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January 31, 2013

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 nether 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, IPL 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

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

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.<sup>1</sup> 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.<sup>2</sup> Indeed, the data point to a complete inversion of the employment patterns that obtained in higher

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<sup>1</sup>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.").

<sup>2</sup>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.<sup>3</sup> 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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<sup>3</sup> John W. Curtis and Monica F. Jacob, AAUP Contingent Faculty Index 2006 (Association of University Professors, 2006) (available at <http://www.aaup.org/NR/rdonlyres/5EC9F777-EDB8-43B8-AE7B-AA5CCBA3A762/0/AAUPContingentFacultyIndex2006.pdf>); U.S. Dep't of Educ., National Ctr. for Educ. Statistics, CAREER/TECHNICAL EDUCATION STATISTICS, *Table P.61 Percentage Distribution of Teaching Faculty in 4-year and 2-year Institutions, by Faculty Rank and Tenure Status, Control and Level of Institution, Curriculum Area, and Career Teaching Field: 2003-04* (available at <http://nces.ed.gov/surveys/ctes/tables/P61.asp>); Schuster & Finkelstein, *supra* note 1, at 323-24.

(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 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 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



**ADDENDUM: EXCERPT FROM UIPL 04-87**

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

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Assistant Secretary Jane Oates

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employed in accordance with the assurance given earlier, the State must consider whether there was a bona fide offer of employment.