UNEMPLOYMENT COMPENSATION DIVISION: Employers, contributions of based on number of employees; construction of Section 2 (g) (4) of Indiana Act.

June 5, 1936.

Hon. F. C. McClurg,
Chief Counsel,
Unemployment Compensation Division,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter requesting an official opinion as to the correct construction of Section 2 (g) (4) of Chapter 4 of the Acts of 1936. In order to direct attention to the specific questions which you have in mind you have assumed certain examples and directed your questions specifically to the examples assumed. Subsequent to your writing the foregoing letter you again wrote me suggesting a modification of your question addressed to example one. I have made this modification and the examples and questions addressed to them with such modification are as follows:

"EXAMPLE 1—Corporation A, parent, owns 51% of the common stock of a subsidiary corporation B and also 51% of another subsidiary corporation C. The parent corporation and each of the subsidiary corporations employs three persons.

"Ques. 1—Are the three corporations to be treated as a single employing unit and liable to contributions, inasmuch as, collectively, the employees total eight or more, or is each one to be considered as a separate employing unit?

"EXAMPLE 2—Corporation A, parent, owns 51% of the common stock of its subsidiary corporation B. B in turn owns 51% of the common stock of its own subsidiary corporation C. Each of the three corporations employs three persons.

"Ques. 2—Are the three corporations to be treated as a single employing unit and liable to contributions, inasmuch as, collectively, the employees total eight or more?"
“EXAMPLE 3—X, an individual, unincorporated, owns a certain business. He employs three persons. He owns 51% of the common stock of corporation A, and also 51% of the common stock of corporation B, each of which corporation employs three persons.

“Ques. 3—In the application of this law can X, the individual, be grouped with corporations A and B and treated as an employing unit and liable for contributions; inasmuch as, collectively, the employees total eight or more?

“EXAMPLE 4—X, an individual, unincorporated, employs no one. He owns 51% of the common stock of corporation A, 51% of the common stock of corporation B, and 51% of the common stock of corporation C. Each of these corporations employs three persons.

“Ques 4—In the application of this law can the individual X and/or the three corporations be treated as a single employing unit and liable to contributions, inasmuch as, collectively, the employees total eight or more?

“EXAMPLE 5—B, an individual, unincorporated, owns a store which employs three persons. He also owns two-thirds interest in a partnership operating another store which employs six persons.

“Ques. 5—In the application of the law can B, together with the partnership, be treated as a single employing unit and liable for contributions, inasmuch as, collectively, the employees total eight or more?”

You also submit three additional questions numbered 6, 7 and 8 which are as follows:

“Ques. 6—Does ownership of more than one-half interest in a partnership constitute control in the light of the possible intent and meaning of the above quotation from the Act?

“Ques. 7.—Does ownership of 51% of the common stock of a corporation constitute control in the light of the possible intent and meaning of the above quotation from the Act?
“Ques. 8—If percentage of stock or share ownership is to be considered as governing, what percentage (if other than 51%) can be specified as constituting control?”

Separating Section 2 (g) (4) from other parts of the same section and indicating the parts omitted by asterisks the language under consideration reads as follows:

“As used in this act, unless the context clearly requires otherwise: * * *

“(g) Employer means: * * *

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

It will be noted that in order to constitute an employer under paragraph one of subsection (g) an employing unit must have had within either the current or preceding calendar year eight or more individuals in its employment in each of twenty different weeks, irrespective of whether or not such weeks are or were consecutive and irrespective of whether the same individuals are or were employed in each such day. At first blush paragraph (4) supra apparently is intended to take care of the situation presented where an employing unit standing alone would not constitute an employer but where by combination with other employing units owned or controlled by the same interests the requisite number of employees existed to constitute of the group so owned and controlled an employer; but upon closer observation it will be seen that the actual effect of the language used is to make each of the employing units thus combined an employer. In other words, the establishment of the group depends upon the fact of ownership or control by the same interests, which together would, if treated as a single unit, make of such units one employer, but when the group is established then each separate unit becomes an employer.
Before considering your questions 1, 2, 3, 4 and 5 specifically, I think it is desirable to consider your questions 6, 7 and 8 because upon their answers will depend pretty largely the answers to the other questions.

First, therefore, as to Question 6,—"Does ownership of more than one-half interest in a partnership constitute control in the light of the possible intent and meaning of the above quotation from the act?" The quotation referred to is from Section 2 (g) (4). I think your question should be answered in the negative. The element of control in a partnership is ordinarily joint as to the partners irrespective of the amount of the relative interests of the membership of the firm. However, your attention should be called in this connection, I think, to the fact that the question of control in such a case would have to be determined by the agreement of the parties in each such case.

Your seventh question is answered in the affirmative upon the assumption that the stock ownership is voting stock and is of the type through which control may be exercised. Your attention is called again to the fact that the articles of incorporation may classify common stock and give certain common stock privileges over other common stock.

Your eighth question does not admit of a categorical answer but I think a majority of stock ownership, providing the stock owned is of a class possessing the highest voting rights, would be sufficient to constitute a controlling interest. I think I should say in this connection that I do not think actual control is necessarily meant as the term is used in the statute. If the right to control exists I think it should be considered as control.

With these observations, we can now take up your questions 1, 2, 3, 4 and 5. From what has already been said it is observed that the answer to question 1 is that each employing unit is to be considered as a separate employer.

The answer to your second question is that each of the three groups are to be treated as an employer and liable to contributions.

The answer to your third question is that the individual represented by X and each of the two corporations controlled by X are to be treated as employers.

Answering your question number 4, the individual represented by X cannot be considered an employer because he
is not an employing unit. Each of the corporations, however, is an employer within the meaning of the act.

The answer to your fifth question is in the negative. The example assumed does not show that B, the individual, either owns or controls the partnership in which he owns only a two-thirds interest.

BOYS' SCHOOL, INDIANA: Male juvenile offenders—Jurisdiction of Juvenile Court and right of Boys' School to accept commitments where child is more than 16 years of age.

June 8, 1936.

E. M. Dill, Superintendent,
The Indiana Boys' School,
Plainfield, Indiana,

Dear Sir:

I have at hand your request for an official opinion relative to the commitment of boys to your institution who have passed the age of sixteen years. You submit three specific questions, as follows:

1. Does a Juvenile Court have jurisdiction to issue a valid commitment of a boy who has passed the age of sixteen, provided the boy had been given a suspended sentence or been placed on probation prior to reaching such age?

2. Does the Juvenile Court have any authority in cases of violation of law of boys between the ages of sixteen and seventeen, or is the authority vested in any court which such a boy might come before?

3. Should the Indiana Boys' School receive boys after they reach the age of seventeen for first commitment who had been placed on probation or who had received a suspended sentence prior to becoming seventeen years of age?

The answer to your first question is in the affirmative. Jurisdiction of the person of a boy, once having vested in the Juvenile Court, continues, and the court may control the custody and discipline of the boy until he has reached the age of twenty-one years. (Miller v. Sup't. of Indiana Boys' School, .... Ind. ...., 198 N. E. 66.)