

EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION UI-STC
	CORRESPONDENCE SYMBOL OUI/DL
	DATE February 7, 2014

ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 22-12, CHANGE 2

TO: STATE WORKFORCE AGENCIES

FROM: GERRI FIALA /s/ for ERIC M. SELEZNOW
Acting Assistant Secretary

SUBJECT: Short-Time Compensation Provisions in the Middle Class Tax Relief and Job Creation Act of 2012

- Purpose.** To inform states of additional optional provisions that are approved for short-time compensation (STC) laws under section 3306(v)(10) of the Federal Unemployment Tax Act (FUTA).
- References.**
 - The Layoff Prevention Act of 2012 (Subtitle D), Title II of the Middle Class Tax Relief and Job Creation Act of 2012 (Public Law (Pub. L.) 112-96);
 - Federal Unemployment Tax Act (FUTA), 26 U.S.C. 3301 *et seq.*;
 - Unemployment Insurance Program Letter (UIPL) No. 39-83, *Model Legislative Language to Implement a Short Time (Work Sharing) Compensation Program and Recommended Improvements in State Provisions for Partial Unemployment Benefits*; and
 - UIPL No. 22-12 and UIPL No. 22-12, Change 1, *Short-Time Compensation Provisions in the Middle Class Tax Relief and Job Creation Act of 2012.*
- Background.** On February 22, 2012, President Obama signed the Middle Class Tax Relief and Job Creation Act of 2012 (Act). Subtitle D of Title II of the Act, section 2161, modifies the definition of the term “short-time compensation” that had been in Pub. L. 102-318 and codifies it in a new subsection (v) of section 3306, FUTA. States are not required to enact an STC program into law; however, states may not operate an STC program that does not conform to the new definition in FUTA.

In UIPL 22-12, Change 1, Section K, the Department of Labor (Department) approved under the Secretary of Labor’s (Secretary) authority under Section 3306(v)(10), FUTA, five optional provisions as “appropriate” for an STC program that had been included in prior model language issued by the Department but were not included in section 3306(v), FUTA.

The Department has determined that as long as there are no conflicts with other provisions of Federal unemployment compensation (UC) law, section 3306(v)(10), FUTA, provides broad authority for the Secretary to approve additional provisions in a state STC law as “appropriate” for an STC program. This provides states with the flexibility to customize their

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STC laws to meet their own unique needs. However, the Department’s determination that these state law STC provisions are “appropriate”, as that term is used in Section 3304(v)(10), FUTA, and are not otherwise inconsistent with Federal UC law, is not to be construed as necessarily encouraging these provisions. The Department is mindful that while states might see benefits in these provisions, they also have the disadvantage of, by excluding or discouraging some employers from STC participation, reducing the number of workers potentially eligible for STC.

Upon request from some states and based on review of provisions in current state STC laws, the Secretary has approved nine additional optional provisions under section 3306(v)(10), FUTA. States are not required to keep or include these provisions in their STC laws in order to conform to section 3306(v), FUTA. However, if a state law currently contains any of these provisions, or a state adds any of them in a new enactment, they will not raise an issue concerning conformity with section 3306(v), FUTA. A state with a provision not addressed here or in UIPL No. 22-12, Change 1, or that wishes to include such provisions in subsequent enactments, must request, in writing, that the Department approve such optional provisions as “appropriate” for an STC program. The Department will issue subsequent guidance if any additional provisions are approved.

4. Additional Optional Provisions That Are Now Approved by the Secretary of Labor for Purposes of an STC Program.

A. Provisions that exclude certain employers from participation in an STC program.

1. Exclude employers with negative unemployment experience from participating in STC.
2. Exclude maximum-rated employers from participating in STC.
3. Exclude employers that are subject to a “new employer” tax rate from participating in STC.

States may prohibit employers with negative unemployment experience; employers who are assigned the maximum tax rate (5.4 percent or greater); or employers who are assigned a fixed “new employer rate” from participation in the STC program. These are all provisions that prevent STC participation by employers who may have a financial incentive to participate for some reason other than avoiding a layoff. Because STC would have little or no effect on the future tax rates of negative or maximum-rated employers, these provisions avoid transferring the costs of STC to other employers in the state. Additionally, because new employer rates are not affected by benefit charges until the employers have a specified level of experience, their STC costs are effectively passed on to other employers during the period that the “new employer rate” is in effect.

B. Assess a surcharge on certain employers who participate in STC.

States may assess certain employers (e.g., employers with negative unemployment experience, maximum-rated employers, or new employers) a surcharge to allow them to

participate in STC. This provision enables more employers to participate in STC; addresses concerns about solvency; addresses concerns about employers not being effectively charged for STC benefit payments; and ensures STC is truly being used to avoid layoffs. In order to avoid a conformity issue with the experience rating requirements of FUTA, states must continue to charge STC payments to employers who are assessed this surcharge consistent with how STC payments are charged to other employers under state law.

This is an alternative to the exclusions from STC participation described above in paragraph A for addressing these concerns. The Department previously encouraged this option in guidance issued in 1983 when the STC program was first authorized. (UIPL No. 39-83, Attachment 1. NOTE: This UIPL is no longer active and has been superseded by subsequent guidance.)

C. Limit the amount of time workers in an affected unit may be subject to an STC plan.

States may require an employer to specify the period when the STC plan will be in effect and limit the approval to a specified number of months in a specified time frame for the same work unit. This provision can ensure that employers who experience regular cyclical downturns do not incorporate the STC program into their business models, or use STC to avoid the consequences of restructuring the operations of their company to address new, permanent economic realities.

D. Limit STC participation if an employer recently reduced its workforce by a specific percentage within a specific time period specified in state law.

States may exclude from STC participation employers who recently reduced the workforce in the affected group by imposing layoffs. A state providing for this exclusion must specify in its state law the minimum amount (in percentage) of recent workforce reduction and how recently in time the reduction must have occurred to trigger the STC participation prohibition. While this provision is aimed at encouraging employers to try STC in their initial round of layoffs, it could have the effect of excluding employers who otherwise may be good candidates for STC simply because they have recently had to lay off a certain portion of their staff.

E. Require employers to specify whether the STC plan is a transition to permanent layoffs.

States may require that an employer provide information about whether the STC plan is intended to be a transition to permanent layoffs. As long as this requirement is for informational purposes only, it is appropriate in order to plan a response to potential eventual layoffs or to provide additional services to claimants. However, states may not exclude employers from STC participation based on their response. Section 3306(v), FUTA, no longer limits STC plans to averting temporary layoffs. Thus, states may require such information as part of the application, but may not base approval of the plan on the information received.

F. Prohibit employees receiving supplemental unemployment benefits from being included in an STC plan.

States may prohibit employees receiving supplemental unemployment benefits (SUB) from being included in an STC plan. SUB are paid from a tax-exempt plan or trust funded by an employer, the employee, or a union to provide a benefit to supplement state UC and are designed to help maintain a recipient's pre-separation standard of living. Excluding these workers from receiving STC is appropriate because individuals receiving SUB already are receiving income support very similar to STC, so that STC would arguably be duplicative and would not serve the same purpose as it would absent these workers receiving SUB. Indeed, providing STC to these individuals might result in their receiving a higher weekly income than they did before the reduction in their work week. However, an employer with employees receiving SUB may not be wholly excluded from STC participation if it has employees not receiving SUB who the employer wishes to include in an STC plan.

G. Relieve employers of charges for STC paid to individuals who are participating in training with the approval of the state agency.

States may relieve employers from charges for STC paid to individuals participating in training, as provided in section 3306(v)(6), FUTA. Most states relieve an employer of charges if UC claimants participate in approved training. This is appropriate because it gives employers an incentive to provide training to upgrade the skills of its employees, which may avoid future layoffs.

5. **Action Requested.** State Administrators are requested to provide this information to appropriate staff. States are also encouraged to consult with the Department regarding provisions in their current STC laws or any proposed STC legislation, including any of these optional STC provisions, to ensure they do not create any conflict with Federal UC law. For further information concerning the STC program, states are encouraged to go to the Department's STC website at: <http://stc.workforce3one.org>.
6. **Inquiries.** Questions should be directed to the appropriate Regional Office.