

AMENDED IN SENATE JULY 25, 1995

AMENDED IN SENATE JULY 19, 1995

AMENDED IN ASSEMBLY MAY 22, 1995

AMENDED IN ASSEMBLY APRIL 17, 1995

CALIFORNIA LEGISLATURE—1995–96 REGULAR SESSION

ASSEMBLY BILL

No. 272

Introduced by Assembly Member Kuykendall

February 6, 1995

An act to amend Sections 650 and 13004.1 of, to add Article 11.5 (commencing with Section 1231) to Chapter 4 of Part 1 of Division 1 of, and to repeal Section 1234 of, the Unemployment Insurance Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 272, as amended, Kuykendall. Employment: taxes and contributions.

Existing law requires employers to make specified payments and withholdings from wages paid for employment. Existing law requires that those employer payments and withholdings be paid to the Employment Development Department. Existing law excludes certain services, including sales presentations of consumer products in the home, from those employer payments and withholdings.

This bill would provide that sales presentations of services and other intangibles in the home are within this exclusion, and ~~that the amendments of these provisions do not constitute~~

~~a change in, but are declaratory of, existing law would specify the Legislature's intent concerning any refunds, credits, or assessments of any taxes arising or occurring before the effective date of this act from these types of services.~~

This bill would require the Employment Development Department to develop and implement a taxpayer education and information program, as specified. This bill would require the department to make a specified biennial report to the Legislature regarding areas of recurrent taxpayer noncompliance.

This bill would provide that the taxes, interest, additions to tax, or penalties assessed against an employing unit may be relieved if the failure to make a timely return or payment is due to a person's reasonable reliance on written advice from the Employment Development Department, as specified. The bill would also provide that these provisions do not apply to an employing unit that is a nonprofit organization or a governmental agency. Provisions that would authorize relief from specified unemployment insurance taxes, excluding interest and penalties, would only become operative upon a certification by the United States Secretary of Labor, as specified, and would be repealed upon a notification of the Secretary of State by the Director of Employment Development that the United States Secretary of Labor had made an adverse determination, as specified.

Existing law permits the Executive Director or the Chief Counsel of the State Board of Equalization, or the Executive Officer or Chief Counsel of the Franchise Tax Board to recommend the settlement of any civil tax matter dispute with respect to specified taxes, under certain conditions.

This bill would permit the Director or the Chief Counsel of the Employment Development Department to recommend to the Unemployment Insurance Appeals Board, a settlement of any civil employment tax matter dispute, as specified.

This bill would make certain legislative findings and declarations regarding employment taxation.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.



The people of the State of California do enact as follows:

1 SECTION 1. *This act shall be known and may be cited*
2 *as the Employment Taxpayer's Bill of Rights Act of 1995.*

3 SEC. 2. The Legislature finds and declares that
4 uncertainty in the application of California employment
5 tax laws, particularly in the area of determining whether
6 a worker is an employee or an independent contractor,
7 has resulted in lack of uniformity and predictability of tax
8 liability and in unplanned assessments that are
9 unreasonably harsh and that ultimately harm the state's
10 business climate. It is the intent of the Legislature to
11 improve the administration of employment tax laws
12 through the adoption of safeguards that have proven
13 effective in the administration of federal employment tax
14 laws, and in the administration of California's other tax
15 laws.

16 The Legislature further finds that the California
17 employment tax system is based largely on
18 self-assessment, and the development of understandable
19 employment tax laws and taxpayers informed of those
20 laws will improve compliance, the business climate, and
21 the relationship between taxpayers and the government.

22 ~~SEC. 2.—~~

23 SEC. 3. Section 650 of the Unemployment Insurance
24 Code is amended to read:

25 650. "Employment" does not include services
26 performed as a real estate, mineral, oil and gas, or
27 cemetery broker or as a real estate, cemetery or direct
28 sales salesperson by an individual if all of the following
29 conditions are met:

30 (a) The individual is licensed under the provisions of
31 Chapter 19 (commencing with Section 9600) of Division
32 3 of, or Part 1 (commencing with Section 10000) of
33 Division 4 of, the Business and Professions Code or is
34 engaged in the trade or business of primarily inperson
35 demonstration and sales presentation of consumer
36 products, including services or other intangibles, in the
37 home or sales to any buyer on a buy-sell basis, a
38 deposit-commission basis, or any similar basis, for resale



1 by the buyer or any other person in the home or
2 otherwise than from a retail or wholesale establishment.

3 (b) Substantially all of the remuneration (whether or
4 not paid in cash) for the services performed by that
5 individual is directly related to sales or other output
6 (including the performance of services) rather than to
7 the number of hours worked by that individual.

8 (c) The services performed by the individual are
9 performed pursuant to a written contract between that
10 individual and the person for whom the services are
11 performed and the contract provides that the individual
12 will not be treated as an employee with respect to those
13 services for state tax purposes.

14 ~~SEC. 3.—~~

15 SEC. 4. Article 11.5 (commencing with Section 1231)
16 is added to Chapter 4 of Part 1 of Division 1 of the
17 Unemployment Insurance Code, to read:

18

19

Article 11.5. Taxpayer’s Rights

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21 1231. (a) The department shall develop and
22 implement a taxpayer education and information
23 program directed at, but not limited to, the following:

24 (1) Taxpayer or industry groups identified in the
25 biennial report described in Section 1232.

26 (2) Department audit and compliance staff.

27 (3) (A) Identifying forms, procedures, regulations, or
28 laws that are confusing and lead to taxpayer errors.

29 (B) Taking appropriate action, including
30 recommending remedial legislation to change those
31 items identified pursuant to subparagraph (A).

32 (b) The education and information program
33 described in subdivision (a) shall include all of the
34 following:

35 (1) Communication with the taxpayer or industry
36 groups identified in the annual report described in
37 Section 1232 which explains in simplified terms the most
38 common errors made by taxpayers and how those errors
39 may be avoided or corrected.



1 (2) Participation in small business seminars and
2 similar programs organized by state and local agencies.

3 (3) Revision of taxpayer educational materials
4 currently produced by the department to explain in
5 simplified terms the most common errors made by
6 taxpayers and how those errors may be avoided or
7 corrected.

8 (4) Implementation of a continuing education
9 program for audit personnel to include the application of
10 new legislation to taxpayer activities and to minimize
11 recurrent taxpayer noncompliance or inconsistency of
12 administration.

13 1232. (a) The department shall perform a systematic
14 identification of areas of recurrent taxpayer
15 noncompliance and shall report its findings to the
16 Legislature biennially beginning on or before December
17 31, 1997.

18 (b) As part of the identification process described in
19 subdivision (a), the department shall do both of the
20 following:

21 (1) Compile and analyze sample data from its audit
22 process, including, but not limited to, all of the following:

23 (A) The statute or regulation violated by the taxpayer.

24 (B) The amount of tax involved.

25 (C) The industry or business engaged in by the
26 taxpayer.

27 (D) The number of years covered in the audit period.

28 (E) Whether appropriate returns and reports were
29 filed with the department.

30 (2) Conduct a biennial hearing before the director
31 where representatives of taxpayer and industry groups,
32 individual taxpayers, and other appropriate
33 representatives are allowed to present their proposals on
34 changes to the employment tax laws which may further
35 facilitate achievement of the legislative findings.

36 (c) The department shall include in its report
37 recommendations for improving taxpayer compliance
38 and uniform administration, including, but not limited to,
39 all of the following:

40 (1) Changes in statutes or in department regulations.



1 (2) Improvement of training of department
2 personnel.

3 (3) Improvement of taxpayer communication and
4 education.

5 (4) Increased enforcement capabilities.

6 1233. (a) If an employing unit's failure to make a
7 timely return or payment is due to the person's
8 reasonable reliance on written advice from the
9 department, the employing unit may be relieved of the
10 taxes assessed, or any interest, additions to tax, or
11 penalties added thereto, as follows:

12 (1) Taxes or any interest, additions to tax, or penalties
13 added thereto, shall only be relieved if the employing
14 unit's failure to make a timely return or payment was due
15 to the employing unit's reasonable reliance on the
16 written advice of a ~~legal~~ ruling by the ~~chief counsel~~
17 *director or his or her designee*, and only if the department
18 itself finds all the conditions described in subdivision (b)
19 are satisfied.

20 (2) In the event that the employing unit relied on
21 written advice of other than a ~~chief counsel ruling~~ *ruling*
22 *of the director or his or her designee*, taxes shall not be
23 relieved. Interest, additions to tax, or penalties may be
24 waived if the department staff finds all the conditions
25 described in subdivision (b) are satisfied.

26 (b) For purposes of subdivision (a), relief shall be
27 granted if all of the following conditions are satisfied:

28 (1) The employing unit or the employing unit's
29 representative requested in writing that the department
30 advise him or her whether a particular activity or
31 transaction is subject to tax under the tax laws
32 administered by the department, and the specific facts
33 and circumstances of the employment relationship,
34 activity, or transaction were fully described in the
35 request.

36 (2) The department responded in writing to the
37 person regarding the written request for advice, stating
38 whether or not the described employment relationship,
39 activity, or transaction is subject to tax, or stating the



1 conditions under which the activity or transaction is
2 subject to tax.

3 (3) In reasonable reliance on the department's written
4 advice, the person did not remit the tax due.

5 (4) The liability for taxes applied to a particular
6 activity or transaction that occurred before the
7 department rescinded or modified the advice so given, by
8 sending written notice to the person of the rescinded or
9 modified advice.

10 (5) The tax consequences expressed in the
11 department's written advice were not subsequently
12 changed by any of the following:

13 (A) A change in state or federal statutory law or case
14 law.

15 (B) A change in a federal administrative ruling or
16 regulation where the department's written advice was
17 based on that federal administrative ruling or regulation.

18 (C) A change in material facts or circumstances
19 relating to the taxpayer.

20 (c) Any person seeking relief under this section shall
21 file with the department all of the following:

22 (1) A copy of the person's written request to the
23 department and a copy of the department's written
24 advice.

25 (2) A statement signed under penalty of perjury,
26 setting forth the facts on which the claim is based.

27 (3) Any other information which the department may
28 require.

29 (d) Only the person making the written request shall
30 be entitled to rely on the department's written advice to
31 that person.

32 (e) If written advice is issued pursuant to this section,
33 it shall include a declaration that the tax consequences
34 expressed in the advice may be subject to change for any
35 of the reasons specified in paragraph (5) of subdivision
36 (b) and that it is the duty of the requester to be aware of
37 any of these possible changes.

38 (f) This section shall not apply if the requester's
39 request for written advice pursuant to paragraph (1) of



1 subdivision (b) contained a misrepresentation or
2 omission of one or more material facts.

3 (g) For purposes of subdivision (a), the department
4 shall waive only that portion of tax, penalties, interest, or
5 additions to tax attributable to the actions taken by the
6 employing unit after receipt of the written advice of the
7 department which were in reasonable reliance on the
8 written advice.

9 (h) When a request is made for a legal ruling, the
10 request shall specifically so state. ~~Chief counsel~~ *Director*
11 rulings shall be issued as provided in published guidelines.
12 When a ~~chief counsel~~ *director* ruling is issued, the ruling
13 shall be signed by the ~~chief counsel~~ *director* or his or her
14 designee.

15 (i) This section shall not apply to an employing unit
16 that is a nonprofit organization or a governmental
17 agency.

18 (j) Notwithstanding any other provision of this
19 section, no relief from unemployment insurance taxes
20 imposed pursuant to Article 3 (commencing with Section
21 976) of Chapter 4 of Part 1, other than relief from interest
22 and penalties, shall be granted pursuant to this section
23 unless Section 1234, as enacted by the act enacting this
24 section, becomes operative.

25 1234. (a) Relief from unemployment insurance taxes
26 imposed pursuant to Article 3 (commencing with Section
27 976) of Chapter 4 of Part 1 shall be granted pursuant to
28 Section 1233 if this section becomes operative.

29 (b) This section shall become operative on the January
30 1 immediately following a certification of the
31 unemployment compensation law of California,
32 including Sections 1233 and 1234, by the United States
33 Secretary of Labor pursuant to Section 3303 of Title 26 of
34 the United States Code.

35 (c) If the United States Secretary of Labor determines
36 that the operation of this section would preclude
37 certification of the unemployment compensation law of
38 California pursuant to Section 3303 of Title 26 of the
39 United States Code, this section shall remain in effect only



1 until the director notifies the Secretary of State of that
2 determination, and as of that date is repealed.

3 1236. (a) (1) Subject to paragraph (2), the director,
4 or the chief counsel if authorized by the director, may
5 recommend to the Unemployment Insurance Appeals
6 Board a settlement of any civil employment tax matter
7 dispute arising under Article 8 (commencing with
8 Section 1126), Article 9 (commencing with Section 1176),
9 or Article 11 (commencing with Section 1221).

10 (2) No recommendation of settlement shall be
11 submitted to the Unemployment Insurance Appeals
12 Board unless and until that recommendation has been
13 submitted by the director or chief counsel to the Attorney
14 General. Within 30 days of receiving that
15 recommendation, the Attorney General shall review the
16 recommendation and advise in writing the director or
17 chief counsel of his or her conclusions as to whether the
18 recommendation is reasonable from an overall
19 perspective. The director or chief counsel shall, with each
20 recommendation of settlement submitted to the
21 Unemployment Insurance Appeals Board, also submit
22 the Attorney General's written conclusions obtained
23 pursuant to this paragraph.

24 (3) The members of the Unemployment Insurance
25 Appeals Board shall not participate in the settlement of
26 these tax matters, except as provided in subdivision (c).

27 (b) Whenever a reduction of tax in excess of five
28 hundred dollars (\$500) is approved pursuant to this
29 section, there shall be placed on file in the office of the
30 director a public record with respect to that settlement.
31 The public record shall include, but need not be limited
32 to, all of the following information:

33 (1) The name or names of the taxpayers who are
34 parties to the settlement.

35 (2) The total amount involved.

36 (3) The amount payable or refundable pursuant to the
37 settlement.

38 (4) A summary of the reasons why the settlement is in
39 the best interests of the state.



1 (5) The Attorney General's conclusion as to whether
2 the recommendation of settlement was reasonable from
3 an overall perspective.

4 The public record shall not include any information
5 that relates to any trade secret, patent, process, style of
6 work, apparatus, business secret, or organizational
7 structure that, if disclosed, would adversely affect the
8 taxpayer or the national defense.

9 (c) (1) Any recommendation for settlement shall be
10 approved or disapproved by the Unemployment
11 Insurance Appeals Board, itself, within 45 days of the
12 submission of that recommendation by the department.
13 Any recommendation for settlement that is not either
14 approved or disapproved by the board within 45 days of
15 the submission of that recommendation shall be deemed
16 approved. Upon approval of a recommendation for
17 settlement, the matter shall be referred back to the
18 director or chief counsel in accordance with the decision
19 of the Unemployment Insurance Appeals Board.

20 (2) Disapproval of a recommendation for settlement
21 shall be made only by a majority vote of the
22 Unemployment Insurance Appeals Board. Where the
23 Unemployment Insurance Appeals Board disapproves a
24 recommendation for settlement, the matter shall be
25 remanded to department staff for further negotiation,
26 and may be resubmitted to the Unemployment Insurance
27 Appeals Board, in the same manner and subject to the
28 same requirements as the initial submission at the
29 discretion of the director or chief counsel.

30 (d) All settlements entered into pursuant to this
31 section shall be final and nonappealable, except upon a
32 showing of fraud or misrepresentation with respect to a
33 material fact.

34 (e) Any proceedings undertaken by the
35 Unemployment Insurance Appeals Board pursuant to a
36 settlement as described in this section shall be conducted
37 in a closed session or sessions. Except as provided in
38 subdivision (b), any settlement entered into pursuant to
39 this section shall constitute confidential tax information.



1 (f) Any settlement of a civil employment tax matter
2 arising out of a disagreement between the department
3 and the employing unit on the status of a worker as an
4 employee or an independent contractor may also include
5 an agreement on the prospective classification of that
6 worker and any worker similarly situated.

7 (g) *For purposes of this section, settlement is defined*
8 *as a compromise on the amount of the tax liability,*
9 *consistent with the reasonable evaluation of the costs and*
10 *risks associated with litigation of these matters.*

11 (h) *This section shall be operative January 1, 1997.*

12 ~~SEC. 4.—~~

13 SEC. 5. Section 13004.1 of the Unemployment
14 Insurance Code is amended to read:

15 13004.1. “Employee” does not include any individual
16 if all of the following conditions exist:

17 (a) The individual is licensed pursuant to the
18 provisions of Part 1 (commencing with Section 10000) of
19 Division 4 of the Business and Professions Code and is
20 performing services in the capacity of a licensee, or the
21 individual is engaged in the trade or business of primarily
22 in-person demonstration and sales presentation of
23 consumer products, including services or other
24 intangibles, in the home or sales to any buyer on a buy-sell
25 basis, a deposit-commission basis, or any similar basis, for
26 resale by the buyer or any other person in the home or
27 otherwise than in a retail or wholesale establishment.

28 (b) Substantially all of the remuneration (whether or
29 not paid in cash) for the services performed by that
30 individual is directly related to sales or other output
31 (including the performance of services) rather than to
32 the number of hours worked by that individual.

33 (c) The services performed by the individual are
34 performed pursuant to a written contract between that
35 individual and the person for whom the services are
36 performed and the contract provides that the individual
37 will not be treated as an employee with respect to those
38 services for state tax purposes.

39 ~~SEC. 5.—~~



1 SEC. 6. The amendments of Sections 650 and 13004.1
2 of the Unemployment Insurance Code made by this act
3 ~~do not constitute a change in, but are declaratory of,~~
4 ~~existing law.~~ shall not be construed to allow a refund or
5 credit of any taxes paid for any quarter occurring before
6 the effective date of this act. The Employment
7 Development Department shall not make any
8 assessment for taxes due for any quarters occurring
9 before the effective date of this act, if the taxpayer met
10 the provisions of Section 650 of the Unemployment
11 Insurance Code as clarified by this act. The Employment
12 Development Department shall not collect any
13 assessment not final on the date of signature of this act by
14 the Governor, if the taxpayer met the provisions of
15 Section 650 of the Unemployment Insurance Code as
16 clarified by this act.

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