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DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 04-87

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

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Administrator
for Regional Management

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

- 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).
- 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).
- 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 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.