

Subject

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Labor
Employment Security
Division



STATE OF KANSAS

Office of the Attorney General

State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

VERN MILLER
Attorney General

June 3, 1974

Opinion No. 74- 165

Mr. Bob Kent
Executive Director
Kansas Employment Security Division
Department of Labor
401 Topeka Avenue
Topeka, Kansas 66603

Dear Mr. Kent:

K.S.A. 44-703 (i) (4) provides in pertinent part: "The term 'employment' shall not include: * * * (4) Agricultural labor". [Emphasis supplied.]

In Brookover Feed Yards, Inc. v. Carlton, Commissioner, 213 Kan. 684, it is stated at Syllabus 3:

"In a proceeding by the state labor commissioner to establish liability of a corporate feedlot operator for contributions under the employment security act (K.S.A. 44-701, et seq., as amended), the record on appeal is examined and it is held: The services performed by the corporation's employees, as set forth in the opinion, constitute "agricultural labor" within the meaning of the exemption clause of the act."

You state that approximately fifty employers who operate commercial feedlots may as a result of Brookover, supra, now elect against paying employer's contributions under the Employment Security Law. Several of these employers have made contributions for a number of years (since 1958). Some have paid contributions under "protest." The following questions are posed relative to refund of contributions:

"Would the employer who has been paying contributions to the fund since 1958 be entitled to a refund

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of all monies paid if no application for refund was received from the employer prior to January 26, 1974?

"If a three (3) year limitation on refunds is imposed by this section, would the three year period extend back from the employer's initial request for refund of contributions or protest of liability established under the law? Several requests for refund were received from employers prior to receiving a decision from the Supreme Court.

"If a three year limitation applies and refunds are initiated by the Commissioner, would we be correct in using the date of the Supreme Court decision to establish the application date of an employer for refund?"

, K.S.A. 44-717(h) provides:

"If any individual or organization makes application for refund or adjustment of any amount paid as contributions or interest under this law and the commissioner shall determine that such amount or any portion thereof was erroneously collected, the commissioner shall allow such individual or organization to make an adjustment thereof without interest, in connection with subsequent contribution payments by him, or if such adjustment cannot be made the commissioner shall refund said amount, without interest, from the employment security fund with this exception: All interest erroneously collected which has been paid into the special employment security fund shall be refunded out of the special employment security fund. No adjustment or refund shall be allowed with respect to a payment as contributions or interest unless an application therefor shall be made on or before whichever of the following dates is later (1) one year from the date on which such payment was made; or (2) three years from the last day of the period with respect to which such payment was made. For like cause and within the same period adjustment or refund may be so made on the commissioner's own initiative. The division shall not be required to refund any contributions based upon wages paid which have been used as base-period wages in a determination of a claimant's benefit rights when justifiable and correct payments have been made to the claimant as the result of such determination."

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Unemployment compensation contributions are generally categorized as taxes. Relief from unauthorized or wrongful collection is subject to the general rules applicable to taxes. Howes Bros. Co. v. Massachusetts Unemployment Compensation Commission, 296 Mass. 275, 5 N.E.2d 720. Strict compliance with statutory procedures relative to the recovery of tax payments is required.

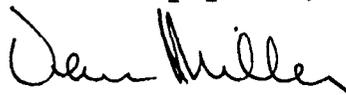
We note that K.S.A. 44-717(h), above, requires that individuals or organizations make application for refunds. In the absence of an application the commissioner may on his own initiative "[f]or like cause and within the same period" make refunds. Accordingly, in our opinion, claimants who have paid into the fund without making application for refund are entitled to recover only those payments within one of the two periods specified -- "whichever . . . is later." [Emphasis supplied.]

Since the issue of liability for corporate feedlot operations has been litigated to the highest court in the state, the date of the Supreme Court opinion, January 26, 1974, should serve as the date from which calculations regarding refunds should be made.

For employers who have filed applications for refund prior to the date of the Brookover opinion, the calculation for refund must be based on the date the application was received by the Commissioner.

We are hopeful that the foregoing will be of assistance.

Sincerely yours,



VERN MILLER
Attorney General

VM:DRH:jsm