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THE FEDERAL-STATE PARTNERSHIP OF UNEMPLOYMENT COMPENSATION

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Federal and state governments jointly administer the unemployment compensation system. Many participants at the Symposium addressed this aspect of unemployment compensation, and it is the topic of the four Articles that follow. This Introduction discusses three broad areas in order to provide a framework for issues concerning federal-state relations in unemployment compensation. This Introduction also will highlight some of the points made by Symposium participants in response to the ideas expressed in the following Articles. Part I addresses how the federal-state partnership operates and defines areas of responsibility for both the states and the federal government. Part I also discusses the balance of power between the federal and state governments. Part II examines how the states interact in claims involving more than one state. Part III questions the traditional role of the federal government as a partner with the states in the administration of unemployment compensation.

I. THE FEDERAL-STATE RELATIONSHIP

The federal government and the states share responsibility for the nation's unemployment compensation (UC) system. In general, the federal government is responsible for establishing a framework for the system, and each state is given the responsibility of actually running the system within its jurisdiction.¹ The UC system is built around a tax credit program whereby employers pay both a federal and a state payroll tax.² Employers are then able to credit up to ninety percent of the


2. MURRAY RUBIN, FEDERAL-STATE RELATIONS IN UNEMPLOYMENT INSURANCE 3 (1983).
state tax against the federal tax. This credit, however, is available only if the state's unemployment insurance program meets federal requirements, and the Secretary of Labor must certify a state's program on a yearly basis in order for the tax credit to become available to that state's employers. Further, states must immediately pay amounts received from state taxes for unemployment compensation to the United States Treasury Department. These funds are then credited to the Unemployment Trust Fund, and states may withdraw money from this fund to make UC payments.

There are three main reasons for the federal-state structure of the UC system. First, when creating the federal UC laws, the Roosevelt administration feared that the United States Supreme Court would hold unconstitutional a completely federal system, or a system which placed absolute requirements upon the states. Although valid at the time, this concern no longer operates as a justification for the system because of changes in constitutional law. The second reason stemmed from concern that states might be discouraged from maintaining effective UC programs because of fears that business would move to other states in order to avoid paying the taxes needed to provide unemployment benefits. This "race to the bottom" problem remains a concern today, although scholars acknowledge that a wide variety of other considerations affect a state's decisions regarding unemployment compensation. Third, the federal-state partnership gives the states the flexibility to experiment with unemployment compensation within a broad federally controlled structure. Such regulated flexibility limits the cost of mistakes in two ways. First, it limits the extent of possible reforms to those allowed under federal law. Second, it limits any adverse effects of a particular reform on the state that has

3. Id. at 15.
4. Id. at 3.
7. Rubin, supra note 2, at 38.
8. Hight, supra note 6, at 615.
9. Rubin, supra note 2, at 14-15; see also Hight, supra note 6, at 615 (explaining the states' concern that employers would be at an economic disadvantage).
10. See Blaustein, supra note 1, at 266-73.
11. Id. at 325; Hight, supra note 6, at 616.
adopted a reform. If the reform proves beneficial, other states may adopt it with reliable information about its costs and benefits. This third reason for the federal-state structure remains a valid justification for the UC system. Indeed, most of the innovation in unemployment compensation comes from the states.

The UC system places strong incentives upon the states to comply with federal mandates. Failure to comply weakens a state's ability to provide UC, increases tax costs for the state's employers, and places political pressure upon the state's leaders. Furthermore, federal grants pay for the costs of administering a state's system only if the state's administrative system meets federal requirements. The state's need for these grants essentially allows the federal government to control state administrative practices. Thus, while the states may legally choose not to comply, there are strong financial and political incentives to follow the federal procedures.

The federal government has been gaining power over the states in unemployment compensation since the 1970s. Prior to that time, a balance had existed between the two levels of government because the practical limitations of enforcing federal policies in the states kept a check on the federal government's financial and political power. This balance has been upset, however, by the inclusion of the Unemployment Trust Fund in the federal budget, because federal mandates that reduce UC coverage will reduce the federal deficit. Consequently, the federal government now has greater incentive to intervene in state programs and the resulting increase in federal intervention tilts the balance of power in favor of the federal government.

12. Rubin, supra note 2, at 5, 13, 251.
13. Id. at 5.
14. Id. at 2–3, 18.
15. Id. at 3; see also Cabais v. Egger, 690 F.2d 234, 235–36 (D.C. Cir. 1982).
16. Rubin, supra note 2, at 27.
17. Id. at 4–5. The federal government did have some financial control over the states. One of the Symposium presenters, Gerard Hildebrand, described the federal government's power to withdraw employer tax credits and to refuse to provide administrative funding to the states as two "bombs." Gerard Hildebrand, Remarks at Unemployment Compensation: Continuity and Change Symposium Presented by the Advisory Council on Unemployment Compensation and the University of Michigan Journal of Law Reform 486 (Mar. 31, 1995) [hereinafter Symposium Transcript] (transcript on file with the University of Michigan Journal of Law Reform).
18. Hight, supra note 6, at 621.
19. Blaustein, supra note 1, at 241; Rubin, supra note 2, at 239–41; Hight, supra note 6, at 628.
The federal government exercises its power over the states in two broad areas. First, it requires that state UC procedures comply with the administrative requirements of the Social Security Act. Second, it brings state laws into conformity with federally mandated statutory language. The first area is largely a matter of administrative practice, while the second is based on statutory language and interpretation. Issues of administrative compliance center around the requirement that a state's system must contain “methods of administration... as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due.” This requirement has been used to challenge state laws that delay payment of benefits while an employer appeals an award of compensation, fail to properly calculate an employee's base period, or deny payment to those currently in prison. The key issue in these challenges was whether the state had erected administrative procedures that frustrated the requirement of full payment of benefits “when due.”

Conformity issues arise when the language and interpretation of a state's unemployment laws do not meet federal specifications. An example of a conformity dispute is the litigation which arose from the requirement that states provide coverage for elementary and secondary school employees. Several states found that this requirement did not apply to work performed for schools closely connected with churches. The Secretary of Labor, however, interpreted the new language to include these employees. In two separate federal cases, courts upheld the states' view. Further, while

21. Id.
22. Id. at 532.
26. Jenkins v. Bowling, 691 F.2d 1225, 1227, 1234 (7th Cir. 1982).
27. Java, 402 U.S. at 133; Pennington, 22 F.3d at 1388; Jenkins, 691 F.2d at 1229.
29. Id. at 780 n.10.
30. Id. at 778.
31. Id. at 778-85 (agreeing with South Dakota); Alabama v. Marshall, 626 F.2d 366 (5th Cir. 1980), cert. denied, 452 U.S. 905 (1981) (agreeing with Alabama and Nevada); see also Hildebrand, supra note 20, at 561-62 (providing an additional example).
the federal government does have substantial control over state UC systems, it will normally negotiate with a state to achieve compliance and conformity rather than engage in a formal legal challenge.\textsuperscript{32}

The current federal-state UC system does not guarantee uniformity among the states. Critics cite the lack of uniformity as a principal argument for a system entirely under federal control.\textsuperscript{33} The Article by Maribeth Wilt-Seibert provides an example of this lack of uniformity. She discusses how federal requirements concerning teachers and other employees of educational institutions have created a wide variety of results in various states.\textsuperscript{34} From the beginning of the UC program, however, its creators understood this potential for contrasting outcomes to be a part of the system.\textsuperscript{35} Indeed, uniformity is likely impossible because the needs of individual states vary,\textsuperscript{36} and flexibility among the states necessarily leads to a lack of uniformity.\textsuperscript{37} This situation reflects the value that the system places upon the ability of states to adjust their UC systems to meet their individual needs.\textsuperscript{38} In arriving at the appropriate balance of power between the federal government and the states, critics must consider the extent to which the UC system should tolerate this lack of uniformity.

II. INTERSTATE RELATIONS

State unemployment compensation systems interact with each other when a worker files a claim in one state based, in part or in whole, upon work done in other states.\textsuperscript{39} Until 1970, these types of claims were handled in accordance with voluntary agreements between states.\textsuperscript{40} This system produced inequitable results, however, because individual states could

\begin{itemize}
  \item \textsuperscript{32} Rubin, supra note 2, at 3; see also Hildebrand, supra note 20, at 532–34 (providing a detailed discussion of this process).
  \item \textsuperscript{33} Rubin, supra note 2, at 245–46.
  \item \textsuperscript{35} Rubin, supra note 2, at 13.
  \item \textsuperscript{36} Blaustein, supra note 1, at 326.
  \item \textsuperscript{37} Rubin, supra note 2, at 245–46.
  \item \textsuperscript{38} Hight, supra note 6, at 616.
  \item \textsuperscript{39} Mark D. Esterle, Interstate Claims: Their History and Their Challenges, 29 U. Mich. J.L. Ref. 485, 485 (1996).
  \item \textsuperscript{40} Id.
\end{itemize}
refuse to recognize interstate claims or penalize claims based on work done in another state.\textsuperscript{41} In 1970, Congress amended the Federal Unemployment Tax Act to require that states handle these claims according to federally approved agreements.\textsuperscript{42} This amendment provides that states must not deny or reduce compensation solely because a claim is filed in another state or because the claimant lives in another state.\textsuperscript{43} States are also required to “participate in any arrangements for the payment of compensation on the basis of combining an individual’s wages and employment covered under the State law with his wages and employment covered under the unemployment compensation law of other States which are approved by the Secretary of Labor.”\textsuperscript{44} The workings of this federally mandated system of interstate agreements is the subject of the Symposium Article by Mark D. Esterle.\textsuperscript{45}

Interstate benefits claims give rise to choice-of-law problems, specifically concerning eligibility and the length of the base period. While Esterle’s Article points out the need for clarification in the choice-of-law rules governing these claims, some general rules are discernible. It is fairly clear that the base period of the paying state controls.\textsuperscript{46} The situation is less clear, however, with regard to eligibility questions. It appears that if there is a disparity between the base periods of the paying and transferring states then the eligibility laws of the paying state control.\textsuperscript{47} If the base periods are the same, however, then eligibility is to be determined by proceedings in the transferring state under that state’s law.\textsuperscript{48} These choice-of-law rules are discussed in greater detail in Esterle’s Article, and they clearly form a major issue in interstate coverage cases.

\textsuperscript{41} Id. at 5–7.


\textsuperscript{44} Id. § 3304(a)(9)(B).

\textsuperscript{45} Esterle, \textit{supra} note 39.

\textsuperscript{46} See, e.g., \textit{In re} Claim of Johnson, 605 N.Y.S.2d 449, 450 (N.Y. App. Div. 1993) (interpreting 20 C.F.R. § 616.6). The state in which the claim is filed is referred to as the “paying state.” States from which the claimant seeks to have work time transferred is called the “transfer state.” Esterle, \textit{supra} note 39, at 8–9. See also Benjamin Rose Inst. v. District Unemployment Compensation Bd., 338 A.2d 104, 107 n.10 (D.C. Cir. 1975), cert. denied, 429 U.S. 835 (1976) (applying these definitions to a claimant who had worked in Ohio, the transferring state, and had filed his claim in the District of Columbia, the paying state).

\textsuperscript{47} Benjamin Rose Inst., 338 A.2d at 107.

\textsuperscript{48} Id.
Interstate benefits claims also raise due process issues that were discussed during the Symposium. Due process concerns arise when a claimant files an interstate claim and then is faced with administrative procedures in at least two states. Such a situation increases the potential for a violation of the claimant's due process rights. Problems may arise when states fail to properly communicate. This failure may occur when one state asks another for clarification and that state fails to respond adequately or when results of proceedings conducted by one state and transferred to another are defective. Due process problems also may occur where filing deadlines depend upon the forwarding of information from other states. Interstate benefits claims may involve telephone hearings because, by definition, the parties are in different states; such hearings also raise due process concerns. Finally, problems may arise from interstate differences in the right to counsel and the right to appeal a denial of benefits. The potential for these conflicts clearly needs to be addressed to ensure that the interstate system protects claimants' due process rights.

III. THE ROLE OF THE FEDERAL GOVERNMENT

Traditionally, the federal government has acted as a partner of the states in administering unemployment compensation. In

49. See, e.g., Benjamin Rose Inst. v. District Unemployment Compensation Bd., 355 A.2d 569, 571 (D.C. Cir.), cert. denied, 429 U.S. 835 (1976) (finding that the transferring state's statement of its law in response to questions from the paying state was adequate but lacking in clarity).

50. See, e.g., Simmons v. District Unemployment Compensation Bd., 292 A.2d 797, 800 (D.C. Cir. 1972) (denying an employer's appeal from a grant of benefits because another state's administrative law judge failed to make findings of fact concerning the credibility of witnesses which were necessary for the employer to carry its burden of proof).

51. See, e.g., Dowd v. Director of the Div. of Employment Sec., 459 N.E.2d 471, 473 (Mass. 1984) (remanding for a determination of credibility where a claimant asserted that he filed late because he was told to wait for his records to arrive from another state).


53. At least one state supreme court has found that an unemployment benefits claimant must be informed both of the right to counsel and the ability to secure free legal aid. Simmons v. Traughber, 791 S.W.2d 21, 23–24 (Tenn. 1990).
light of this partnership, the Department of Labor prefers working with the states to resolve conformity and compliance issues rather than instituting formal proceedings, in part because decertification and withdrawal of administrative funding would have a severe impact on a state's ability to provide unemployment compensation. This cooperative approach is also historically based. When the federal government first developed the UC system, the states lacked sufficient knowledge to set up their own programs. To gain this knowledge, states came to rely upon the federal government. Although this reliance has decreased over time, state-federal cooperation was established early in the history of the American UC system and continues today. While there has been tension between the federal government and the states, the federal government in many ways remains a partner with the states in providing unemployment compensation. Furthermore, a variety of political factors limits the ability of the Department of Labor to directly challenge the states.

The Article written by John Gray and Jane Greengold Stevens sharply criticizes the performance of the federal government as a partner with the states. In their Article, they assert that the federal government should take a more active role in enforcing federal standards, especially timeliness requirements. The difficulty claimants have in forcing the federal government to pressure states to comply with federal requirements supports their argument. There might be a standing issue, because a UC claimant is only indirectly affected by a suit against the Department of Labor. In addition, the Department of Labor's enforcement of federal

54. RUBIN, supra note 2, at 4.
55. Id. at 3–4.
56. Id. at 23.
57. Id.
58. Id. at 2–4.
59. Id. at 29–33.
61. Id. at 509–12. The federal government requires that decisions from appeals of initial determinations be issued within a certain time frame. Currently, decisions must be issued within 30 days of the date of the appeal in 60% of the cases and within 45 days in 80% of the cases. 20 C.F.R. § 650.4(b) (1995).
62. See, e.g., Cabais v. Egger, 690 F.2d 234, 240 (D.C. Cir. 1982) (holding that an unemployment benefits claimant lacked standing in a suit to force the Department of Labor to change a federal interpretation that had become effective as state law in the claimant's state).
standards may be entitled to judicial deference under the Administrative Procedure Act. Plaintiffs who sue state agencies to force compliance with federal standards face fewer obstacles than plaintiffs who sue the federal government, but suits would have to be brought in each state and would likely be extremely time consuming. While Gray and Stevens note that it is possible to join the federal government in suits against the states, they explain that this approach contains several serious risks.

Gray and Stevens are claimants' advocates from New York City, and they write from that perspective. At least one of the Symposium participants felt that this particular perspective leads to a lack of balance in their Article. An associate counsel of the State of New York Department of Labor attended the Symposium and defended the Department's record. He argued that New York provides more protection of claimants' interests than other states and that in 1990 the Department's unemployment insurance agency had tried to review the quality of the system.


64. See Cabais, 690 F.2d at 240 (explaining that a recipient of benefits can challenge state law).


66. Id. at 509 nn. * & **.

67. Audience Member, Symposium Transcript, supra note 17, at 520-21.

68. Id. at 545-47.

69. Id. at 546. Following the Symposium, this audience member provided the University of Michigan Journal of Law Reform with a chart illustrating the New York State Unemployment Insurance Appeal Board's progress toward meeting federal timeliness standards during the period of January 1993 through May 1995. Letter from Jerome M. Solomon, Associate Counsel, State of New York Department of Labor, to Alison M. Sawka, Symposium Editor, University of Michigan Journal of Law Reform (July 12, 1995) (on file with the University of Michigan Journal of Law Reform). The United States Department of Labor timeliness standards for first level benefit appeals require that a state issue at least 60% of the decisions within 30 days of the date of appeal and at least 80% of the decisions within 45 days of appeal. 20 C.F.R. § 650.4(b) (1995). The chart in the letter shows that, in the covered areas, the standard of 60% of decisions mailed within 30 days was met for two months in 1993, for six months in 1994, and for four of the first five months in 1995. Letter from Jerome M. Soloman to Alison M. Sawka, supra. The standard of 80% of decisions mailed within 45 days was met for two months in 1993, for three months in 1994, and for three of the first five months in 1995. Id. Furthermore, during the period covered by the chart, the average percentage of cases in each year that were timely decided under the federal standards increased. Id. According to Solomon, the Unemployment Insurance Appeal Board's increasing success in meeting these standards can be
Gray and Stevens may be correct that the current federal-state partnership allows the states to avoid federal timeliness standards at the expense of claimants. Perhaps the federal government should be less willing to negotiate with the states on matters that have such a direct impact on so many claimants. Their claim that the Department of Labor's ability to decertify and withdraw administrative grants should be considered to contain lesser measures, including informal pressure, suggests a way in which the federal government could deal with the states on these issues. However, rigid enforcement of federal standards on a broad level may deny the states the flexibility to experiment and adjust to local conditions. Such a shift of the federal role from a partner with the states to an advocate for claimants would alter the current system of unemployment compensation in this country.

CONCLUSION

The unemployment compensation system has been, and continues to be, a partnership between the federal government and state governments. It is based upon a system of tax credits to employers and administrative grants to the states. This system gives the states flexibility to experiment and adapt their policies to local conditions while allowing the federal government to establish broad guidelines which ensure that adequate coverage will be provided. The federal government also sets the terms of an interstate agreement by which the states interact to allow claimants to collect benefits based upon employment in multiple states. Questions remain, however, regarding the basic structure of this federal-state relationship. How these issues are resolved will fundamentally shape the unemployment compensation system.

attributed to the work of an internal task force that made recommendations and continues to oversee improvements in managing workflow and upgrades in computerization. Id.

70. Gray & Stevens, supra note 60, at 515.