



Department of
Job and Family Services

John R. Kasich, Governor
Cynthia C. Dungey, Director

November 8, 2013

The Honorable Nina Turner
Ohio Senate
1 Capitol Square, 2nd Floor
Columbus, Ohio 43215

Dear Senator Turner:

Thank you for your letter to former ODJFS Director Michael Colbert, regarding unemployment compensation claims submitted by adjunct faculty members at Ohio's colleges and universities. Your letter was forwarded to my attention for a response. I appreciate the opportunity to clarify how ODJFS defines "reasonable assurance" when processing claims from educational employees.

ODJFS uses a combination of federal law and guidance as well as state law to form the basis for Ohio policy on reasonable assurance. The Federal Unemployment Tax Act (FUTA), Section 3304(a)(6)(A)(i-iv), establishes basic parameters for how states may consider professional and nonprofessional employees of educational institutions, educational service agencies, and other entities in whether to allow unemployment compensation benefits during periods between or within academic years or terms.

USDOL attempts to clarify federal law concerning the treatment of educational employees and the between-terms denial provisions in their fact sheet, titled "Conformity Requirements for State UC Laws," (enclosed here and viewable at http://workforcesecurity.doleta.gov/unemploy/pdf/uilaws_termsdenial.pdf). It also provides answers to frequently asked questions about §3304(a)(6)(A)(i-v), FUTA. Ohio's Unemployment Compensation Benefits Policy Guide applies the logic provided in this document, to adjudicate claims by educational employees.

The USDOL fact sheet explains that:

- (1) "Reasonable assurance means that the individual has a written, oral or implied agreement that s/he will perform services in the same or similar capacity during the ensuing academic year, term, or remainder of the term. In order for there to be a reasonable assurance, **there must be a bona fide offer of employment, not just a possibility that employment will exist.**"

AND

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- (2) "...A mere possibility of employment, rather than reasonable assurance, may be found if:
- The circumstances under which the claimant would be employed are not within the educational institution's control, **and**
 - The educational institution can not [sic] provide evidence that the claimant normally would perform services during the following academic year or term."

In applying federal and state law/guidance, Ohio's UC Benefits Policy Guide defines the term "reasonable assurance":

"7. Contract or Reasonable Assurance (Written, Verbal, or Implied). The contract with an institution of education may take a number of forms. For example, an individual who has tenure and will resume his/her post when the next academic term or year begins is considered to have an ongoing contract even though there is no formal written contract. In some cases, the contract may be merely a notice of appointment, reappointment, or a letter indicating that the individual's services have been accepted. Generally, when there is a mutual commitment between the institution and the individual, the services are considered to be covered by a contract. The term reasonable assurance also means a written, verbal, or implied agreement that the employee will perform services in the same or similar capacity during the next academic year or term. For a reasonable assurance to exist, there must be an actual offer of employment in the second academic period, made by an individual authorized to make that offer. The between-terms disqualification is not applicable unless the school or college has provided the agency with written verification indicating claimant has reasonable assurance of employment in the next academic year or term.

A withdrawal of an offer of employment does not necessarily mean the original offer was not made. Claimants may at any time challenge whether an offer of work is bona fide.

An offer of employment is not bona fide if only a possibility of employment exists.

Generally, a possibility instead of a reasonable assurance of employment exists if:

- (1) The circumstances under which the claimant would be employed are not within the educational institution's control; and
- (2) The educational institution cannot provide evidence that such claimants normally perform services the following academic year."

This definition is consistent with the "Conformity Requirements for State UC Laws" fact sheet as well as USDOL's Unemployment Insurance Policy Letter (UIPL) 4-87, titled "Interpretation of 'Reasonable Assurance' in Section 3304(a)(6)(A) Federal Unemployment Tax Act" (enclosed here and also viewable at http://workforcesecurity.doleta.gov/unemploy/pdf/UIPL_4-87.pdf). Ohio's policy also includes the numerous examples provided in UIPL 4-87.

Please be assured that the ODJFS Office of Unemployment Compensation is not without guidance concerning the adjudication of "reasonable assurance." As for the possibility of

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seemingly inconsistent judgments, we are interested in learning more about these rulings and will further investigate decisions made on these types of claims. If areas of improvement are discovered, they will be addressed with adjudication staff in order to avoid potential future inconsistency.

Thank you for the opportunity to respond to your concerns. Please don't hesitate to contact Joe Dunn, ODJFS Legislative Liaison, at 614-644-0058, if we can be of further assistance.

Sincerely,



Sara Hall Phillips
Deputy Director
Office of Unemployment Compensation

Enclosures:

Conformity Requirements for State UC Laws Fact Sheet
UIPL 4-87

Conformity Requirements for State UC Laws

Educational Employees: The Between and Within Terms Denial Provisions

Overview

The Federal Unemployment Tax Act (FUTA) generally requires equal treatment for the payment of unemployment compensation on the basis of service to certain nonprofit organizations, federally recognized Indian tribes, and state and local government workers in the same amount, on the same terms, and subject to the same conditions, as other service subject to state law.

An exception to this requirement of equal treatment in FUTA Section 3304(a)(6)(A)(i-iv) involves the treatment of professional and nonprofessional employees of educational institutions, educational service agencies, and other entities pertaining to the denial of unemployment compensation during periods between or within academic years or terms when there is a contract or reasonable assurance that such individual will perform such service in the same or similar capacity in the ensuing academic year or term.

The treatment of employees of educational institutions, educational service agencies, and other entities under FUTA depends on their status as professional or nonprofessional workers. State law must deny benefits to professional employees between and within the academic years or terms when a contract or reasonable assurance exists. State law may deny benefits to nonprofessional employees between and within the academic years or terms when a contract or reasonable assurance exists.

Federal Law Provisions Relating to School Employees

§3304(a)(6)(A)(i), FUTA provides that benefits shall be denied when a claim is based on services for an educational institution in *an instructional, research, or principal administrative capacity* if the individual performs services in the first academic year or term and there is a contract or reasonable assurance that the individual will perform services in any such capacity for any educational institution in the second such academic year or term.

§3304(a)(6)(A)(ii)(I), FUTA provides that benefits may be denied when a claim is based on services for an educational institution in *any other capacity* if the individual performs services in the first academic year or term and there is a contract or reasonable assurance that the individual will perform services in any such capacity for any educational institution in the second such academic year or term. In this context, “any other

capacity” means a capacity which is not an instructional, research, or principal administrative capacity.

§3304(a)(6)(A)(ii)(II), FUTA provides that if a claim is denied to an individual based on service in *any other capacity*, and such individual is not reemployed in the second such academic year or term, then such individual is entitled to retroactive payment of UC.

§3304(a)(6)(A)(iii), FUTA provides that benefits shall be denied when a claim is based on services for an educational institution in any capacity, the claim is for any week during an established and customary vacation period or holiday recess, and there is a contract or reasonable assurance of being rehired following the established and customary vacation period or holiday recess.

§3304(a)(6)(A)(iv), FUTA provides that benefits shall be denied if the claim is based on services in *an instructional or principal administrative capacity* and the claim is for weeks between or within academic years or terms for an *educational service agency* in an educational institution when there is a contract or reasonable assurance of being rehired.

§3304(a)(6)(A)(v), FUTA provides that benefits may be denied for any week between or within academic years or terms if the claim is based on services in a capacity *other than an instructional or principal administrative capacity* to, for, or on behalf of an educational institution, and there is a contract or reasonable assurance that such individual will be rehired in the second of such academic year or term academic year or term.

Frequently Asked Questions:

1. What does the phrase “reasonable assurance” mean?

Reasonable assurance means that the individual has a written, oral or implied agreement that s/he will perform services in the same or similar capacity during the ensuing academic year, term, or remainder of the term. In order for there to be a reasonable assurance, there must be a bona fide offer of employment, not just a possibility that employment will exist. In addition, reasonable assurance exists only if the economic terms and conditions of the job offered in the second period are not substantially less (as determined by state law) than the terms and conditions for the job in the first period.

2. What does the phrase “same or similar capacity” mean?

The phrase “same or similar capacity” refers to the category of service performed, either in a professional capacity (instructional, research, or principal administrative capacity) as indicated in §3304(a)(6)(A)(i), or in a nonprofessional capacity (any other capacity) as indicated in §3304(a)(6)(A)(ii). Thus, services in an instructional, research or principal administrative capacity are in the “same or similar capacity” even though the offer for

employment is in an instructional capacity in the first term and a principal administrative capacity the second term.

3. What is an academic year?

An academic year is the period of time characteristic of a school year. It most usually means a fall and spring semester.

4. What is an academic term?

An academic term is that period of time within an academic year when classes are held. Examples include semesters and trimesters. Terms can also be other nontraditional periods of time when classes are held, such as summer sessions.

5. What is a vacation period?

A vacation period is that time within an academic year or term during which school is not in session due to a holiday or school break. Examples include winter and spring break, Christmas vacation, etc.

6. Must there be a guarantee of work in the ensuing academic year for the denial to apply?

In order for the claimant to be denied benefits, there must be a contract or reasonable assurance of being rehired. For “professional employees” there is usually (but not always) a contract of employment for the following academic year or term. For nonprofessionals, there may not be a contract of employment. However, for the between term provision to apply, there must be a bona fide offer of employment. A bona fide offer of employment means more than the mere possibility that employment will exist.

A mere possibility of employment, rather than reasonable assurance, may be found if:

- the circumstances under which the claimant would be employed are not within the educational institution’s control, and
- the educational institution can not provide evidence that the claimant normally would perform services during the following academic year or term.

7. What does “educational services agency” mean?

An educational services agency is a governmental agency or governmental entity established or operated exclusively for the purpose of providing services to one or more educational institutions. For example, such agencies may provide driver education and audiovisual services to all schools in the state and employees of these agencies may travel from school to school providing these services.

References:

UIPL 18-78. State Option to Deny Benefits “Between Terms” and/or “Within Terms” to employees of an Educational Services Agency.

UIPL 34-80. Determination of Amounts of Benefits Payable Between Terms When There are Both School and Non-School Wage Credits.

UIPL 30-85. Denial of Benefits to Educational Employees in Crossover Situations.


UIPL 11-86. UCFE-UCX Application of “Between and Within Terms” Denial Provisions of State Laws to Employees of Federally-Operated Schools.

UIPL 4-87. Interpretation of “Reasonable Assurance” in Section 3304(a)(6)(A) Federal Unemployment Tax Act.

UIPL 43-93. Optional Between and Within Terms Denial Provisions.

UIPL 41-97. Application of Between and Within Terms Denial to Head Start Program Personnel

U.S. DEPARTMENT OF LABOR Employment and Training Administration Washington, D.C. 20213	CLASSIFICATION
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	CORRESPONDENCE SYMBOL
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	DATE
	December 24, 1986

DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 4-87
 TO : ALL STATE EMPLOYMENT SECURITY AGENCIES
 FROM : DONALD J. KULICK 
 Administrator
 for Regional Management

 SUBJECT : Interpretation of "Reasonable Assurance" in
 Section 3304(a)(6)(A), Federal Unemployment
 Tax Act

1. Purpose: To provide guidance to State agencies on the interpretation of "reasonable assurance" as it relates to application of the denial provisions of Section 3304(a)(6)(A), Federal Unemployment Tax Act (FUTA).

2. References: Section 3304(a)(6)(A), FUTA; Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976-P.L. 94-566 and its five supplements; UIPL 18-78 (March 16, 1978); UIPL 4-83 (November 15, 1982); UIPL 41-83 (September 13, 1983); UIPL 30-85 (50 Fed. Reg. 48,280, published November 22, 1985).

3. Background: Section 3304(a)(6)(A), FUTA, requires States to pay compensation based on services performed for certain governmental entities and non-profit organizations on the same terms and conditions as are applicable to other services covered by State law. Exceptions to this requirement are found in five distinct clauses of Section 3304(a)(6)(A). These exceptions provide that an employee of an educational institution, an educational service agency, and certain other entities will be ineligible to receive unemployment compensation (based on such educational employment) between academic years or terms and during vacation periods and holiday recesses within terms if the employee has a "reasonable assurance" of performing services in such educational employment in the following year, term or remainder of a term. The provisions creating these exceptions are referred to as the "between and within terms denial" provisions.

"Reasonable assurance" is defined as a written, oral, or implied agreement that the employee will perform services

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in the same or similar capacity during the ensuing academic year, term, or remainder of a term. The "same or similar capacity" refers to the type of services provided; i.e., a "professional" capacity as provided by clause (i) or a "nonprofessional" capacity as provided by clause (ii). For a reasonable assurance to exist, the educational institution must provide a written statement to the State agency stating that the employee has been given a bona fide offer of a specified job (e.g., a teaching job) in the second academic period.

Reviews of court cases and selected States' procedures have revealed inconsistencies in the application of the between and within terms provisions, particularly where the circumstances of employment change from one academic period to the next. This interpretation is being issued to clarify the effect of the between and within terms denial on certain classes of claimants and to ensure that States consistently apply these Federal law requirements. This UIPL consolidates and restates, with one exception which is noted, previous issuances regarding reasonable assurance.

The interpretation in this UIPL applies to all clauses of Section 3304(a)(6)(A) regarding reasonable assurance, including optional clause (v).

4. Interpretation. The unemployment compensation program is intended in part to relieve the impact of involuntary unemployment on the claimant. The between and within terms denial provisions in Section 3304(a)(6)(A) reflect this in that they do not totally prohibit employees of educational institutions from receiving unemployment benefits between or within academic years. These provisions were created to prevent an employee with a reasonable assurance of resuming employment in the next ensuing academic period from receiving benefits during certain holiday and vacation periods or between academic years or terms. The provisions of Section 3304(a)(6)(A) have, therefore, been interpreted (1) to require denial of benefits to claimants between and within academic years who have a reasonable assurance of resuming employment in the next ensuing academic period, and (2) to require the payment of benefits to otherwise eligible claimants who do not have a reasonable assurance, or who have wage credits not earned in employment to which the between and within terms clauses apply.

Accordingly, the following principles apply to reasonable assurance and its effect on the between and within terms denial provisions in Section 3304(a)(6)(A):

a. There must be a bona fide offer of employment in the second academic period in order for a reasonable assurance to exist. For example, if an individual providing an assurance had no authority to do so, then the offer is not bona fide. Moreover, a withdrawal of an offer of employment does not necessarily mean the original offer was not bona fide. Claimants may at any time challenge whether an offer of work is bona fide.

b. An offer of employment is not bona fide if only a possibility of employment exists. Generally, a possibility instead of a reasonable assurance of employment exists if (1) the circumstances under which the claimant would be employed are not within the educational institution's control, and (2) the educational institution cannot provide evidence that such claimants normally perform services the following academic year.

c. Reasonable assurance exists only if the economic terms and conditions of the job offered in the second period are not substantially less (as determined under State law) than the terms and conditions for the job in the first period. This position modifies that stated on page 23 of Supplement 5, of the Draft Legislation.

The State agency is responsible for determining whether a claimant has a reasonable assurance of performing services the following academic year. If an issue regarding reasonable assurance arises, States are to follow regular fact-finding procedures for determining a claimant's eligibility.

If a reasonable assurance exists, application of the between and within terms provisions remains subject to the crossover provisions discussed in UIPLs 18-78 and 30-85.

A claimant who initially has been determined to not have a reasonable assurance will subsequently become subject to the between and within terms denial provisions when the claimant is given such reasonable assurance.

5. Examples. The following examples have been developed to assist States in understanding how our interpretation may be applied to some of the more complex situations which may arise. States determine whether the specific economic terms and conditions of the job offered in the second period are substantially less than the job in the first

period. Therefore, results in the examples of determinations regarding economic terms and conditions may not be identical in all States. Since not all cases can be anticipated, the general principles stated in the previous section should be consulted for cases not falling within these examples.

In the following examples, an "on-call" substitute teacher is one who is generally available whenever summoned to perform services for the employer, usually on a day to day basis. A "long-term" substitute, on the other hand, fills in under certain circumstances for other teachers for an extended period of time.

a. Refusal of a Contract in the Second Academic Year. (Principles 4.a and 4.c) A principal refuses a contract for the second academic year as a teacher; the school offers no other employment. The State agency determines that the economic terms and conditions are substantially the same as in the first academic year. Therefore, a reasonable assurance exists.

b. Offers of Reduced Employment. (Principles 4.a and 4.c) A full-time teacher during the first academic year is offered a contract to teach one hour per day during the second academic year. Rather than refuse the contract and risk no earnings at all, the teacher accepts. The State adjudicating the claim considers this reduction to be a substantial change in economic terms and conditions. Therefore, no reasonable assurance exists.

c. Full-time Teacher Offered Long-Term Substitute Contract. (Principles 4.a and 4.c) A full-time teacher is told that the teacher's current contract will not be renewed, but is offered a one-year contract as a "long-term" substitute teacher. In this district, a "long-term" substitute replaces a regular full-time teacher who may be ill or on leave of absence for as much as an entire school year. The rate of pay is the same as for a full-time teacher and daily employment is guaranteed for the term of the contract. In this case, the State agency determines that the economic terms and conditions are identical. Therefore, a reasonable assurance exists.

d. Full-time Teacher Placed on On-call List. (Principles 4.b and 4.c) A full-time teacher in the first academic year is placed on the on-call list for the next year. The State adjudicating the claim requires the educational institution to indicate that the claimant will be

given substantially the same amount of employment for the between and within terms denial provisions to apply. This could occur if the employer indicates that teachers who were full-time the prior year are called to work before other substitute teachers and that those at the top of the substitute list usually work four to five days a week most weeks in the year. The educational institution indicates that the claimant is only added to the bottom of the substitute list and will be infrequently called. In this case, the State agency determines that this is a substantial reduction in the economic terms and conditions of the job. A reasonable assurance does not exist because (1) the claimant is offered only a possibility of work, and (2) any work that does materialize would probably result in a substantial reduction in the hours worked.

e. On-call Substitute Teacher Retained on On-call List. (Principles 4.a and 4.c) An on-call substitute teacher in the first academic year is kept on the on-call list for the next year. The circumstances under which the teacher will be called for work are not changed. The State determines that a substantial change in economic terms and conditions is not anticipated. Therefore, the between and within terms denial provisions would apply because the claimant has a reasonable assurance of performing services.

f. On-Call Substitute Retained, but Offered Reduced Hours of Work. (Principles 4.b and 4.c) An on-call substitute is retained on the on-call list. However, a new collective bargaining agreement provides that certified teachers will be called to work before non-certified teachers. The claimant is a non-certified teacher and had previously been one of the first substitutes called for work, but now will be called infrequently if at all. The State may determine that the between and within terms denial provisions would not apply for the same reasons cited in (d).

g. Reasonable Assurance vs. a Possibility of Work. (Principles 4.a. and 4.b) A teacher is offered the same job in the second academic year in a special program which is funded from an outside source. This program has been funded for the past four years. However, at the beginning of summer recess, no notification of the following year's funding has been received. Other than this lack of notification, which usually arrives late in the summer, no reason exists to indicate that the program will be suspended or abolished. While the circumstances under which the teacher

is employed are not within the school's control, the school can still establish a pattern showing that the program is likely to be funded in the second academic year. Therefore, the offer of work is bona fide and a reasonable assurance exists. If the program is not funded and the claimant is not employed in accordance with the assurance given earlier, the State must consider whether there was a bona fide offer of employment.

6. Action Required. States are requested to review their laws and procedures and make any changes needed to conform with this interpretation.

7. Inquiries. Direct inquiries to the appropriate Regional Office.