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Employment and Training Administration
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DIRECTIVE: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 18-78

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : LAWRENCE W. ROGERS
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Field Operations

SUBJECT : State Option to Deny Benefits "Between Terms" and/or "Within Terms" to Employees of an Educational Service Agency Similarly to Employees of Educational Institutions

1. Purpose. To inform SESAs of the option made available by amendment to section 3304(a)(6)(A) which permits States to deny benefits "between terms" and/or "within terms" to employees of an educational service agency.
2. References. P.L. 94-566, P.L. 95-19, P.L. 95-171 and Supplement 4, 1976 Draft Legislation, dated August 26, 1977.
3. Background. Prior to enactment of P.L. 95-171, States were not allowed to deny benefits "between terms" to employees of educational service agencies who were contracted out by these agencies to individual schools to provide special courses in education. Denial was not permitted to employees of these agencies because the agencies were not deemed to be schools within the meaning of the term "educational institution" as interpreted for purposes of the provisions in section 3304(a)(6)(A). The amendment made to the Federal provision by P.L. 95-171 now permits States to apply the denial between terms and/or within terms to employees of educational service agencies who work in educational institutions under the same conditions as are applicable under clauses (i), (ii), and (iii) of section 3304(a)(6)(A) to employees who are actually employed by the educational institutions.
4. Interpretation. Section 2 of P.L. 95-171, approved November 12, 1977, amended section 3304(a)(6)(A) of the Federal Unemployment Tax Act (FUTA) by adding a new clause as follows:

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"(iv) with respect to any services described in clause (i) or (ii), compensation payable on the basis of services in any such capacity may be denied as specified in clauses (i), (ii), and (iii) to any individual who performed such services in an educational institution while in the employ of an educational service agency, and for this purpose the term 'educational service agency' means a governmental agency or governmental entity which is established and operated exclusively for the purpose of providing such services to one or more educational institutions, and . . ."

Senate Report No. 95-456, September 29, 1977, to accompany H.R. 3387, explains the purpose and applicability of the new provision.

"[The provisions of section 3304(a)(6)(A), FUTA,] apply only to individuals who are actually employed by educational institutions. In a number of States there are separate State agencies set up to provide specialized services to many schools. 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. Since such employees are in every respect the equivalent of school personnel and follow the same work and vacation patterns, it seems appropriate to apply the same benefit exclusions during vacation periods to these employees as are applied to persons who are directly employed by schools."

The new provision is optional, and States may adopt all of it or any part of it. A State may amend its law to provide for the denial to educational service employees performing services in an educational institution in an instructional, research, or principal administrative (i.e., in a professional service) capacity for the periods and under the conditions set

forth in clauses (i) and (iii), or in one of those clauses, or the other; and in any other (i.e., in a nonprofessional service) capacity, for the periods and under the conditions set forth in clauses (ii) and (iii), or in one of those clauses or the other.

There is a distinction between the denial provisions in clauses (i) and (ii), on the one hand, and the denial provisions in clauses (iii) and (iv), on the other hand. Clauses (i) and (ii) do not apply to cross-overs between professional and nonprofessional capacities--e.g., when an individual is employed in a nonprofessional capacity in one year and in a professional capacity in the succeeding year the "between terms" denial provision would not apply. Clauses (iii) and (iv) denials do apply to cross-overs which occur between terms or during the vacation period or holiday recess within a term or between terms. See also pages 6 and 7, Supplement 3, 1976 Draft Legislation, May 6, 1977.

If a State adopts all or part of the benefit denial authorized by clause (iv) and applies it to either the professional or nonprofessional classes of educational service agency employees or to both classes, the State law provision may not be selective within a class because of the "equal treatment" requirement of section 3304(a)(6)(A). None of the benefit denial provisions in the clauses of section 3304(a)(6)(A) may be applied to individuals performing services in any capacity other than an instructional, research, or principal administrative capacity for an institution of higher education.

The optional provision may apply only to employees of a governmental agency established and operated specifically and exclusively to provide specialized services to educational institutions in the State. The employees of such an agency to which the provision may apply must be employed by the agency, perform their services in educational institutions, and perform the specialized services provided by such agencies.

The agencies referred to are commonly called educational service agencies (ESAs). Denial of benefits in accordance with the new provision may only be accomplished pursuant to

specific State statutory authority, not by interpretation or by regulation, since, prior to the new provision, the Federal law and parallel State law provisions did not permit application of clauses (i), (ii), or (iii) of section 3304(a)(6)(A) to employees of educational service agencies, it follows that legislative authority is needed to extend the application of those provisions to employees of ESAs.

A new subparagraph (D) is added to section 4(a)(3), 1976 Draft Legislation, on page 49, as follows:

"(D) With respect to weeks of unemployment beginning after [date] benefits shall be denied to an individual who performed services in an educational institution while in the employ of an educational service agency for any week which commences during a period described in subparagraphs (A), (B), and (C) if such individual performs any services described in subparagraphs (A) or (B) in the first of such periods, as specified in the applicable subparagraph, and there is a contract or a reasonable assurance, as applicable in the appropriate subparagraph, that such individual will perform such services in the second of such periods, as applicable in the appropriate subparagraph. For purposes of this subparagraph the term 'educational service agency' means a governmental agency or governmental entity which is established and operated exclusively for the purposes of providing such services to one or more educational institutions."

Subparagraph (C) referred to in the above quoted draft language is set forth on page 7 of Supplement 3, 1976 Draft Legislation, dated May 6, 1977.

A State may modify the draft language to the extent that the new provision will not be applied to the full extent authorized by the Federal law, with the exception of the limitation mentioned previously prohibiting differentiations within a class of employees.

Question and Answer 1, page 9, on the same subject in Supplement 4 to 1976 Draft Legislation, August 26, 1977, is modified by this letter and should be annotated accordingly. If a State does not adopt the new provision, the question and answer still apply to that State. If a State adopts only part, the question and answer apply in that part in that State.

5. Action Required. SESAs are requested to inform the appropriate staff of the contents of this UIPL.

6. Inquiries. Questions should be directed to your regional office.