questions relevant to citizenship will be placed on the claims forms, there will no doubt be cases in the future regarding this disqualification of illegal aliens.

71. Pub. L. No. 94-566 permitted the states to deny benefits between terms to nonprofessional employees of primary or secondary schools. S. REP. No. 94-1265, *supra* note 66, indicates that the U.S. House bill originally would have permitted states to cover nonprofessional school employees for a two-year period. However, the Committee on Finance, to which the bill was referred, made the option permanent for the states. Pub. L. No. 94-566, § 115, 90 Stat. 2667 (1976).

72. PROGRAM IMPROVEMENTS, *supra* note 7, at 10.

73. Ch. 77-262, § 3, 1977 Fla. Laws 1220 (codified at FLA. STAT. § 443.05(5) (1977)).

74. *Id.* § 4 (codified at FLA. STAT. § 443.06(7) (1977)).

75. The two provisions were added by the U.S. Senate to Pub. L. No. 94-566. The Florida law simply tracked these provisions.

76. Added to Florida law by ch. 63-157, 1963 Fla. Laws 318 (current version at FLA. STAT. § 443.06(7)(a) (1977)).

77. FLA. STAT. § 443.06(7)(a) (1977).

In mandating the "preponderance of evidence" standard, Congress intended to prevent discrimination against those aliens legally residing in the United States whose ethnic, racial, or linguistic characteristics make them identifiable and thus suspect.⁷⁸ Congress envisioned the difficulty of making determinations on citizenship status, observing that even trained experts have difficulty interpreting the Immigration and Naturalization Act.⁷⁹ The establishment of a standard defining "preponderance of evidence" as it pertains to alien status may prove to be an interesting development in unemployment compensation law.

2. *Pregnancy Disqualification*

In 1975 the United States Supreme Court considered the constitutionality of a provision in Utah's UC law which disqualified women whose separation from work was due to pregnancy. The Court found that a "conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid. . . ."⁸⁰ In response to this decision, Public Law No. 94-566 prohibited states from disqualifying claimants solely on the basis of pregnancy. Prior Florida law had provided that voluntarily quitting work without (1) good cause attributable to the employer, or (2) good cause due to illness *other than pregnancy*, disqualified claimants from receiving benefits.⁸¹ Interestingly, the cases involving disqualifications based on pregnancy were not based on this "voluntary quit" *disqualification*. Rather, the cases generally refer to the claimant's failure to be "able and available" for work, a separate *eligibility* requirement.⁸² Senate Bills 1231 and 1262 deleted the pregnancy

78. 122 CONG. REC. 17025 (1976) (remarks of Sen. Haskell).

79. *Id.* (remarks of Sen. Cranston).

80. *Turner v. Department of Employment Security*, 423 U.S. 44, 46 (1975). The Utah statute disqualified women for the period twelve weeks before and six weeks after childbirth.

81. Ch. 63-327, § 1, 1963 Fla. Laws 895 (current version at FLA. STAT. § 443.06(1) (1977)).

82. Cases on this point generally take into consideration factors indicating ability to work. For example, one claimant, because of her physical appearance in advanced stages of pregnancy, was terminated. However, because she had a doctor's verification of ability to work, she was deemed available for work and therefore not disqualified from UC benefits. No. 1755 (App. Ref. Dec. April 3, 1955). For further such cases, see 3 UNEMPL. INS. REP. (CCH), Fla. ¶¶ 1950.417, .420.

The distinction between disqualifying conditions and eligibility conditions should be noted. Disqualifying conditions are, for example, voluntarily quitting work, misconduct, or failure to apply for suitable work. These are all found within FLA. STAT. § 443.05 (1977), which also provides for certain penalties to attach for the various disqualifying conditions.

Eligibility conditions include such requirements as being able and available for work, having earned sufficient wage credits, and having served a one-week waiting period. FLA. STAT. § 443.05 (1977). Failure to meet these eligibility conditions does not result in a penalty, but benefits will be withheld until such requirements are met.

exception from the good cause, voluntary quitting provision.⁸³ The impact of this deletion may be minor, given the way the cases in this area have been resolved. The provision will likely have its greatest effect on women engaged in more strenuous labor who voluntarily quit to seek less physically demanding work. Those who quit to await childbirth will still be disqualified under the able and available criterion for eligibility.

3. *Effect of Social Security and Pensions on UC Benefits*

House Bill 1231⁸⁴ provided the vehicle for another mandatory change. The bill required that UC benefits be offset by any benefits or income received under a pension or retirement plan, regardless of the source; that is, regardless of whether the employee contributed to the plan or not. It further provided, though, that benefits received under the United States Social Security Act may not be offset.⁸⁵ The original intent of Public Law No. 94-566 was to disqualify those persons receiving such pensions insofar as they had withdrawn completely (*i.e.*, retired) from the workforce, contrary to the rationale of unemployment insurance. Hence, the federal provision requires that all retirement benefits be offset, including Social Security income.⁸⁶

Florida's law on this point had already undergone close scrutiny because of its rather arbitrary provisions. It provided for disqualification when the claimant was eligible for retirement benefits via a union contract plan or public or private benefit program. However, if any of these were combined with income from the United States Social Security Act, the claimant was eligible for UC benefits offset by such combined income.⁸⁷ To complicate the picture further, decisions of the Industrial Relations Commission (IRC), the final administrative appeal board in the state, suggested that when the pension was from the claimant's contributions, the pension was not

83. It should be noted that Senate Bills 1231 and 1262 had different effective dates. Ch. 77-262, § 4, 1977 Fla. Laws 1220. The mandatory bill, SB 1231, had an effective date of January 1, 1978, pursuant to Pub. L. No. 94-566. Fla. SB 1262 (1977), however, was effective July 1, 1977. Thus, the pregnancy provision was effective prior to the mandatory date.

84. Ch. 77-424, § 1, 1977 Fla. Laws 1739 (codified at FLA. STAT. § 443.06(8) (1977)).

85. *Id.* Fla. SB 1262 (1977), ch. 77-399, 1977 Fla. Laws 1673 (codified at FLA. STAT. § 443.06(8) (1977)), also amended the provision regarding pension offsets. It eliminated the distinction as to the source of the pension—employer versus employee contributions. However, it did not eliminate the offset for Social Security income as was required by Pub. L. No. 94-566. The federal provision, however, is not effective until 1979.

86. S. REP. No. 94-1265, 94th Cong., 2d Sess. 21-22 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6015-16.

87. Ch. 18402, § 6(E), 1937 Fla. Laws 1303 (current version at FLA. STAT. § 443.06(8) (1977)).

income but a "recapture of claimant's own funds."⁸⁸ This was an apparent source of contention between the commission and department heads, as manifested by the following rather pointed excerpt from an opinion on the issue by the IRS:

We have consistently held that retirement income based on the claimant's contributions should not be offset against the weekly benefit amount. . . . This is but one further example of the injustice and inefficiency that must necessarily follow a policy wherein supposedly fair and impartial hearings are conducted by persons who submit to dictates imposed by their administrative superiors—and, further, as is the case here, when those superiors select, arbitrarily, what law the Hearing Officer should honor and what law he should not.⁸⁹

It is interesting to note that no draft language on this point was provided to the states regarding this federal amendment. The federal provision is effective on October 1, 1979,⁹⁰ thus "permitting the National Commission on Unemployment Compensation an opportunity for thorough study of this issue and Congress the chance to act in light of the Commission's findings and recommendations."⁹¹ So an amendment may be anticipated.

4. *Extended Benefits*

Regular UC benefits in Florida are provided for a maximum of twenty-six weeks. But Florida also administers extended benefits for those who have exhausted regular benefits. The availability of these benefits is based on the state or national unemployment rate.⁹² When the national rate of unemployment is greater than 5%, the

88. See, e.g., Industrial Relations Commission (IRC) Order No. 76-1986 (1976).

89. *Id.* See also IRC Order No. 76-735 (1976), in which the claimant retired and received a pension to which she had contributed. IRC held that because she had contributed, this income did not disqualify her.

90. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 314(15), 90 Stat. 2667 (amending I.R.C. § 3304).

91. CONF. REP. NO. 94-1745 to H.R. 10210, 94th Cong., 2d Sess. 16, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6032.

92. Title II of the Employment Security Amendments of 1970, Pub. L. No. 91-373, § 201, 84 Stat. 695, established the first permanent federal-state extended benefits program, responding to the problem of high unemployment resulting from periods of recession. Benefit exhaustion is a primary problem in the unemployment insurance program. The burden of dealing with long-term unemployment has shifted to extended benefits programs. Because the unemployment compensation program was originally designed to combat the effects of temporary, short-term unemployment, the program is presently feeling the strain of the present high unemployment rate (over 5%), which is projected to remain until 1980. The extended benefits program provides only a band-aid solution to the long-term unemployment problem. *Response, supra* note 23, at 823-25.

U.S. Secretary of Labor issues a decree indicating that an "on" period for extended benefits is in progress. The states may then make extended benefits available for up to thirteen weeks to claimants who have exhausted their maximum amount of regular benefits.⁹³

Pursuant to the federal amendments, Florida Senate Bill 1231 modified the state and national "on/off" indicators.⁹⁴ The state "on" indicator was most affected by the change. For a state "on" indicator to be triggered, the rate of insured unemployment over the immediately preceding twelve week period must be 5% or more.⁹⁵ Previously, there was a tandem provision requiring (1) a 4% or more rate of unemployment among the insured which (2) equals or exceeds 120% of the average of such rate for the corresponding period in each of two preceding years.⁹⁶ This latter provision thus required an ever-increasing unemployment rate in order to trigger extended benefits. For Florida, this was a particularly stringent requirement in view of the state's generally high rates of unemployment. Interestingly, Congress has legislated, on seven different occasions since 1970, to allow waiver of the 120% factor—the legislation being of a temporary or emergency nature.⁹⁷ The waiver permitted in the 1976 amendment to FUTA is permanent, and Florida has taken advantage of it.

B. Amendments Beyond the Federal Mandate

The 1977 legislative session also generated amendments to Florida's UC law which were not required by Public Law No. 94-566. Twenty-three nonmandatory bills were proposed. There was evidently much interest in the UC system, as it has come under fire from both sides of the system—that is, from both employers and

93. The duration of benefit periods has always been limited in United States unemployment insurance systems. The rationale is based on fear of the financial strain resulting from unlimited duration, presumed work disincentive effects, and the necessity of maintaining the "insurance" character of the program, that is, requiring the worker to *earn* his or her benefits. Notably, five countries provide for unlimited duration of benefits: France, Australia, New Zealand, Belgium, and Yugoslavia. Florida has one of the more restrictive computations for duration of benefits. In 1969, of the 35% of workers who exhausted their benefits, 19% were eligible for less than 26 weeks of benefits (the maximum allowed). As a result, Florida's exhaustee rate was within the top five in the nation. This fact, combined with a high unemployment rate, makes the extended benefits of particular importance to Florida claimants. W.E. UPJOHN INSTITUTE FOR EMPLOYMENT RESEARCH, *THE DURATION OF UNEMPLOYMENT COMPENSATION BENEFITS* 14 (1978) (Table 3) [hereinafter cited as *DURATION*].

94. Ch. 77-262, § 2, 1977 Fla. Laws 1220 (codified at FLA. STAT. § 443.04(5)(a)2-3 (1977)).

95. *Id.*

96. FLA. STAT. § 443.04(5)(a)4 (1977).

97. DRAFT LANGUAGE, *supra* note 48, at 79.

employees. A newspaper series on supposed abuses of unemployment disaster relief in the wake of the freeze in 1976-77 no doubt provided part of the impetus for closer scrutiny of the entire system.⁹⁸ The following are changes not required by the federal law.

1. *Disqualifications*

(a) *Misconduct*

Of great significance to claimants is the provision in Senate Bill 1262 which defines misconduct, heretofore defined by administrative and judicial interpretation.⁹⁹ Misconduct is a disqualifying condition of separation from employment.¹⁰⁰ It is the most highly contested issue on appeal.¹⁰¹ Misconduct has generally been defined as conduct "tantamount to an intentional disregard of the employer's interest."¹⁰² Paradoxically, case law indicates that there need be no correlation between the misconduct in question and actual damage to the employer's interest. Thus, damage to the employer is not generally a factor in determining whether or not misconduct has occurred.¹⁰³

One of the most influential cases regarding misconduct came out of the Wisconsin Supreme Court in 1941—*Boynton Cab Co. v. Neubeck*¹⁰⁴—and has often been cited with approval in many jurisdictions. The court indicated that misconduct, for purposes of unemployment compensation disqualification,

is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such

98. Memorandum to Governor Reubin Askew from Edward Trombetta, Secretary of Commerce (Oct. 17, 1977). Trombetta indicated that although the UC program had been subjected to increased public criticism in the "political arena and in the press" following the January, 1977 freeze, in reality the percentage of fraudulent claims was "extremely low"—less than 1.7% of those claims filed for disaster relief.

99. Ch. 77-399, § 4, 1977 Fla. Laws 1673 (codified at FLA. STAT. § 443.06(9) (1977)).

100. FLA. STAT. § 443.06 (1977) enumerates the disqualifying conditions.

101. Of the 18,158 disqualifications for misconduct at the claims level, 10,926 were appealed, comprising 36.2% of the total appeals. 1976 U.C. ANNUAL REPORT, *supra* note 26, at 22.

102. *Woskoff v. Desta Enterprises, Inc.*, 187 So. 2d 101, 103 (Fla. 1966). This language is generally found in most states' decisions on the issue. Some states include this language in their statutes.

103. The conduct which is deemed misconduct connected with work varies considerably from case to case. For example, continued absenteeism due to personal problems apparently of the claimant's own making has been deemed an intentional disregard of the employer's interest, *Castillo v. Florida Dep't of Commerce*, 253 So. 2d 162 (Fla. 2d Dist. Ct. App. 1971).

104. 296 N.W. 636 (Wis. 1941).

degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.¹⁰⁵

The court went on to indicate that statutes which provide for forfeitures must be strictly construed, and that ambiguous terms must be construed so as to prevent forfeiture.¹⁰⁶

The purpose of the unemployment compensation program supposedly is to provide economic security for those "involuntarily unemployed." The *Boynton* language comes closest to implementing this intent. It would be difficult to contend that one who has committed conduct with such evil intent would not foresee termination of employment as a consequence. An intent to become voluntarily unemployed might be imputed.

Even though *Boynton* is widely viewed as the definitive statement on misconduct, Florida decisions seem to have ignored the very explicit mens rea requirement set forth there. Florida's disregard of the mens rea requirement can be seen in the following cases: inability of an employee to report to work because he was in jail due to the excessive use of alcohol was held misconduct;¹⁰⁷ inefficient work performance due to dissatisfaction at failure to be given a salary increase was deemed misconduct;¹⁰⁸ a furnace operator who, having been once warned, negligently allowed his furnace to go out twice in a two-year period was held to have been discharged for misconduct.¹⁰⁹

Interestingly, the new Florida provision virtually tracks the language of *Boynton*.¹¹⁰ The legislative intent seems clearly to indicate that the mens rea requirement, as prescribed in *Boynton*, is a threshold element which must be found for a misconduct disqualification. This legislative intent is further evidenced by the deletion, on the floor of the Florida Senate, of two clauses which would have

105. *Id.* at 640.

106. *Id.* at 641.

107. No. AT-502 (App. Trib. Dec. 1940), 3 UNEMPL. INS. REP. (CCH) ¶ 1970.40.

108. No. AT-133 (App. Trib. Dec. 1940), 3 UNEMPL. INS. REP. (CCH) ¶ 1970.451.

109. No. 4359 (App. Ref. Dec. 1948), 3 UNEMPL. INS. REP. (CCH) ¶ 1970.503.

110. Ch. 77-399, § 4, 1977 Fla. Laws 1677, 1679, provides the following definition of misconduct:

- (a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee; or
- (b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

defined misconduct as repeated violations of work rules or instructions—neither of which required *mens rea*.¹¹¹ The implication is that misconduct has been substantially narrowed. A “moral” judgment of misconduct is no longer valid. Rather, “misconduct” is to be interpreted in line with the rationale and policy of the UC program.

The new misconduct provision still leaves open the question of the duration of disqualification. The legislature instructed the Florida Division of Employment Security to promulgate rules to define degrees of misconduct. However, no criteria were set forth in the statute to guide the division.¹¹² The maximum period of disqualification was raised from twelve weeks to fifty-two weeks,¹¹³ although the twelve-week disqualification as it pertained to the “voluntary quit” rule was removed.¹¹⁴ A provision that the disqualification shall continue for the full period of unemployment and until the employee has been reemployed and earned ten times his weekly benefit amount is still effective for both “voluntary quit” and misconduct.¹¹⁵ It is difficult to account for the relaxation of the “voluntary quit” disqualification. In fact, this is the first amendment to the disqualification section which has resulted in a relaxation rather than a stiffening of penalties.

111. Sections 443.06(9)(c) and (d) of Fla. SB 1262 (1977) were deleted from the engrossed version. They defined misconduct as: “(c) Repeated violation of a publicized work rule; or (d) Repeated failure to follow reasonable instructions despite previous warnings.” Also, the *mens rea* in section (b) was reinserted. FLA. S. JOUR. 669 (Reg. Sess. 1977).

112. Ch. 77-399, § 4, 1977 Fla. Laws 1673 (codified at FLA. STAT. § 443.06(1)(b) (1977)). Emergency rules have been promulgated by the Division of Employment Security, which categorize degrees of misconduct as: felonies (the maximum disqualification period of 27-52 weeks), misdemeanors, and violations of major and minor company rules. It is still questionable whether these categories are actually within the scope of the new misconduct definition. FLA. DEP’T COM. DIV. EMPL. SEC. EMER. R. 8 BER 77-8 to 77-13.

113. The disqualification period for misconduct has been amended on a number of occasions. In 1939, in addition to a seven-week disqualification period, a further provision permitted a reduction of the benefit duration period of not more than three weeks. In 1941, the seven-week maximum was raised to twelve weeks and the three-week reduction was dropped. In 1943, in addition to the existing provisions, there was added the requirement that the claimant also become reemployed and have earned wages equal to or in excess of ten times the weekly benefit amount. 15 FLA. STAT. ANN. § 443.06(1) (West 1975) (historical note).

114. Voluntary quitting is another highly contested disqualification issue. In 1976, there were 46,423 disqualifications for voluntary quitting, which constituted 35.3% of total disqualifications in Florida. 1976 U.C. ANNUAL REPORT, *supra*, note 26, at 22. The voluntary quitting provision has undergone revision which has limited the claimant’s ability to claim good cause for leaving employment. The original statute disqualified those who had voluntarily left work without good cause. A 1939 amendment narrowed the provision by adding that the claimant must have voluntarily left his or her most recent employer. But in 1963, good cause was limited only to such cause as was attributable to the employer. This final provision severely limited the nondisqualifying conditions under which an employee may leave employment. 15 FLA. STAT. ANN. § 443.06(1) (West 1975) (historical note).

115. Ch. 77-399, § 4, 1977 Fla. Laws 1673 (codified at FLA. STAT. § 443.06(1)(a)-(b) (1977)).

(b) *Suitable Work*

Refusal of "suitable work" is another disqualifying condition for the collection of UC benefits. Every state provides for this disqualification.¹¹⁶ The proviso that refusal of other than suitable work is not disqualifying is a means of protecting the worker from being forced to accept a job which may be hazardous or for which the worker is physically unsuited. The present Florida provision requires a consideration of the following factors in determining suitability: degree of risk to health, safety, and morals; physical fitness and prior training; experience and prior earnings; length of unemployment; the prospects of securing local work in customary occupation; and the distance to the available work.¹¹⁷ Senate Bill 1262 amended the provisions by requiring that suitable work shall be a job which (1) pays the minimum wage, and (2) pays a wage that is 120% or more of the weekly benefit amount of the individual's extended benefits.¹¹⁸ Thus, when an individual has exhausted regular benefits, the prior earnings consideration is no longer relevant, except insofar as it determines the weekly benefit amount. The minimum wage requirement, of course, will have the greatest impact on unskilled, low-income workers. However, the 120% factor required for exhaustees will affect the middle-income and above workers. The intent appears to be to reduce the good cause available for refusing work as the length of unemployment increases—already a factor considered in the suitable work determination. The 120% factor, combined with the duration of unemployment, appears to be an attempt to force the middle and above income workers back into the labor force—into jobs which ordinarily would not be suitable under the "prior earnings" factor.

There are three conditions under which an individual may refuse work without being disqualified: (1) if the position is vacant due to a strike or labor dispute—thus preventing the individual from being forced into the precarious position of a strikebreaker; (2) if the conditions of work are substantially less favorable than those prevailing in similar work—thus preventing the undermining of labor standards; and (3) if a condition of employment is to join or resign from a labor organization.¹¹⁹ This last provision is in keeping with requirements of both the National Labor Relations Act¹²⁰ and the right-to-

116. [1975] 1A UNEMPL. INS. REP. (CCH) ¶ 1965.

117. FLA. STAT. § 443.06(2)(d) (1977).

118. Ch. 77-399, § 4, 1977 Fla. Laws 1673 (codified at FLA. STAT. § 443.06(2) (1977)).

119. These conditions are specifically carved out in I.R.C. § 3303, and are enumerated in FLA. STAT. § 443.06(2)(b) (1977).

120. 29 U.S.C. §§ 151-197 (1970).

work provision of the Florida Constitution.¹²¹ The Florida Supreme Court has ruled on a related matter in *Adams v. Auchter Co.*¹²² There the court stated that the union or nonunion status of a vacant position shall not be a consideration for the determination of suitable work.¹²³ Thus, union members will be required to accept non-union work if it is otherwise suitable.

2. Administrative Changes

Amidst all the substantive changes in the unemployment compensation law, the legislature also enacted a transitional change in the administrative appeals body. The Industrial Relations Commission—previously responsible for final administrative determinations of unemployment compensation cases as well as for worker's compensation cases¹²⁴—will no longer be the decisionmaking body in UC appeals. Senate Bill 1262 created a Board of Review, which is now solely responsible for final UC administrative appeals.¹²⁵ This change is likely to result in more expeditious decisions.

Presently, federal rules require that the states administer UC programs in a manner "reasonably calculated" to provide for hearings and appeals with the "greatest promptness administratively feasible."¹²⁶ The federal rules set forth deadlines for appeals which apply only to the first appeals level: 60% of appeals decisions must be made within thirty days of the date of appeal; 80% within forty-five days of the appeal date.¹²⁷

The Industrial Relations Commission (now the Unemployment Appeals Commission), the second administrative appeal level, has no corresponding federal mandate providing for appeals decisions deadlines, other than the general language requiring the greatest promptness feasible. The IRC rules of procedure provide for deci-

121. FLA. CONST. art. I, § 6.

122. 339 So. 2d 623 (Fla. 1976). The petitioner in that case claimed that his refusal to accept nonunion work did not constitute failure to accept *suitable* work and thus render him ineligible for UC benefits.

123. *Id.*

124. FLA. ADMIN. CODE ch. 8I-1.01.

125. Ch. 77-399, § 6, 1977 Fla. Laws 1673 (codified at FLA. STAT. § 20.17(12) (1977)). The Board of Review consists of a chairperson and two members who are appointed by the Governor and confirmed by the senate. Not more than one member of the board is to be classified as a "representative of employers," nor more than one a "representative of employees." *Id.* The chairperson is the only full-time member and is required to have the same qualifications as those required of circuit court judges. *Id.* Subsequently, the 1978 legislature changed the name of the board to the Unemployment Appeals Commission. Fla. SB 1240 (1978).

126. 20 C.F.R. § 650.1 (1977).

127. *Id.* § 650.4.

sions to be made within a "reasonable time."¹²⁸ Thus, they have fallen short of the level of promptness which first-level appeals have attained.¹²⁹

It may be argued, however, that guidelines of the Administrative Procedure Act (APA) apply to these second-level appeals decisions.¹³⁰ Although the IRC is exempt from the APA provision which requires officers of the Division of Administrative Hearings to hear formal proceedings, it is not exempt from the general provisions regarding procedural requirements of these proceedings.¹³¹ Specifically, the APA requires that a final order be rendered within ninety days after the hearing is concluded, if conducted by the agency.¹³² The Board of Review, acting as the agency head to the extent that its decisions are final, subject only to judicial review, comes within the ambit of the ninety-day requirement.¹³³ Thus far there has been no challenge regarding the timeliness of the decisions at the second-appeal level. However, as familiarity with the APA grows, so too will the probability of a timeliness challenge to the Board of Review procedures.

V. CONCLUSION

During the 1977 legislative session, twenty-four bills were proposed to amend various provisions of Florida's unemployment compensation law. Of the twenty-four, four passed. These four broke new ground in extending coverage to workers previously unprotected. Because of Florida's greater than average share of farmworkers, their coverage is of special significance. What impact their coverage will have on Florida's taxing, financing, and administrative schemes remains to be seen.

Determining the ramifications of the statutory definition of misconduct is another point of conjecture at this time. Whether the new definition heralds a more liberal approach to unemployment compensation will depend on how it is construed by claims examiners and appeals referees. The direction of the national unemployment

128. FLA. ADMIN. CODE ch. 8I-2.09. The Board of Review has adopted the IRC rules of procedure as they pertain to UC appeals. See proposed rules 8J-2.01 to 2.09, filed Aug. 18, 1977.

129. In 1976, IRC had 2,475 cases pending from 1975, and received 5,384 more cases. The commission disposed of 5,212 cases during 1976 and left 2,647 (approximately 33%) cases pending as of December 31, 1976. 1976 U.C. ANNUAL REPORT, *supra* note 26, at 25.

130. FLA. STAT. ch. 120 (1977).

131. *Id.* § 120.57(1)(a)2.

132. *Id.* § 120.59(1)(a).

133. Assuming that the 90-day limit applies to these second-level appeals, the IRC fell short of the timeliness requirement by over 900 cases.

compensation law is toward more liberal coverage of persons suffering the effects of high unemployment rates. Florida is taking new steps in that direction.

