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THE EXTENSION OF COVERAGE OF UNEMPLOYMENT COMPENSATION†

By WALTER GELLHORN*

THE number of workers at present protected by our still rudimentary state unemployment compensation laws is strikingly less than the number of individuals, now employed, who are subject to the hazard of future unemployment.¹ This fact, more eloquently than could much argumentation, demonstrates that there is room for considerable expansion in the coverage of our unemployment compensation laws within the present framework. My discussion presupposes acceptance of that framework in its essentials. I shall not here consider expansion of unemployment compensation laws in terms of embracing at least partially the functions of health insurance. Nor shall I advert to the arguments that provisions should be made for compensating for absence of work, rather than merely for its loss. There are many astute and earnest students who feel that our unemployment legislation is fundamentally deficient because it presupposes that a person entitled to its benefits must previously have been employed for a qualifying period of time. They argue, instead, that individuals who are willing to work productively should be assured compensation, whether or not work is actually to be found for them, and that young people first entering the labor market have rights not lightly to be ignored. Such suggestions may have substantial merit, and most assuredly deserve respectful consideration. For the present, however, comment will be confined

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¹Recently, the Social Security Board made an estimate that "workers in nearly nineteen million jobs" were, as of December 15, 1937, covered by the unemployment compensation laws of the forty-eight states, the District of Columbia, Alaska and Hawaii. Social Security Board, Summary of Progress January 1-March 31, 1938, p. 1. Of the persons gainfully occupied at the time of the 1930 Federal census, some 36½ millions, it has been estimated, were employees of other individuals or of private or public organizations. Wendt, *Census Classifications and Social Security Categories*, (1938) 1 Social Security Bulletin (IV) 3. Even if it be assumed that the number of employed individuals has substantially decreased since 1930, it is nevertheless patent that many millions of workers are still without statutory protection, however meager, against the hazard of interrupted employment.

to the possibility of extending the coverage of unemployment compensation legislation as we know it today.

The coverage of the existing statutes is severely limited by functional exceptions, which represent the classification of workers, not by any reference to their need for protection, but rather by reference to the nature of their employers. The major groups now excluded almost completely from the scope of unemployment compensation laws are agricultural workers, government employees, employees of non-profit making organizations, and workers in domestic service.

The excluded workers have been omitted from the application of the unemployment compensation laws for a variety of reasons,—practical, political, and constitutional. As a practical matter, it was felt at the inception of the unemployment compensation program that collection of contributions from farmers and from housewives would represent so onerous a task that it should not even be attempted. Further, there were some fears that inclusion of these groups in the unemployment compensation laws might arouse the opposition of important voting elements, and thus jeopardize the chances of securing passage of any remedial legislation whatever.²

As to employees of religious, educational and philanthropic organizations, tradition dictated that the employers' customary immunity from taxation should be extended to this new field, and that the socially desirable, or supposedly socially desirable activities, of such organizations should not be hampered by requiring them to be financially responsible for insuring their employees against loss of employment.³

²It is interesting to note in this connection that, upon recommendation of a Royal Commission, agricultural labor has finally been brought within the coverage of the English Unemployment Insurance statute 24 & 25 Geo. 5, ch. 29, Chitty's Annual Statutes (1934) 324-25; 26 Geo. 5 & 1 Edw. 8, ch. 13, 30 Chitty's Annual Statutes (1935-36) 467-71. The move was apparently welcomed by the farming community itself. See Metropolitan Life Insurance Company, *British Experience with Unemployment Insurance*, (1933) 6:50-52; Stafford, *Unemployment Assistance in Great Britain*, (1937) 31 *Am. Pol. Sci. Rev.* 433-54; Hohman, *The Status of Unemployment Insurance in Great Britain*, (1934) 42 *J. Pol. Econ.* 721-52.

³It is unnecessary here to consider the ultimate wisdom of indiscriminately granting an indirect government subsidy to organizations of this type, in the form of tax exemptions. It may properly be suggested, however, that a distinction should be drawn in any event between taxation for general revenue purposes and "taxation" for a specific protective use, such as unemployment compensation, old age insurance, or workmen's compensation. An unemployed or injured worker suffers the same hardships, whether his last employer was a steel mill or an orphanage. While it may be deemed desirable to subsidize orphanages and like institutions, it is doubtful that

Government workers were omitted from consideration partly because there is a prevailing, though inaccurate, belief that such employees have complete security of tenure, and partly because it was believed that application of state laws to various groups of governmental employees was impossible as a matter of constitutional law. No doubt the constitutional limitations were pressed far beyond their appropriate scope; but until recently it was fashionable to advance cautiously, if at all, into fields where constitutional uncertainties were thought to lurk.

These and other functional exclusions do not, however, tell the whole story; for, in addition, tremendous numbers of individuals employed by employers having fewer than eight employees are omitted from the protective legislation now under discussion.⁴ Twenty-nine of the fifty-one unemployment compensation laws extend only to employers who have employed eight or more individuals during a stated period of time in the course of the year. Only twelve apply to employers of less than four individuals.⁵

This numerical classification, like some of the occupational exclusions, has been justified on the ground of administrative expediency. It was deemed to be impossible to collect taxes and to secure accurate wage records from small employers not inured to the intricacies of bookkeeping and tax reporting. The force of this argument is, however, much diminished when one considers that Title VIII of the Social Security Act, imposing what are popularly called "the old-age insurance taxes," applies to employers quite without reference to the number of individuals they may have in their employ. Since the federal government

the subsidy should be at the expense of their employees. This fact has recently been given articulate recognition by the Advisory Council on Social Security, which, on April 29, 1938, unanimously approved the following recommendation for the stated reasons:

"That the services performed by employees of private non-profit religious, charitable, and educational institutions now excluded from coverage under Titles II and VIII should be brought into coverage under the same provisions of these Titles as affect other covered groups.

"1. There is no justification in social policy for the exclusion of the employees of such organizations from the protection afforded by the old-age insurance system.

"2. No special administrative difficulties exist in the coverage of the employees of such organizations under the system."

⁴It is estimated by the Unemployment Compensation Division of the Bureau of Research and Statistics, Social Security Board, that 4,500,000 workers in this country are employed in concerns with less than eight employees.

⁵Arizona, Arkansas, Delaware, District of Columbia, Hawaii, Idaho, Minnesota, Montana, Nevada, Ohio, Pennsylvania, Wyoming; Social Security Board, *A Comparison of State Unemployment Compensation Laws*, (1938) 4-5.

has been able to secure information and to collect taxes from the hordes of small employers throughout the country, is there any reason still to indulge the argument that a state agency cannot do likewise? While it has been suggested that fluctuations in unemployment in smaller concerns are not so great as where larger numbers are involved,⁶ it is probably also true that business failures are more frequent in the small firms than in the large.⁷ It would therefore be chimerical to suppose that unemployment is but rarely encountered in such establishments, and that protection against its consequences is not required.

These gaps in the coverage of an unemployment compensation law could in the main be eliminated by individual state action, if sentiment to achieve that end were strong enough. One may doubt, however, that such a sentiment will be soon or vigorously manifested, for the groups of workers now unprotected are in the main unorganized and, though numerous, are therefore weak; the state administrative agencies are absorbed in the struggle to execute the laws as they now stand, and are not yet seeking new worlds to conquer; and the issues are perhaps not sufficiently dramatic to arouse a spontaneous public opinion in favor of reform.

In any event, a single state is not competent to extend the scope of its law to cover every group excepted from its application. A relatively minor example is the field of maritime employment, now excluded from the reach of state laws, with no equivalent protection in federal legislation. It has been held in connection with workmen's compensation statutes that the states are powerless to apply their statutes within the realm of the federal admiralty jurisdiction; and it may be assumed that in unemployment compensation matters, too, only the federal government may lay down the rules affecting the masters and members of crews of vessels on navigable waters.⁸

⁶See Hansen, Bjornaraa, and Sogge, *Decline in Employment in the 1930-31 Depression in St. Paul, Minneapolis, and Duluth* (1932); National Industrial Conference Board, Inc., *Mergers in Industry* (1929); King, *Employment, Hours and Earnings in Prosperity and Depression* (1923).

⁷See N. Y. Dept. of Labor, *Economic Brief in Support of N. Y. State Unemployment Insurance Law* (2d ed. 1937, Placement and Unemployment Ins. Ser. Special Bull. No. 1) 93.

⁸See *Southern Pacific Co. v. Jensen*, (1917) 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086; *Knickerbocker Ice Co. v. Stewart*, (1920) 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834; *State of Washington v. W. C. Dawson & Co.*, (1924) 264 U. S. 219, 44 Sup. Ct. 302, 68 L. Ed. 646; cf. *State Industrial Commission of the State of New York v. Nordenholt Corp.*, (1922) 259 U. S. 263, 42 Sup. Ct. 473, 66 L. Ed. 933. A bill was introduced in Congress on April 8, 1938, by Mr. Havenner, to provide unemployment

But individuals in maritime employments are inconsiderable in number, compared with those whose work compels them to cross state lines. The problem of interstate employment, with its many interesting and puzzling variations, is not readily solvable by individual state action. Indeed, even cooperative action by many states can produce nothing more than a palliative for, rather than a solution of, the difficulties involved.

Let us at the outset state the obvious: Some workers do not desire to remain permanently in one place; and even if all workers so desired, some jobs would prevent them from so doing. Thus, there are many who have migratory tendencies, or who have become habituated to periodic migrations. There are many more who, as part of the surplus labor force upon which so many of our economic operations depend, become migratory because of the necessity of seeking jobs wherever the opportunities present themselves. There are still many more who are transitory workers because their employers conduct multi-state activities—railroad men, traveling salesmen, circus attendants, sailors, bus drivers, and a host of others who, not usually by their desire but by their employer's, cross state lines in their work, or work consecutively but not protractedly in many different states. Separate from all these, with a problem of their own, are the workers who, when unemployed, reside in a state different from that in which they have had their last employment—for example, the men and women who return to the old homestead when times are bad in the metropolis, or those who have moved hopefully to what was thought to be a greener, but proved to be an equally sere, pasture.

Until relatively recently the multi-state worker was largely ignored in the administration of the unemployment compensation laws. An individual, in order to be eligible for benefits, must have earned enough wages within the state to "qualify" him; he must of course be wholly unemployed; and he must register and report regularly at an employment office within the state. Consider what this meant for a man who had been employed regularly, let us say, in Virginia, who had been lured to Michigan by tall tales of high wages, and who had become unemployed in Michigan after only a few weeks of work there. The brevity of his employment in Michigan foreclosed the possibility of his being eligible for benefits there; and, in order to secure the benefits to which he might have been entitled in Virginia, he would have

compensation for seamen. H. R. 10205 (75th Cong., 3d Sess.). The proposal died in committee.

been compelled to return to that state, register as unemployed, thereafter serve a waiting period of some weeks, and finally, when on the verge of, if not wholly past, desperation, he might have been granted unemployment compensation.

Within the past year the great majority of the states entered into a voluntary agreement, an Interstate Benefit Payment Plan, for meeting the needs of individuals so circumstanced. The Plan contemplates that when X has worked in States A, B and C, finally becoming unemployed in State C, he may register at an unemployment office there in order to secure whatever benefits may be his due. State C will first pay him benefits earned under its law; when they are exhausted, it will report to State A that X is still unemployed, and State A will thereupon pay benefits earned under its law, the payments being made through the State Employment Office in State C, the "agent state." Finally, if X is still unemployed, he may be paid benefits he may have earned in State B, still without the necessity of his going to that State to register and report in person.⁹

This plan will immeasurably improve the lot of the man who has qualified for unemployment compensation in a state other than that of his residence.¹⁰ It represents a major administrative improvement, and furnishes an encouraging illustration of the as yet largely unexplored values of interstate cooperation.

But whatever else it may be, it is not a solution of all the problems of multi-state employment. It does not at all affect, for example, the plight of the man who is successively but not lengthily employed in several states. Such an individual is not likely to have earned sufficient wages to qualify him to receive unemployment compensation in even one state, to say nothing of all the states in which he may have found employment; and this is true although in the aggregate his wages may have been substantial. Nor does it directly affect the difficult determinations that must

⁹The Interstate Benefit Payment Plan was developed in October 1937 by a committee of state administrators, working in harmonious cooperation with the Social Security Board. Procedure under the plan was perfected in March 1938 and the plan is proving effective in actual operation. For a brief discussion, see *Interstate Benefit-Payment Plan*, (1938) 1 Soc. Sec. Bull. (No. 4) 18; *ibid.* (No. 5) 17; McCaffrey, *Interstate Benefit Plan to be Used for Migratory Workers*, (1938) *Employment News* (Cal. St. Dept. of Empl.) Vol. 2, No. 2, p.9.

¹⁰For a discussion of the first interstate agreement with respect to the handling of interstate claims for unemployment compensation, see Geddes and Russell, *The Operation of the New England Interstate Agreement in Rhode Island*, (1938) 1 Soc. Sec. Bull. (No. 5) 7.

be made where a man works for a single employer, but transiently, in many different localities.

In the main we have been considering the plight of the unprotected or only partially protected multi-state worker. Let us for a moment turn our attention to the employer whose business demands multi-state or interstate operations.

The interstate employer may be compelled in the first place to maintain records in conformity with the requirements of, and make reports to, a number of different states, each demanding different items of information or the same items of information arranged in a different manner. Many employers have inveighed against the horrors of record-keeping. No doubt the agitation in this respect sometimes represents dissatisfaction with the substantive aspects of the law, rather than with the procedural requirements of administrative agencies. But it is easy to understand and to justify the employers' resentment against the volume of separate reports they must make to state and federal agencies in connection with social security matters.

Apart from the administrative and clerical difficulties involved, an employer with employees having no fixed place of work is faced with the unpleasant possibility of being called upon to pay unemployment compensation contributions in each of several states in respect of the wages paid to a single employee. In their statutes and in their administrative practices the states have sought to develop formulae for determining where the place of employment exists. Their effort has been to bring within the coverage of a single state system all of the services performed by a travelling employee, although those services may have been rendered in a number of different states. Their desire has been to avoid duplication of expense to the employer, while at the same time aiding the employee to build up substantial wage credits in a single state, rather than negligible wage credits in each of a number of states. If there were complete uniformity of statutory language and complete uniformity of administrative practice, substantial success in these respects might be achieved. Unfortunately, however, some situations stubbornly refuse to fall within the confines of the formulae, some of which, moreover, are inconsistent or are so broadly phrased as to make it possible for two or more states to assert that the full amount of the employees' wages is subject to taxation within that state.¹¹

¹¹For example, a salesman who performs the greater part of his service in New York would be subject to the New York law. If his service without

Hence the employer may have the barren choice of paying multiple contributions or of contesting his liability through court action; while the employee, when unemployed, may find himself unable to claim benefits in any one of the states, or may find that the duration of benefits, if by chance he is qualified to receive them at all, is so short as to be scarcely worth the effort of establishing his eligibility. Interstate employers, such as the railroads and the air lines, have encountered difficulty in meeting the requirements of the varying state workmen's compensation laws.¹² These difficulties are even further intensified in the realm of unemployment compensation legislation, where the statutes apply indiscriminately to the interstate and intrastate operations of employers, whereas the workmen's compensation laws in the main extend only to their intrastate operations.¹³

How, then, can these difficulties of coverage and administration be overcome? The obvious answer, and one to which people have turned with great reluctance, is that unemployment compensation should be put upon a national basis under national administration, thus disposing at one stroke of the difficulties of both the multi-state worker and the multi-state employer. A national system would also permit the inclusion of maritime workers, would probably make it easier from a political point of view to extend the coverage of unemployment compensation legislation to other groups now excepted from its application, and would more readily be extended to all employers of one or more individuals.¹⁴ Further, a federal system might well be able to operate efficiently by securing only one wage report from employers, containing all the in-

the state were in New Jersey, was not incidental to his service within New York, and his base of operations or control or his residence were in New Jersey, he would fall within the definition of "employment" in the New Jersey statute.

¹²Gellhorn, *Federal Workmen's Compensation for Transportation Employees*, (1934) 43 *Yale L. J.* 906 at 913.

¹³Some recognition of these propositions is perhaps to be found in the enactment of the Wagner-Wheeler-Crosser bill (S. 3772; H. R. 10127, 75th Cong., 3d Sess., (1938)), establishing an unemployment insurance system for railroad employees, under the administration of the Railroad Retirement Board. The bill, passed at the close of the last session of Congress, was approved by the president on June 25, 1938.

¹⁴The response of the Advisory Council on Social Security made public in Washington on December 18, 1938, lends support to the belief that extension of coverage might be expedited under Federal auspices. That report recommends, *inter alia*, that the old age insurance features of the Social Security Act be broadened to include the employees of religious, charitable, and educational institutions, domestic employees, and farm employees. The Advisory Council had already urged the inclusion of seamen and of various groups of federal and state employees.

formation that would be needed for both old-age insurance and unemployment compensation purposes. This circumstance alone would involve a substantial monetary saving to the American employer.

There are, of course, arguments, some substantial and some merely sentimental, against such a federal system. I put aside without discussion the sentimental argument that such a system marks a further centralization of power and an invasion of the reserved rights of the states. I take it as a self-evident proposition that our federal-state organization was and is intended to furnish an effective instrument of government. If, as I think is possible here, it may be demonstrated that the allocation of a task to the states rather than to the national government fails to produce results and that the failure is not attributable to disinclination of the states but rather to their real inability to function effectively, that task, it seems to me, then becomes a national task, to be performed by the national government. Determination of the agency which is to perform a particular function should be strongly influenced by pragmatic considerations, rather than by preconceived theories bearing but slight relationship to the task actually at hand.

It may be argued, perhaps more forcefully, that the present arrangement, with fifty-one separate unemployment compensation laws, is an advantageous one, because the number of the statutes and the independence of their administrators make for freer experimentation in a field in which few absolutes have as yet been established. The advantages of experimentation should not be denied; but neither should its likelihood be exaggerated. Actually, I believe, we shall see little basic experimentation. There will unquestionably continue to be a certain amount of juggling of formulae, with attendant improvement of administrative methods in various state agencies. But I am not at all sure that administrative advances will come more readily through the state agencies than through a federal administration. The federal government in late years has been experimenting more and more successfully with the use of regional administrations, making for some diversity of experience, some understanding of local problems, and some opportunity for questing into new methods of doing old jobs. I believe that most of the advantages of state administration are or can be achieved through this form of federal administrative organization.

A federal administration would not only lead to an extension of the coverage of existing legislation. It should also effect very substantial economies in executing unemployment compensation plans. There is an inordinate amount of duplication in our present organization. Each state maintains separate and distinct staffs, in large part performing the functions of similar staffs in neighboring states. Over them all is the Social Security Board itself, with a substantial organization of advisers on unemployment compensation matters, checking upon the accomplishments of the state administrators and joining with them in the making of future plans. Much of the overlapping inherent in this arrangement could be abolished by a purely federal administration.

Possibly to some extent, also, the level of administrative competence might be raised by at least a slight diminution in the parochialism which is so marked a characteristic of our American way of doing official business. If State X needs an experienced administrator for a particular type of operation, it must find its man among the citizens of that State, and if none of its qualified and experienced citizens happens fortunately to be available, alas, it must then select an inexperienced and unqualified person for the job, no matter how many worthy candidates might be available among the citizenry of other states. There might be no really basic change in this respect if unemployment compensation were to be administered federally, for the civil service laws of the United States on the whole reflect much of this same philosophy of parochialism. Even so, however, national administration is potentially more flexible than that of the states in the selection and assignment of personnel, and as such should be welcomed.¹⁵

There will undoubtedly be difficulties in working out a national unemployment compensation scheme with room for growth and improvement. Let me give just one example of these difficulties. There are many students of unemployment compensation problems who today feel that benefits should be paid at a flat rate with some allowance for dependents, rather than by strict admeasurement of wages previously earned by the now unemployed

¹⁵We sometimes mistakenly believe that the personnel problem becomes important only in the higher reaches. In this connection the experience of one midwestern state is instructive. The Administration of its unemployment compensation laws was marked by a high degree of mechanization. It almost collapsed because, unfortunately, there happened to be in that particular state a shortage of experienced operators of tabulating machinery. Local pride prevented recruiting the needed personnel in states of a more commercialized character, where there was an over-abundance of trained workers.

individual. The difficulty in working out a flat rate for the country as a whole, which will not be thought of as unduly low for some portions of the country and unduly high for others, is of course recognized, its latest manifestation being the wages and hour legislation passed by Congress in 1938. In the first half of 1938 it was estimated that two-fifths of the unemployment compensation checks in New York were in the amount of \$15.00, the maximum benefit payable in that state;¹⁰ the median figure for all benefits rose to slightly over \$13.00; while the average of weekly benefit payments for February-March 1938 was \$11.49. These figures are unquestionably much higher than the benefit payments in some of the other states. For example, the average payment for total unemployment in Tennessee during March 1938 was only \$7.04, while in Virginia it came to only \$7.66. The working out of a satisfactory national benefit rate on some basis other than the present one of individual flexibility would involve considerable political maneuvering.

Still, this seeming obstacle should not be regarded as insuperable. There is a tendency, it seems to me, to get further and further away from the old notion that regional and sectional differences are ineradicable. Bit by bit differentials between various sections of the country—differentials based upon different standards of living which themselves are consequences of the differentials—are going to disappear. As the economic status of the Southern worker is bettered through his own organization and by legislation, the difficulty of developing a satisfactory national benefit structure should be substantially diminished if not dissipated.

The states are struggling manfully to operate their unemployment compensation laws. They deserve vast credit for the energy, devotion, and ability of their appointed administrators. Yet one need not be an enemy of their efforts to observe that their success is incomplete. It will never be final until all who are employed are protected against loss of wages caused by a cessation of their work. But the states cannot readily extend the coverage of their laws to all who are now excluded. In that circumstance, shall the federal government step in with laws to protect special groups who are not fully sheltered by state legislation? Or

¹⁰In November 1938 an incomplete sampling of the benefit checks paid in that month showed that 32.4% of the payments were in the maximum amount of \$15.00; in the metropolitan area around New York City, the percentage was 35.5.

shall the whole task be assumed by a nationwide, unified administration, embracing within its jurisdiction the unemployment problem of all the workers? The second alternative, in my judgment, holds the greater promise of development of standards, of simplification in administrative methods, and of economy in operation.¹⁷ The final and complete extension of coverage depends upon its adoption.

¹⁷One difficulty with a piece-meal plugging of gaps is exemplified by the Railroad Unemployment Insurance Act. That Act covers railroad employees whose railroad employment has been interrupted. But many railroad employees may also have been employed in other jobs, as well. Hence, a single individual may be comprehended within two distinct unemployment compensation systems, with benefit rights in each contingent upon his status in the other, but with wage records and other data kept separately.

Another even more basic objection may be urged in opposition to creation of separate systems for particular industries. Such separatism will probably be demanded most insistently by the industries with the highest degree of stability. Their removal from the general unemployment compensation system might seriously affect the strength, not to say the actual solvency, of the systems from which they were withdrawn.