



State of New Jersey

DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT

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ROBERT ASARO-ANGELO
Acting Commissioner

April 23, 2018

Robert Asaro-Angelo, Commissioner
Department of Labor and Workforce Development
1 John Fitch Plaza
13th Floor
Trenton, NJ 08625

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
DOCKET NO. LID 07013-14S

Civil Action

Jersey Shore Reporting, LLC)	
Petitioner)	RESPONDENT'S MOTION FOR INTERLOCUTORY
v.)	APPEAL TO THE COMMISSIONER OF LABOR
)	AND WORKFORCE DEVELOPMENT
Department of Labor)	
Respondent)	

Dear Commissioner:

The Department is requesting Interlocutory Appeal of Judge Pelios' partial Order of Summary Decision on the above captioned matter under N.J.A.C. 1:1-14.10(b). Judge Pelios interpretation of N.J.S.A. 43:21-19(i) 1(G) is incorrect and a hearing must be held to have testimony to explain the relevant legal facts of N.J.S.A. 43:21-19(i) 1(G) and its relation to granting a FUTA exemption.

N.J.S.A. 1:1-14.10(b) states:

(b) Any request for interlocutory review shall be made to the agency head and copies served on all parties no later than five working days from the receipt of the written order or oral ruling, whichever is rendered first. An opposing party may, within three days of receipt of the request, submit an objection to the agency head. A copy must be served on the party who requested review. Any request for interlocutory review or objection to a request shall be in writing by memorandum, letter or motion and shall include a copy of any written order or ruling or a summary of any oral order or ruling sought to be reviewed. Copies of all documents submitted shall be filed with the judge and Clerk.

The purpose of FUTA is to fund the administration of State unemployment compensation fund.

A State whose unemployment law is certified as acceptable by the United States Department of Labor (USDOL) is eligible for millions of dollars in grants to administer its fund. 42 U.S.C. §501 et seq. In order to fund unemployment benefit programs administered by the states, FUTA imposes an excise tax based upon a percentage of wages paid by an employer. Pursuant to 26 U.S.C. §3301(2) and 26 U.S.C. §3306(b)(1) the current rate is 6% of the first \$7,000 of wages per employee. However, employers can obtain a credit for up to 90% of the FUTA tax provided that the State's unemployment law has been certified pursuant to the requirements set forth in 26 U.S.C. §3304. Should the state lose certification, it would result in the loss of this credit for all employers in the state. Thus, rather than paying the current FUTA tax of \$42 per employee, all employers would be liable to pay the full FUTA tax of \$420. In addition, decertification may result in the loss of the aforementioned millions of dollars in grants necessary to administer the State unemployment compensation fund. It should be noted that in Special Care of N.J., Inc. v. Bd. of Review, 327 N.J. Super. 197, 211-12 (App. Div.), certif. denied, 164 N.J. 190 (2000), the court noted that the State was not obligated to adopt existing federal statutory exemptions. Special Care did not address whether the State had the authority to adopt exemptions that did not have a corresponding FUTA

exemption and whether such action by the State would be contrary to the provisions of N.J.S.A. 43:21-19(i)1(G). Hence, reliance upon Special Care does not support Jersey Shore's argument that the provisions of N.J.S.A. 43:21-19(i)(10) and the accompanying Legislative Statement override the existing statutory provisions set forth in N.J.S.A. 43:21-19(i)1(G).

The Legislature and the courts have repeatedly recognized the interrelationships between the federal and state unemployment compensation acts and the need for the State to remain in compliance with the federal law. Carpet Remnant Warehouse v. Department of Labor, 125 N.J. 567, 588 (1991). The Legislature may have been well-intentioned when it stated its intention to grant an exemption to the employers of court reporters without also requiring a corresponding FUTA exemption. However, the Legislative committee amendment statements cannot alter the plain language of the previously enacted legislative mandate imposed by N.J.S.A. 43:21-19(i)1(G). N.J.S.A. 43:21-19(i)1(G) requires that service must be covered by the UCL unless it has been demonstrated that there is a corresponding FUTA exemption.

The language of N.J.S.A. 43:21-19(i) 1(G) has been previously approved by USDOL. See 26 U.S.C. §3304. N.J.S.A. 43:21-19(i)(10) does not contain any language directing that this exemption shall be granted in the absence of a FUTA exemption. Indeed, for the above stated reasons it could not. Here, the only language suggesting that the statue be applied in such a manner is outside the mandatory plain language of the statute and is contained solely within the legislative statements. N.J.S.A. 43:21-19(i)(10) is clearly subject to the provisions of N.J.S.A. 43:21-19(i) 1(G) as it is in subsection (i) of section 19. Applying N.J.S.A. 43:21-19(i)(10) in the manner apparently intended by the Legislature and as urged here by Jersey Shore would create a clear conflict with the plain language of N.J.S.A. 43:21-19(i) 1(G). Such action would invite decertification of the State's unemployment compensation law by USDOL consequently causing

the assessment of a higher FUTA tax for all employers and the loss of administrative funds. Accordingly, Jersey Shore's argument should be rejected.

Such action may invite decertification of the State's unemployment compensation law by USDOL consequently causing the assessment of a higher FUTA tax for all employers and the loss of administrative funds. Accordingly, Judge Pelios' order for partial summary decision in favor of Jersey Shore as to the exemption for Court Reporters established under N.J.S.A. 43:21-19(i)(10) for the audit periods occurring during years 2008, 2009 and 2010 should be rejected. An order should be issued directing a full hearing with testimony concerning the State's imposition of FUTA credits by holding all employment liable for contributions as required by N.J.S.A. 43:21-19(i)1(G) unless it has been shown that a corresponding FUTA exemption has been granted. The only circumstance where a FUTA credit is not required to be accounted for is if there is a federal statutory exemption under FUTA or the IRS has granted a "personal" exemption by way of private ruling or SS-8 determination. N.J.S.A. 43:21-19(i)(7) was enacted by the Legislature to require a FUTA exemption before a State exemption under the UCL would be granted so that the federal-state FUTA credit scheme would remain intact and would be uniformly applied. The Legislature has previously recognized that under N.J.S.A. 43:21-19(i)1(G) the State cannot grant a State exemption unless it has been demonstrated that the IRS has granted a FUTA exemption. This was duly recognized by the Legislature when it enacted the provisions of N.J.S.A. 43:21-19(i)(7). By enacting N.J.S.A. 43:21-19(i)(10) the Legislature has simply disregarded the mandate imposed by N.J.S.A. 43:21-19(i)1(G).

Based upon the above, the Order of Summary Decision holding Jersey Shore exempt from contributions pursuant to N.J.S.A. 43:21-19(i)(10) should be rejected. Accordingly, this matter

should be scheduled for a full hearing concerning the effect of N.J.S.A. 43:21-19(i)(10) on the Unemployment Compensation Trust Fund and FUTA credits.

Respectfully submitted,

By _____
T. Raymond B. Kilgore
Supervising Redetermination Auditor

Cc: Elia A. Pelios, ALJ
James Prusinowski, Esq.