

Featured Articles

Why Section 530 of the Revenue Act of 1978 Applies to the States

by

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Abstract

This paper's bold claim is Section 530 of the Revenue Act of 1978 applies to the states. The issue is topical given the Obama Administration's current use of Memoranda of Understanding among the IRS, DOL, and several states to challenge independent contractor misclassification. The transparent MOU purpose is to circumvent employment tax constraints Congress imposed on IRS subtitle C determinations in furtherance of, *inter alia*, Affordable Care Act objectives. However and as the paper demonstrates, when Congress enacted section 530 it contextually qualified the subtitle C definitional infrastructure. Well settled dual federal-state employment tax jurisprudence imposes an obligation each state act must be coterminous, harmonious, and uniform with the federal progenitor. Since Congress has never impounded section 530 in the Internal Revenue Code, *per se*, it may well be the provision's contextual qualification extends beyond title 26 boundaries.

Why Section 530 of the Revenue Act of 1978 Applies to the States

Beginning 2011, federal and state agencies undertook deliberate steps to become more aggressive in challenging worker misclassification. On September 19, 2011 the Internal Revenue Service entered into a Memorandum of

Understanding with the Department of Labor wherein worker misclassification appears to have engendered a renewed enforcement commitment. Concomitantly in 2011, DOL committed \$12 million of that fiscal year's budget to an interagency crackdown on worker misclassification.⁷

It may well be DOL's challenge under the Fair Labor Standards Act is undertaken as a first instance worker misclassification challenge for the reason IRS Title 26, Subtitle C, Chapter 23 audits terminate once the IRS determines section 530 safe haven provisions have been met.⁸ Indeed, the increased executive branch commitment undertaken to challenge worker misclassification appears to target reducing section 530 effectiveness. Eligibility for section 530 independent contractor status is tied to proper information reporting, consistent historical treatment of the contractor class of workers, and reasonable cause for the classification.

The administration's increased worker misclassification challenges also extend to the states. On September 20, 2011, DOL and IRS signed a memorandum of understanding with Missouri and six other states (Connecticut, Maryland, Massachusetts, Minnesota, Utah and Washington) that will enable DOL to share information and coordinate enforcement

⁷ Idalski, A. A., & Greene, D. V. (2011, January 24). Employee versus independent contractor. *BNA Insights: Labor and Employment Law*. Retrieved from <http://www.bna.com>.

⁸ References to "section 530" are to Section 530 of the Revenue Act of 1978.

activities with the IRS and participating states.⁹ As discussed in this paper, Missouri is among the states leading the challenge to Congressional right, power, and authority to contextually qualify important employment tax infrastructure definitions such as employer, employment, and employee.

Current federal challenges to independent contractor status are undertaken, in large part, in furtherance of ACA interests. It remains unresolved whether Affordable Care Act worker classification is contextually bound by section 530 safe havens.¹⁰ Once an employer incurs an adverse DOL worker misclassification adjudication, the IRS will then be empowered to levy ACA penalties pursuant to 26 U.S.C. §4980H. ACA interests and undermining the reach of section 530 safe haven relief appears to be among the executive branch motives underpinning the DOL-IRS September 19, 2011 MOU and the September 20, 2011 MOU agreements with several states.

President Obama's challenges to section 530 safe haven relief are not novel. When he was a member of the United States Senate he introduced S. 2044,¹¹ the

⁹ Retrieved from http://www.martindale.com/labor-employment-law/article_Husch-Blackwell-LLP_1351352.htm.

¹⁰ Boeskin, D. & Mort, K. (2011, December 6). Affordable care act may create hazards for employers that misclassify workers, especially those relying on section 530 relief. *BNA Insights: Labor and Employment Law*. Retrieved from <http://www.bna.com>.

¹¹ Weissman, W. H. (2009, February 28). Section 530: its history and application in light of the federal definition of the employer-employee

“Independent Contractor Proper Classification Act of 2007.” The bill was among other bills introduced in Congress intended to limit or eliminate section 530. All such bills died in committee and never made it to the floor of either house.

While the President’s transparent section 530 disdain and ACA interests fuel the ongoing worker misclassification agenda commenced 2011, this paper’s focus explains why section 530 applies to the states. Briefly, dual federal-state taxation jurisprudence commands unemployment laws should be operationally uniform and harmonious among the states and coterminous with the federal progenitor. Moreover, extant decisional law holds relevant exogenous enactments contextually qualify the endogenous definitional infrastructure in the absence of express decoupling language. The paper concludes, accordingly, section 530 applies to the states.

Finally and as an example, the paper demonstrates incongruous operation of section 530’s contextual qualification of the coterminous unemployment tax definitional infrastructure among the states by comparing important provisions in the Indiana and Missouri economic security acts. Indiana’s economic security act respects section 530 contextual qualification while Missouri’s does not. Since uniform and harmonious operation of coterminous federal and state acts remains the public policy ideal, the Secretary of

relationship for federal tax purposes. *National Association of Tax Reporting and Professional Management*. Retrieved from http://www.irs.gov/pub/irs-utl/irpac-br_530_relief_-_appendix_natrm_paper_09032009.pdf.

Labor’s involvement in approving state acts sets the stage for possible federal intervention.

Important Dual Federal-State Employment Tax Considerations

Federal unemployment tax laws were first enacted in 1935.¹² The Supreme Court’s antedating *Harmel*¹³ decision expressed important tenets that have since become applicable to the unemployment tax schema. *Harmel* was an income tax case where the issue was whether certain oil and gas lease income should have been considered receipts from the sale of a capital asset, as treated under then prevailing state law, or ordinary income pursuant to the prevailing federal revenue act. The *Harmel* principle became a cornerstone embraced by both federal and state courts in the construction of dual federal-state unemployment taxing statutes. The *Harmel* principle recognizes the will of Congress controls in matters involving uniform nationwide taxation schemes and state law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law.¹⁴

This holding remains determinative today. Further, the Supreme Court extended such dual federal-state tax considerations to unemployment taxes in its 1939 *Buckstaff*

¹² “Social Security Act” (P. L. 74-271; 8/14/35).

¹³ *Burnet v. Harmel*, 287 U.S. 103 (1932).

¹⁴ *Ibid.* p. 110. (Citations omitted).

Bath House Co. decision.¹⁵ There, the Court held the Act was an attempt to find a method by which the states and the federal government could ‘work together to a common end.’ The Court found prior thereto many states had “held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors.”

The *Harmel* principle, as substantively extended to employment taxes by the *Buckstaff Bath House Co.* Court, is generally recognized across the federal circuit courts of appeal and several state revisory courts.¹⁶ Such unmitigated authority commands the federal unemployment act and the economic security acts of the several states are to be uniform and harmonious in operation.

¹⁵ *Buckstaff Bath House Co. v. McKinley*, 308 U.S. 358, 363 (1939); *citing*, *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

¹⁶ *La Caisse Populaire Ste. Marie v. United States*, 563 F.2d 505, 509 (1st Cir. 1977); *citing*, *Burnet v. Harmel*, *supra*, at 110. *Accord*, *Old Virginia Brick Company v. Commissioner of Internal Revenue*, 367 F.2d 276 (4th Cir. 1966); *C. M. Thibodaux Co., LTD. v. United States*, 915 F.2d 992 (5th Cir. 1990); *Slaughter v. Commissioner of Internal Revenue*, 746 F.2d 1479 (6th Cir. 1984); *Scully v. United States*, 840 F.2d 478 (7th Cir. 1988); *United States v. Myra Foundation*, 382 F.2d 107 (8th Cir. 1967); *Kahn v. Immigration and Naturalization Service*, 36 F.3d 1412 (9th Cir. 1994); *Matcovich v. Anglim*, 134 F.2d 834 (9th Cir. 1943); *Ordway v. United States*, 908 F.2d 890 (11th Cir. 1990); *Lewis v. Reagan*, 516 F.Supp. 548 (USDC DC 1981); *Goeller v. United States*, 109 Fed.Cl. 534 (Fed.Clms. 2013); *Kratz & Craig Surveying, Inc. v. Commissioner of Internal Revenue*, 134 T.C. 167 (2010); *Blanchard v. Blanchard*, 261 Ga. 11 (1991); and, *Albers v. Albers*, 2013-Ohio-2352 (Ct.Appls. 2013).

Coterminous Federal and State Acts

Buckstaff Bath House Co. also crystallized the command state unemployment acts are to be coterminous with the federal unemployment act, to wit:

The Act was designed therefore to operate in a dual fashion—state laws were to be integrated with the federal Act; payments under state laws could be credited against liabilities under the other. That it was designed so as to bring the states into the cooperative venture is clear. The fact that it would operate though the states did not come in does not alter the fact that there were great practical inducements for the states to become components of a unitary plan for unemployment relief. It is this invitation by the Congress to the states which is of importance to the issue in this case. For certainly, under the coordinated scheme which the Act visualizes, when Congress brought within its scope various classes of employers it in practical effect invited the states to tax the same classes. Hence, if there were any doubt as to the jurisdiction of the states to tax any of those classes it might well be removed by that invitation, for in absence of a declaration to the contrary, it would seem to be a fair presumption for that purpose of Congress to have state law as closely coterminous as possible with its own. To the extent that it was not, the hopes

for a coordinated and integrated dual system would not materialize.¹⁷

By the foregoing language, the decision created a first instance unemployment tax *presumption* state law was to be as closely coterminous as possible with Congressional unemployment enactments. This important presumption translates section 530 is made applicable to the states on recognizing the safe harbor provision contextually qualifies Chapter 23's definitional infrastructure.

Early on, state high courts embraced these tenets. For example, the California Supreme Court's *Butte County*¹⁸ decision counsels that state relied heavily on conformity to the federal act and uniform and harmonious operation among the several state acts as an inducement for that state to participate in the dual federal-state unemployment tax scheme. The *Butte County* Court further counseled, ". . . heed must be given to the federal act as interpreted by the rules adopted thereunder . . ." California, accordingly, respects the fundamental requirement coterminous federal and state acts must operate on a uniform and harmonious basis.

Exogenous Enactment Contextual Qualification

Section 530 of the Revenue Act of 1978 was enacted in response to taxpayer complaints concerning IRS worker

¹⁷ *Buckstaff Bath House Co.*, *supra*, at p. 363.

¹⁸ *California Employment Commission v. Butte County Rice Growers Association*, 25 Cal.2d 624, 643 (1944).

misclassification aggressiveness. The provision was originally intended as a temporary measure, but was made permanent by the Tax Equity and Fiscal Responsibility Act of 1982.¹⁹ It has since been amended by section 1706 of the Tax Reform Act of 1986 and section 1122 of the Small Business Job Protection Act of 1996.²⁰

Throughout its legislative history, section 530 has not been codified in Title 26, United States Code. The provision remains exogenous to the all titles of the United States Code. Its applicability to Title 26, subtitle C, however, is made clear by its opening statement: (a) Termination of Certain Employment Tax Liability. (1) In general. - If - (A) *for purposes of employment taxes . . .*" (*Emphasis added*). Unmistakably, Congress intended section 530 apply to employment taxes governed by Title 26, subtitle C. As a result, section 530 contextually qualifies Chapter 23's definitional infrastructure, including terms like employment, employer, and employee.

Exogenous contextual qualification of the employment tax definitional infrastructure was first generalized by the Supreme Court's in its *Rowan* decision.²¹ *Rowan* was decided in 1980, at a time after section 530's initial enactment and before its provisions were made permanent by the Tax Equity and Fiscal Responsibility Act of 1982. The principles elucidated by *Rowan's* teaching still prove controlling today

¹⁹ Weissman, *supra*.

²⁰ *Ibid*.

²¹ *Rowan Cos., Inc. v. United States*, 452 U.S. 247 (1981).

notwithstanding Congress's 1983 effort to "decouple" its holding.

First, *Rowan* makes clear Congress, by and through exogenous enactments (*e.g.*, subtitle A's section 119 employee gross income exclusion), alters, modifies, or supplants the (intra-title, inter-subtitle) definitional infrastructure (*e.g.*, subtitle C's definition of wages).²² Second, *Rowan's* holding translates the executive branch of government lacks the right, power, and authority to promulgate regulations interpreting endogenous definitions in a manner inconsistent with Congress's contextual mandate. And, third, *Rowan* proves executive branch regulations so promulgated will be invalidated.

Rowan Companies, Inc. owned and operated offshore oil and gas rigs. For its convenience, Rowan provided meals and lodging without cost to its employees pursuant to 26 U.S.C. §119 during those times they worked on the rigs. The employer did not include the value of the meals and lodging in computing its employees' "wages" for the purpose of paying taxes under either FICA (Chapter 21) or FUTA (Chapter 23). Furthermore, it did not include the value of the meals and lodging in computing "wages" for the purpose of withholding its employees' federal income taxes (Chapter 24).

²² Context is hierarchical. Here, hierarchy is accordingly regressed: (Article 1 Legislative Powers, inter-title United States Code): (inter-title United States Code: intra-title United States Code): (intra-title United States Code: inter-subtitle United States Code): (inter-subtitle United States Code: intra-subtitle United States Code): (intra-subtitle United States Code: inter-section). The point is, context is a function of hierarchical order.

Upon audit, the Internal Revenue Service included the fair value of the meals and lodging in the employees' "wages" for the purpose of FICA and FUTA, but not for the purposes of income tax withholding. In so doing, the IRS acted consistently with then current Treasury regulations interpreting the definition of FICA and FUTA "wages" to include the value of such meals and lodging, whereas the substantially identical definition of "wages" in the statutory provision governing income tax withholding were then interpreted by Treasury regulations to exclude this value. The corporation paid the additional assessment and brought suit for a refund in the United States District Court for the Southern District of Texas.

The district court granted the government's motion for summary judgment. The United States Court of Appeals for the Fifth Circuit affirmed,²³ expressing the view that the different interpretations of the definition of "wages" were justified by the different purposes of FICA and FUTA, on the one hand, and income tax withholding, on the other. The Supreme Court granted *certiorari*.

The *Rowan* Court reversed, holding meals and lodging for the convenience of the employer amounted to traditional notions of excludable wage income pursuant to 26 U.S.C. §119 and, by and through the enactment of that subtitle A section, Congress concomitantly excluded meals and lodging for the convenience of the employer from the definition of wages for

²³ The Fifth Circuit's *Rowan* decision is reported at 624 F.2d 701.

subtitle C, Chapters 21 (FICA) and 23 (FUTA), and Chapter 24 (federal income tax withholding) purposes. Distilled to a substantive generalization, the *Rowan* Court recognized (intra-title, inter-subtitle) contextual qualification and applied that contextual qualification to the term “wages.” It held when Congress qualified the definition of wages for subtitle A section 119 income exclusion purposes it concomitantly contextually qualified the definition of wages for subtitle C employment tax purposes.²⁴ Accordingly, the Court’s *Rowan* holding recognized legislative branch exogenous contextual qualification in matters involving an endogenous definitional infrastructure.

The *Rowan* Court also held, in a 6 to 3 decision, since the then prevailing Treasury regulations recognized Section 119 income wage excludable only for federal income tax withholding purposes and includable for FICA and FUTA purposes the regulations were invalid on the grounds and for the reasons the Treasury failed to implement the statutory definition of “wages” in a consistent and reasonable manner. This aspect of the *Rowan* holding has important implications both when states enact employment tax legislation outside the coterminous and uniform and harmonious operation

²⁴ Affordable Care Act commentators have raised the issue whether section 530 applies to subtitle D ACA excise taxes. See, e.g., Boeskin and Mort, *supra*. However, at least in the case of the forgoing commentators, the analysis fails to properly countenance *Rowan*’s inter-subtitle contextual qualification mandate. If the Court consistently applies *Rowan*’s inter-subtitle contextual qualification holding, the inescapable conclusion is section 530 subtitle C contextual qualification concomitantly contextually qualifies subtitle D ACA excise tax provisions.

mandate and when the Secretary of Labor approves such facially infirm state economic security acts.

In 1983, Congress took two steps to countermand *Rowan*’s holding. First, it provided for an employment tax specific wage exclusion of section 119 meals and lodging for the convenience of the employer.²⁵ Second, Congress enacted a provision “decoupling” federal income tax withholding wage definition from FICA and FUTA wage definition. The *Canisius College* Second Circuit considered Congress had, accordingly, overturned the general premise of *Rowan*.²⁶ Here, it is suggested Congress did not overturn *Rowan*’s general premise by the 1983 modifications. *Rowan*’s (intra-title, inter-subtitle) contextual qualification holding was and remains the decision’s true general premise. Congress lacks the right, power, and authority to overturn the Court’s interpretation of the contextual qualification framework. Rather, it was the specific application of that framework to the definition of wages for Chapter 24 versus Chapters 21 and 23 that Congress “decoupled.”²⁷

The Second Circuit’s *Canisius College* decision elucidates the significance of *Rowan*’s (intra-title, inter-subtitle) contextual qualification mandate. Payments made by

²⁵ *Canisius College v. United States*, 799 F.2d 18 (2nd Cir. 1986).

²⁶ *Ibid.*

²⁷ The anti-*Rowan* wage definition decoupling provisions are included in Chapter 21 at section 3121(a) (following paragraph 23) and in Chapter 23 at section 3306(b) (following paragraph 20).

Canisius College pursuant to its salary reduction plan were excludable from its employees' wages under section 403(b). However, Revenue Ruling 65-208 represented the notion such payments were nonetheless wages for FICA purposes notwithstanding they appeared to be excluded under 26 U.S.C. §3121(a)(2) as it then prevailed. The Second Circuit recognized *Rowan* essentially invalidated Revenue Ruling 65-208 on the same grounds and for the same reasons it had invalidated the regulations at issue in *Rowan*. However, the 1983 Congressional action intentionally made Revenue Ruling 65-208 retroactively valid, decoupling wage definition for Chapter 24 versus Chapters 21 and 23 purposes.

The foregoing series of events implicate *Rowan's* contextual qualification mandate remains viable for purposes of recognizing exogenous legislation contextually qualifies the endogenous definitional infrastructure in the absence of decoupling. Accordingly, *Rowan's* holding translates section 530 contextually qualifies the employment tax definitional infrastructure, including terms such as employment, employer, and employee. The confluence of *Rowan*, *Harmel*, and *Buckstaff Bath House Co.*, requires state acts to be coterminous with their federal progenitor to enable uniform and harmonious operation of the dual federal-state unemployment tax schema engineered by Congress. Therefore, section 530 applies to the definitional infrastructure of the several state economic security acts. State acts facially inconsistent with this extant jurisprudence

and approved by the Secretary of Labor, like Missouri's, run the risk of federal intervention.²⁸

Comparison of the Indiana and Missouri Economic Security Acts

Differences in respective key provisions included in the Indiana and Missouri economic security acts reveal Indiana's compliance with the coterminous section 530 contextually qualified definitional infrastructure. The comparison also demonstrates Missouri's disregard for such important employment tax public policy considerations by structuring its economic security act in a manner so as to evade Congress's section 530 contextual qualifications, replacing it with its own standard. This one example of fundamental coterminous inconsistency destroys the uniform and harmonious operation of the dual federal-state unemployment tax schema recognized as the program's most important characteristic by other states, like California.

The Indiana Department of State Revenue's 2013 Section 530 Revenue Ruling

On March 19, 2013, the Indiana Department of State Revenue issued its Revenue Ruling #2013-02 ST. The ruling is interesting for the reason its dictum includes an anti-Section-530 diatribe while its holding conforms to Congress's section 530 contextual qualification. In the ruling's holding, the

²⁸ Federal intervention may be justified on the basis of substantive due process underscored by the doctrine of separated powers and ordered liberty. See, e.g., Brown, R. L. (June 1991). Separated powers and ordered liberty. *University of Pennsylvania Law Review*, 139 U.Pa.L.Rev. 1513.

Indiana Department of State Revenue concedes it will follow the IRS's transparent Section 530 determination and, thereupon, forewarns once the IRS's determination changes so will the state's worker misclassification position.

Indiana has enacted an economic security act provision embracing this paper's arguments: when Congress contextually qualifies definitions under 26 U.S.C. §§3301, *et seq.*, (FUTA), it concomitantly imposes such contextual qualifications upon the states by and through well settled decisional law, including *Harmel*, *Buckstaff Bath House Co.* and *Rowan*. The Indiana Revised Statutes bear witness, to wit:

Section 22-4-37-1. Securing benefits of federal acts -- Rules to effectuate authorized.

It is declared to be the purpose of this article to secure to the state of Indiana and to employers and employees therein all the rights and benefits which are conferred under the provisions of 42 U.S.C. 501 through 504, 42 U.S.C. 1101 through 1109, 26 U.S.C. 3301 through 3311, and 29 U.S.C. 49 *et seq.*, and the amendments thereto. Whenever the department shall find it necessary, it shall have power to formulate rules after public hearing and opportunity to be heard whereof due notice is given as is provided in this article for the adoption of rules pursuant to IC 4-22-2, and with the approval of the governor of Indiana, to adopt such rules as shall effectuate the declared purposes of this article.

As a result and by the express language of the foregoing provision, Indiana has embraced Congress's contextual qualification of FUTA's definitional infrastructure.

Missouri's Non-Coterminous, Non-Uniform, Non-Harmonious Unemployment Tax Framework

By contrast, Missouri Revised Statutes Section 288.304 appears to challenge the weight of the foregoing authority and Congress's sole right, power, and authority to contextually qualify FUTA definitions. Missouri's definition of the term "employment" exhibits this authoritative indifference, to wit:

Employment defined.

288.034. 1. "Employment" means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied, and notwithstanding any other provisions of this section, service with respect to which a tax is required to be paid under any federal unemployment tax law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or which, as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act, is required to be covered under this law.

By this provision, Missouri's employment definition starting point references FUTA's taxable obligation. While Indiana's Act embraces the totality of Chapter 23, including section 3306's definitions, Missouri's Act begins with

Congress's taxable FUTA base and then delineates its further inclusions and exclusions. That is, Missouri's Act creates an illusory appearance of uniform and harmonious operation with the federal progenitor. Poignantly, Missouri adds back its own worker classification definition in section 288.034(5):

5. Service performed by an individual for remuneration shall be deemed to be employment subject to this law unless it is shown to the satisfaction of the division that such services were performed by an independent contractor. In determining the existence of the independent contractor relationship, the common law of agency right to control shall be applied. The common law of agency right to control test shall include but not be limited to: if the alleged employer retains the right to control the manner and means by which the results are to be accomplished, the individual who performs the service is an employee. If only the results are controlled, the individual performing the service is an independent contractor.

There is some evidence the state of Missouri recognizes it does not currently comply with Congressional section 530 contextual qualification of the unemployment tax definitional infrastructure. HB 1642 was introduced into the Missouri House of Representatives on January 29, 2014.²⁹ Among other things, the bill amends chapter 285, Missouri

²⁹ The activity history for HB 1642 may be retrieved here: <http://www.house.mo.gov/billactions.aspx?bill=HB1642&year=2014&code=R>.

Revised Statutes. The bill introduces new section 285.517 which provides:

285.517. Notwithstanding any provision of sections

285.500 to 285.515 or any other provision of law to the contrary, for any taxpayer undergoing an audit conducted by the department of labor and industrial relations regarding classification of an individual as an independent contractor or employee, if the taxpayer has been granted relief from the imposition of federal employment taxes under Section 530 of the Revenue Act of 1978, as amended, for an individual, with the result that the taxpayer can continue to classify the individual as an independent contractor for purposes of federal employment taxes, the department of labor and industrial relations shall allow the taxpayer to classify the individual as an independent contractor for purposes of Missouri employment taxes.

HB 1642 passed the Missouri House of Representatives on March 27, 2014 by a vote of 87 to 53. The bill is now before the Missouri Senate. If the provision becomes law, it would bring Missouri closer to coterminous compliance with the federal act to the extent of a prior IRS determination.³⁰

³⁰ One case is currently pending before the Missouri Division of Economic Security wherein the employer has an Internal Revenue Service letter granting section 530 relief for the unemployment tax year ending December 31, 2011. The IRS recognizes the employer met the information reporting and consistent treatment requirements. The IRS recognized the employer had a reasonable basis for treating the workers as independent contractors pursuant to section 530(a)(2)(A). Compliance with that safe harbor

However, Missouri would not yet be in *complete* compliance with Congressional section 530 contextual qualification of the employment tax definitional infrastructure. That is, an original Missouri Division of Economic Security determination would not be bound by section 285.517.

In apparent response to the passage of HB 1642 by the Missouri House of Representatives, the U. S. Department of Labor (Administrator, Office of Unemployment Insurance) sent a letter to the Director of the Missouri Department of Labor and Industrial Relations on April 21, 2014.³¹ The letter's first sentence reads, "We have reviewed Missouri House Bill (HB) 1642, as passed by the House, *for conformity to Federal unemployment compensation (UC) law.*" As a result, it is transparent the U.S. Department of Labor recognizes it has a duty to review the several states economic security acts to ensure such acts are coterminous and uniform and harmonious with the federal progenitor prior to approving same.

The DOL, on page three of the letter, objects to HB 1642 recognizing federal section 530 determinations as conclusive in Missouri Division of Economic Security audits. First, the letter claims Revenue Procedure 85-18 "does not

provision creates a conclusive presumption the workers are not to be treated as employees. See, *General Investment Corporation, infra*. The Missouri Division of Economic Security continues to maintain a position section 530 is inapplicable to its economic security act.

³¹ A copy of the April 21, 2014 DOL can be found at: https://www.academia.edu/8399054/Exhibit_A-April_21_2014_DOL_Letter_to_MODES

convert individuals from the status of employee to the status of self-employed." However, the Ninth Circuit's *General Investment Corporation* decision concludes compliance with section 530's reporting, consistency, and section 530(a)(2)(c)'s reasonable basis requirements creates a *conclusive presumption* the workers are not to be treated as employees.³²

Second, DOL's April 21, 2014 letter boldly declares, "Missouri UC law may not offer the same relief as provided in section 530." This statement is in direct contravention to *Rowan's* contextual qualification holding. Moreover, it is also in direct contravention to the Ninth Circuit's *General Investment Corporation* conclusive presumption holding.

It appears the Obama administration attempted to influence the Missouri state government not to enact HB 1642. The Missouri House of Representatives passed HB 1642 on March 27, 2014 and the bill was reported to the Missouri Senate four days later.³³ Before the Missouri Senate voted on the bill, the Department of Labor delivered its April 21, 2014 letter. The appearance the Obama administration's DOL letter was written to influence the Missouri state government's action not to enact HB 1642 is beyond the pale.

Taken together, the *Harmel, Buckstaff Bath House Co., Rowan* unemployment tax jurisprudence realizes section 530 applies to the economic security acts of the several states.

³² *General Investment Corporation v. United States*, 823 F.2d 337 (9th Cir. 1987).

³³ See note 23, *supra*.

Coterminous and uniform and harmonious operation of the dual federal-state unemployment tax schema was an important consideration for states subscribing to the program. When some states embrace Congress' section 530 contextual qualification and others do not, the promise of uniformity and harmony is destroyed. It appears the Obama administration's interference in the section 530 Congressional will to contextually qualify the unemployment tax definitional infrastructure implicates separated powers substantive due process. Federal intervention looms on the horizon.