

EMPLOYMENT SECURITY:  
CONSTITUTIONAL LAW:

1. The legislative history of the Reed Act, which provides for advances to States with depleted reserve accounts for the purpose of assisting them in the financing of their unemployment benefit payments, indicates that the advances are not regarded as a "loan to the State." 2. Any advance which would be received by the State of Missouri from the Federal Government under Title XII of the Social Security Act (42 U.S.C.A. § 1321) does not create a liability of the State of Missouri. 3. The receipt of advances by the State of Missouri under Title XII of the Social Security Act (42 U.S.C.A. § 1321) would not be in violation of Article III, Section 37 of the Missouri Constitution or subsection 1 of Section 288.330, RSMo 1969.

OPINION NO. 182

October 3, 1975

Mr. Geoffrey McCarron, Director  
Department of Labor and Industrial Relations  
421 East Dunklin Street  
Jefferson City, Missouri 65101



Dear Mr. McCarron:

This is to acknowledge receipt of your request for a formal opinion from this office which reads as follows:

"Can the State of Missouri, Division of Employment Security receive advancements of money appropriated by the Federal Congress for the payment of Unemployment Compensation benefits? Such advancements will be placed in the Missouri Unemployment Trust Fund Account which is part of the Unemployment Trust Fund established in the Treasury of the United States under Section 904 of the Social Security Act. Advancements bear no interest. They are part of the Unemployment Compensation Fund established by Section 288.290, RSMo, needed for payment of unemployment benefits."

In addition, you further indicate as follows:

"In the last session of the Missouri Legislature a bill was passed and signed by Governor Bond (S. B. 325) increasing the

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maximum amount of unemployment benefits from \$67.00 to \$85.00 per week. The weekly benefit amount was increased from 4% to 5% of total wages paid to an eligible insured worker during that quarter of his base period in which his base period was highest. There was an insignificant tax increase on employers. Thus, the unemployment benefit account may become insufficient to pay benefits. The Federal law provides for loans for such purposes. The problem is whether Missouri can borrow from the Federal Government for the purpose of paying such benefits."

We have also been informed that it has been projected that as a result of the passage of the above legislation, the Unemployment Compensation Fund will be depleted by March, 1976.

In your opinion request you did not specifically refer to what Federal legislation is involved, but based on the memorandum attached to your request, we are presuming that you are referring to Section 1201 of Title XII of the Social Security Act (42 U.S.C.A. § 1321), commonly referred to as the Reed Act, which permits the Governor of the State to request and receive for the State's account, advances from the Federal Unemployment Trust Fund under certain conditions. In addition, based on the memorandum attached to your request, the presumption is made that you are requesting our opinion as to whether or not the receipt of such advances by the State of Missouri would be in violation of Article III, Section 37 of the Missouri Constitution or subsection 1 of Section 288.330, RSMo 1969.

In connection with the above, Article III, Section 37 of the Missouri Constitution provides as follows:

"The general assembly shall have no power to contract or authorize the contracting of any liability of the state, or to issue bonds therefor, except (1) to refund outstanding bonds, the refunding bonds to mature not more than twenty-five years from date, (2) on the recommendation of the governor, for a temporary liability to be incurred by reason of unforeseen emergency or casual deficiency in revenue, in a sum not to exceed one million dollars for any

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one year and to be paid in not more than five years from its creation, and (3) when the liability exceeds one million dollars, the general assembly as on constitutional amendments, or the people by the initiative, may also submit a measure containing the amount, purpose and terms of the liability, and if the measure is approved by a majority of the qualified electors of the state voting thereon at the election, the liability may be incurred, and the bonds issued therefore must be retired serially and by instalments [sic] within a period not exceeding twenty-five years from their date. Before any bonds are issued under this section the general assembly shall make adequate provision for the payment of the principal and interest, and may provide an annual tax on all taxable property in an amount sufficient for the purpose."

Also, subsection 1 of Section 288.330, RSMo 1969, reads as follows:

"1. Benefits shall be deemed to be due and payable only to the extent that moneys are available to the credit of the unemployment compensation fund and neither the state nor the division shall be liable for any amount in excess of such sums. Neither the state of Missouri, nor any person or agency acting for it, may under any circumstance by issuing bonds or otherwise borrow money from any source whatsoever to pay benefits hereunder." (Emphasis added)

In view of the above provisions, it is submitted that the primary issue for consideration is whether or not an "advance" received from the Federal unemployment account in the Unemployment Trust pursuant to Section 1201 of Title XII of the Society Security Act (42 U.S.C.A. § 1321) constitutes a "borrowing" which creates a "liability of the state" in violation of subsection 1 of Section 288.330, RSMo 1969, and Article III, Section 37 of the Missouri Constitution.

I

LEGISLATIVE HISTORY OF REED ACT

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Before proceeding further, it is our view that a discussion of the legislative history of the Reed Act would be helpful to an understanding of the problem. In 1935, the Federal Unemployment Tax was a 3% tax levied upon payrolls (up to the first \$3,000 of annual income of workers) of all employers of 8 or more workers during 20 weeks in the year in all but certain specified categories of employment. The employer was permitted to offset up to 90% of the Federal tax (2.7% of taxable payrolls) with any taxes paid to an unemployment insurance system under the laws of the State in which he did business.

In 1935, Congress passed the unemployment tax provisions of the Social Security Act, and at that time, it was believed that 10% of the total cost of the unemployment compensation program would be needed for administrative expenses. Therefore, the law provided the maximum offset of 90% (2.7% of taxable wages) and reserved 10% for the Federal Government. Federal tax collections from this source were not earmarked for employment security purposes, but instead went into the general fund of the United States Treasury. Each year the Congress of the United States would appropriate money to the States to cover the administrative expenses of this program. However, over the years and contrary to the expectation of the United States Congress, the unemployment tax collection on the Federal level exceeded in each year, the actual appropriation necessary to fund the administrative costs of the program. As a result, the Congress of the United States amended the Social Security Act of 1954 by passing the so-called Reed Bill. One of the principal features of the bill was to establish and maintain a \$200 million reserve in the Federal unemployment account which would be available for advances to the States with depleted reserve accounts for the purpose of assisting them in the financing of their unemployment benefit payments. It was indicated that the two basic needs to which these excess tax collections should be devoted were for the protection of the State trust accounts against the contingency of insolvency and to provide for greater flexibility in administrative operations. See Senate Report No. 1621 dated June 18, 1954 (which accompanied the original Reed Act), 1954 U.S. Cong. & Adm. News, Vol. 2, 83d Cong. 2d Sess. pp. 2909, 2911. In this regard, the original Title XII provided as follows:

"Sec. 1201. (a) If--

'(1) the balance in the unemployment fund of a State in the Unemployment Trust Fund at the close of September 30, 1953, or at the close of the last day in any ensuing calendar quarter, is less than the

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total compensation paid out under the unemployment compensation law of such State during the twelve-month period ending at the close of such day;

' (2) the Governor of such State applies to the Secretary of Labor during the calendar quarter following such day for an advance under this subsection; and

' (3) the Secretary of Labor finds that the conditions specified in paragraphs (1) and (2) have been met,

the Secretary of Labor shall certify to the Secretary of the Treasury such amounts as may be specified in the application of the Governor, but the aggregate of the amounts so certified pursuant to any such application shall not exceed the highest total compensation paid out under the unemployment compensation law of such State during any one of the four calendar quarters preceding the quarter in which such application was made. For the purposes of this subsection, (A) the application shall be made on such forms, and shall contain such information and data (fiscal and otherwise) concerning the operation and administration of the State unemployment compensation law, as the Secretary of Labor deems necessary or relevant to the performance of his duties under this title, and (B) the term "compensation" means cash benefits payable to individuals with respect to their unemployment, exclusive of expenses of administration.

"(b) The Secretary of the Treasury shall, prior to audit or settlement by the General Accounting Office, transfer from the Federal unemployment account to the account of any State in the Unemployment Trust Fund the amounts certified under subsection (a) by the Secretary of Labor (but not exceeding that portion of the balance in the Federal unemployment account at the time of such transfer which is not restricted as to

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use pursuant to section 903 (b)). Any amount so transferred shall be an advance which shall be repaid (without interest) by the State to the Federal unemployment account in the manner provided in subsections (a) and (b) (1) of section 1202." (Emphasis added)

In addition, the following comment was made in the 1954 U.S. Cong. & Adm. News, Vol. 2, 83d Cong. 2d Sess. at p. 2910:

"(5) Repayment of the advances obtained by States in accordance with the above conditions are to be made by either (a) transfer of funds from the trust account of the borrowing State (at the direction of its governor) to the Federal unemployment account, or (b) a decrease in the 90 percent allowable credit against the 3 percent Federal unemployment tax. . . ."

Also, the following comment was made at p. 2911:

"The provision of a loan account, as established under H.R. 5173, from which States with depleted accounts may secure repayable advances, recognizes the Federal interest in protecting the solvency of State trust accounts in a manner consistent with the original intent that States be charged with ultimate responsibility in financing the benefits which they elect to provide."

Thus, it would appear at first glance that originally the "advances" were considered by the Federal Government to be "loans" which were to be repayable by the State itself.

Subsequently in 1960, in very broad amendments to the Social Security Act, the Congress of the United States also made changes in the Unemployment Compensation Act by specifically amending Section 1201 of Title XII of the Social Security Act. Originally, the House Bill, among other things, included an amendment for improvements in the operation of the Federal unemployment account by tightening the conditions pertaining to eligibility for and repayment of advances to States with depleted reserve accounts. This was the only house amendment adopted by the conference committee. In addition, the committee's bill provided for a larger "loan fund" by increasing the amount authorized to be built up in the Federal unemployment account from \$200 million to \$500 million. See 1960 U.S.

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Cong. & Adm. News, Vol. 2, 86th Cong. 2d Sess. p. 3661. Also, in House Report No. 1799, 86th Cong. 2d Sess. submitted by Congressman Wilbur Mills, he made the following comment at p. 51:

"Broadly, the purpose of these amendments is to provide adequate funds for administration and for advances to the States whose unemployment reserves have been depleted by heavy unemployment. The amendments will improve the operation of the present "loan" fund in several particulars."

As is indicated above, the words "loan fund" are again used. As will be demonstrated, this was probably a casual misuse of language. In any event, it is clear that the amendment did not provide for obligatory repayment by the State itself. At p. 54 of the same Mills' report, the repayment provisions are characterized as follows:

"Advances made to a State after the enactment of your committee's bill, if not repaid by the State within the specified period of time [and this method is made totally optional with the Governor of each State], will be repaid under newly added provisions to the section providing for repayment of an advance through reduction in employers' credits against the Federal Unemployment Tax." (Emphasis added)

It is to be noted that the monies are now termed "advances." In addition, the amendment to Section 1201 as set forth in the 1960 U.S. Cong. & Adm. News, Vol. 2, 86th Cong. 2d Sess. pp. 3706, 3707, provides as follows:

"SECTION 1201. ADVANCES TO STATE  
UNEMPLOYMENT FUNDS

(a) Advances--Subsection (a) of section 1201 provides that advances shall be made to the States from the Federal unemployment account in the Unemployment Trust Fund under the conditions specified and shall be repayable (without interest) in the manner provided in the following provisions of the Social Security Act:

(1) Section 901(d) (1) relating to repayment by the transfer to the

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Federal unemployment account of the additional tax received by reason of the reduced credits provisions of section 3302(c) (2) or (3) of the Federal Unemployment Tax Act, and the crediting of the amount so transferred against the balance of outstanding advances made to the State.

(2) Section 903(b)(2) relating to repayment by the transfer to the Federal unemployment account of the amount that otherwise would be transferred to the account of a State to be credited against the balance of outstanding advances made to the State; and

(3) Section 1202 relating to repayment by a State of outstanding advances by transfers from the State account."

To summarize the foregoing discussion, prior to the 1960 amendment, Section 1201 of Title XII (42 U.S.C.A. § 1321) reads as follows:

". . . Any amount so transferred shall be an advance which shall be repaid (without interest) by the State to the Federal unemployment account in the manner provided in subsections (a) and (b) (1) of section 1202." (Emphasis added)

However, as a result of the 1960 amendment, the sentence quoted above was deleted. Instead, the wording of subsection (a) of Section 1201 was amended, so that insofar as repayment is concerned, it now reads as follows:

"Section 1201(a) (1) Advances shall be made to the States from the Federal unemployment account in the Unemployment Trust Fund as provided in this section, and shall be repayable, without interest in the manner provided in section 901(d)(1) (42 U.S.C.A. 1101(d)(1)), 903(b)(2) (42 U.S.C.A. 1103(b)(2)) and 1202 (42 U.S.C.A. 1322) of this title." (42 U.S.C.A. § 1321)

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Thus, as a result of the above legislation, the monies are now deemed "advances." The phrase "shall be repaid by the State" was dropped.

In reviewing the Reed Bill, it is also helpful to consider the legislative history to the Temporary Unemployment Compensation Act of 1958 which was adopted two years before the 1960 amendment to Section 1201 of Title XII. Briefly, this legislation provided for temporary additional unemployment compensation benefits to covered employees who had exhausted their benefits under State and specified Federal laws. The legislation further authorized the Secretary of Labor to enter into agreements with State agencies administering the unemployment compensation laws of such States or with other authorized officials under which the State agencies would make payments of temporary unemployment compensation under the bill as agents of the United States. The legislation did not impose Federal benefits or eligibility standards upon the States nor did it compel the States to accept its provisions. In discussing the repayment provisions, Senate Report No. 1625, the majority report, as set forth in the 1958 U.S. Cong. & Adm. News, provided on p. 2585 as follows:

"Your committee is of the opinion that the payments made under this bill should not be regarded as a loan to the States. The bill authorizes appropriation of the money for these Federal benefits out of the general funds of the Treasury. Although provision is made in the legislation for ultimate restoration to the Treasury of the amount so used, this restoration is accomplished not by requiring repayment by the States but through the exercise of the Federal taxing power wholly separate from the terms of any agreement with a State to carry out the program for paying temporary additional compensation.

"Although the funds obtained under title XII of the Social Security Act as amended by the Reed Act in 1954 are used by the States to pay benefits provided by their State laws and the funds obtained under your committee bill would be used to pay Federal benefits as agents of the United States, the restoration provisions under both are essentially the same.  
. . ."

Similarly in 1963, the Temporary Unemployment Compensation Act of 1958 was revised. In general, House Report No. 8821 indicated

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that the purpose of the legislation was to revise the provisions of law relating to the methods by which amounts made available to the State pursuant to the Temporary Unemployment Compensation Act of 1958 and Title XII of the Social Security Act were to be restored to the Treasury, by modifying the rate of employer repayment, and by permitting at the option of the State each year, installment repayments by a State in lieu of additional employer taxes. See 1963 U.S. Cong. & Adm. News, Vol. 2, 88th Cong. 1st Sess. p. 1098. In addition, in House Report No. 860, p. 1 which accompanied House Report No. 8821, it was indicated that House Report No. 8821 was designed:

"To revise provisions of law relating to the methods by which amounts made available to the States pursuant to the T.U.C.A. of 1958 and Title XII of the Social Sec. Act are to be restored to the Treasury. . . ."

". . . that legislation was financed by federal money made available to the states out of the general funds of the Treasury. Provision was made in that legislation for the ultimate restoration to the States, but through the exercise of the Federal Taxing power."  
(Emphasis added)

It is interesting to note that the above comments were made by the same Congressman, Wilbur Mills, who in 1960 had referred to the Reed Act as a loan fund. Like the Reed Act, the Temporary Unemployment Compensation Act of 1958 and its 1963 revision provided for the repayment of advances by the reduction of credits on an employer's Federal Unemployment Tax under what is now 26 U.S.C.A. § 3302(c)(2). The only distinction between the present Reed Act and the Temporary Unemployment Compensation Act of 1958 and its 1963 revision is that the present Reed Act provides for two additional methods of repayment which will be discussed.

To summarize the legislative history of the Reed Act, the monies now received under the Reed Act are now deemed to be "advances." As a result of the 1960 amendment to the Reed Act, the phrase "shall be repaid by the State" in Section 1201 was dropped. Consequently, the method of repayment is generally as follows: (1) by reduction in the State's share of the amount of any excess in the employment security administration account that would otherwise be transferred to the State's account in the Unemployment Trust Fund; (2) through a transfer of funds from the State's account in the Unemployment Trust Fund to the Federal unemployment account; or (3) by a reduction in the

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total credit otherwise allowed to an employer subject to the Unemployment Compensation Law of the State. As will be discussed, none of these methods of repayment constitutes an obligatory repayment by the State itself, either out of its general revenues or even out of the State's account of the Federal Unemployment Trust Fund. Therefore, it is submitted that the legislative history of the Reed Act indicates that advances made under this legislation are not regarded as a loan to the State itself.

## II

### OPERATION OF REED ACT UNDER FEDERAL LAW

We will now examine the operation of the Reed Act in its present form. Section 1321 of subchapter 12 entitled, "Advances to State Unemployment Funds," is found in Title 42 of the United States Code Annotated. This section reads as follows:

"(a)(1) Advances shall be made to the States from the Federal unemployment account in the Unemployment Trust Fund as provided in this section, and shall be repayable, without interest, in the manner provided in sections 1101(d)(1), 1103(b)(2) and 1322 of this title. An advance to a State for the payment of compensation in any month may be made if--

(A) the Governor of the State applies therefor no earlier than the first day of the preceding month, and

(B) he furnishes to the Secretary of Labor his estimate of the amount of an advance which will be required by the State for the payment of compensation in such month.

(2) In the case of any application for an advance under this section to any State for any month, the Secretary of Labor shall--

(A) determine the amount (if any) which he finds will be required by such State for the payment of compensation in such month, and

(B) certify to the Secretary of the Treasury the amount (not greater than

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the amount estimated by the Governor of the State) determined under subparagraph (A).

The aggregate of the amounts certified by the Secretary of Labor with respect to any month shall not exceed the amount which the Secretary of the Treasury reports to the Secretary of Labor is available in the Federal unemployment account for advances with respect to such month.

(3) For purposes of this subsection--

(A) an application for an advance shall be made on such forms, and shall contain such information and data (fiscal and otherwise) concerning the operation and administration of the State unemployment compensation law, as the Secretary of Labor deems necessary or relevant to the performance of his duties under this subchapter,

(B) the amount required by any State for the payment of compensation in any month shall be determined with due allowance for contingencies and taking into account all other amounts that will be available in the State's unemployment fund for the payment of compensation in such month, and

(C) the term 'compensation' means cash benefits payable to individuals with respect to their unemployment, exclusive of expenses of administration.

(b) The Secretary of the Treasury shall, prior to audit or settlement by the General Accounting Office, transfer from the Federal unemployment account to the account of the State in the Unemployment Trust Fund the amount certified under subsection (a) of this section by the Secretary of Labor (but not exceeding that portion of the balance in the Federal unemployment account at the time of the transfer which is not restricted as to use pursuant to section 1103(b)(1) of this title)."

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Thus, under the above legislation, the Governor of the State is permitted to request and receive for the State's account, advances from the Federal unemployment account in the Unemployment Trust Fund under certain conditions, and that these advances are repayable, without interest. As is indicated, there are three methods of repayment:

(1) By reduction in the State's share of the amount of any excess in the Federal employment security administration account which would otherwise have been transferred to the State's account in the Unemployment Trust Fund. In this regard, 42 U.S.C.A. § 1103(a)(1) and (b)(2) reads as follows:

"(a)(1) If as of the close of any fiscal year after the fiscal year ending June 30, 1972, the amount in the extended unemployment compensation account has reached the limit provided in section 1105(b)(2) of this title and the amount in the Federal unemployment account has reached the limit provided in section 1102(a) of this title and all advances pursuant to section 1105(d) of this title and section 1323 of this title have been repaid, and there remains in the employment security administration account any amount over the amount provided in section 1101(f)(3)(A) of this title, such excess amount, except as provided in subsection (b) of this section, shall be transferred (as of the beginning of the succeeding fiscal year) to the accounts of the States in the Unemployment Trust Fund.

(2) Each State's share of the funds to be transferred under this subsection as of any July 1--

(A) shall be determined by the Secretary of Labor and certified by him to the Secretary of the Treasury before that date on the basis of reports furnished by the States to the Secretary of Labor before June 1, and

(B) shall bear the same ratio to the total amount to be so transferred as the amount of wages subject to contributions under such State's unemployment compensation law during the preceding calendar year which have been reported to the State before May 1 bears to the total of wages subject to contributions

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under all State unemployment compensation laws during such calendar year which have been reported to the States before May 1.

\* \* \*

(3) The amount which, but for this paragraph, would be transferred to the account of a State under subsection (a) of this section or paragraph (1) of this subsection shall be reduced (but not below zero) by the balance of advances made to the State under section 1321 of this title. The sum by which such amount is reduced shall--

(A) be transferred to or retained in (as the case may be) the Federal unemployment account, and

(B) be credited against, and operate to reduce--

(i) first, any balance of advances made before September 13, 1960 to the State under section 1321 of this title, and

(ii) second, any balance of advances made on or after September 13, 1960 to the State under section 1321 of this title."

Under the above-statutory provisions, there would be a transfer of any excess amount in the Federal account to the State account under the provisions of (a)(1) if certain conditions occur. However, until there is actually a transfer, the funds involved are strictly Federal funds. Furthermore, by indicating in (b)(2) that these funds must be applied first toward the repayment of any advance, the Federal Government is actually using Federal funds raised by the Federal taxing authority to reduce the balance of any advance. Insofar as the State itself receiving funds under this section, it is wholly conjectural, and the funds are clearly not State funds until they would be received by the State. Therefore, it is submitted that this method of repayment does not create a State liability.

(2) Through a transfer of funds from the State's account in the Unemployment Trust Fund to the Federal unemployment account. In this regard, 42 U.S.C.A. § 1322 reads as follows:

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"The Governor of any State may at any time request that funds be transferred from the account of such State to the Federal unemployment account in repayment of part or all of that balance of advances, made to such State under section 1321 of this title, specified in the request. The Secretary of Labor shall certify to the Secretary of the Treasury the amount and balance specified in the request; and the Secretary of the Treasury shall promptly transfer such amount in reduction of such balance."

It is to be noted that the above language provides that the Governor of any State may at any time request that funds be transferred from the account of such State to the Federal unemployment account in repayment of part or all of that balance of advances.

In this regard, there is numerous authority to support the proposition that the word "may" is permissive, rather than mandatory. See Words and Phrases, Vol. 26A, p. 390. As a result, this method of repayment is discretionary with the Governor of the State, and so long as he does not exercise his discretion there is no State liability created. Therefore, it is our view that this method of repayment does not create any mandatory obligation of payment by the State itself.

(3) By a reduction in the total credit otherwise allowed to an employer subject to the Unemployment Compensation Law of a State when filing his Federal Unemployment Tax form. In this regard, 42 U.S.C.A. § 1101(d)(1) provides as follows:

"(d)(1) The Secretary of the Treasury is directed to transfer from the employment security administration account--

(A) To the Federal unemployment account, an amount equal to the amount by which--

(i) 100 per centum of the additional tax received under the Federal Unemployment Tax Act with respect to any State by reason of the reduced credits provisions of section 3302(c)(3) of such Act and covered into the Treasury for the repayment of advances made to the State under section 1321 of this title, exceeds

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(ii) the amount transferred to the account of such State pursuant to subparagraph (B) of this paragraph.

Any amount transferred pursuant to this subparagraph shall be credited against, and shall operate to reduce, that balance of advances, made under section 1321 of this title to the State, with respect to which employers paid such additional tax.

(B) To the account (in the Unemployment Trust Fund) of the State with respect to which employers paid such additional tax, an amount equal to the amount by which such additional tax received and covered into the Treasury exceeds that balance of advances, made under section 1321 of this title to the State, with respect to which employers paid such additional tax.

(2) Transfers under this subsection shall be as of the beginning of the month succeeding the month in which the moneys were credited to the employment security administration account pursuant to subsection (b)(2) of this section."

Also, 42 U.S.C.A. § 3302(c)(3) provides as follows:

"(3) If an advance or advances have been made to the unemployment account of a State under Title XII of the Social Security Act on or after the date of the enactment of the Employment Security Act of 1960, then the total credits (after applying subsections (a) and (b) and paragraphs (1) and (2) of this subsection) otherwise allowable under this section for the taxable year in the case of a taxpayer subject to the unemployment compensation law of such State shall be reduced--

(A) (i) in the case of a taxable year beginning with the second consecutive January 1 as of the beginning of which there is a balance of such advances, by 10 percent of the tax imposed by section 3301 with respect to the wages paid by

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such taxpayer during such taxable year which are attributable to such State; and

(ii) in the case of any succeeding taxable year beginning with a consecutive January 1 as of the beginning of which there is a balance of such advances, by an additional 10 percent, for each such succeeding taxable year, of the tax imposed by section 3301 with respect to the wages paid by such taxpayer during such taxable year which are attributable to such State;

(B) in the case of a taxable year beginning with the third or fourth consecutive January 1 as of the beginning of which there is a balance of such advances, by the amount determined by multiplying the wages paid by such taxpayer during such taxable year which are attributable to such State by the percentage (if any) by which--

(i) 2.7 percent, exceeds

(ii) the average employer contribution rate for such State for the calendar year preceding such taxable year; and

(C) in the case of a taxable year beginning with the fifth or any succeeding consecutive January 1 as of the beginning of which there is a balance of such advances, by the amount determined by multiplying the wages paid by such taxpayer during such taxable year which are attributable to such State by the percentage (if any) by which--

(i) the 5-year benefit cost rate applicable to such State for such taxable year or (if higher) 2.7 percent, exceeds

(ii) the average employer contribution rate for such State for the

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calendar year preceding such taxable year."

Thus, under the above-statutory provisions, any advances made under Title XII to a State after 1960 which have not been reimbursed by repayment methods #1 and #2 within a specified period of time are recouped by means of a reduction of Federal credit allowed to employers subject to the Unemployment Tax Act. An explanation as to how this procedure mechanically works is set forth in the C.C.H. Unemployment Insurance Reports § 1160, p. 4249.-3 which reads as follows:

"If no such repayment is made, reductions in credit are made as follows: for the taxable year beginning with the second January 1 after an advance is made, the credit is reduced by 10% of 3% (the deemed federal rate for credit purposes), or .3%. For the following taxable year, the credit is reduced by 20% of 3%. In the case of the third and fourth consecutive taxable years for which there has been an outstanding balance of advances as of January 1, if the state has (for the calendar year preceding such taxable year) collected as contributions from employers on remuneration subject to the state law less than an amount equal to 2.7% of the total remuneration subject to contributions under the state law (as determined by the state by April 30 of the taxable year, using a March 31 cutoff date), the tax credit against the federal tax due on wages paid in such taxable year will be further reduced by the amount (rounded to the nearest 0.1%) by which the average employer contribution rate is less than 2.7%.

"In the case of the fifth and succeeding consecutive taxable years for which there has been an outstanding balance of advances as of January 1, if the state has collected (for the calendar year immediately preceding the taxable year) in employer taxes less than an amount equal to one-fifth of the aggregate benefits paid in the first 5 of the last 6 years preceding the taxable year (as determined by the state by the following April 30, using a March 31 cutoff date) or an amount equal to 2.7% of the state taxable remuneration (for the calendar

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year immediately preceding the taxable year), whichever is higher, then the tax credit against the federal tax will be further reduced. The reduction will be a rate, rounded to the nearest 0.1%, which, when applied to the state's taxable wages for such immediately preceding calendar year, would have produced the revenue necessary to make up the difference between the contributions actually paid and the average benefit cost rate (or 2.7% if higher). In determining the amount collected by the state, employee contributions may be included, if employer contributions average 2.7% or more."

Thus, as is indicated above, an employer normally receives a large credit against the amount of Federal tax, but until the advance is repaid by methods #1 or #2, that credit is steadily reduced until the advance is repaid. It is our understanding that this is the method of repayment that is most frequently used. However, as was previously indicated in our discussion of the legislative history of the Reed Act, the repayment of advances under this method is accomplished under the Federal taxing power on employers subject to the Federal Unemployment Tax Act. There is actually no State liability created or any mandatory obligation of repayment by the State itself under this method of repayment.

To summarize the foregoing discussion, any advance received by a State from the Federal Government under Title XII of the Social Security Act (42 U.S.C.A. § 1321) does not create a "liability of the State of Missouri." The reason is that there is no obligatory repayment by the State of Missouri out of its general revenues or even out of the State's account of the Federal Unemployment Trust Fund. In addition, there is no mandatory obligation for the State of Missouri to pay back the advances under any statutory provision. However, there is no "forgiveness" by the Federal Government. If the advances are not repaid by methods #1 and #2 within a specified period of time, then the advances are recouped by the Federal Government under its Federal taxing power on employers by reducing the Federal tax credit allowed to employers who are subject to the State's Unemployment Tax Act, until the advance is repaid.

### III

#### APPLICATION OF REED ACT TO STATE LAW

Having reviewed the legislative history of the Reed Act and how the Act presently operates under Federal law, we now consider whether or not it would be a violation of Article III, Section 37

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of the Missouri Constitution and subsection 1 of Section 288.330, RSMo 1969, for the State of Missouri to receive advances under Title XII of the Social Security Act (42 U.S.C.A. § 1321). In this regard, to refresh your memory, Article III, Section 37 of the Missouri Constitution provides as follows:

"The general assembly shall have no power to contract or authorize the contracting of any liability of the state, or to issue bonds therefor, except (1) to refund outstanding bonds, the refunding bonds to mature not more than twenty-five years from date, (2) on the recommendation of the governor, for a temporary liability to be incurred by reason of unforeseen emergency or casual deficiency in revenue, in a sum not to exceed one million dollars for any one year and to be paid in not more than five years from its creation, and (3) when the liability exceeds one million dollars, the general assembly as on constitutional amendments, or the people by the initiative, may also submit a measure containing the amount, purpose and terms of the liability, and if the measure is approved by a majority of the qualified electors of the state voting thereon at the election, the liability may be incurred, and the bonds issued therefor must be retired serially and be instalment [sic] within a period not exceeding twenty-five years from their date. Before any bonds are issued under this section the general assembly shall make adequate provision for the payment of the principal and interest, and may provide an annual tax on all taxable property in an amount sufficient for the purpose."

Also subsection 1 of Section 288.330, RSMo 1969, reads as follows:

"1. Benefits shall be deemed to be due and payable only to the extent that moneys are available to the credit of the unemployment compensation fund and neither the state nor the division shall be liable for any amount in excess of such sums. Neither the state of Missouri, nor any person or agency acting for it, may under any circumstances, by issuing bonds or otherwise borrow money from any source whatsoever to pay benefits hereunder."

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First of all, as was previously indicated under the Federal legislation, the Governor of the State is the proper party to request for the State's account advances from the Federal unemployment account in the Unemployment Trust Fund (42 U.S.C.A. § 1321). Therefore, it should be noted initially that the prohibition of Article III, Section 37 of the Missouri Constitution applies to the General Assembly, and not the Governor. However, there would still be a question as a result of the language in subsection 1 of Section 288.330, RSMo 1969; and as will be subsequently discussed, we will presume that the Missouri legislature will pass legislation giving the Governor specific authority to request these advances.

In connection with the above, your attention is directed to the case of Petition of Board of Public Buildings, 363 S.W.2d 598 (Mo.Banc 1962). In this case, there was a proceeding in a petition by the State Board of Public Buildings for a decree authorizing issuance of and adjudicating validity of revenue bonds for construction of a state office building. In considering the issue of whether or not there was a violation of Article III, Section 37 of the Missouri Constitution, the Supreme Court of Missouri held that the power to enforce a contract created by bonds sold to finance construction of a state office building and a resolution calling for issuance of bonds secured by revenues arising from rental of the building did not constitute a "liability" within the constitutional restriction. The reasoning of the court on p. 605 was as follows:

". . . We hold 'liability' here, as used in § 37, Art. 3 of our Constitution, means, in its true context, a contractual indebtedness, present or future, absolute or contingent, which will be or may be liquidated by general taxation. We do not consider that the power to enforce this contract created by the bonds and the resolution, as given to the bondholders, constitutes such an indebtedness as just defined. We can hardly conceive of a money judgment against the state or the Board in this situation, except for rentals collected and not properly accounted for." (Emphasis added)

As was previously discussed, it is our view that any advance received by a State from the Federal Government under Title XII of the Social Security Act (42 U.S.C.A. § 1321), does not create a "liability" of the State. The reason being that there is no obligatory repayment by the State itself, either out of its general revenues or even out of the State's account of the Federal

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Unemployment Trust Fund. In short, there is no mandatory obligation for the State to pay back the advances under any statutory provision. Instead, the advances are generally recouped by the Federal Government under its Federal taxing power on employers by reducing the Federal tax credit allowed to employers who are subject to the State's State Unemployment Tax, until they are repaid. Under such circumstances, it is our view that the receipt of advances by the State of Missouri under Title XII of the Social Security Act (42 U.S.C.A. § 1321), would be in accordance with the holding in the Board of Public Buildings decision, supra, and would not be in violation of Article III, Section 37 of the Missouri Constitution.

In regard to subsection 1 of Section 288.330, RSMo 1969, the word "borrow" is defined in Black's Law Dictionary as follows:

"To solicit and receive from another any article of property or thing of value with the intention and promise to repay or return it or its equivalent."

Similarly, it is pointed out in Black's Law Dictionary that the word "borrow" has been held the reciprocal action with "to lend," citing Bank of United States v. Drapkin & Goldberg Const. Co., 11 N.Y.S.2d 334, 338 (1939). Also, the word "borrower" is defined in Black's Law Dictionary as "He to whom a thing is lent at his request."

In this connection, we have previously pointed out that the legislative history of the Reed Act indicates that advances made under this legislation are not considered to be a "loan" to the State. Also, we have previously pointed out that there is no mandatory obligation for the State of Missouri to pay back the advances under any statutory provision. As a result, it is our view that advances received by the State under Title XII of the Social Security Act (42 U.S.C.A. § 1321) would not be in violation of subsection 1 of Section 288.330, RSMo 1969.

To summarize our views, it is our opinion that the receipt of advances by the State of Missouri under Title XII of the Social Security Act (42 U.S.C.A. § 1321) would not be in violation of Article III, Section 37 of the Missouri Constitution or subsection 1 of Section 288.330, RSMo 1969.

#### IV

#### AUTHORITY OF THE GOVERNOR TO REQUEST REED ACT FUNDS

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As previously indicated, the Governor of the State of Missouri is the proper party under Federal law to request, for the State's account, advances from the Federal unemployment account in the Unemployment Trust Fund (42 U.S.C.A. § 1321). You have not asked in your opinion request whether the Governor has authority under State law to request such advances. Our research has not found any court ruling precisely on this point; and, for that reason, we are unable to determine with certainty whether the Governor has the power to request such advances without legislative authorization to do so. We point out that at least 2 of the 5 states that have received such advances have specifically adopted legislation authorizing the Governor to request advances. For example, the State of Washington which has received approximately \$44 million in advances, has adopted legislation as found in the Revised Code Washington Annotated, Titles 49 to 50, Section 50.12.180 relating to State-Federal cooperation which provides in part as follows:

"The governor is authorized to apply for an advance to the state unemployment fund and to accept the responsibility for the repayment of such advance in accordance with the conditions specified in Title XII of the social security act, as amended, in order to secure to this state and its citizens the advantages available under the provisions of such title."

The adoption of legislation by the General Assembly to give express authority to the Governor to request advances from the Federal Government under the provisions of Title XII of the Social Security Act (42 U.S.C.A. § 1321) would eliminate any doubt as to the Governor's authority to do so. Accordingly, to preclude the possibility of any successful court challenge to the receipt of such advances, it is our recommendation that legislation be sought.

#### CONCLUSION

The opinion of this office is as follows:

1. The legislative history of the Reed Act, which provides for advances to States with depleted reserve accounts for the purpose of assisting them in the financing of their unemployment benefit payments, indicates that the advances are not regarded as a "loan to the State."

2. Any advance which would be received by the State of Missouri from the Federal Government under Title XII of the Social

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Security Act (42 U.S.C.A. § 1321) does not create a liability of the State of Missouri.

3. The receipt of advances by the State of Missouri under Title XII of the Social Security Act (42 U.S.C.A. § 1321) would not be in violation of Article III, Section 37 of the Missouri Constitution or subsection 1 of Section 288.330, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH  
Attorney General