In early cases involving jurisdiction the Iowa court seemed not to be concerned in finding this condition precedent, but in finding: whether service was made on a "general agent"[34] or "agent"[35] of the foreign corporation; whether the action arose out of or was connected with the business of the office or agency maintained by the defendant in a county other than where the principal resided;[36] or whether the person served was actually an agent or clerk of the defendant.[37]

Subsequent Iowa cases generally have followed the presence theory, that the corporation is found to be present through its activities within the state;[38] or have found that the corporation has subjected itself to the jurisdiction of the state by its activities.[39] They have discussed what constitutes "doing business", and have indicated that mere casual acts are not enough activity to constitute "doing business",[40] nor is solicitation of orders by salesmen of the corporation.[41] However, the Court has found the foreign corporation to be "doing business" where it engaged in solicitation plus additional activity, such as the agent aiding local retailers in selling the company's product;[42] or where the representative also maintained a permanent display room and induced persons to become retailers of the company's product.[43] A foreign corporation

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(1937); International Shoe Co. v. Lovejoy, 219 Iowa 204, 257 N.W. 576 (1935). The last case apparently involves the same foreign corporation as did *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), discussed *supra*. In the Iowa case a landlord was seeking to recover damages against the corporation for alleged wrongful removal of a stock of shoes from leased premises, while in the Washington case the State of Washington was trying to recover contributions allegedly due under their Unemployment Compensation Act.

(c) IOWA CODE R.C.P. 56(g) (1954): American Asphalt Corp. v. Shankland, 205 Iowa 862, 219 N.W. 28 (1928); Jones v. Illinois Cent. R. Co., 188 Iowa 850, 175 N.W. 316 (1920).

[34] Little v. Threshing Machine Co., 166 Iowa 651, 147 N.W. 872 (1914).

[35] Kalbach v. Service Station Equip. Co., 207 Iowa 1077, 224 N.W. 73 (1929); Bell Jones Co. v. Erie R. R. Co., 168 Iowa 96, 150 N.W. 7 (1914). See also a recent Federal case which relied on the *Kalbach* case, Rebo v. U. S. Trotting Ass'n, 14 F.R.D. 25 (S.D. Iowa 1953).

[36] Winney v. Sandwich Mfg. Co., 86 Iowa 608, 53 N.W. 421 (1892); Upton Mfg. Co. v. Stewart Bros., 61 Iowa 209, 16 N.W. 84 (1883).

[37] State v. Bitter Root Val. Irr. Co., 185 Iowa 60, 169 N.W. 776 (1918); Pugh v. Bothne Co., 178 Iowa 601, 159 N.W. 1030 (1916); Murphy v. Development Co., 169 Iowa 542, 151 N.W. 500 (1915); Gross v. Nichols, 72 Iowa 239, 33 N.W. 653 (1887). See also RESTATEMENT, CONFLICT OF LAWS, IOWA ANNOT. § 92 (1935), where the authors were concerned over the interpretation the Iowa court was giving these statutes at that time.

[38] Elk River Coal & Lbr. Co. v. Funk, 222 Iowa 1222, 271 N.W. 204 (1937); International Shoe Co. v. Lovejoy, 219 Iowa 204, 257 N.W. 576 (1935).

[39] Jones v. Illinois Cent. R. Co., 188 Iowa 850, 175 N.W. 316 (1920).

[40] Sasnett v. Iowa State Traveling Men's Ass'n, 90 F.2d 514 (8th Cir. 1937).

[41] Dorsey v. Anderson, 222 Iowa 917, 270 N.W. 463 (1937); Burnham Mfg. Co. v. Queen Stove Works, 214 Iowa 112, 241 N.W. 405 (1932).

[42] American Asphalt Corp. v. Shankland, 205 Iowa 862, 219 N.W. 28 (1928).

[43] International Shoe Co. v. Lovejoy, 219 Iowa 204, 257 N.W. 576 (1935).

was found not to be "doing business": where it had no interest nor control over its local licensee which was a separate entity, although it furnished advice as to the selling and promotion of products;[44] by the mere selling of a railroad ticket which routes the passenger over the lines of a foreign carrier;[45] where the foreign corporation acts as a testamentary trustee in Iowa.[46]

Iowa has held that one act does not constitute "doing business".[47] An early case declared that "an officer going over the country does not carry the corporation in his pocket", that a single transaction by this officer is not the carrying on of business by a foreign corporation, and that service on such officer does not confer jurisdiction over the foreign corporation.[48] Thus in the absence of a future enactment of a statute making one act or transaction sufficient to confer jurisdiction over a foreign corporation, Iowa will probably continue to hold that one act is not "doing business". Since the *International Shoe* case the Iowa Court has not had a case involving jurisdiction over a foreign corporation and the question of whether or not the foreign corporation was "doing business". Thus one can only predict that, as many other states have, Iowa will follow the new test used in that case.[49] Even if that test is accepted the question whether one act will be sufficient to confer jurisdiction over a foreign corporation would still remain.

The Vermont and Maryland statutes have not been before the United States Supreme Court. It would seem that the likelihood is greater that the one-tort provision of those statutes, rather than the one-contract provision, will be upheld as within the police powers of the state.

M. D. DUTTON (Feb. 1955)

EDITORIAL NOTES

Articles of Interest in Other Law Reviews

1. *Symposium on Cooperatives,* 1954 WIS. L. REV. 553 (July, 1954). A comparative analysis of the cooperative laws of various states, including Iowa, appears in chart form at pages 612-613. Copies of the issue may be obtained at $1.00 each from the Wisconsin Law Review, University of Wisconsin Law School, Madison, Wis.

2. Swenson and Degnan, *Severance of Joint Tenancies,* 38 MINN. L. REV. 466 (April, 1954). Both authors were members of the

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[44] Mayer v. Wright, 234 Iowa 1158, 15 N.W.2d 268 (1944).
[45] Jones v. Illinois Cent. R. Co., 188 Iowa 850, 175 N.W. 316 (1920).
[46] 1930 OP. ATTY. GEN. 225.
[47] Keokuk & Hamilton Bridge Co. v. Curtin-H Corp., 223 Iowa 915, 274 N.W. 78 (1937).
[48] Louden Machinery Co. v. American Malleable Iron Co., 127 Fed. 1008, 1009 (C.C. S.D. Iowa 1904).
[49] See note 7, supra.

Drake University Law School faculty. The article considers pertinent Iowa material, including some of the Iowa Land Title Standards. Copies of the issue are obtainable for $1.75 each from Minnesota Law Review, University of Minnesota Law School, Minneapolis, Minn.

Supplemental Notes to Articles Previously Published

1. *Habeas Corpus in Iowa,* 3 DRAKE L. REV. 30 (1953), discussed some of the aspects of the writ of habeas corpus as applied in the Iowa courts. One of the aspects there mentioned was its use in child custody cases. Add to footnote 18 (which has reference to a rebuttable presumption in favor of the natural parents) the case of *Durst v. Roach,* 62 N.W.2d 159 (Iowa, 1954). Add to footnote 16 the cases of *Justice v. Hobbs,* 63 N.W.2d 882 (Iowa, 1954), and *Stillmunkes v. Stillmunkes,* 65 N.W.2d 366 (1954). In the *Hobbs* case, the father sought to obtain custody of his child by habeas corpus, at a time when there were several cases pending involving custody of the child. The trial court consolidated all in one action and denied the father's application for the writ. On appeal, the Supreme Court reversed, modifying the original divorce decree whereby custody had been granted to the mother, and ordered the child to be delivered to the father even though he was going to take the child out of the state. The *Stillmunkes* case also gives some indication as to how far the court will inquire into the welfare of the child. Here the mother had refused to grant the father visitation periods after a separation agreement in which there was a property settlement. He sued out a writ of habeas corpus, and the mother, in her answering petition, denied the father's allegations and further prayed that he be required to furnish support money. The lower court found for the mother, granted the father custody on Saturdays, and decreed that he pay $80 per month in child support. The Supreme Court reversed, granting custody to the plaintiff during the summer months and also modifying the decree by reducing the amount of child support payments.

In regard to criminal cases, an interesting note may be added to footnote 60. In *Gibson v. Lainson,* 60 N.W.2d 797 (Iowa, 1953), the petitioner sought release from prison by a writ of habeas corpus, claiming in part that there was newly discovered evidence in the form of a dying declaration which would exonerate him. The Court held that this was the only issue not raised on a previous appeal, and that newly acquired evidence cannot be considered in habeas corpus proceedings.

2. *Remedies for Judgment Obtained through Perjury,* 3 DRAKE L. REV. 23 (1953). Add to footnote 42 reference to Note, 54 COL. L. REV. 403 (1954), which presents a critical analysis of the distinction between intrinsic and extrinsic fraud. The writer indicates that the rule of *United States v. Throckmorton,* 98 U.S. 61 (1878), concerning the doctrine of intrinsic fraud, "has retained little vitality as a rule of decision." This conclusion is based upon

the writer's observation that: (1) the court rarely dismisses a petition alleging perjury without considering the merits of the case; (2) there is a judicial willingness to circumvent the rule; and (3) in cases where the petition to set aside a judgment because of perjury is denied, the result is not necessarily attributable to the *Throckmorton* doctrine.

3. In *The Iowa Title Standards I,* 2 DRAKE L. REV. 76, 90-91 (1953) there is a critical comment on Standard 4.11 which takes the position that a contract to sell made by both joint tenants severs the joint tenancy. Further discussion of the Title Standards Committee's position appears in *The Iowa Title Standards III,* 3 DRAKE L. REV. 87, 88 n. 8 (1954). Further criticism of the position adopted by the Committee, and of two related cases, In re *Sprague's Estate,* 57 N.W.2d 212 (Iowa, 1953), and *Buford v. Dahlke,* 62 N.W.2d 252 (Neb., 1954), will be found in Swenson and Degnan, *Severance of Joint Tenancies,* 38 MINN. L. REV. 466, 475-481 (1954). The authors point out that neither case mentions the rule that payment to one of several joint obligees discharges the entire obligation, absent fraud and the like, and suggest that the Iowa court could still hold that payment to the surviving joint tenant would discharge the debtor.

"EMPLOYERS" SUBJECT TO THE IOWA EMPLOYMENT SECURITY LAW

Introduction and Scope

The unemployment compensation system is a coordinated federal and state system.[1] The Federal Unemployment Tax Act[2] imposes a tax upon employers with respect to wages paid by them for employment subject to the act, and each state, including Iowa,[3]

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[1] For a general discussion of the economics and development of unemployment compensation and specific phases of the law, see *Symposium on Unemployment Compensation,* 55 YALE L. J. 1-263 (1945), which includes the following articles: Burns, *Unemployment Compensation and Socio-Economic Objectives,* 55 YALE L. J. 1; Witte, *Development of Unemployment Compensation,* 55 YALE L. J. 21; Clague, *The Economics of Unemployment Compensation,* 55 YALE L. J. 53; Asia, *Employment Relations: Common-Law Concept and Legislative Definition,* 55 YALE L. J. 76; Harrison, Freeman, Menard, Kampfer, Lesser, and Simrell, *Eligibility and Disqualification for Benefits,* 55 YALE L. J. 117; Silverstone, *The Administration of Unemployment Compensation,* 55 YALE L. J. 205; Arnold, *Experience Rating,* 55 YALE L. J. 218; Schmidt, *Experience Rating and Unemployment Compensation,* 55 YALE L. J. 242; and Ellickson, *Labor's Demand for Real Unemployment Security,* 55 YALE L. J. 253.

[2] 26 U.S.C. §§ 1600 *et seq.* (1952).

[3] IOWA CODE ch. 96 (1954).

has an unemployment compensation statute requiring a similar tax or contribution to the state. The federal tax rate is 3% but amounts paid under the state laws are allowable as credit against the federal tax up to 90%.[4] Amounts collected by the Federal Government are used in paying the costs of administering both the federal and state plans and amounts collected by states are used solely in payment of benefits to unemployed workers. No benefits are payable under the federal statute.

The Iowa Employment Security Commission is charged with the administration of the Iowa unemployment compensation law. There are two major aspects to this law: (1) the payment of benefits to the unemployed and (2) the liability of employers for the payment of the tax provided by the statute.[5] This article will not discuss the problem of payment of benefits except as it may incidentally have a bearing on the subject at hand. The Federal Act will likewise be mentioned only in such incidental manner. This article is limited to consideration of the question "Who Is an Employer Under the Iowa Employment Security Law?"

Section 96.19-6, Code of Iowa, 1954, defines what is meant by the word "employer" in the law and in doing so sets out seven subsections which comprise the seven ways a business may be an "employer" under the Iowa law. Each of these subsections will be discussed below.

A. NORMAL COVERAGE

Subsection *a* might be termed as the *normal* way in which a business becomes an "employer." The subsection states:

> " 'Employer' means: Any employing unit which for some portion of a day in each of fifteen different weeks within either the current or the preceding calendar year, excepting the calendar year 1935 (whether or not such weeks are or were consecutive) has or had in employment eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such day)."

In analyzing this subsection there are three problems to be discussed: (1) What is an employing unit? (2) How to count

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[4] The constitutionality of the payroll tax imposed on employers under the federal law was upheld by the U. S. Supreme Court in *Charles C. Stewart Machine Co. v. Davis*, 301 U.S. 548 (1937). The validity of the tax was there attacked on the ground that it was not an excise, that it was not uniform, that its exceptions were arbitrary and violative of the Fifth Amendment, that its purpose was not revenue but an unlawful invasion of the reserved powers of the states, and that the states in submitting to it had yielded to coercion and had abandoned governmental functions which they were not permitted to surrender. The Court held adversely to all these contentions.

[5] In *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937), the Supreme Court held that the Alabama Unemployment Compensation Act did not violate the due process and equal protection clauses of the United States Constitution, and also disposed of the argument that the state laws were unconstitutional because they were coerced by the federal statute. This and other early decisions upholding the constitutionality of the state laws has probably been the reason that the question has not been raised with respect to the Iowa law.

fifteen weeks? (3) What individuals are to be counted in determining the required eight? It should be noted that these problems are also present in the six other subsections of Section 96.19-6.

(1) What is an Employing Unit?

The term "employing unit" is defined in Section 96.19-5.[6] The federal act as well as the state acts appear uniformly to intend to include all individuals or organizations regardless of type within the definition of employing unit. The Iowa law, as well as that of a number of other states, even lists receivers, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person within the definition. The Iowa law is broad enough that problems that have arisen in some other states as to receivers, administrators, etc. have not appeared here.

Where an employing unit has two or more separate establishments within the State, all the individuals employed by it and performing services within the state will be deemed to be employed by a single employing unit. Thus, a company having three branches in the state, each of which has three employees, is liable for contributions. Under the Federal Act an employer having eight individuals in employment throughout the United States, each in

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6 " 'Employing Unit' means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January 1, 1936, had in its employ one or more individuals performing services for it within this state. All individuals performing services within this state, for any employing unit which maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of this chapter. Whenever any employing unit contracts with or has under it any contractor or subcontractor for any work which is part of its usual trade, occupation, profession, or business, unless the employing unit as well as each such contractor or subcontractor is an employer by reason of subsection 6 or section 96.8 subsection 3, the employing unit shall for all the purposes of this chapter be deemed to employ each individual in the employ of each such contractor or subcontractor for each day during which such individual is engaged in performing such work; except that each such contractor or subcontractor who is an employer by reason of subsection 6 or section 96.8 subsection 3, shall alone be liable for the contributions measured by wages payable to individuals in his employ, and except that any employing unit who shall become liable for and pay contributions with respect to individuals in the employ of any such contractor or subcontractor who is not an employer by reason of subsection 6 or section 96.8 subsection 3, may recover the same from such contractor or subcontractor, except as any contractor or subcontractor who would in the absence of the foregoing provisions be liable to pay said contributions, accepts exclusive liability for said contributions under an agreement with such employer made pursuant to general rules of the commission. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this chapter, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of such work and provided, further, that such employment was for a total of not less than eight hours in any one calendar week."

a different state, is liable for taxes. The fact that the businesses conducted at different places by an employer are entirely unrelated is immaterial. This is true even though the businesses are conducted under different names and maintain separate books, payrolls, etc.

Also included in the definition of "employing unit" are two possible instances where an employer may become liable for employees of others: first, in the case of employees of contractors or subcontractors; and second, in the case of employees of his own employees, helpers, assistants, etc.

Whenever any employing unit contracts with or has under it any contractor or subcontractor for any work which is part of its usual trade, occupation, profession or business, unless the employing unit as well as each such contractor or subcontractor is an employer subject to the law, the employing unit is deemed to employ each individual in the employ of each such contractor or subcontractor for each day during which the work is performed. Where the contractor or subcontractor is an employer subject to the law, he alone is liable for contributions based upon the wages of his employee. In such case, the hiring employing unit will be held liable where his employees and those of the contractor total more than eight, but he will pay contributions only on the wages of his own employees.

An important Iowa case on the problem of subcontractors is the *Glidden* case.[7] In that case the Iowa Supreme Court held that workmen engaged by construction companies to build primary transmission lines for appellant, a rural electric cooperative, were not employees of appellant under the contractor-subcontractor provision of the Iowa Employment Security Law. The Court held that appellant's usual business was that of distributing electricity after the primary lines had been constructed. The construction companies were held to be independent contractors whose services were not in the usual course of appellant's business.[8]

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[7] Glidden Rural Electric Cooperative v. Iowa Emp. Sec. Comm., 236 Iowa 910, 20 N.W.2d 435 (1945).

[8] The subcontractor question was considered in regard to orchestras hired by a restaurant, in *Rodney Kenyon v. Iowa Emp. Sec. Comm.*, Dist. Ct. Linn Co., June 25, 1946. The Court held a band engaged by plaintiff-appellant in his tavern did not constitute any part of the usual business of plaintiff. Also it was considered by the Commission in a decision dated October 22, 1951, involving an owner who employed an orchestra leader, an independent contractor, to furnish music during certain hours. The Commission found that the providing of music was not part of owner's usual business; that it was in the nature of an advertisement to draw patronage. The same question was considered in relation to building contractors in Commission Decision of February 21, 1950. There a father and three sons were bricklayers who engaged in construction of houses, and contracted with firms to do other work such as plumbing, painting, etc. They contended such work was not part of their usual business of brick masonry. The Commission found that for the time in question appellants went into the field of general contracting and that the other firms were performing work which was part of the usual business of appellant. A Commission Decision of March 13, 1950, reached similar results on similar facts.

If a person is employed by an agent or employee of an employing unit to perform or assist in performing his work for at least eight hours in any one week, he will be deemed to be employed by such employing unit if that unit has actual or constructive knowledge of the work. It is immaterial whether the person so employed was hired or paid directly by the employing unit or by its agent or employee.[9]

(2) How to count fifteen weeks?

Few problems appear to arise in the counting of the fifteen weeks. The statute requires that there must have been eight persons in non-exempt employment for some portion of a day in each of fifteen different weeks within either the current or preceding year. The weeks need not be consecutive but must occur within a single calendar year. The employees need not be the same people nor must they be employed at the same moment if the total number during the day is eight. Some question has arisen as to the meaning of "week". The Commission by Regulation 36 has defined that word as used in this section to mean "a calendar week" and not a "flexible week."[10]

The Federal law differs from the Iowa law in that it provides there must have been the required number of persons in non-exempt employment for some portion of at least twenty days during the taxable year, each day being in a different calendar week.[11]

(3) What individuals are to be counted in determining the required eight?

The Federal law at present imposes a tax on "employers of eight or more"[12] as does the Iowa law. The number of employees and period of time varies from state to state. In about a dozen states employers of one or more persons are liable for contributions, and in a number of other states employers of four or more persons are covered.[13]

In counting the number of employees to determine whether an employer is liable, attention must be given: (1) Types of employment covered under the law; (2) the effect of place of employment; (3) types of employment not mentioned in the law; and (4) types of employment and employees excluded from coverage. These matters are governed by Section 96.19-7 in which the word "employment" is defined.

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[9] Appeal Tribunal Decision 40A-1038-CM. A telephone company's first operator hired and paid for a relief operator out of own wages. Held she was an employee of the telephone company since her "presence" as an operator on job was evidence the company knew of her services.

[10] COMM. REG. 36, IOWA DEPT. RULES 78 (1952).

[11] 26 U.S.C. § 1607(a) (1952).

[12] After 1955, employers are subject to the Federal tax if they have four or more employees. This is a result of the passage of Pub. L. No. 767, 83d Cong., 2d Sess., ch. 1212 (Sep. 1, 1954).

[13] 1A CCH UNEMP. INS. REP., TREATISE, § 1301 (1954).

(a) Types of employment included by law.

The statute provides in general that employment means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied.[14] Services performed by an individual for wages shall be deemed to be employment subject to the law unless and until it is shown to the Commission's satisfaction that such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact.

Iowa applies the common law master-servant tests.[15] Varying state laws lead to different interpretations.[16] In Iowa the key to the determination of the employer-employee relationship is the right of control. In 1941 the Iowa Court in holding that certain taxicab drivers were in the employ of a taxicab company said:

> "The authorities agree that the right of control is the principal test.
> "It is well settled that a failure to exercise control does not mean that the right to control does not exist. Also that a servant may be given by his master much freedom

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14 IOWA CODE § 96.19-7-a (1954).

15 Meredith Publishing Co. v. Iowa Emp. Sec. Comm., 232 Iowa 666, 6 N.W.2d 6 (1942). It was argued by the Commission that the Iowa Employment Security Law created an employment relationship broader in scope and coverage than the common-law relationships of employer-employee-independent contractor. The Court pointed out that the status of employer and employee had its origin in the relationship of master and servant and that it was the common-law conception of employment relationship which has been carried into and made a part of the federal legislation such as the Social Security Act and the Federal Unemployment Tax Act. The Court also pointed out the close, general inter-relation maintained between federal and state legislation with respect to provisions and purposes. The Court stated, at 678, 6 N.W.2d 6, at 13:

> "It is true, that most of the states, in the enactment of unemployment compensation laws have by the terms thereof sought to narrow the separation and distinction between employee and independent contractor, and have made the coverage of their legislation broader in this respect than the federal law. But Iowa has not seen fit to do so. It has so worded this particular section of the statute as to conform to the conception of the above-noted federal boards, to the common-law conception of employer-employee-independent contractor relationship, and to the pronouncements of this court and of every other court with respect thereto. It has made the factor of control or direction of the performing individual dominant."

The Commission also argued that the whole philosophy of the act demands that its coverage be broadened beyond age-old common-law relationships of master and servant, that coverage be extended to all individuals to whom involuntary unemployment is a threat and to all employers, and industry in general. In response the Court stated, at 684, 6 N.W.2d 6, at 16:

> "It is not for us to pass upon the soundness of this economic philosophy. But, it is our duty to say that it is far beyond the purpose and scope of the Iowa Employment Security Law."

16 Note, 35 CALIF. L. REV. 156 (1947); Note, 33 CALIF. L. REV. 648 (1945); Comment, 33 ILL. B. J. 169 (1945); Note, 29 KY. L. J. 82 (1940); Comment, 21 ORE. L. REV. 406 (1942); Comment, 4 U. OF DETROIT L. J. 53 (1940); Asia, *Employment Relations: Common-Law Concept and Legislative Definition*, 55 YALE L. J. 53 (1945).

> in the methods and means whereby he does his work. . . . It should be remembered also that absence from the agreement of a provision recognizing the right of control does not mean that no such right exists. The reservation of the right of control is presumed unless the contrary appears. . . . The statute requires an affirmative showing of freedom from control both under the contract and in fact."[17]

In an earlier decision the District Court of Woodbury County had reached a similar conclusion in a case involving taxicab drivers.[18]

Another Iowa case on the subject of determination of master-servant involved a magazine subscription solicitor remunerated on a commission basis. Such person is an independent contractor where the evidence shows that whatever direction, supervision or suggestion given by the publishing company were with respect to the general result to be accomplished. The Court said:

> "We think the Iowa Legislature had a definite purpose in making the factor of direction or control of a worker in the performance of his service the test of coverage. In other words, if the worker was subject to such direction or control, he is within the statute, and if he is not so subject, and is an independent contractor, then he is excluded from the statute. There is wisdom in such a provision and it is in keeping with the purpose of the legislation."[19]

An earlier district court decision in *Fuller Brush Company v. Iowa Unemployment Compensation Commission and Lambrecht* had reached a similar conclusion.[20]

In 1941 the Iowa Court considered a situation where a company sought to stimulate the activities of its dealers but did not control their activities in fact. The Court held there was not an employer-employee relationship existing under the circumstances. It is to be noted that this case cites with favor the tests applied in certain workman's compensation cases as applicable to the determination of the question of control.[21]

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[17] Kaus, d/b/a United Cab Co. v. Unemployment Comp. Comm., 230 Iowa 860, 864, 299 N.W. 415, 418 (1941).

[18] Yellow Cab v. Unemployment Comp. Comm. and Courtier, Dist. Ct., Woodbury County (Mar. 1940).

[19] Meredith Publishing Co. v. Iowa Emp. Sec. Comm., 232 Iowa 666, 682, 6 N.W.2d 6, 15 (1942).

[20] Dist. Ct., Scott County (July, 1940). The Court held that the statute is not susceptible to the interpretation that the existence of any degree of control and direction establishes the employer-employee relationship, unless the employer has the right to direct and control the salesman with respect to details of his work as distinguished from matters pertaining only to the final result.

[21] Moorman Mfg. Co. v. Unemployment Comp. Comm., 230 Iowa 123, 296 N.W. 791 (1941).

In other instances a home tinter of pictures was held to be an independent contractor,[22] and a woman who did telephone soliciting from her home to be an employee.[23]

(b) Effect of place of employment.

"The entire service of an employee who performs service both within and without the state is subject to the Iowa Law if such service is localized in Iowa. Service is deemed localized in Iowa if the service performed outside the state is incidental to that performed within the state, ...

"Where an employee's service is not localized in any state, such service is covered by the Iowa Law if part of the service is performed in Iowa and the base of operations is in Iowa, but, if there is no base of operations, then the place from which such service is directed and controlled is in Iowa. Where the base of operations or place from which the service is directed or controlled is not in any state in which part of the service is performed, such service is covered by the law of the state in which the employee has his residence.

"If an employee residing in Iowa performs service entirely outside the state, but contributions are not required with respect to such services under an unemployment compensation law of any other state or of the federal government, the employing unit may elect to have such services covered by the Iowa Law. Services performed in Iowa, if not otherwise covered, will be subject to the Iowa Law if contributions are not required and paid with respect to such services under an unemployment compensation law of another state or the federal government."[24]

(c) Types of employment not specifically mentioned in the law.

The Iowa law makes no specific provision with respect to officers and directors of corporations. The Commission by Regulation provided at one time that such individuals should be counted "except those who do not actually perform service and are not required or expected to perform any, and who do not receive any remuneration."[25]

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[22] Commission Decision 49C-1058 (Feb. 10, 1950). The Commission found that the manager of Dean Studios did not exercise or have the right to exercise direction or control over the manner in which the individual performed her tinting work. The manager was concerned only with the result of the work. Only direction given was a slip accompanying each picture as to color of eyes, hair, clothing, etc.

[23] Hazel Wright v. Iowa Emp. Sec. Comm. and National Benefit Ins. Co., Dist. Ct., Woodbury County (June 23, 1951). The company controlled working hours and vacations, gave the individual a list of prospects to call with instructions as to what to say, and she was required to make daily reports. The Court held that the individual must be considered an employee as the company failed to sustain burden of proving she was free from their direction and control.

[24] Explanation of IOWA CODE § 96.19-7-b (1954), as given in 3 CCH UNEMP. INS. REP., IOWA, § 1334 (1954).

[25] COMMISSION REG. 9-A, reported to CCH as rescinded, in Emp. Sec. Comm. letter, November 4, 1952. Although the regulation has been rescinded, the policy currently followed by the Commission is the same in substance.

No distinction is made in the law between individuals on the basis of citizenship, residence, or age. Neither does it differentiate between part time or temporary workers and those engaged in full time work. Bona fide partners are employers rather than employees. This interpretation, of course, presents the possibility in a small firm whereby it may change its status to a non-subject employer by taking in some employees as partners. This, of course, must be done cautiously for if the relationship is found not to be bona fide, the employer may become subject to penalties. There is no provision in the Iowa law as to pieceworkers and home workers nor as to salesmen and commission men. The status of all these types of workers must be determined by the same criteria as used in determining status of other types of workers who are not specifically excluded from coverage.[26]

(d) Types of employment and employees excluded by law.

The Iowa law provides for a number of important exemptions from the term "employment."[27] Workers engaged in exempt employment are not included in determining an employer's required eight employees nor are amounts paid to such workers considered taxable wages under the law. Exempt employments fall in two classes. One type applies to all services performed for a certain type of employer such as governmental bodies and charitable institutions. The second type applies to certain services such as agricultural regardless of the employing unit for whom such services are performed.

The federal statute provides that if one-half or more of the services performed by an individual in any pay period constitute included employment, all services of such individual for such period will be deemed to be included employment. The Iowa law contains no provision concerning this question. The interpretation given by the Commission, however, is that if an employee is working in both exempt and non-exempt employment only the wages for the non-exempt employment would be subject to contributions.[28]

Agricultural labor which, of course, is of great importance in a state such as Iowa, is exempt for both federal and state unemployment tax purposes. The Iowa law is almost identical with the Federal Act in this regard. Types of services defined as "agricultural labor" are set out in the law.[29]

Under the first paragraph of this definition the services must be performed on a farm. A rather broad meaning is given to the term "farm" and it is interpreted to include fur-bearing animal farms and greenhouses and other similar structures used primarily for raising of agricultural and horticultural commodities.

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[26] 3 CCH UNEMP. INS. REP., IOWA, §§ 1340-1348 (1954).
[27] IOWA CODE § 96.19-7-g (1954).
[28] Emp. Sec. Comm. Letter, July 18, 1942.
[29] IOWA CODE § 96.19-7-g(4) (1954).

Under the language of the second paragraph services may be exempt as "agricultural" even though not performed in conducting any of the operations referred to in the first paragraph. This extends exemption to services by carpenters, painters, bookkeepers, and other skilled or semi-skilled workers whose services contribute to the proper conduct of the farm operated by their employer. However, the services must be performed in the employ of the owner or tenant or other operator of the farm.

Under paragraph three the exemption is extended to services performed in connection with certain specified products and operations whether or not performed on a farm or in the employ of the owner or tenant of a farm. Exemption extends to services performed in connection with the production or harvesting of any commodity defined as "agricultural" under Section 15 (g) of the Agricultural Marketing Act. Exemption is extended to services performed in connection with the hatching of poultry, ginning of cotton, and raising or harvesting of mushrooms.

Paragraph four extends exemption to services enumerated whether or not performed in the employ of the owner, tenant, or other operator of a farm, but other than fruits and vegetables, such services must have been as an incident to ordinary farming operations.[30]

The Iowa Supreme Court in 1948 held that all employees necessary to the conduct and operation of a commercial hatchery, though not all actually engaged in the manual process of incubating chicks, are within the statutory exclusion of "agricultural labor" where it is defined to include "all services performed in connection with the hatching of poultry."[31] This holding follows a federal court ruling on identical language in the Federal Act.[32]

In a 1942 case the Iowa Supreme Court held that services of workmen employed to do carpenter work and other repair work on farm buildings in order to make them more salable was not agricultural labor. The work did not include tiling, cultivating or harvesting or the building of fences.[33] It should be noted that the law at the time of this case did not define "agricultural labor" as it now does.[34] It is possible a different result would be reached under the present law.

Generally speaking, the federal and state unemployment insurance statutes do not apply to services performed by governmental employees. The Iowa statute clearly excludes service

[30] 1A CCH UNEMP. INS. REP., TREATISE, § 1365 (1954). This refers to the Federal Act but, as the Iowa law is identical, should be equally applicable to it.

[31] Stromberg Hatchery v. Iowa Emp. Sec. Comm., 239 Iowa 1047, 33 N.W.2d 498 (1948).

[32] Birmingham v. Rucker's Imperial Breeding Farm, Inc., 152 F.2d 837 (8th Cir. 1945).

[33] Equitable Life Ins. Co. v. Iowa Emp. Sec. Comm., 231 Iowa 889, 2 N.W.2d 262 (1942).

[34] Definition of "agricultural labor" added by IOWA LAWS (1943) ch. 77 § 1.

performed in the employ of the state or any political subdivision or any instrumentality of the state or its political subdivisions. It also excludes services performed in the employ of any other state or its subdivisions, or of the United States government or instrumentalities thereof. However, if Congress permits states to require federal instrumentalities to make payments, the Iowa law will be applicable to such instrumentalities.[35]

Service performed in the employ of an employing unit organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes is exempt.[36] An organization in order to establish its exemption under this provision must meet two tests: (1) It must be organized exclusively for one or more of the purposes enumerated; and (2) no part of its earnings may inure to the benefit of any private shareholder or individual.[37] A nonprofit organization is not exempt unless it is organized and operated exclusively for one or more of the purposes enumerated. This is the interpretation given by the Commission to the Iowa law. It is also the interpretation most Courts have given the Federal Act.[38] However, in one case arising under the law in the District of Columbia the Compensation Board there contended that the organization must be operated exclusively for one of the purposes named but the United States Court of Appeals for the District of Columbia overruled this contention. The Court held that Congress intended to include within the exemption every nonprofit organization designed and operated for the benefit and enlightenment of the community, the State, or Nation—in short, to apply the exemption to those organizations commonly designated charitable in the law of trusts.[39]

The charging of fees does not necessarily render an institution non-charitable if these go to pay the expense of operation.[40] The House Committee report on the original Social Security Act stated that for the purpose of determining whether an organization is excluded from the act as a charitable institution "the use to which the income is applied is the ultimate test of exclusion rather than the source from which the income is derived."[41]

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[35] IOWA CODE § 96.19-7-g(1) (1954). PUB. L. No. 767, 83d Cong., 2d Sess., ch. 1212 (Sept. 1, 1954) provides for unemployment compensation for almost all federal civilian employees after Dec. 31, 1954. This is to be paid through the state unemployment compensation agencies and reimbursement made to the state by the federal government. It appears that § 96.19-7-g(1) will allow Iowa to participate without any change being made in the Iowa law.

[36] IOWA CODE § 96.19-7-g(7) (1954).

[37] The Federal Act in addition has a third test, which is that the organization must not in any substantial part of its activities attempt to influence legislation by propaganda or otherwise.

[38] 1A CCH UNEMP. INS. REP., TREATISE, § 1356 (1954).

[39] International Reform Fed. v. District Unemp. Comp. Board, 131 F.2d 337 (D.C. Cir. 1942).

[40] Scripps Memorial Hosp., Inc., v. California Emp. Comm., 24 Cal.2d 681, 151 P.2d 109 (1944); In re Mendelsohn, 262 App.Div. 605, 31 N.Y.S.2d 435 (3d Dept., 1941).

[41] 1A CCH UNEMP. INS. REP., TREATISE, § 1356 (1954).

Service as a physician, nurse, student nurse, or intern, is not specifically exempted under Iowa law; it would be excluded if performed for a charitable or other exempt organization.

The Iowa statute specifically exempts services performed during school vacations or outside of school hours by students who devote their time and efforts chiefly to their studies, rather than to incidental employment.[42] The Federal Act exempts services performed by a student who is enrolled and regularly attending classes, if such services are performed in the employ of an organization exempt from income tax under the Internal Revenue Code.[43] This difference in State and Federal law may lead to occasions where an employer is liable under the Federal Act and not under the state law. This is one of the instances when it may be to the advantage of the employing unit voluntarily to elect coverage under the state law.[44]

Domestic service is specifically exempt from coverage in Iowa.[45] This, however, is confined to such service in private homes while the Federal law extends the exemption to local college clubs or local chapters of a college fraternity or sorority.[46]

The Federal Act exempts service performed by an individual under 18 in the delivery or distribution of newspapers, not including delivery to any point for subsequent delivery or distribution.[47] Many states have adopted a similar provision. Iowa has no such provision. Of course, it is necessary to consider in this regard whether the newsboys meet the test of independent contractors, or perhaps would be exempt as students.

There is no specific exemption in the Iowa law as to service of maritime workers as there was at one time,[48] and no specific exemption of casual labor. The Iowa law does exempt service performed by a person in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his father or mother.[49]

Service with respect to which unemployment compensation is payable under a system established by an act of Congress is exempt from coverage of the Iowa law.[50] This includes service subject to tax under the Railroad Unemployment Insurance Act.

B. SUCCESSOR IN INTEREST

Subsection b of Section 96.19-6 provides:

" 'Employer' means: . . . Any employing unit which acquired the organization, trade or business, or substantially

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[42] Iowa Code § 96.19-7-g(8) (1954).
[43] 26 U.S.C. § 1607(c) (10) (1952).
[44] Discussed in section *f*, *infra*.
[45] Iowa Code § 96.19-7-g(5) (1954).
[46] 26 U.S.C. § 1607(c)(2) (1952).
[47] 26 U.S.C. § 1607(c)(15) (1952).
[48] Stricken by Iowa Laws (1945) ch. 90 § 1.
[49] Iowa Code § 96.19-7-g(6) (1954).
[50] Iowa Code § 96.19-7-g(3) (1954).

> all the assets thereof, of another which at the time of such acquisition was an employer subject to this chapter."

The successor in interest becomes subject to the law because his predecessor was subject thereto.[51] This section was considered by the Supreme Court of Iowa in a case in 1946. Appellee had purchased the merchandise and fixtures for $5,000, the trustee retaining the accounts receivable totaling about $2,500. The Commission conceded appellee did not acquire "the organization, trade, or business" of the predecessor and also that if accounts receivable are classed as assets, that appellee did not acquire "substantially all the assets thereof." The Commission contended that the statute was intended to include physical assets only. The Court held that accounts receivable were assets within the contemplation of the statute and that, therefore, appellee did not acquire "substantially all the assets", and did not succeed to the prior status of the predecessor.[52] It is to be noted that this case is concerned only with the portion of the subsection "acquires . . . substantially all the assets." It is possible according to Commission interpretation to acquire the organization, trade or business without acquiring substantially all the assets.[53]

In the case of *William B. May, Jr., d/b/a Ben's Produce v. Iowa Employment Security Commission,*[54] an individual acquired by purchase certain assets of a partnership engaged in the poultry and produce business. The partnership operated in Ohio and Iowa and was liable for contributions in Iowa because it was subject to the Federal Unemployment Tax Act, even though the partnership had less than eight employees for fifteen weeks in Iowa. The individual acquired the Iowa assets, with the exception of the stock in trade. The Court held the organization, trade or business of the partnership was not transferred, but simply the Iowa branch and that the acquiring individual was not subject to contributions as a successor employer.

A question which arises as to the meaning of successor is whether this refers to one who acquires assets by judicial proceedings. The New York Court has stated:

> "The term 'successor' as used in the above provision plainly imports a devolution of property by stautory succession. It applies to persons to whom property descends by opera-

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[51] COMMISSION REG. 7-C, IOWA DEPT. RULES 76 (1952): "Any employer who terminates his business for any reason whatsoever, or transfers or sells all or a substantial part of the assets of his organization, trade or business to another, or changes the trade name of such business or address thereof, shall, within 10 days after such termination, transfer, or change of name or address, give notice in writing to the commission of that fact. He shall set forth in such notice the former name and address of the business, the new name and address, the name of any new owner, and his own name and present address."

[52] Spagnola, d/b/a Square Deal Grocery v. Iowa Emp. Sec. Comm., 237 Iowa 645, 23 N.W.2d 433 (1946).

[53] *Ibid.*

[54] Dist. Ct., Jefferson County (Sep. 30, 1948).

tion of law and not to a situation where property passes by the voluntary acts of the owners."[55]

Kansas has a definite provision that the acquisition of assets must be by other than judicial proceedings or assignment for benefit of creditors.[56] The Massachusetts Supreme Judicial Court has held a receiver was not an employer by reason of the successor in interest provision. The Court said: "The word 'acquire' imports ownership and is not satisfied by the mere custody or control that a receiver has."[57]

Iowa has no court decision on this point but the matter is construed by the Commission to include within successors in interest those that succeed by judicial process. At present the Commission has pending in the Linn County District Court, set for hearing November 23, 1954, a case in which the executors of an individual's estate, who in such capacity carried on the decedent's business, contend they should not be liable under the successor in interest provision. Perhaps when a decision is forthcoming in this case the Iowa position on this point will be clarified.

It is important to note that a successor who becomes subject to the state act will be liable for contributions for at least one full calendar year even though less than the required number of individuals are employed at all times after acquisition of the business. This is true because most state acts provide that an employer may terminate only after the Commission finds that during the preceding calendar year the number of employees and period of employment was not sufficient to bring him within the "employer" definition.[58]

In a case before the Commission a partnership was conducted prior to July 1, 1949, by *E*, and by *H* who died on that date. *E* acquired the entire business by virtue of a contract providing for such. Liability was claimed under 96.19-6-b on the basis that he was the successor in interest. It should be noted that Section 96.19-6-b provides: "Any *employing unit* which acquired the organization, etc." The Commission in a decision on January 18, 1950, held that *E* as an individual was never an "employing unit" as defined in Section 96.19-5) prior to July 1, 1949, and therefore when he acquired the interest of deceased partner, he was not an "employer" under the law.[59]

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[55] Matter of Turano, 260 App.Div. 971, 23 N.Y.S.2d 213, 214 (3d Dept. 1940).

[56] KAN. GEN. STAT. ch. 44 § 703(h)(3) (1949).

[57] Commissioner of Ins. v. Broad Street Mut. Cas. Ins. Co., 312 Mass. 261, 263, 44 N.E.2d 683, 684 (1942).

[58] If liable only because of subsection *g*, coverage automatically terminates at the end of one calendar year .

[59] Another point, although outside the scope of this discussion is that involving the eligibility of the successor to the experience rating record of the predecessor employer. Iowa, as well as most states, permits a reduction in contribution rate on the basis of each employer's experience in stabilizing his employment. IOWA CODE § 96.7-3 (1954).

C. EFFECT OF ACQUIRING A BUSINESS OR ITS ASSETS

Subsection *c* of Section 96.19-6 provides:

> " 'Employer' means: . . . Any employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another employing unit and which, if treated as a single unit with such other employing unit, would be an employer under paragraph *a* of this subsection."

This subsection provides that if the two employing units (the acquiring organization and the one acquired) jointly had as many as eight employees on fifteen days in the calendar year, each day being in a different week the employing unit which acquired the business of the other employing unit would be an employer within the meaning of the Iowa law. The significant thing to notice is that one is to look to both employing units and their records in order to see if eight or more were employed on the requisite number of days, or to determine the length of time necessary to constitute the employing unit an employer.

Once the determination is made that the employing unit is an employer it accordingly becomes liable for contributions, but the contributions of that employer who becomes such by purchasing all the assets of another business will not include contributions on wages payable by its predecessor but will be based solely on the total wages paid and payable by it (both before and after the acquisition). The distinction is this: in counting the number of workers to determine whether one is an employer the statute directs you to look to the acquiring employing unit and the acquired unit, while for the answer as to upon what wages the newly subject employer's contribution is based, it is necessary to look only to wages paid and payable by it.[60]

D. MAJORITY CONTROL

Subsection *d* is commonly referred to as the "majority control" provision and states:

> " 'Employer' means: . . . Any employing unit which together with one or more other employing units, is owned or controlled (by legally enforcible means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforcible means or otherwise), and which, if treated as a single unit with such other employing unit, would be an employer under paragraph *a* of this subsection."

Many of the states have similar provisions in their law requiring the employees of all enterprises under common control or ownership to be counted together in determining whether an employer is subject to the state law. In most states this grouping of business enterprises which are commonly owned or controlled is for the

[60] Support for this statement is to be found in an undated, unsigned memorandum in the Commission files, entitled "Official Interpretations of the Iowa Unemployment Compensation Law by the Iowa Unemployment Compensation Commission." General Counsel for the Commission, Earl W. Fritz, indicates that the statements and examples in this memorandum which are referred to in this article represent the current Commission position.

single purpose of determining whether each separate enterprise may be treated as an employer. The determination of whether a particular enterprise is subject to a state act is dependent upon the employment record of the entire group, but each enterprise is thereafter responsible only for contributions on the wages paid to its own employees and eligible for merit rating on its own experience. This is the procedure followed by the Iowa Commission.[61] The Federal Act contains no "majority control" provision.

The constitutionality of the majority control provision has been questioned in a number of states. The conclusions reached have not been uniform but in most cases the validity has been sustained.[62] In Georgia and Indiana, substantially the same provision was held unconstitutional.[63] The common ownership and control provision in the Iowa law was held not to be unconstitutional when attacked on the ground that it impaired the obligation of a contract, and that it was a violation of due process and discriminatory. The Court held that the common ownership and control provision in the law is a valid constitutional exercise of legislative power and the classification contained therein has a fair and substantial relation to the object of the legislation, since it fixes a classification which is neither arbitrary nor capricious. The Court said:

> "That the legislature may make a reasonable classification for the imposition of the tax is likewise beyond the question. By its definition of the word 'employer' under the common ownership and control provisions, the legislature has merely used as a basis the common control that exists between otherwise separate business establishments. . . . The classification resting upon control is reasonable and it is calculated to effect the legislative purpose. The possibility that evasion by splitting business establishments is prevented is sufficient justification for the classification."[64]

The determining factor is the ownership or control. This control may be through ownership, majority ownership of stock, vot-

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[61] This procedure was upheld in *Ottumwa Benner Food Stores, Inc. v. Iowa Emp. Sec. Comm.*, No. 10809, Dist. Ct., Des Moines County (Sep. 1953).

[62] Industrial Comm. of Colo. v. Alma-Denver Bus Lines, Inc., Dist. Ct., Denver (unreported, 1937); New Haven Metal & Heating Supply Co. v. Danaker, 128 Conn. 213, 21 A.2d 383 (1941); Zehender & Factor, Inc. v. Murphy, 386 Ill. 258, 53 N.E.2d 944 (1944); Maine Unemp. Comp. Comm. v. Androscoggin, Inc., 137 Me. 154, 16 A.2d 252 (1940); Iron St. Corp. v. Unemp. Comp. Comm., 305 Mich. 643, 9 N.W.2d 874 (1943); Godsol v. Mich. Unemp. Comp. Comm., 302 Mich. 652, 5 N.W.2d 874 (1942); Kellogg v. Murphy, 349 Mo. 1165, 164 S.W.2d 285 (1942); State *el ret.* Unemp. Comp. Comm. v. Willis Barber and Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941); Gibson Products Co. Inc. v. Murphy, 93 Okla.App. 240, 100 P.2d 453 (1940); State v. Kitsap County Bank, 10 Wash.2d 520, 117 P.2d 228 (1941).

[63] Independent Gasoline Co. v. Bureau of Unemp. Comp., 190 Ga. 613, 10 S.E.2d 58 (1940); Benner-Coryell Lumber Co. v. Indiana Unemp. Comp. Bd., 218 Ind. 20, 29 N.E.2d 776 (1940).

[64] Mount Vernon Bank & Trust Co. v. Iowa Emp. Sec. Comm., 233 Iowa 1165, 1174, 1175, 11 N.W.2d 402, 406 (1943).

ing, voting trust, interlocking directors, or any other manner without regard to whether or not such controlling power is legally enforcible. The element of control in a partnership presents an entirely different problem. Ordinarily it may be said control is joint as to the partners, irrespective of the amount of the relative interests of the membership of the firm. The question of control in each case would have to be determined by the agreement of the parties in each such case.[65]

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[65] Official Interpretations of the Iowa Unemp. Sec. Law by the Iowa Unemp. Sec. Comm., referred to in footnote 60, *supra*, contain the following illustrative examples:

Example 1: Corporation A, parent, owns 51% of the common stock of a subsidiary corporation B, and also 51% of another subsidiary corporation C. The parent corporation and each of the subsidiary corporations employs three persons.
The answer to the above would be that each employing unit is to be considered as a separate employer. Due to the fact the three employing corporate units are owned and controlled by the same interests, and, collectively considered, do employ the requisite number of individuals, each is an employer.

Example 2: Corporation A, parent, owns 51% of the common stock of its subsidiary corporation B. B in turn owns 51% of the common stock of its own subsidiary corporation C. Each of the three corporations employs three persons.
The answer to the above situation would be the same as the preceding.

Example 3: X, an individual, unincorporated, owns a certain business. He employs three persons. He owns 51% of the common stock of corporation A, and also 51% of the common stock of corporation B, each of which corporation employs three persons.
The answer to Example 3 is the same as the two immediately preceding.
NOTE: The above answers are given in the affirmatice upon the assumption that the stock ownership is voting stock and is of the type through which control may be exercised.

Example 4: X, an individual, unincorporated, employs no one. X owns 51% of the common stock of corporation A, 51% of the common stock of corporation B, and 51% of the common stock of corporation C. Each of these corporations employ three persons.
The individual represented by X cannot be considered an employer inasmuch as he is not an employing unit. Each of the corporations, however, is an employer within the meaning of the Act.

Example 5: B, an individual, unincorporated, owns a store which employs three persons. He also owns a two-thirds interest in a partnership operating another store which employs six persons.
There is nothing indicative in the above example as to whether B owns or controls the partnership in which he owns a two-thirds interest. The amount and extent of the interest might be a strong factor in finally determining whether B does own or control the partnership. The agreement of the parties would have to be examined and a determination made on that basis. Solely on the above facts the answer would of necessity be in the negative as to considering the two organizations (individual and partnership) together.

In one case on majority control, the Iowa Supreme Court held that two banking corporations constituted a single employing unit within the meaning of the law where the majority of the stock in each corporation was owned by the same persons and the control being lodged in the majority stockholders, the two banking corporations were "controlled" by the same interests within the meaning of the law.[66]

In a case before the Commission in 1948, four of the partners in appellant partnership were owners of in excess of 50% of a corporation, a covered employer. However, the partners agreed control of the partnership was in certain members who did not have control of the corporation. The Commission held the two units were not owned or controlled by the same interests.[67]

Not to be overlooked are cases which, while arising in the determination of merit ratings, have also led to significant results by the Court in the "majority control" area of the law. In the *Burlington Truck Lines* case Company *A*, a subsidiary of a large corporation, had two unrelated departments, which were regarded as a single unit for tax purposes. *A* "sold" one of the departments to Company *B*, a newly organized subsidiary of the same large corporation, which continued the acquired business with no change in personnel, manner of doing business, etc. *A* was a subject employer and had secured a reduced contribution rate as result of the combined experience records of the two departments. The new corporation claimed the same merit rating, but was denied it by the Commission because the new employer had not had three years of coverage and because it was not considered to be a successor in interest to *A*. On appeal, the Court stated that as both the "buyer" and "seller" were wholly controlled by the same parent corporation therefore no real change in employing unit or employer had taken place. It was pointed out that separate employers controlled by the same interests are regarded as one employer for tax purposes under the law. The Court ruled that the two businesses should continue to be regarded as one unit in determining the tax rate of each subsidiary.[68]

The most recent case bearing on this problem was decided in the District Court of Des Moines County in September, 1953. Here, the Benner Tea Company was an established employer under the law and by virtue of its benefit experience had acquired a zero contribution rate. In the last quarter of 1951 the Ottumwa Benner Food Store was incorporated as a wholly owned subsidiary of Benner Tea Company and commenced operation of a new store. The Commission contended that because of the "control" factor the plaintiff was within the definition of employer. The Ottumwa

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[66] Mount Vernon Bank & Trust Co. v. Iowa Emp. Sec. Comm., 233 Iowa 1165, 11 N.W.2d 402 (1943).

[67] Commission Decision, April 2, 1948 (Wormhoudt Lumber Co.).

[68] Burlington Truck Lines, Inc., v. Iowa Emp. Sec. Comm., 239 Iowa 752, 32 N.W.2d 792 (1948).

Benner Food Store admitted it came within that provision but alleged that if it were required to make payments because of the "control" by the parent, it should be entitled to benefit of the parent's employment experience. It argued that the *Burlington Truck Lines* case was authority for such view. The Court held that plaintiff's contention could not be upheld and stated:

> "Here we have no sale or transfer to a subsequent employing unit, no reorganization or merger into a single employing unit, no predecessor or successor employer. Actually, the Ottumwa store was a new enterprise and even though controlled by the Benner Tea Company with some identity of officers and with a common plan of operation and management, yet it was a separate employing unit with no previous employer- employee experience.
>
> "So far as can be determined the precise question in this case has not been presented in Iowa or elsewhere. In other jurisdictions with much similar statutory provisions it is held that even though employing units with identity of control are treated as a single unit for the purpose of determining liability under the Act, it does not follow that they are entitled to the experience rating of the controlling unit. See Ned's Auto Supply Co., et al v. Commission, (Mich.), 20 N.W. 2d 813, and El Queeno Company v. Christgau (Minn.), 21 N.W. 2d 601."[69]

In another case of interest before the Commission in 1951 the sole stockholders of two hotel corporations were partners in a distributing company. It was held that the distributing company was an employer on the basis of its ownership and control and must stand on its own record in determining its rate and not on that of the hotel corporations.[70]

E. TERMINATION OF LIABILITY

Subsection *e* provides:

> " 'Employer' means: . . . Any employing unit which, having become an employer under paragraph *a*, *b*, *c*, or *d*, has not, under section 96.8, ceased to be an employer subject to this chapter."

This section means that any employing unit which has become an "employer" under any of the preceding subsections and has not terminated as provided by law will still be an "employer" even though the circumstances are such that at the present time it would not be considered liable under any of the preceding subsections.

An employing unit which became subject to the law other than by voluntary election may cease to be subject as of January 1 of any calendar year if it files a written application with the Commission before February 15 of such year. The application will be granted if the Commission finds that the employing unit did not come within the definition of "employer" during the preceding

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[69] Ottumwa Benner Food Stores, Inc. v. Iowa Emp. Sec. Comm., No. 10809, Dist. Ct., Des Moines County (Sep. 1953).

[70] Commission Decision, June 8, 1951 (Ottumwa Distributing Co.).

calendar year.[71] It would seem under such provision that the minimum time which an employing unit could be under the act would be two years. If, for example, it became subject after 15 weeks had elapsed in 1953 it must pay contributions for that entire year as an employing unit which is or becomes an employer subject to the act within any calendar year is subject during the whole of such calendar year. Assume that in 1954 the number of its payroll has dropped so that at no time during 1954 did it have eight employees. Despite this, it must pay contributions for 1954 as there must be a full calendar year during which it does not come within the definition of "employer". It may apply for termination effective January 1, 1955, before February 15 of that year.

An employing unit which is subject to the law as result of voluntary election or which has elected to have certain services covered, may terminate coverage as of January 1 of any calendar year, after two calendar years of coverage, if it files written notice before February 15 of such year.[72]

If a subject employer's business has been sold or otherwise transferred to another employing unit, or reorganized or merged into a single employing unit, and the successor assumes the predecessor's position, the transferring employer's account shall terminate on the date of such transfer, reorganization or merger.[73]

If the subject employer's business is discontinued other than by sale or transfer and such employer has had no employment for one year the Commission may, on its own motion, terminate such employer's account.[74]

F. VOLUNTARY ELECTION

Subsection *f* provides:

> " 'Employer' means: . . . For the effective period of its election pursuant to section 96.8 subsection 3 any other employing unit which has elected to become fully subject to this chapter."

This means that an employing unit not otherwise subject to the Iowa law may become subject thereto for not less than two calendar years by filing a written election with the commission which is subject to the commission's written approval. An employer may also elect coverage of types of employment which are otherwise excluded.

Under most state unemployment compensation laws, including Iowa's, liability for taxes or contributions attaches as of January 1 of the calendar year in which the employer becomes subject to the law. In some cases this may work a hardship on the employer in that it may not have allowed for such in budgeting and making charges, and if it expects to become liable during the year, it may

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[71] IOWA CODE § 96.8-2 (1954).
[72] IOWA CODE § 96.8-3 (1954).
[73] IOWA CODE § 96.8-4-a (1954); COMMISSION REG. 7-C, IOWA DEPT. RULES 76 (1952).
[74] IOWA CODE § 96.8-4-b (1954).

elect coverage immediately, in which case the employing unit becomes subject as of the date stated in the Commission's approval of such election.

The election provision in the state law makes it possible for employers to extend the benefits of such law to employees who would not ordinarily be eligible. If the employer is liable for the federal tax, an election of coverage under the state law will not even increase his tax payments. In fact, an election of coverage in such a case might even result in a tax saving since the employer may qualify for a reduced contribution rate under the experience rating provision of the state law. The credit allowed against the federal tax with respect to contributions paid into state funds makes this possible.

G. "EMPLOYER" SUBJECT TO FEDERAL LAW

Subsection *g* provides:

> " 'Employer' means: . . . Any employing unit which is an employer under the provisions of subchapter (c) (Federal Unemployment Tax Act) of the Internal Revenue Code. Provided, however, that if an employer subject to contributions solely because of the terms of this subsection shall establish proper proof to the satisfaction of the commission that his employees have been and will be duly covered and insured under the unemployment compensation law of another jurisdiction such employer shall not be deemed an employer and such services shall not be deemed employment under this chapter."

An employer may be subject to the Iowa law even though it has less than the eight employees required. For example, if the employing unit is an "employer" under the Federal Act and has at least one employee in employment in Iowa, it will be deemed an "employer" in Iowa, unless it is established that its employees have been and will be covered under the law of another jurisdiction.

In Commerce Clearing House Unemployment Insurance Service, the statement is made that:

> "A number of states avoid the possibility of an employer having to pay taxes under the federal act, while his employees are ineligible for benefits by providing that all employers and employees who are subject to the Federal Unemployment Tax Act shall also be subject to the state act. . . . For state laws which have provisions of this nature, see Charts division."[75]

The Charts division shows Iowa to have such provision and without a doubt refers to subsection *g* quoted above. This state ment in the Commerce Clearing House Service would seem to in-

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[75] 1A CCH UNEMP. INS. REP., TREATISE, § 1301 (1954).

dicate that any change made in the Federal law[76] would automatically bring such "employer" under the Federal law under the Iowa law by virtue of subsection *g*. This matter has not as yet been in issue in Iowa. The Iowa Commission, however, is of the opinion that such interpretation is too broad and believes that subsection *g* must be interpreted to mean the Federal law as it existed at the time of the adoption of *g*.[77] The Commission is supported in its interpretation by a letter from the Iowa Attorney General's office dated August 5, 1954.[78]

The letter referred to makes reference to a Michigan case which in construing an almost identical statute held:

> "The trial judge so construed sec. 42 (7) as to make federal enactments or interpretations enacted or adopted after the enactment of said sec. 42 (7), to affect future liability of employers under the Michigan statute. It would seem the trial judge construed the words, 'is liable' to mean, is or shall hereafter become liable under future acts; the words 'is payable' to mean, is now payable or shall hereafter be made payable by future acts of congress or future interpretations of acts of congress.

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[76] Such change was made in the Federal Act by PUB. L. No. 767, 83d Cong., 2d Sess., ch. 1212 (Sept. 1, 1954), which provided that employers of four or more are subject to Federal tax. It is quite possible that the Iowa law will be amended by the 1955 General Assembly to provide that employing units having four or more will be "employers" under Iowa law. Otherwise, there would be many employers having between four and eight employees who would be required to pay under the Federal Act yet whose employees would not be eligible for any unemployment benefits.

[77] Subparagraph *g* of subsection 6 was inserted by IOWA LAWS (1947) ch. 74 § 6, in lieu of a subparagraph which had been inserted by IOWA LAWS (1939) ch. 65 § 3, and which read as follows: "Any employing unit which has in its employ any employee who is not covered by the unemployment compensation law of any other state and which employee is subject to title IX of the federal social security act." The latter portion of the present subparagraph was added by IOWA LAWS (1949) ch. 66, § 1.

[78] The letter states:

"Your question is, if the proposed amendment to the Federal Act is adopted, will such change automatically become a part of our law by virtue of the provisions of that part of sub-paragraph g quoted above?

"The situation you present involves the matter of our legislature adopting a part of a Federal Statute by reference. It is presumed that at the time of the adoption of said Sub-paragraph g that our legislature knew the provisions of the Federal Act. There can be no doubt in my mind that such adoption by reference would be held by our Courts to include the statute as of the time of the adoption. Under this theory any subsequent action by the Federal Congress would in no way change the Iowa statute. I fail to find where the Supreme Court of Iowa has passed squarely upon this question, but the Supreme Court of the State of Michigan in the case of Lievense vs. Michigan Unemployment Compensation Commission, 335 Michigan 339, 55 N.W.2d 857, decided the same question in accordance with the foregoing conclusion.

"It is my opinion that if the Iowa law is to be kept in compliance with the Federal Act, it will be necessary for the legislature to give attention to the matter of amending the provisions of Section 96.19-6-g at the next session . . . ."

> "We note that the word 'is' sometimes is construed to include the meaning 'shall be'; but this of course is exceptional and evidently depends on the context, the nature of the whole situation, and the rules of construction. . . .
>
> "If the trial judge is correct in his construction of sec. 42 (7), and if consequently the legislature is to be considered as intending to enact that future acts of congress or rulings by Federal authorities could change the liability of a Michigan employer, then the Michigan act in question would be to that extent an unconstitutional delegation of legislative authority to congress or some federal authority. . . .
>
> "Following the rule just cited from People v. Dubina, we construe the words in sec. 42 (7), 'is liable' and 'is payable' to mean liable and payable as the federal law stood enacted and construed, at the time said sec. 42 (7) of the Michigan statute was enacted.
>
> "As thus considered, we find sec. 42 (7) a valid enactment, adopting by reference the federal laws and construction thereof in existence when the Michigan act was enacted."[79]

No case has come before the Iowa courts involving subsection *g* and the Commission has issued only one decision in which it was involved. By including a stockholder as an employee, the Commissioner of Internal Revenue had held a corporation to be subject to the Federal Unemployment Tax for 1949. Although the Iowa Commission felt that there was in fact no employer-employee relationship, and so held with respect to subsequent years,[80] because of the effect of subsection *g*, the corporation was held to be an employer under Iowa law for the year 1949.[81]

RUTH B. FRITZ (Aug. 1955)

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[79] Lievense v. Unemp. Comp. Comm., 335 Mich. 339, 341, 55 N.W.2d 857, 858 (1952).

[80] See footnote 58, *supra*.

[81] Commission Decision, Oct. 24, 1951 (Fort Dodge Wholesale Meats).