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ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 5-17

TO: STATE WORKFORCE AGENCIES

FROM: PORTIA WU /s/
Assistant Secretary

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

1. **Purpose.** To provide the Department of Labor's (the Department) interpretation of the terms "contract" and "reasonable assurance" as used in sections 3304(a)(6)(A)(i) through (iv) of the Federal Unemployment Tax Act (FUTA). This guidance supersedes the guidance provided in Unemployment Insurance Program Letter (UIPL) No. 04-87 issued on December 24, 1986, and applies to all levels of education for public and non-profit educational institutions, including primary, secondary, and post-secondary education. The Department is issuing this guidance to remind states of the requirements, clarify the definitions of "contract" and "reasonable assurance," and to explain how they apply to situations that were not addressed in UIPL No. 04-87. This guidance also provides an overview of the relevant amendments to section 3304(a)(6), FUTA, to help states understand the historical background and the Department's interpretation of these provisions.

2. **References.**

- Employment Security Amendments of 1970, Pub. L. 91-373 (Aug. 10, 1970)
- Unemployment Compensation Amendments of 1976, Pub. L. 94-566 (Oct. 20, 1976)
- Sections 3304, 3309 of the Federal Unemployment Tax Act (FUTA)
- UIPL No. 18-78, *State Option to Deny Benefits "Between Terms" and/or "Within Terms" to Employees of an Educational Service Agency Similarly to Employees of Educational Institutions*, (March 6, 1978)
- UIPL No. 21-80, *Secretary's Decision on Attribution of Benefit Liability to Reimbursing Employers in Proceedings as to Delaware, New Jersey, and New York.* (February 29, 1980)
- UIPL No. 41-83, *Amendments Made by P.L. 98-21 (Social Security Act Amendments of 1983) Which Affect the Federal-State Unemployment Compensation Program,* (September 13, 1983)
- UIPL No. 30-85, *Denial of Benefits to Educational Employees in Crossover Situations*, (July 1, 1985)
- UIPL No. 04-87, *Interpretation of Reasonable Assurance in Section 3304(a)(6)(A), Federal Unemployment Tax Act*, (December 24, 1986). (superseded by this UIPL)

RESCISSIONS None	EXPIRATION DATE Continuing

- UIPL No. 44-93. *Unemployment Tax Act Relating to Reimbursing Employers*, (September 13, 1993)
- Senate Finance Committee Report, 91st Congress, 2d Session, Senate Report No. 91-752, at p.14 (March 26, 1970)
- Joint Explanatory Statement of the Committee of Conference, 94th Congress, 2d Session, Report No. 94-1745, at p. 12 (October 1, 1976)
- Senate Report on the Unemployment Compensation Amendments of 1976, 94th Congress, 2d Session, Senate Report No. 94-1265, at p. 9 (September 20, 1976)

3. <u>Background</u>. The Department's last guidance on the issue of whether an individual has a contract or reasonable assurance to work for an educational institution when school resumes for purposes of determining UC eligibility during the period of time when school is not in session was in 1986 and did not address specifically examples related to institutions of higher education. Since that time, the employment model educational institutions follow has changed appreciably, particularly for institutions of higher education. In higher education the use of part-time instructors, often referred to as "adjunct" or "contingent" faculty, has increased significantly. At present, many adjunct or contingent faculty have contracts or offers to perform services in subsequent years or terms that are contingent on factors such as funding, enrollment, and program changes. Similar changes in the employment model could occur in primary and secondary education institutions as well. For these reasons, the Department is issuing its guidance on this issue.

The Federal Unemployment Tax Act (FUTA) is the Federal law that provides for a tax on the wages every employer pays during the calendar year. Among other things, the Federal tax supports the unemployment insurance system by funding grants to states for the administration of their UC laws and making advances to state trust funds to ensure the availability of funds to pay UC. Federal law provides for employers to receive a credit against the FUTA tax if certain conditions are met in the state UC program. One of these requirements is that state unemployment insurance laws must cover services for certain employers. Prior to the 1970s, if individuals worked for state or local governmental entities or non-profit organizations, including those who worked for educational institutions (state and local government and non-profits), the services they provided to those entities were excluded from coverage under federal and state unemployment compensation (UC) laws. However, through amendments to FUTA in the 1970s, services provided to those entities were required to be covered, so individuals were no longer excluded from receiving UC based on these services when they were unemployed. The federal amendments that provided for these expansions in UC eligibility also generally prohibited individuals who worked for educational institutions (state and local government and non-profits) from being eligible for UC based on these services when school was not in session if the individuals had a contract or reasonable assurance of working for an educational institution when school resumed. While these provisions in federal law have been amended several times, the general requirements still apply. Detailed information about the applicable provisions in federal law is provided below and in Attachment III.

Section 3304(a)(6)(A), FUTA, requires, as a condition of certification for employer tax credits, that states pay UC based on services performed for certain governmental entities, non-

profit organizations, or Indian tribes on the same terms and conditions and in the same amount as are applicable to other services covered by state law. This provision is referred to as the "equal treatment" requirement. Exceptions to this "equal treatment" requirement are found in clauses (i) through (v) of 3304(a)(6)(A), FUTA, and, as described below, require the denial of UC based on services for educational institutions and educational service agencies between academic years and terms to certain employees. These provisions are the result of several amendments to FUTA beginning in the 1970s and are commonly referred to as the "between and within terms" denial provisions.

These exceptions apply to three categories of employees: employees of an educational institution; employees of an educational service agency; and, if the state law provides for the optional denial in clause (v) of sec. 3304(a)(6)(A), FUTA, employees who provide services to or on behalf of an educational institution. Under these provisions, any employee in one of these categories may not be paid UC based on such educational employment between academic years or terms, and during vacation periods or holiday recesses within terms, if that employee has a "contract" or "reasonable assurance" of performing services in such educational employment in the following year, term, or remainder of a term. Clause (i) applies to services "in an instructional, research, or principal administrative capacity" (professional capacity or professional). Clause (ii) applies to "services in any other capacity" and encompasses any services in other than an instructional, research, or principal administrative capacity, regardless of the legal or educational requirements to perform such services (non-professional capacity or non-professional). While application of the between and within terms denial provisions is mandatory regarding services in a professional capacity, states have discretion in determining whether to apply these provisions to services in a non-professional capacity.

Since the Department's 1986 UIPL interpreting "reasonable assurance," states have been inconsistent in their interpretation of the term "contract or reasonable assurance," particularly in the context of instructional positions in higher education. This UIPL is being issued to clarify the Department's interpretation of the terms "contract" and "reasonable assurance" in sec. 3304(a)(6)(A), FUTA, and to assist states in applying these consistent with Federal law requirements. This UIPL supersedes UIPL No. 04-87.

UIPL Nos. 15-92 and 43-93 provide guidance on the requirements for states' laws to conform with the optional denial provisions in sec. 3304(a)(6)(A)(ii), FUTA, for services in a non-professional capacity and are still in effect. As those UIPLs explain, for positions subject to a state's adoption of the optional between and with terms denial provisions for services in a non-professional capacity, states may adopt a test that establishes a higher threshold, such as a stricter test, for determining that a claimant has a "reasonable assurance" that a job is available than is provided in this UIPL. However, states may not have a test that establishes a lower threshold or a less restrictive test.

Additional background and discussion of the legislative history and the reasoning underlying the Department's interpretation in this UIPL is contained in Attachment II.

4. **Interpretation.** The term "contract" applies to employment subject to sec. 3304(a)(6)(A)(i), FUTA, employment in a professional capacity, and the term "reasonable assurance" applies to all employment subject to the clauses of sec. 3304(a)(6)(A), FUTA, whether the employment is in a professional or a non-professional capacity. This includes claimants providing services in primary, secondary, and post-secondary education. As explained below, states must take into account several factors when determining whether or not a claimant has a "contract" or a "reasonable assurance" for the succeeding academic year or term for purposes of determining whether or not the claimant may be paid UC based on such services.

   The interpretations of the terms "contract" and "reasonable assurance" in this UIPL apply to any employment subject to the clauses of sec. 3304(a)(6)(A), FUTA, whether the employment is in a professional or a non-professional capacity.

   a. Prerequisites for a "contract" or "reasonable assurance" determination.

   Before making a determination about whether there is a contract or reasonable assurance, the state must determine whether the employment offered in the following academic year or term, or remainder of the current academic year or term, meets three prerequisites. If any one of the three prerequisites is not met, the state UC agency may not deny the claimant UC based on the between and within terms denial provision. However, if all three prerequisites are met, then the state UC agency must determine if the claimant has a contract or reasonable assurance.

   (1) **The offer of employment may be written, oral, or implied, and must be a genuine offer, that is, an offer made by an individual with actual authority to offer employment. Thus, if someone without authority to commit the educational institution to employing an individual makes the offer, this prerequisite is not met.**

   (2) **The employment offered in the following academic year or term, or remainder of the current academic year or term, must be in the same capacity**. Services under sec. 3304(a)(6)(A), FUTA, are performed in two capacities: (1) a professional capacity or (2) a non-professional capacity. The employment offered in the following academic year or term must be provided in the same capacity as the previous academic year's or term's employment.

   For example, if the employment in the first academic year or term was to provide services in a professional capacity, and the employment offered in the following academic year or term is also to provide services in a professional capacity, then this requirement is met. However, if employment in the first academic year or term was in a professional capacity, and the offer for the following year or term is in a non-professional capacity, the state must follow the Department's guidance on "crossover" situations. See UIPL No. 30-85, Denial of Benefits to Educational Employees in Crossover Situations and UIPL No. 18-78, State Option to Deny Benefits "Between Terms" and/or "Within Terms" to Employees of an Educational Service Agency Similarly to Employees of Educational Institutions. That guidance

also applies where a claimant transitions from one type of employer to another (i.e., from an educational institution to an educational service agency). (Note: a crossover situation does not exist if the individual transitions from one capacity to the other within terms. See sec. 3304(a)(6)(A)(iii), FUTA.)

This determination must be made based on the actual services the claimant provided in the first academic year or term and the actual services the claimant will provide in the following academic year or term. The state agency may not make this determination solely based on the claimant's job title or lack of job title but must base its determination on the nature of the actual duties that have been performed and that will be performed.

(3) **The economic conditions of the job offered may not be considerably less in the following academic year or term (or portion thereof) than in the first academic year or term (or portion thereof).** The Department interprets "considerably less" to mean that the economic conditions of the job offered will be considerably less if the claimant will not earn at least 90% of the amount that the claimant earned in the first academic year or term, or in a corresponding term, if the claimant does not regularly work successive terms (i.e. the claimant works the spring term each year).

If the job offered in the following academic year or term does not meet each of these prerequisites, then the state agency cannot deny the claimant UC based on the between and within term denial provisions in section 3304(a)(6)(A), FUTA. Thus, no further inquiry is required. If the job offered meets each of the three prerequisites, the state agency must next determine whether the offer is a contract. Then, if no contract exists, the state agency must determine whether the claimant has a reasonable assurance to perform professional services in the following academic term or year.

b. What is a "contract?"

Section 3304(a)(6)(A)(i), FUTA, provides that states' laws must require that UC be denied between and within terms to claimants who perform services in a professional capacity in an academic year or term if they have a "contract" or "reasonable assurance" to perform professional services in the following academic year or term. For the purposes of this provision, the term "contract" refers only to an enforceable, non-contingent agreement that provides for compensation: (1) for an entire academic year; or (2) on an annual basis, though the contract terms describing compensation do not have to be expressed specifically as an annual salary. For example, a contract may provide that the claimant works nine months of the year, has a summer break, and receives nine payments during the working months. If the offer is a contract, then UC may not be paid based on the educational services subject to the between and within term denial provisions in section 3304(a)(6)(A), FUTA. However, any arrangement that does not provide the kind of non-contingent guarantee of employment on an annual basis intended to be covered by the "contract" exclusion, regardless of whether the arrangement would meet the relevant state's statutory or common law requirements to be considered a contract, must, instead, be analyzed to determine whether it provides a "reasonable assurance" of continued employment.

c. What is a "reasonable assurance?"

The legislative history demonstrates that the determining factor in whether a claimant has a "reasonable assurance" is "the availability of a job" to the claimant in the following academic term or year (or portion thereof). States must make the following findings in determining if the claimant has a reasonable assurance. Unless all of these findings can be made, the claimant does not have a reasonable assurance.

Are Contingencies Within the Employer's Control?

If any contingencies in the offer are within the employer's (i.e., the educational institution's) control, the state agency must determine the claimant does not have a reasonable assurance. Contingencies within the employer's control are those contingencies where the employer has the ability to satisfy the contingency. For example, the Department considers contingencies such as course programming, decisions on how to allocate available funding, final course offerings, program changes, and facility availability to be within the control of the employer. In each of these contingencies, whether the contingency will be satisfied is determined by an exercise of the employer's discretion in how best to allocate available resources. Similarly, offers that contain contingencies that allow employers to retract the offer at their discretion are considered to be within the employers' control. Generally, the Department considers contingencies based upon circumstances such as enrollment, funding, such as an appropriation for a specific course, and seniority to not be in the employers' control. However, as explained above, if the employer receives a general appropriation and can choose how to allocate those funds, this contingency would be within the employer's control. If the state agency determines that any of the contingencies are within the employers' control, then the claimant does not have a "reasonable assurance" that a job is available and thus will be entitled to UC if otherwise eligible.

Totality of Circumstances

The state agency must analyze the totality of circumstances to find whether it is highly probable that there is a job available for the claimant in the following academic year or term. This element requires considering factors such as funding, including appropriations, enrollment, the nature of the course (required or optional, taught regularly or only sporadically), the claimant's seniority, budgeting and assignment practices of the school, the number of offers made in relation to the number of potential teaching assignments, the period of student registration, and any other contingencies. When considering whether funding will be available, the state agency must consider the history of the educational institution's funding and the likelihood that the educational institution will receive the funding for a specific course and the individual claimant's likelihood of receiving an assignment. For a state agency to find that it is highly probable that a job is available does not require it to find that there is a certainty of a job.

Contingent Nature of the Offer

If the offer contains a contingency, the state agency must give primary weight to the contingent nature of the offer. This requires the state agency to find whether it is highly probable that the contingency will be met. If it is not highly probable the contingency will be met, there is no reasonable assurance because the contingent nature of the offer outweighs any other facts indicating that the claimant has a "reasonable assurance." The term "highly probable" is intended to mean it is very likely that the contingency will be met. For example, if a claimant has an offer that is contingent on funding, the state agency's analysis must consider the likelihood that the institution will have funding available to teach the course. This analysis could entail consideration of previous funding or appropriation levels, the likelihood of obtaining funding in the following term, and any other information that indicates whether the educational institution will have funding for the course in the following term. The Department acknowledges that states have some latitude in making this determination. The examples in Attachment I provide situations of when reasonable assurance does and does not exist.

d. Guidance for Making the Determination

(1) If there is a high probability that employment will be available based on the totality of circumstances and contingent nature of the offer inquiry, the state agency must determine that the claimant has a "reasonable assurance."

(2) As is generally the case with determinations of entitlement to UC, the state agency is responsible for determining whether a claimant has a "reasonable assurance" of performing services the following academic year. This means neither the claimant nor the employer has the burden to establish the claimant has or does not have a "reasonable assurance." If an issue regarding "reasonable assurance" arises, states must follow regular fact-finding procedures for determining a claimant's eligibility. This does not, however, relieve claimants or employers of the responsibility to provide sufficient information to the state agency to make a determination when requested to do so.

(3) As part of the state agency's determination of whether a "reasonable assurance" exists, it must obtain from the educational institution a written statement to the state agency explaining the manner in which the employee was given a reasonable assurance of employment in the following academic period (i.e., was it in writing, oral, or implied and what information about the offer, including contingencies, was communicated to the individual). This written statement may be used in the totality of the circumstances analysis. However, the statement itself does not conclusively demonstrate that a claimant has a "reasonable assurance" and state agencies must carry out the analysis required in this UIPL when determining if a claimant has a "reasonable assurance."

(4) All workers may file a claim for benefits as soon as they become unemployed. If an individual's circumstances change during a spell of unemployment, the individual's eligibility for benefits may also change. Thus, a claimant who initially had been determined to not have a "reasonable assurance" can subsequently become subject to the

between and within terms denial provisions if the claimant later receives such "reasonable assurance." Similarly, a claimant who was originally determined to have a reasonable assurance may later be determined to not have a reasonable assurance. For claimants providing services in a professional capacity, UC payments may not be made with respect to weeks of unemployment beginning prior to the change in circumstances. However, for claimants providing services in a non-professional capacity, UC payments are required to be made with respect to weeks of unemployment beginning prior to the change in circumstances for each week the claimant filed a timely claim for compensation. In either case, if the claimant meets the state's other requirements to receive UC, the state agency must pay UC with respect to weeks of unemployment beginning after the date of the change in circumstances. Guidance on retroactive benefit payments for claimants providing services in a non-professional capacity can be found in UIPL No. 41-83, *Amendments Made by P.L. 93-21 (Social Security Act Amendments of 1983), Which Affect the Federal-State Unemployment Compensation Program*.

(5) Multiple-employer situations – Some claimants subject to the between and within denial provisions provide services for more than one educational employer. When the claimant provides services for more than one educational employer, the state agency may not determine that a claimant has a contract or "reasonable assurance" based solely on the finding that the claimant has a contract or "reasonable assurance" from one of the employers without further analysis. In these situations, state agencies must first determine whether the claimant has a contract or reasonable assurance with each of the educational employers. If, for example, there is reasonable assurance with all employers, the claimant has a reasonable assurance and UC may not be paid based on any of these services. Similarly, if, for example, there is no contract or reasonable assurance with any employer, the claimant does not have a reasonable assurance overall and UC must be paid based on all of these services. However, if the claimant has a contract or reasonable assurance with at least one but not all employers, states have two options when determining which services would be the basis for UC payments.

a. Option 1: The state determines UC eligibility between or within terms, in accordance with state law, based on the services performed for the employer(s) for which there is no "contract" or "reasonable assurance". The services for the educational employers for which there is a "contract" or "reasonable assurance" are not available for determining eligibility for UC between terms.

b. Option 2: The state agency looks at all of the services and determines whether, as a whole, the economic conditions prerequisite requirement is met. If it is, UC is not payable between or within terms based on any of these services. If the economic conditions requirement is not met, all of the services would be used to determine eligibility for UC. (If the state uses this option, the state may, if permitted under state law, determine that the unemployment is not attributable to those educational employers who provided a contract or reasonable assurance and relieve them of charges or reimbursement for their portion of the UC paid in accordance with UIPL Nos. 21-80 and 44-93.)

(6) Voluntary Quits for Good Cause—If claimants are separated from employment with the educational employer(s) because of a voluntary quit, states must take that into account when determining whether or not the claimant has a reasonable assurance for purposes of UC eligibility between or within terms. Specifically, if the reason the claimant quit constitutes good cause under state law, then the claimant does not have a reasonable assurance of employment in the next academic year or term, or portion thereof. Thus, UC would be payable between or within terms based on these services. This requirement applies regardless of whether the claimant worked in a professional capacity or in a non-professional capacity.

(7) Graduate students may be eligible for UC if the student's services are not exempted from coverage under sec. 3306(c)(10), FUTA, or if state law provides coverage of such services. Under this provision of FUTA, a graduate student is in covered employment unless the student is enrolled in the school, college, or university and regularly attending classes. The state must determine if the student is "enrolled" and "regularly attending classes" on a case-by-case basis. See 26 CFR sec. 31.3121(b)(10)–2. If the student works in covered employment, then the student must be treated the same as all other individuals covered under the state law. Some states provide broader coverage for graduate students than that required by FUTA. If a state law provides broader coverage, the services must be treated in the same manner as any other services subject to sec. 3304(a)(6)(a), FUTA, including the between and with terms denial provisions. Benefit entitlement determination must be made using the procedures outlined in this UIPL.

(8) As noted above, the "reasonable assurance" or contract does not have to be with the same employer. However, if the "reasonable assurance" is with a different type of employer subject to sec. 3304(a)(6)(A), FUTA, (e.g. from an educational institution to an educational service agency), the states must follow the Department's guidance on cross over situations. See UIPL Nos. 18-78 and 30-85.

5. <u>Action Requested</u>. State agency administrators are requested to provide the information contained in this UIPL to appropriate staff and are requested to review their laws and procedures and make any changes needed to conform to this interpretation.

6. <u>Inquiries</u>. Please direct questions or requests for technical assistants to the appropriate regional office.

7. <u>Attachments</u>.

Attachment I	Flowchart Illustrating how to Determine if the Between and Within Term Denial Applies
Attachment II	Examples for Determining Reasonable Assurance
Attachment III	Historical and Legal Analysis