



June 24, 2014

Assistant Secretary Portia Wu
Employment & Training Administration
United States Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: Request for Clarification of Guidance on the Between and Within Terms Denial Provisions in Section 3304(a)(6)(A) of the Federal Unemployment Tax Act

Dear Assistant Secretary Wu:

Congratulations on your recent confirmation as Assistant Secretary of the U.S. Department of Labor. We are writing on behalf of our respective unions and associations, which jointly represent virtually all organized contingent faculty nationwide, to raise with you jointly an issue about which several of us have had separate conversations with your predecessor: The need for the Employment and Training Administration (“ETA”) to clarify its guidance to state employment security agencies by making it clear that an offer of employment to a higher education professional is not a “reasonable assurance of employment” within the meaning of Section 3304(a)(6)(A) of the Federal Unemployment Tax Act (“FUTA”) where the offer is contingent on factors such as enrollment, funding, or program changes.

As we detail in this letter, ETA last issued guidance on this issue in 1986—twenty-eight years ago—and that guidance itself was drawn from guidance documents that ETA issued eight to ten years earlier. The existing guidance does not adequately address the higher education setting, and is now badly out of date given the increasingly contingent nature of employment in higher education settings. In the absence of guidance, states have reached conflicting conclusions as to whether contingent offers of employment to higher education professionals amount to reasonable assurance. In light of these developments, we submit that revised guidance is needed that makes clear that an offer of employment to a higher education professional for an upcoming term or academic year is not reasonable assurance if the offer is contingent on enrollment, funding, or program changes. Appended to this letter is a proposed revision of the existing guidance that we all support, with proposed additions indicated in red, which we believe would remedy this problem.

After you have had an opportunity to review our request with your staff, we respectfully request a meeting with you and your designees to further explain the need for the requested clarification.

Statutory and Regulatory Background

Congress first brought higher education faculty within the unemployment insurance program in 1970, when it amended FUTA to require states to provide coverage to persons working in certain non-profit institutions and to professionals working in public colleges and universities. Employment Security Amendments of 1970, Pub. L. No. 91-373, § 104, 84 Stat. 697-99. The 1970 amendments provided a particular exception applicable to higher education professionals. That exception provided that unemployment compensation was not payable between terms and over the summer if the employee had a contract of employment for the next term. *Id.* In 1976, Congress further amended FUTA so as to require states, as a condition of participation in the federal unemployment insurance program, to extend unemployment insurance compensation coverage to nearly all persons working for state and local government, effective January 1, 1978. *See* Unemployment Compensation Amendments of 1976, P.L. 94-566, 90 Stat. 2667. A consequence of the 1976 amendments was to require participating states to cover persons working in elementary and secondary schools, as well as in institutions of higher education, subject to exceptions (codified at 26 U.S.C. § 3304(a)(6)(A)(i)-(vi)), which have come to be known as the “between and within terms denial provisions.”

The between and within terms denial provisions that apply to professional education employees (codified at 26 U.S.C. § 3304(a)(6)(A)(i) and (iii)) require participating states to deny unemployment compensation to professional employees of education institutions (be they K-12 schools or higher education institutions) between academic years or terms, as well as during established and customary vacation periods or holiday recesses within terms, if such employees have a “reasonable assurance” of professional employment in an educational institution in the following year, term or remainder of a term.

The touchstone for denying unemployment insurance benefits under the “within and between denial” provisions is the concept of “reasonable assurance.” In 1976 ETA provided states with the following definition of that term, drawn from the Unemployment Compensation Amendments of 1976:

“For the purposes of this provision, the term ‘a reasonable assurance’ means a written, verbal, or implied agreement that the employee will perform services in the same capacity during the ensuing academic year or term. A contract is intended to include tenure status.” [U.S. Dep’t of Labor, Employment and Training Administration, *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976-P.L. 94-566*, p. 56 (1976) (“1976 Draft Language”), quoting H. Conf. Rep. No. 94-1745, Oct. 1, 1976, p. 12.]

ETA issued further guidance as to the meaning of “reasonable assurance” and other issues arising under the “within and between terms denial” provisions in a series of supplements to the *1976 Draft Language* issued from 1976 to 1978. *See id.*, Supplement 1, pp. 17-20 (Dec. 7, 1976); *id.* Supplement 3, pp. 4-7 (May 6, 1977); *id.* Supplement 5, pp. 25-30 (Nov. 13, 1978).

In 1986, ETA issued Unemployment Insurance Program Letter (“UIPL”) 04-87, to “consolidate[] and restate[]” its previous guidance on reasonable assurance. To date, UIPL 04-87 remains ETA’s most recent and comprehensive guidance on the subject. UIPL 04-87 restates the definition of “reasonable assurance” in relevant part as follows:

“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. 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.

The UIPL goes on to observe that in light of the fact that ETA’s review “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,” guidance that “consolidates and restates” ETA’s prior issuances was necessary “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.”

Beyond its restatement of the definition of “reasonable assurance,” the substance of UIPL’s guidance lies in its articulation of three general “principles” applicable to reasonable assurance determinations and in the illustrative examples it provides. The three principles set forth in UIPL 04-87 are the following:

- 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.

The UIPL then sets out seven examples to illustrate the application of these principles, which are reproduced in full in the addendum to this letter. All of the hypothesized examples are geared toward the K-12 setting rather than the higher education setting.

The Need for Revised Guidance

ETA's guidance in UILP 04-87 has provided some clarity to the concept of "reasonable assurance" under FUTA, particularly as applied to the K-12 setting. However, as discussed below, further clarification is needed to account for circumstances faced by professionals who work for higher education institutions on a contingent basis. In particular, revised guidance is needed to address the fact that offers of future employment for contingent faculty are frequently, as the term suggests, contingent on enrollment, funding, or program changes.

The landscape of academic employment has been in a process of dramatic change in the decades following ETA's issuance of guidance on "reasonable assurance." Since the mid to late 1970s, higher education institutions have moved away from the tenure system—characterized by full-time salaried employment and stable career paths leading to the relative job security of tenured status—as the primary model for academic employment and towards a structure that relies heavily on the employment of education professionals on a contingent basis.¹ The available empirical studies of contingent academic employment vary somewhat in their precise figures—depending on whether the particular study focuses on full-time faculty, part-time faculty, or both, as well as on whether the study includes two-year as well as four-year institutions—but the trend-lines are remarkably consistent. The studies all demonstrate a marked and accelerating increase in the number and relative proportion of teaching staff appointed by colleges and universities on a contingent basis.² Indeed, the data point to a complete inversion of the employment

¹ See John G. Cross & Eddie N. Goldenberg, OFF-TRACK PROFS: NONTENURED TEACHERS IN HIGHER EDUCATION 18, 32 (2009) (noting the recent "remarkable" growth of non-tenure-eligible professors and arguing that the number has likely been underestimated); Jack H. Schuster & Martin J. Finkelstein, THE AMERICAN FACULTY: THE RESTRUCTURING OF ACADEMIC WORK AND CAREERS 323 (2006) ("[A]cademic staffing is moving, seemingly inexorably, toward becoming a contingent workforce. A *majority* contingent workforce, no less."); Gary Rhoades, *Reorganizing the Faculty Workforce for Flexibility: Part-time Professional Labor*, 67 J. HIGHER EDUC. 626, 626 (1996) ("Managers in higher education have hired more part-time workers to minimize costs and maximize managerial control The professional position of faculty is being renegotiated, with an increased emphasis on managerial flexibility.").

² See Leora Baron-Nixon, CONNECTING NON FULL-TIME FACULTY TO INSTITUTIONAL MISSION: A GUIDEBOOK FOR COLLEGE/UNIVERSITY ADMINISTRATORS AND FACULTY DEVELOPERS 3 (2007) ("Part-

patterns that obtained in higher education during the mid-1970s. In 1975, tenured and tenure-track faculty members accounted for nearly half of the academic workforce in two-year and four-year institutions; but in the most recent years for which statistics are available, individuals with contingent appointments make up more than three quarters of the academic workforce.³

ETA's "consolidat[ion] and restate[ment]" of its 1970s-era guidance in UIPL No. 04-87 needs to be revisited in light of these developments. UIPL No. 04-87 does not provide sufficient clarity to ensure consistent and fair application of the "reasonable assurance" standard by state unemployment administrators in the circumstances faced by contingent faculty in higher education. Indeed, as noted above, the examples in UIPL No. 04-87 focus on the application of the term "reasonable assurance" in the K-12 setting. Especially given the substantial restructuring of the academic profession, there is a pressing need for revised guidance that is tailored to the higher education setting and that takes account of the fact that contingent employment is now the norm in that setting.

Of equal moment is the considerable disarray in state statutory and decisional law on the question of whether contingent offers of employment to higher education professionals constitute reasonable assurance under FUTA. Some states have explicitly—and, in our view, correctly—specified that contingent offers of employment do not provide reasonable assurance or are at least presumed not to provide reasonable assurance. For example, California's Unemployment Insurance Code provides that "'reasonable assurance' includes, but is not limited to, an offer of employment or assignment made by the educational institution, *provided that the offer or assignment is not contingent on*

time college faculty, variously referred to as adjunct, part-timers, or contingent faculty, now comprise almost half of all instructional professionals at American colleges and universities. U.S. Department of Education data reveal that in 1970, 22 percent of faculty were considered part time, and in 1987, the proportion rose to 38 percent. In 1998, it rose to 43 percent." (footnotes omitted)); Schuster & Finkelstein, *supra* note 1 at 40 ("Between 1969-70 and 2001, the number of part-timers increased by 376%, or roughly at a rate *more than five times as fast* as the full-time faculty increase. . . . By 2001 the number of part-timers exceeded the entire number of full-time faculty in 1969-70 and was closing relentlessly on the total count of full-timers."); Charles Outcalt, A PROFILE OF THE COMMUNITY COLLEGE PROFESSORiate, 1975-2000 6 (2002) (noting that part-time faculty constitute 65% of the community college professoriate); Roger G. Baldwin & Jay L. Chronister, TEACHING WITHOUT TENURE: POLICIES AND PRACTICES FOR A NEW ERA 3-4 (2001) (noting a "consistent upward trend in full-time non-tenure-track hiring" and that non-tenure track faculty grew from under 19% to more than 27% between 1975 and 1993).

³ John W. Curtis, *The Employment Status of Instructional Staff Members in Higher Education, Fall 2011*. American Association of University Professors, April 2014: Table 1, page 2. Available at <http://www.aaup.org/our-work/research> ; Schuster & Finkelstein, *supra* note 1, at 323-24.

*enrollment, funding, or program changes.*⁴ And in Massachusetts, the Division of Unemployment Assistance of the state's Department of Labor and Workforce Development has issued guidance specifically dealing with adjunct faculty, which, after discussing the characteristics of adjunct faculty, provides as follows:

In nearly all cases [of adjunct faculty employment] continued employment in the next ensuing academic year or term is contingent on enrollment or financing or both. *For adjunct teaching staff there can be no reasonable assurance if re-employment is contingent on such factors as enrollment or funding regardless of the extent to which past patterns of re-employment indicated a likelihood of returning to work.* In adjudicating cases involving adjunct professors, if fact-finding indicates that re-employment is contingent on enrollment or funding, it should be determined that no reasonable assurance exists and the claimant approved for benefit payment.^[5]

Similarly, Washington's employment security statute expressly distinguishes between tenured and tenure-track employment, on the one hand, and contingent academic employment (at least in two-year colleges), on the other, and establishes a presumption against reasonable assurance with respect to the latter category, with "[p]rimary weight ... given to the contingent nature of an offer of employment based on enrollment, funding, and program changes."⁶

But in jurisdictions that lack statutory or administrative guidance regarding how contingent offers of employment should be treated, courts have struggled with the issue and come to conflicting results. A sampling of the varying approaches to this issue found in the case law is set out in the margin.⁷ But it should be borne in mind that not only are the

⁴ Cal. Un. Ins. Code § 1253.3(g) (emphasis added). *See also Cervisi v. Unemployment Ins. Appeals Bd.*, 208 Cal. App. 3d 635, 639 (Cal. Ct. App. 1989) (finding that faculty did not have a reasonable assurance where employment was contingent on adequate class enrollment).

⁵ Mass. Dep't of Labor & Workforce Development, Div. of Unemployment Assistance, SERVICE REPRESENTATIVES GUIDE § 1557(J) (2009).

⁶Wash. Rev. Code § 50.44.053.

⁷ *Compare Claim of Jama*, 467 N.Y.S.2d 82, 83 (App. Div. 1983) (holding that college instructor who received offer to teach the following semester did not have reasonable assurance because the position "was dependent upon the enrollment of an adequate number of students"); *Redmond v. Employment Div.*, 675 P.2d 1126, 1129 (Or. App. 1984) (concluding that community college tutor lacked reasonable assurance where offer "was contingent on students registering, needing tutoring and specifically requesting him as a tutor"); and *Lock Haven Univ. of Penn. of State System of Higher Educ. v. Unemployment Compensation Bd. of Rev.*, 559 A.2d 1015, 1018 (Pa. Cmwlth. Ct. 1989) (affirming unemployment compensation board's finding that claimant had no reasonable assurance in light of "clear termination language" of claimant's contract, and "contingencies of funding and retrenchment abstinence" in offer of future employment); *with Emery v. Boise State University*, 32 P.3d 1112, 1115 (Idaho 2001) (holding that "notice of approval to teach" a particular course issued to part-time community college constituted reasonable assurance

cases cited at n.7 a fraction of the existing conflicting court decisions, the case law is the proverbial tip of the iceberg: Only a very small proportion of state unemployment administrator determinations ever make their way to court. Accordingly, there can be no doubt that underlying all of this inconsistent case law is an even more extensive body of inconsistent administrative decisions and practices relating to higher education professionals employed on a contingent basis.

Such inconsistency in the administration of unemployment insurance benefits with respect to contingent faculty cries out for clarification. Therefore, we urge ETA to revise its guidance as to the interpretation of the term “reasonable assurance” along the lines recommended below.

Proposed Revisions to UIPL 04-87

As noted above, the Department, drawing on the relevant legislative history, has defined “reasonable assurance” 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” (emphasis added), and has placed the burden on employers to demonstrate that such an agreement exists. This being so, we submit that the only appropriate approach to the question of contingent employment offers in the higher education setting is one in line with that taken by the legislature and courts of California. That is, ETA should issue revised guidance making it clear to state unemployment insurance administrators that an offer of employment to an education professional, other than one who is tenured or working in a tenure-track position on an annual salary, that is contingent on enrollment, funding, program changes or other factors outside the employee’s control is *not* “reasonable assurance of continued employment.”

Accordingly, we request that ETA issue new guidance that restates UIPL 04-87 with the following additions.

1. Add the following two principles after principle 4.c.:
 - d. Individuals who have achieved tenure or who work in tenure-track positions on an annual salary basis are presumed to have reasonable assurance unless there is evidence showing that the individual’s employment will not continue in the next relevant term.

even though the course was subject to cancellation for insufficient enrollment); *Giuttari v. Dept. of Labor*, 2008 WL 4681943 (N.J. Super. Ct. App. Div. Oct. 23, 2008) (affirming an order requiring an adjunct faculty instructor to pay back unemployment benefits he had received because he had a “reasonable assurance” of employment even though his employment could have been cancelled due to insufficient enrollment); and *Archie v. Unemployment Compensation Bd. of Review*, 897 A.2d 1, 5 (Pa. Cmwlth. 2006) (affirming denial of benefits to adjunct professor who worked term-to-term where offer was “dependent upon student enrollment” because the university had hired her to teach classes for three years, thus establishing “historical pattern” supporting “reasonable assurance”).

- e. Individuals who are not tenured or who do not work in tenure-track positions on an annual salary basis, and who receive an offer of employment that is either conditioned on enrollment, funding, program changes, or other factors outside of the individual's control, or that fails to clarify the employment status of the individual, do not have reasonable assurance.
2. Add the following examples after example 5.g.:
 - h. Tenure-Track Faculty Member Offered Classes to Teach a Second Year. (Principles 4.a and 4.d) A full-time, tenure-track faculty member on an annual salary who does not teach or get paid in the summer has been assigned classes for the upcoming fall term. The university is committed to paying her for full-time work whether or not her assigned classes are canceled due to low enrollments. Therefore, reasonable assurance exists.
 - i. Non-Tenured, Non-Tenure-Track College Instructor Receives Term Assignment Contingent on Enrollment. (principles 4.b and 4.e) A non-tenured, non-tenure-track instructor has been hired by college to teach classes on a term-to-term basis, such that his employment ends at the conclusion of each term, and the college then decides whether to hire him for the upcoming term. After the end of the Spring term, the college assigns the teacher a course offered in the Fall semester, but informs the teacher that the course is subject to cancellation at any time during the Fall add/drop period if enrollment is below a certain limit. No reasonable assurance exists because the offer of employment is contingent on enrollment.
 - j. Non-Tenured, Non-Tenure-Track College Instructor Receives Academic Year Assignment Contingent on Enrollment or Program Changes. (principles 4.b and 4.e) A non-tenured, non-tenure-track instructor has been hired by college to teach classes on an academic-year-to-academic year basis, such that her employment ends at the conclusion of each year, and the college then decides whether to hire her for the upcoming academic year. After the end of the academic year, the college assigns the teacher to courses in both semesters of the upcoming academic year, but the assignment letter states the courses are subject to cancellation based on enrollment levels or program changes. No reasonable assurance exists because the offer of employment is contingent on enrollment or program changes.
 - k. Non-Tenured, Non-Tenure-Track Instructor Receives Term or Academic Year Assignment and Employer Fails to Clarify Whether Employment is Contingent (principles 4.b and 4.e) A non-tenured, non-tenure-track

instructor has been hired by college to teach classes on either a term-to-term basis or an academic-year-to-academic year basis, such that his employment ends at the conclusion of the assigned classes, and the college then decides whether to hire him for the next term or year. After the end of the term or year, the college assigns the instructor a course in the upcoming term or year, but does not specify whether the assignment is contingent. Given the employer's failure to specify the individual's employment status, no reasonable assurance of continued employment exists.

Revised guidance along the lines specified above is necessary both to resolve inconsistencies in states' application of the "reasonable assurance" standard in the context of contingent employment offers to higher education professionals and to remain true to the text of the reasonable assurance provision and ETA's previous guidance. Attached is an addendum setting forth the proposed text for a new UIPL reflecting these proposed changes, with the revisions set out in redline form.

Thank you for your consideration of our request. We look forward to meeting with you or your designees to discuss this matter further.

Sincerely,



Alice O'Brien
NEA General Counsel



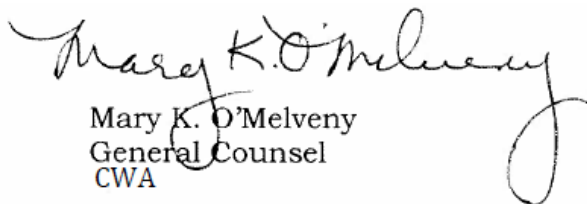
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ADDENDUM: TEXT FOR A PROPOSED REVISION TO UIPL 04-87

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 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.
- d. Individuals who have achieved tenure or who work in tenure-track positions on an annual salary basis are presumed to have reasonable assurance unless there is evidence showing that the individual's employment will not continue in the next relevant term.
- e. Individuals who are not tenured or who do not work in tenure-track positions on an annual salary basis, and who receive an offer of employment that is either conditioned on enrollment, funding, program changes, or other factors outside of the individual's control, or does not clarify the individual's employment status, do not have reasonable assurance.

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.
- h. Tenure-Track Faculty Member Offered Classes to Teach a Second Year. (Principles 4.a and 4.d) A full-time, tenure-track faculty member on an annual salary who does not teach or get paid in the summer has been assigned classes for the upcoming fall term. The university is committed to

paying her for full-time work whether or not her assigned classes are canceled due to low enrollments. Therefore, reasonable assurance exists.

- i. Non-Tenured, Non-Tenure-Track Instructor Receives Assignment Contingent on Enrollment. (principles 4.b and 4.e) A non-tenured, non-tenure-track instructor has been hired by college to teach classes on a term-to-term basis, such that his employment ends at the conclusion of each term, and the college then decides whether to hire him for the upcoming term. After the end of the Spring term, the college assigns the teacher a course offered in the Fall semester, but informs the teacher that the course is subject to cancellation at any time during the Fall add/drop period if enrollment is below a certain limit. No reasonable assurance exists here because the offer of employment is contingent on enrollment.
 - j. Non-Tenured, Non-Tenure-Track College Instructor Receives Academic Year Assignment Contingent on Enrollment or Program Changes. (principles 4.b and 4.e) A non-tenured, non-tenure-track instructor has been hired by college to teach classes on an academic-year-to-academic year basis, such that her employment ends at the conclusion of each year, and the college then decides whether to hire her for the upcoming academic year. After the end of the academic year, the college assigns the teacher to courses in both semesters of the upcoming academic year, but the assignment letter states the courses are subject to cancellation based on enrollment levels or program changes. No reasonable assurance exists because the offer of employment is contingent on enrollment or program changes.
 - k. Non-Tenured, Non-Tenure-Track Instructor Receives Term or Academic Year Assignment and Employer Fails to Clarify Whether Employment is Contingent (principles 4.b and 4.e) A non-tenured, non-tenure-track instructor has been hired by college to teach classes on either a term-to-term basis or an academic-year-to-academic year basis, such that his employment ends at the conclusion of the assigned classes, and the college then decides whether to hire him for the next term or year. After the end of the term or year, the college assigns the instructor a course in the upcoming term or year, but does not specify whether the assignment is contingent. Given the employer's failure to specify the individual's employment status, no reasonable assurance of continued employment exists.
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.