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Robert R. Corbin

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ARIZONA ATTORNEY GENERAL  
11 4, 1980

Re: I80-049 (R80-053)

Dear Mr. Jamieson:

You have requested the Attorney General's opinion concerning whether a conflict exists, within the meaning of A.R.S. § 41-1962, between 26 U.S.C.A. § 3304(a)(15) of the Federal Unemployment Tax Act and A.R.S. § 23-791 of the Employment Security Act. A.R.S. § 41-1962 provides that, in the event of a clear conflict between federal and state law concerning the programs and functions of the Department of Economic Security, federal law controls.<sup>1/</sup>

It is our opinion that a conflict clearly exists between the federal and state laws, so that, pursuant to A.R.S. § 41-1962, the federal law shall control.

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<sup>1/</sup> A.R.S. § 41-1962 reads as follows:

Where any conflict with federal law occurs concerning the programs and functions of the department as established by the law of this state, such federal law shall control. For purposes of this section, "federal law" means any statute passed by the Congress of the United States, any final regulations adopted by any administrative agency of the United States government and published in the code of federal regulations or the federal register or any final decision of the federal judiciary. A conflict between federal law and the law of this state does not exist for purposes of this section unless the source of the federal law, on its face or so clearly as not to require any additional interpretation, establishes the conflict. Upon notification of a conflict with federal law where the conflict does not meet the requirements of this section, the department may conform its programs and functions to eliminate the alleged conflict on condition that the department contest the alleged conflict.

26 U.S.C.A. § 3304(a) requires certain provisions to be included in a state's unemployment insurance (U.I.) laws in order to receive the approval and annual certification from the Secretary of Labor. Requirement 15 states 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;

In 1977, Arizona enacted A.R.S. § 23-791, which provides:

Wages paid by a base-period employer to an individual whose benefit year begins after December 31, 1978 and who at the time of claiming or receiving benefits is receiving any payment on account of retirement which is based on any previous work for such base-period employer shall not be considered "wages for insured work" within the meaning of paragraph 6 of § 23-771 and §§ 23-607 and 23-779.

The conflict between these provisions is fundamental. The federal statute requires a dollar-for-dollar reduction in U.I. benefits for retirement pay when the two types of compensation are payable for previous work and for the same week. The federal statute is structured so that it will effect only a dollar matching result, striking dollars from the U.I. benefits from zero to the maximum U.I. benefit amount as circumstances of each case require.

The Arizona statute, A.R.S. § 23-791, does not aim at the dollar delivery of the U.I. compensation, but rather targets a claimant's eligibility for benefits by cancelling out qualifying wages whenever the claimant receives benefits and retirement pay in a same week from the same base-period employer.

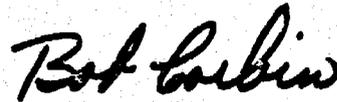
A.R.S. § 23-771.6 requires that a claimant, in order to be eligible for U.I. benefits, must have earned wages from a covered employer in certain amounts during the claimant's base

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period, which is normally the first four of the last five quarters immediately preceding the first day of an individual's benefit year. See A.R.S. §§ 23-605, 23-606 and 23-609. The cancelling of a claimant's qualifying wages would also affect the weekly benefit amount under the formula set out in A.R.S. § 23-779. When retirement pay is applied to the formula for eligibility based on past earnings set out in A.R.S. § 23-771.6, a different result from that mandated by the federal statute may be reached. In some cases, small amounts of retirement pay could render a claimant ineligible for benefits, and likewise a large amount of retirement pay in some cases would have no effect on the benefit amount under the Arizona formula.

Therefore, we conclude that the conflict between the state and federal statutes is clear upon the face of the federal statute, and, thus, A.R.S. § 41-1962 mandates that the federal provision shall control.

Sincerely,



BOB CORBIN  
Attorney General

BC:JT:lfc