June 26, 2015

Secretary of Labor Thomas E. Perez
United States Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: Unemployment for Adjunct Faculty

Dear Secretary Perez:

Over the course of the last three years, NEA has raised with the Employment Training Administration (“ETA”) of the U.S. Department of Labor (“Department”) the need to take action to remedy the difficulties that our members who are adjunct or contingent higher education faculty face in obtaining unemployment benefits.

As you no doubt know, contingent faculty are paid below poverty levels on a fee per class basis and have no assurance from year to year or semester to semester that they will be employed to teach another class. Rather, their employment is contingent on class enrollment, funding and programmatic decisions. As a recent overview of the plight of contingent faculty in the Atlantic Monthly accurately summed up the situation:

Adjunct professors earn a median of $2,700 for a semester-long class, according to a survey of thousands of part-time faculty members. In 2013, NPR reported that the average annual pay for adjuncts is between $20,000 and $25,000, while a March 2015 survey conducted by Pacific Standard among nearly 500 adjuncts found that a majority earn less than $20,000 per year from teaching. Some live on less than that and supplement their income with public assistance: A recent report from UC Berkeley found that nearly a quarter of all adjunct professors receive public assistance, such as Medicaid or food stamps. Indeed, many adjuncts earn less than the federal minimum wage. Unless they work 30 hours or more at one college, they’re not eligible for health insurance from that employer, and like other part-time employees, they do not qualify for other benefits.¹

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Notwithstanding the contingent nature of their employment, and the fact that such faculty therefore lack a reasonable assurance of continued employment from semester to semester, such faculty frequently have been unable to obtain unemployment benefits. That difficulty is due to confusion at the state level about what the ETA considers to be a “reasonable assurance of continued employment” as that phrase is used in Section 3304(a)(6)(A) of the Federal Unemployment Tax Act.

As detailed in the attached NEA correspondence with ETA dating back to January of 2013, ETA’s guidance on this important issue (Unemployment Insurance Program Letter 04-87) is over three decades out of date and does not reflect the realities of current higher education employment patterns. See Exhibit A, January 31, 2013 Letter from NEA President Van Roekel to Assistant Secretary Oates; Exhibit B June 24, 2014 Letter from NEA General Counsel Alice O’Brien, et al to Assistant Secretary Wu; Exhibit C, December 19, 2014 Letter from NEA General Counsel Alice O’Brien, et al, to Assistant Secretary Wu. As that correspondence also indicates, NEA provided ETA with proposed updated guidance on this issue in January of 2013.

When, at a follow up meeting with ETA Assistant Secretary Oates, she indicated that the Department wanted to make sure all unions representing contingent faculty agreed with NEA’s proposed approach, NEA convened all of those unions and secured all of their agreement on proposed updated guidance. The proposed updated guidance, which is supported by NEA, the American Association of University Professors, the American Federation of State County and Municipal Employees, the American Federation of Teachers, the Communications Workers of America, the Service Employees International Union, and the United Automobile Workers, was provided to ETA in June of 2014, (see Exhibit B), and a follow up meeting was held on the issue last October. Subsequent to that meeting, this same unified union coalition provided ETA with certain requested follow up information by way of the letter attached as Exhibit C.

Notwithstanding all this, we still have received no response from the Department on the requested updated guidance. I recognize that this kind of administrative work takes time, but our contingent faculty have waited for years for some action by the Department that remedies their perilous and contingent economic status.

The requested updated guidance is an NEA priority. I would ask that the Department make it a priority as well so that our contingent faculty can receive the unemployment benefits to which they are clearly entitled.

Sincerely,

[Signature]

Lily Eskelsen Garcia  
President
EXHIBIT

A
Assistant Secretary Jane Oates  
Employment & Training Administration  
United States Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

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

Dear Assistant Secretary Oates:

I am writing on behalf of NEA to request that the United States Department of Labor (“Department”) clarify its guidance to state employment security agencies regarding the interpretation of the phrase “reasonable assurance of employment” as used in the “within and between denial” provisions of Section 3304(a)(6)(A) of the Federal Unemployment Tax Act (“FUTA”). Specifically, I ask that the Department revise its existing guidance to take account of particular circumstances faced by higher education professionals who work on a contingent basis—meaning those who are appointed to non-tenure-track, year-to-year or term-to-term contracts—by clarifying that an offer of employment to such an education professional does not constitute a reasonable assurance of employment if the offer is contingent on factors such as enrollment, funding, or program changes.

Statutory and Regulatory Background

Congress first brought higher education faculty within the unemployment insurance program in the Employment Security Amendments of 1970, which 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. Pub. L. No. 91-373, § 104, 84 Stat. 697-99. The 1970 amendments provided a particular exception with respect to the higher education profession, providing 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. The 1976 amendments thus 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 and 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.

As is clear from the foregoing précis, the touchstone for denying unemployment insurance benefits under the “within and between denial” provisions is the concept of “reasonable assurance.” But that term is neither self-executing nor defined in the statute. The Department addressed this gap in its initial guidance to states regarding implementation of the Unemployment Compensation Amendments of 1976 by adopting the definition offered by the Conference Committee Report on those amendments, to wit:

“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.]

The Department 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 1976-78. 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, the Department issued Unemployment Insurance Program Letter (“UIPL”) 04-87, to “consolidate[] and restate[]” its previous guidance on reasonable assurance. To date, UIPL 04-87 remains the Department’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
Assistant Secretary Jane Oates

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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 the Department’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” the Department’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 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**

The Department’s guidance in UIPL 04-87 has gone a long way toward giving substance to the concept of “reasonable assurance” under FUTA. However, as discussed below, further clarification is needed to account for circumstances faced by professionals who work in higher education institutions on a contingent basis—in particular, to address
Assistant Secretary Jane Oates
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the fact that offers of future employment for contingent faculty are frequently, as the term suggests, contingent on enrollment, funding, or program changes.

To place this issue in its proper context, it is important to point out that the landscape of academic employment has been in a process of dramatic change in the decades following the Department’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. 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 trendlines are remarkably consistent. The studies all demonstrate a marked and accelerating increase in the proportion of faculty appointed on a contingent basis in colleges and universities and a corresponding decrease in the proportion of tenured or tenure-eligible faculty.

Indeed, the data point to a complete inversion of the employment patterns that obtained in higher education in 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 trendlines are remarkably consistent. The studies all demonstrate a marked and accelerating increase in the proportion of faculty appointed on a contingent basis in colleges and universities and a corresponding decrease in the proportion of tenured or tenure-eligible faculty.

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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-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 Professorate, 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).
education during the mid-1970s. In 1975, tenured and tenure-track faculty accounted for well over half of the academic workforce in two-year and four-year institutions; but in the most recent years for which statistics are available, full-time and part-time non-tenure-track faculty accounted for at least three fifths of the academic workforce. NEA opposes the casualization of higher education employment and will continue to do so; our point for present purposes, however, is the narrower one that the landscape has changed substantially since the mid to late 1970s.

In light of these developments, the Department’s consolidation and restatement of its 1976-78 guidance in UIPL No. 04-87 does not provide sufficient clarity to ensure consistent and fair application by the states of the “reasonable assurance” standard 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. Given the substantial restructuring of the academic profession, there is a pressing need for revised guidance that is tailored to the higher education context and that takes account of the fact that contingent employment is now the norm in higher education.

The need for such revised guidance in this area is most acute with respect to the question whether an offer of future employment that is entirely contingent on enrollment levels, funding, program changes, or other circumstances constitutes a “reasonable assurance” of employment for an upcoming term. On this question, state statutory and decisional law is divided.

Some state employment statutes explicitly—and, in NEA’s view, correctly—specify that contingent offers of employment do not provide reasonable assurance or are presumed not to provide reasonable assurance. For example, California’s Unemployment Insurance Code specifies 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 enrollment, funding, or program changes.” 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). And 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 sensible presumptions governing each:

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(2) An individual who is tenured or holds tenure track status is considered to have reasonable assurance, unless advised otherwise by the college. For the purposes of this section, tenure track status means a probationary faculty employee having an opportunity to be reviewed for tenure.

(3) In the case of community and technical colleges ..., a person is presumed not to have reasonable assurance under an offer that is conditioned on enrollment, funding, or program changes. It is the college’s burden to provide sufficient documentation to overcome this presumption. Reasonable assurance must be determined on a case-by-case basis by the total weight of evidence rather than the existence of any one factor. Primary weight must be given to the contingent nature of an offer of employment based on enrollment, funding, and program changes. [Wash. Rev. Code § 50.44.053.]

In other jurisdictions, where there is no state statute clarifying how contingent offers of employment should be treated, courts have struggled with the issue and come to conflicting results. 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 retrenchee 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 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”).

Such inconsistency in the administration of unemployment insurance benefits with respect to contingent faculty cries out for clarification. Therefore, we urge the Department to revise its guidance as to the interpretation of the term “reasonable assurance” to clarify its application in the context of contingent offers of employment.
Proposed Revisions to UIPL 04-87

We submit that in light of the Department’s definition of “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”—and its appropriate placing of the burden on employers to demonstrate that such an agreement exists—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 legislatures of California and Washington. Specifically, where an education professional who is not tenured or working in a tenure-track position on an annual salary basis is offered employment for an upcoming term, and that offer is contingent on enrollment, funding, program changes or other factors outside the employee’s control, there should be a presumption that the offer does not constitute “reasonable assurance” that can only be rebutted by a strong showing by the employer that there is a high likelihood of re-employment.

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

1. Add the following two principles after principle “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.

   e. Individuals who are not tenured and do not work in tenure-track positions on an annual salary basis, and who receive an offer of employment that is conditioned on enrollment, funding, program changes, or other factors outside of the individual’s control, are presumed not have reasonable assurance. In such situations, an employer has the burden to provide sufficient documentation to overcome this presumption. Reasonable assurance must be determined on a case-by-case basis by the total weight of evidence, but primary weight must be given to the contingent nature of an offer of employment.

2. Add the following examples after example “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 Instructor Receives Assignment Contingent on Enrollment.** (principles 4.b and 4.e) A non-tenured, non-tenure-track instructor has been hired by a community college to teach classes on a term-to-term basis, such that his employment ends at the conclusion of each term, at which point the college decides whether to hire him for the upcoming term. At 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 in the absence of evidence overcoming the presumption and the primary weight accorded to the contingency of the offer of employment.

NEA submits that the issuance of 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 contingent faculty and to remain true to the text of the reasonable assurance provision and the Department’s previous guidance.

Thank you for your consideration of this request. NEA believes that it would be helpful, once you have reviewed the above, to meet with you and/or your designees to discuss this matter. Please let me know what would work best for you in scheduling that meeting.

Sincerely,

Dennis Van Roekel
NEA President
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. ....

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.
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.]
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“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. 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. Indeed, the data point to a complete inversion of the employment

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1 See John G. Cross & Eddie N. Goldenberg, Off-Track Profes: 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).

enrollment, funding, or program changes.” 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.\(^4\)

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).


\(^6\) Wash. 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 retrenchee 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.

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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

Craig Smith
Director, Higher Education
AFT

Peter Colavito
Director of Government Relations
SEIU

Aaron Nisenson, Esq., Senior Counsel
American Association of University Professors

Mary K. O'Melveny
General Counsel
CWA

/S/
Sylvia E. Johnson, Ph.D.
Deputy Legislative Director
UAW
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
June 24, 2014
Assistant Secretary Portia Wu

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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.
EXHIBIT C
December 19, 2014

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

RE: Follow up to 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:

We want to thank you and your staff, including Office of Unemployment Insurance Administrator Gay Gilbert, for meeting with us to discuss our proposal that the Employment and Training Administration (“ETA”) clarify its guidance so as to address the application of the “reasonable assurance of continued employment” standard to higher education faculty who work on a contingent basis. We are writing to follow up on that meeting in three respects.

First and foremost, we want to respond to the suggestions from Administrator Gilbert that federal law would not permit either ETA or the states to address the question of how the “reasonable assurance” standard applies in the context of contingent offers of employment to faculty who work on the basis of short-term employment arrangements. Administrator Gilbert seemed to suggest that the “reasonable assurance” standard requires unemployment insurance administrators to apply a formless “facts and circumstances” analysis and also seemed to imply that such analysis is inimical to any effort to clarify its application to particular factual settings, such as the one at issue here. If this indeed is ETA’s position, it is deeply flawed.

There is nothing in the statute—or in any regulation with the force of law—that would prevent ETA from clarifying how the “reasonable assurance” standard should apply in particular factual settings. The statute does not define “reasonable assurance,” much less mandate a formless “facts and circumstances” analysis of a kind that would preclude guidance as to how the standard applies in particular factual settings. Indeed, the existing UIPL provides just such guidance in a number of instances—none of which, unfortunately, shed any light on the phenomenon of contingent offers of employment in higher education. And the approach we have proposed, which focuses on the contingent nature of the offer of employment, is entirely consistent with the definition of “reasonable assurance” that ETA
has adopted in its guidance—viz., “a written, verbal, or implied agreement that the employee will perform services in the same capacity during the ensuing academic year or term” (emphasis added). Indeed, our approach gives full weight to the phrase “reasonable assurance of continued employment,” given that an offer of employment that is revocable at will by the employer for reasons wholly outside the employee’s control is the very antithesis of “reasonable assurance of continued employment.”

As for whether it is appropriate for states to weigh in on this issue, we submit that in the absence of clarification from ETA, which we obviously would prefer to the outdated guidance now available, states are certainly within their rights to address the issue, whether by way of state legislation (as California and Washington have) or by way of state administrative guidance.

In this regard, we are particularly concerned by the fact that—apparently as a result of ETA’s intercession—a legislative proposal to address this issue in New Jersey has been shelved, and the Massachusetts Department of Unemployment Assistance has altered its longstanding guidance, which had previously stated that offers of employment to faculty who worked on the basis of short-term employment arrangements do not constitute reasonable assurance if the offer is contingent.\(^1\) While the New Jersey legislation had problematically suggested that a “contract” of re-employment is necessary for reasonable assurance (which we recognize cannot be squared with the disjunctive statutory reference to “contract or reasonable assurance”), it certainly would have been appropriate for New Jersey to make clear that contingent offers of employment to faculty employed on a short-term basis are not “reasonable assurance” of continued employment without requiring a contract as well. But ETA’s advice to the state was not to that effect, but was that the entire New Jersey legislative initiative was impermissible. And the Massachusetts guidance, which to all appearances was amended recently due to an intervention by ETA or some other office within the Department, had no problematic language suggesting that a contract was necessary, but instead had made the determination that an offer of employment to faculty that work on a short-term basis does not constitute “reasonable assurance of continued employment” if the offer is contingent (i.e., revocable at will by the employer). That is the approach that California has adopted, first by judicial decision and later by statute. And, as explained above and in our prior submission, that approach is fully consistent with the statutory language—if not compelled by its plain meaning.

Second, we must ask for a clear and complete explanation of ETA’s position on this issue. We are frankly troubled by the fact that ETA has not been forthcoming as to its position on this important issue, notwithstanding the fact that several of the unions that participated in last month’s meeting have individually raised this issue with ETA over the last few years. Instead of responding directly to our requests for revised guidance, staff in

\(^1\) A copy of Administrator Gilbert’s letter to the Commissioner of New Jersey’s Department of Labor and Workforce Development, stating that pending legislation addressing reasonable assurance in the context of contingent faculty would violate federal law, is attached. A copy of the current guidance from the Massachusetts Department of Unemployment Assistance after an apparent recent intercession by the Department, with the relevant language on page 2 highlighted, also is attached.
ETA appear to have instead interceded with states that are attempting to address this issue to force them to take exactly the opposite of the approach we have urged. If in fact ETA’s view is that the guidance revisions we have proposed conflicts with FUTA or would have some unintended consequences that we have not grasped, we would appreciate a clear response to that effect so that we can proceed as necessary to secure what we all believe to be a critical benefit for an extremely economically vulnerable group of our members.2

Third, during the course of the meeting there were a number of requests for further information on various points. To that end, we are providing further information on whether it is practicable for community colleges to provide reasonable assurance and, as well, on the impact of contingent employment arrangements on student success.

On the first subject, we ask you to consider the experience at Henry Ford Community College in Dearborn, Michigan, where the college and the union of part-time faculty agreed to a seniority system for adjunct faculty members who have served more than eight semesters and 24 contact hours. Under this agreement, the college is obliged to offer covered faculty a class load equal to those taught in prior semesters whenever available and to give covered adjunct faculty preference in re-employment. Under this system, senior adjunct faculty may bump adjunct faculty without seniority when classes are cancelled, so long as the senior adjunct faculty member is qualified to teach the class. This example illustrates that employment arrangements that provide more assurance of re-employment than the customary norm of revocable-at-will offers are not only within the means of relatively well-off institutions, but also of community college on much tighter budgets.

On the second subject, there is a substantial and growing body of research demonstrating that overreliance on a contingent faculty workforce has deleterious consequences for students. Research has demonstrated that exposure to part-time faculty has a negative effect on student retention past the first semester of college3 and on the rate at which community college students transfer to four-year institutions,4 despite the best

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2 Although concerns were raised at our meeting as to possible spillover effects that might be occasioned by the guidance we have requested, none were identified at the meeting. As we explained, K-12 teachers do not work on short-term contingent contracts of the kind that are prevalent in higher education, and we are aware of no situations in which education support professionals—in the K-12 setting or in higher education—face the same type of employment offers. We have asked for guidance specifically relating to the practice of making contingent offers to faculty employed on the basis of short-term arrangements for the simple reason that it is in that setting that the practice is prevalent. Of course if the same arrangements were employed elsewhere in the education sector, the same principle would apply. But there is no evidence that that is currently the case.


4 See Audrey J. Jaeger & M. Kevin Eagan, “Effects of Exposure to Part-time Faculty on Community College Transfer,” Research in Higher Education, No. 0361-0365 (2008); Betheny Gross & Dan Goldhaber, “Community College Transfer and Articulation Policies:
efforts of part-time faculty members. Given the predominance of part-time adjunct faculty in the teaching of many core subject areas that are gateways to future college access (e.g., English composition, foreign languages, and mathematics), these findings ought to be of grave concern to everyone who cares about the success of American college students. On the other hand, many studies have demonstrated that proper integration of part-time faculty into higher educational institutions—the kind of integration that occurs when institutions and part-time faculty share a plan for the long-term presence of particular part-time faculty on a campus—can mitigate these negative effects.5

We hope that you find the foregoing helpful and eagerly await your response to our request for clarification of ETA’s existing guidance on the reasonable assurance provision.

Sincerely,

/s/

Alice O’Brien
Phil Hostak
NEA Office of General Counsel
On behalf of the coalition reflected on the letterhead
