232.

UNEMPLOYMENT COMPENSATION ACT — BUILDING AND LOAN ASSOCIATION — APPRAISERS NOT EMPLOYES WHEN PAID BY PROSPECTIVE BORROWER—CLASSIFICATION "EXTRA WORKER"—CONTRACT OF EMPLOYMENT—"EMPLOYE" CLASSIFIED.

SYLLABUS:

1. Appraisers of a building and loan association are not "employes" of the building and loan association within the meaning of the Unemployment Compensation Act where they are paid for their services directly by the prospective borrower.

2. An employe who spends but from two to four hours a week in performing and conducting the business of a building and loan association which meets but once a week should not be classified as an "extra worker" as that term is used in Section 1345-1c (E) (9), General Code, where such association has no other employes regularly conducting its business.

3. Where an employer has but two regular employes services per-

formed by an extra worker on not more than one day in any calendar week do not make the employer subject to the Act.

4. Where an employer is subject to the Act, the services performed by an extra worker and the wages paid to him make it necessary for the employer to pay greater contributions.

5. Officers and directors of a building and loan association are not, as such, "employes" within the meaning of the Unemployment Compensation Act, but they may perform additional duties under a contract of hire which might make them "employes" within the meaning of the Act. Employes of a building and loan association meeting but once a week, who are otherwise gainfully employed and whose income from the building and loan association is not less than forty per cent (40%) of the total income, are "employes" within the meaning of the Act.

COLUMBUS, OHIO, March 2, 1939.

HON. CHARLES S. MERION, *Supt. Division of Building and Loan Ass'ns, Department of Commerce, Columbus, Ohio.*

DEAR SIR: I have your letter of recent date in which you request my opinion concerning the Unemployment Compensation Act as follows:

> "I respectfully request a determination of the following questions:
>
> *Question 1.*
>
> Are appraisers of a building and loan company *employees* of the building and loan association under the Act and under the following statements of facts:
>
> (a) Appraisers are paid for their services directly by the borrowers, no payment for such services passing through the building and loan association's books and such payment for services, in most instances, being paid after the application for a loan has been made, but before such appraisal is made.
>
> (b) The building and loan association has no control or direction over the appraisers as to governing appraisal, time when appraisal is made, or when appraisal is reported.
>
> (c) Appraisers' services are not required at definite, stated times, but only as loans are applied for to the building and loan association, and reach a volume of five or ten or more appraisals a year.
>
> (d) All appraisers are engaged in other businesses, trades or occupations, from which they derive an income.
>
> *Question 2.*
>
> Is an employee, who is required to spend but from two to four hours a week in the performance of his work properly

classified under the Act as an 'extra worker', as defined in Section 1345-1-E, when considering the following statement of facts:

(a) Building and loan association meets and conducts its business but one day a week.

(b) Those who perform or conduct the business spend from two to four hours a week in the performance of such work, which is short of one day's work a week.

Question 3.

Where an employer has but two full time employees, does the Act provide that 'extra workers' are counted as employees to bring the employer under the scope of the Act?

Question 4.

Where an employer comes under the provisions of the Act by having three or more regular employees, do the 'extra workers' make it necessary for payment of a greater contribution?

Question 5.

Are employees, officers, and directors of building and loan associations, meeting but once each week, and who are otherwise gainfully employed, and whose income from the building and loan association is not less than forty per cent (40%) of his total income, exempt from the provisions of the Act?

(a) Such persons who did contribute would not be able to receive the benefits under the Act."

The five questions presented in your letter will be discussed seriatim in the same order in which they appear.

The answer to your first question depends on the proper analysis of Sections 1345-1c and 1345-1f, General Code. Section 1345-1c, supra, is quoted in part as follows:

" 'Employment' means service, including service performed in interstate commerce, performed for remuneration under any contract of hire, written or oral, express or implied."

It is expressly provided by the above quoted language that service is employment only when it is performed for remuneration under a contract of hire.

Section 1345-1f reads as follows:

" 'Remuneration' means all compensation payable for personal services, including commissions and bonuses and the cash value of all compensation payable in any medium other than cash.

> Gratuities customarily received by an individual in the course of his employment from persons other than his employer, shall be treated as wages payable by his employer. The reasonable cash value of compensation payable in any medium other than cash, and the reasonable average amount of gratuities, shall be estimated and determined in accordance with rules prescribed by the commission."

In the case put by you in paragraph (a) of the first question in your letter, the appraisers do not receive any remuneration from the building and loan association for their services as appraisers, but are paid by the prospective borrowers. It is a matter of common knowledge that the prospective borrower is required to pay the appraisers for their services, and that such payment is in no wise optional with the borrower or dependent upon his generosity. Hence such a payment is not a gratuity, which is really nothing more than a tip. While it is expressly provided that gratuities, customarily received from persons other than the employer, shall be treated as wages payable by the employer, there is no such provision with respect to compensation which is *required* to be paid by persons other than the employer. The maxim, expressio unius est exclusio alterius, applies to this situation and payments required to be made by persons other than the employer are not "remuneration" within the meaning of the term as used in the Unemployment Compensation Act.

These considerations constrain me to the conclusion that services of appraisers for a building and loan association do not constitute "employment" within the meaning of the term as it is used in the Unemployment Compensation Act where such appraisers are paid for their services solely by the prospective borrower and not by the building and loan association. This conclusion makes it unnecessary to consider and discuss the situation presented by paragraphs (b), (c) and (d) in question one of your letter.

In this connection I am not unmindful of Section 9646-4, General Code, but I assume that the appraisers in question do not come within the terms of said section.

The second question in your letter presents a problem of who shall be considered as an "extra worker" under the terms of the Act. Section 1345-1c (E) (9), General Code, provides in part as follows:

> "The term employment shall not include:
>
> * * * * * * * * *
>
> Services performed as an 'extra' worker on not more than one day in any calendar week. (For the purpose of paying contributions under section 1345-4 of the General Code, this item shall not be excepted from the definition of employment subject to this act.)"

It appears from the statement of facts contained in your letter that

the building and loan association meets one day a week and that those who perform and conduct its business spend from two to four hours a week in the performance of such work. While you do not so state, I think it can be fairly assumed that such persons are the employes who ordinarily and usually conduct its business.

The statute does not define an "extra worker" as one who works not more than one day in any calendar week, but merely provides that services performed by an "extra worker" on not more than one day in any calendar week are not to be included in the term "employment". What constitutes an "extra worker" must, therefore, be determined according to the ordinary and usual meaning of the term. The word "extra" is used in contradistinction to ordinary or regular. It seems obvious that there could not be extra workers unless there were also usual or regular workers. It would, therefore, seem that an employe of a building and loan association, meeting and conducting its business on but one day each week and who works from two to four hours a week in performing and conducting said business, is a regular employe and not an "extra worker" within the meaning of the Unemployment Compensation Act. If it were otherwise, we would have the anomalous situation of a building and loan association having extra employes but no regular ones.

The solution to the problem presented by the third question in your letter depends upon a proper construction of Sections 1345-1b (1), 1345-1c (E) (9) and 1345-4, General Code. Section 1345-1b (1) provides in part as follows:

> " 'Employer' 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 the successor thereof, or the local representative of a deceased person who (which) has, or subsequent to December 31, 1936, had in *employment* three or more individuals at any one time within the current calendar year; * * *" (Italics mine.)

Section 1345-1c (E) (9), supra, has been heretofore quoted herein and need not be repeated. Suffice it to say that it provides that the term "employment" does not include services performed as an extra worker on not more than one day in any calendar week. Since Section 1345-1b (1), supra, defines an employer as one who has in *employment* three or more persons at any one time and since Section 1345-1c (E) (9), supra, provides that *employment* shall not include services performed as an extra worker on not more than one day in any calendar week, a person or corporation who has two regular employes and employs the services of an extra worker on not more than one day in any calendar week is not an "employer" within the meaning of the act.

Section 1345-4, supra, requires only employers to contribute to the fund and a person who is not an "employer" within the meaning of the Act would, therefore, be under no legal obligation to make contributions. It should be noted that service performed by extra workers on more than one day in any calendar week constitutes employment. Hence, any person who has two regular employes and who uses the services of an extra worker on more than one day in any calendar week is an "employer" within the meaning of the Act and is required to make the contributions.

The answer to your fourth question is definitely and positively contained in Section 1345-1c (E) (9) heretofore quoted. The matter contained in the parenthesis expressly requires employers, who are subject to the Act, to make contributions on account of wages paid to extra workers.

Question five in your letter will be considered first as it affects officers and directors. In this connection, it is believed that much assistance can be derived from the construction placed on analogous sections in the Workmen's Compensation Act. Section 1465-61, General Code, in part defines an employe as follows:

> "Every person in the service of any person, firm or private corporation, including any public service corporation, employing three or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, * * *."

It will be noted that this language is very similar in its essential terms to Section 1345-1c, supra, and it, therefore, is reasonable to assume that the Legislature intended similar language used in the two acts should have substantially the same meaning. In 1919, Section 1465-61, supra, was considered by the then Attorney General and at page 702 of Vol. I of the Opinions of the Attorney General for the year 1919, the following language was used:

> "* * * Some discrimination is necessary. On the one hand we may start from the proposition that an officer of a corporation, properly speaking, such as a member of its board of directors, which it must have under the laws of the state, or its president and secretary, which it probably will have by virtue of its regulations, are not in the service of the company. As heretofore pointed out, the word 'service' necessarily implies a contractural relation—a hiring. Officers are, however, not *hired or employed under contract, but elected or appointed.* They can not complain of breach of contract as such, if they are supplanted or ousted before the expiration of their terms of office. Their objections to such procedure would have to be grounded upon an entirely different set of legal principles. This alone is sufficient to justify

the first proposition laid down in the statement of the commission's decision which I have quoted.

On the other hand, it is equally clear, as intimated therein, that a person may actually be a servant or employe of a corporation and at the same time one of its officers. This is very frequently the case. The president may be the general manager and his position as general manager would be rather that of an employe than that of an officer. The president of a mercantile company might very well be its sales manager and its secretary its buyer. They would be none the less employes or servants of the company because of their distinct relation to it as officers." (Italics mine).

This language is peculiarly applicable to your question. I realize, of course, that only the Workmen's Compensation Act was being construed in the opinion but in view of the close similarity of the language used in the two acts in defining the term "employe", the quoted portion of the opinion is especially pertinent to the present problem. Officers and directors of a building and loan association are not employed under contract of hire but are elected or appointed. If they were ousted or supplanted before the expiration of their terms of office, their remedy would not be an action for breach of contract. It must, of course, be kept in mind that officers and directors may perform other duties in addition to those which they perform as officers or directors and in such case they may become employes. In consonance with the foregoing observations, you are advised that the officers and directors of a building and loan association are not, as such, "employes" as defined in the Unemployment Compensation Act, but such officers or directors may act in an additional capacity which may make them employes.

Your fifth question raises the further problem of whether the services of employes of a building and loan association are "employment" within the meaning of the Act where such association meets but once a week and where such employes are otherwise gainfully employed and derive not less than forty per cent (40%) of their income from the building and loan association. You suggest that such persons would never be eligbile to receive benefits under the Act even if their connection with the building and loan association were entirely severed.

It is not necessary to consider whether an employer could be compelled to make contributions to the fund where his employes under no conceivable state of facts would ever be eligible to receive benefits under the Act. The employes of the building and loan association in question might not only sever their connection with the building and loan association, but also cease to be otherwise gainfully employed. Under such a situation they would perhaps be eligible to receive benefits under the act. There is no provision in the Act which would exempt building and loan associations,

under the set of facts contained in your fifth question, from making contributions with respect to wages paid their employes and as has been heretofore noted, such employes might conceivably be eligible to receive the benefits.

I am, therefore, of the opinion that in so far as employes are concerned, the building and loan associations must make the contributions based on the wages paid to such employes even though they are otherwise gainfully employed and receive not less than forty per cent of their income from the buliding and loan associations.

In conclusion, I am, therefore, of the opinion that: (1) Appraisers of a building and loan association are not "employes" of the building and loan association within the meaning of the Unemployment Compensation Act where they are paid for their services directly by the prospective borrower; (2) An employe who spends but from two to four hours a week in performing and conducting the business of a building and loan association which meets but once a week should not be classified as an "extra worker" as that term is used in Section 1345-1c (E) (9), General Code, where such association has no other employes regularly conducting its business; (3) Where an employer has but two regular employes services performed by an extra worker on not more than one day in any calendar week do not make the employer subject to the Act; (4) Where an employer is subject to the Act, the services performed by an extra worker and the wages paid to him make it necessary for the employer to pay greater contributions; (5) Officers and directors of a building and loan association are not, as such, "employes" within the meaning of the Unemployment Compensation Act, but they may perform additional duties under a contract of hire which might make them "employes" within the meaning of the Act. Employes of a building and loan association meeting but once a week, who are otherwise gainfully employed and whose income from the building and loan association is not less than forty per cent (40%) of the total income, are "employes" within the meaning of the Act.

Respectfully,
THOMAS J. HERBERT,
Attorney General.