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Opinion No. 13-13

Unemployment Compensation Premiums for Not-for-Profit Corporations

QUESTION

Do unpaid officers of a not-for-profit corporation count toward the number of employees for the purpose of determining whether the corporation is required to pay unemployment compensation premiums under Tenn. Code Ann. § 50-7-207?

OPINION

The more persuasive interpretation is that Tennessee's unemployment statute should not include officers who receive no compensation when calculating whether a corporation must pay unemployment compensation premiums.

ANALYSIS

Tennessee's unemployment compensation statute requires not-for-profit corporations to pay unemployment compensation premiums on an employee's wages when the not-for-profit has four or more individuals "in employment." Tenn. Code Ann. § 50-7-207(b)(4)(B). The definition of "employment" includes "any officer of a corporation." Tenn. Code Ann. § 50-7-207(b)(2)(A). This definition of employment does not draw any distinctions between for-profit and not-for-profit corporations. *See id.* It also does not make any distinctions between paid and volunteer officers. *See id.*

Tennessee courts have provided limited guidance on the question posed. In *Elgin v. Bryant*, 181 S.W.2d 329, 331 (Tenn. 1944), the Tennessee Supreme Court found that an unpaid corporate officer with only nominal duties was not an employee for the purpose of calculating the number of employees under a previous unemployment statute. In so holding, the Court noted that "the act only applies to and covers individuals who are in employment for wages." *Id.* at 330.

The precise issue of whether an unpaid officer who may perform more than a minimal amount of duties counts towards the total amount of employees under Tennessee Code Annotated § 50-7-207(b)(4)(B) or any comparable provision has not been directly addressed by a Tennessee court. *See*

Elgin, 181 S.W.2d at 329–31 (basing its exclusion of a corporate officer from the definition of employee on both her lack of wages *and* her lack of employment duties).

Tennessee’s unemployment statute states that its provisions shall be interpreted “in pari materia” with the Federal Unemployment Tax Act, the Federal Social Security Act and any other related federal law. Tenn. Code Ann. § 50-7-104(b). The Federal Insurance Contributions Act and Federal Unemployment Tax Act both define “employee” as “any officer of a corporation.” 26 U.S.C. § 3121 (d)(1); 26 U.S.C. § 3306 (i). Both the United States Department of Treasury regulations and federal case law nonetheless clarify that an officer of a corporation is not per se an employee under this definition. 26 C.F.R. § 31.312(d)-1(b) (stating that “an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation”). *See also Yeagle Drywall Co., Inc. v. Comm’r*, 54 Fed. Appx. 100, 102 (3rd Cir. 2002); *Texas Carbonate Co. v. Phinney*, 307 F.2d 289, 291-92 (5th Cir.), *cert. denied*, 371 U.S. 940 (1962).

The interpretation of the term “employee” in a similar context in the Social Security Act by the United States Court of Appeals is particularly instructive on the question presented. *See United States v. Bernstein*, 179 F.2d 105 (4th Cir. 1949). In *Bernstein*, the court considered whether unpaid corporate officers would increase the Social Security Tax burden of their employers. *Id.* at 109. Because the Social Security tax is measured by total wages, the court held that such officers are not employees for the purpose of the Social Security Act. *Id.* at 110. The statute defining corporate officers as employees, which is mirrored by Tenn. Code Ann. § 50-7-207(b)(2)(A), was not determinative in the face of the Social Security Act’s clear intent:

A very important consideration is the nature of the legislation and the main object sought to be accomplished. In Title IX of the Social Security Act Congress was levying a tax on wages for the principal purpose of providing either directly, or indirectly through State legislation, a fund to relieve unemployment distress. The tax is measured by a percentage of the wages. *If no wages are paid by the employer, no tax is due. . . . It is crystal clear that two essential conditions precedent must concur in order that a valid tax may be here levied: (1) There must exist a relationship of employer and employee; (2) wages must be paid by the employer to the employee.*

....

“Since the tax was to be measured by the wages paid for the employment, the presumption is that Congress, in levying the tax on one having eight or more employees, had in mind only paid employees. An officer who received no compensation did not increase the tax burden on a corporation subject to the tax, for the tax was measured by the total wages paid. Since in measuring the tax such a person did not count, it would seem inconsistent to count him in order to bring the corporation within the class subjected to the tax. For both purposes it would seem

Congress had in mind only persons who were paid compensation.”

....

“We do not think [the Social Security Act] was intended to include an officer who received no compensation for his services.”

Id. at 110–11 (quoting *National Wooden Box Ass’n v. United States*, 59 F. Supp. 118, 121 (Ct. Cl. 1945) (emphasis added). See also *Fort Dodge By-Products v. United States*, 133 F.Supp. 254, 258-62 (N.D. Iowa 1955); *Tidwell v. United States*, 63 F.Supp. 609, 610-12 (W.D. Tenn. 1945).

Likewise, the Tennessee unemployment compensation statute imposes a premium only on total wages paid. Tenn. Code Ann. § 50-7-402. Here, as in the federal Social Security Act, an unpaid officer will not increase the premium burden on the corporation and will not derive any benefit under the statute from his or her position in the corporation. See *United States v. Bernstein*, 179 F.2d at 110-11. Accordingly, the more persuasive interpretation is that Tennessee’s unemployment statute should not include officers who receive no compensation when calculating whether a corporation must pay unemployment compensation premiums.

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