

Case No. S235903

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

UNITED EDUCATORS OF SAN FRANCISCO, AFT/CFT, AFL-CIO, NEA/CTA,
Plaintiff and Appellant,

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,
Defendant, Cross-Defendant and Appellant.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT,
Real Party In Interest and Respondent.

**SUPREME COURT
FILED**

FEB -1 2017

SAN FRANCISCO UNIFIED SCHOOL DISTRICT, **Jorge Navarrete Clerk**
Plaintiff and Respondent.

v.

Deputy

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,
Defendant and Appellant.

Court of Appeal of the State of California, 1st District, Division 1
No. A142858/A143428
Superior Court of the State of California, County of San Francisco
The Honorable Richard B. Ulmer, Jr., Judge
Civil Case No. CPF 12-512437

**SAN FRANCISCO UNIFIED SCHOOL DISTRICT'S MOTION FOR
JUDICIAL NOTICE**

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MOTION FOR JUDICIAL NOTICE

Respondent SAN FRANCISCO UNIFIED SCHOOL DISTRICT respectfully moves this Court to take judicial notice, under Evidence Code section 452, and California Rules of Court 8.252(a) and 8.520(g), of the following document:

1. Memorandum titled “Interpretation of ‘Contract’ and ‘Reasonable Assurance’ in Section 3304(a)(6)(A) of the Federal Unemployment Tax Act,” issued on December 22, 2016 by the United States Department of Labor. (“Memorandum”) The Memorandum was accessed at the following URL on January 31, 2017, at 8:35 p.m.: https://wdr.doleta.gov/directives/attach/UIPL/UIPL_5-17.pdf. A true and correct copy of the Memorandum is attached to this Motion.

LEGAL ARGUMENT

The Memorandum’s stated purpose is “[t]o provide the Department of Labor’s (the Department) interpretation of the terms ‘contract’ and ‘reasonable assurance’ as used in sections 3304(a)(6)(A)(i) through (iv) of the Federal Unemployment Tax Act (FUTA).”

Evidence Code § 452 states, in pertinent part:

Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451...

... (c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States...

... (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

California courts have taken judicial notice of similar advisory writings of agencies of the United States under Evidence Code § 452(c). (*See, Sierra Pacific Holdings, Inc. v. County of Ventura* (2012) 204 Cal.App.4th 509, 512 (judicial notice taken of Federal Aviation Administration advisory circular.))

No party has previously requested judicial notice of the attached document because it was issued on December 22, 2016, and the DISTRICT's Answer Brief on the Merits is the first brief to be filed subsequent to its issuance. Petitioners will have a fair opportunity to address the memorandum in their reply briefs.

The DISTRICT believes that the Department of Labor's discussion of the term "academic term" on pp. 10-11 of the Memorandum will be helpful to the Court in adjudicating the issue on review.

DATED: January 31, 2017

Respectfully submitted,

BURKE, WILLIAMS & SORENSEN

By: _____

John R. Yeh

Attorneys for Respondent San Francisco Unified
School District

EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION Between and Within Terms Denial
	CORRESPONDENCE SYMBOL OI / DL
	DATE December 22, 2016

ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 5-17

TO: STATE WORKFORCE AGENCIES

FROM: PORTIA WU 
 Assistant Secretary

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

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

2. **References.**

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

RESCISSIONS None	EXPIRATION DATE Continuing
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- UIPL No. 44-93. *Unemployment Tax Act Relating to Reimbursing Employers*, (September 13, 1993)
- Senate Finance Committee Report, 91st Congress, 2d Session, Senate Report No. 91-752, at p.14 (March 26, 1970)
- Joint Explanatory Statement of the Committee of Conference, 94th Congress, 2d Session, Report No. 94-1745, at p. 12 (October 1, 1976)
- Senate Report on the Unemployment Compensation Amendments of 1976, 94th Congress, 2d Session, Senate Report No. 94-1265, at p. 9 (September 20, 1976)

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

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

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

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

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

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

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

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

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

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

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

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

- (1) **The offer of employment may be written, oral, or implied, and must be a genuine offer, that is, an offer made by an individual with actual authority to offer employment. Thus, if someone without authority to commit the educational institution to employing an individual makes the offer, this prerequisite is not met.**
- (2) **The employment offered in the following academic year or term, or remainder of the current academic year or term, must be in the same capacity. Services under sec. 3304(a)(6)(A), FUTA, are performed in two capacities: (1) a professional capacity or (2) a non-professional capacity. The employment offered in the following academic year or term must be provided in the same capacity as the previous academic year's or term's employment.**

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

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

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

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

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

b. What is a "contract?"

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

c. What is a "reasonable assurance?"

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

Are Contingencies Within the Employer's Control?

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

Totality of Circumstances

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

Contingent Nature of the Offer

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

d. Guidance for Making the Determination

- (1) If there is a high probability that employment will be available based on the totality of circumstances and contingent nature of the offer inquiry, the state agency must determine that the claimant has a "reasonable assurance."
- (2) As is generally the case with determinations of entitlement to UC, the state agency is responsible for determining whether a claimant has a "reasonable assurance" of performing services the following academic year. This means neither the claimant nor the employer has the burden to establish the claimant has or does not have a "reasonable assurance." If an issue regarding "reasonable assurance" arises, states must follow regular fact-finding procedures for determining a claimant's eligibility. This does not, however, relieve claimants or employers of the responsibility to provide sufficient information to the state agency to make a determination when requested to do so.
- (3) As part of the state agency's determination of whether a "reasonable assurance" exists, it must obtain from the educational institution a written statement to the state agency explaining the manner in which the employee was given a reasonable assurance of employment in the following academic period (i.e., was it in writing, oral, or implied and what information about the offer, including contingencies, was communicated to the individual). This written statement may be used in the totality of the circumstances analysis. However, the statement itself does not conclusively demonstrate that a claimant has a "reasonable assurance" and state agencies must carry out the analysis required in this UIPL when determining if a claimant has a "reasonable assurance."
- (4) All workers may file a claim for benefits as soon as they become unemployed. If an individual's circumstances change during a spell of unemployment, the individual's eligibility for benefits may also change. Thus, a claimant who initially had been determined to not have a "reasonable assurance" can subsequently become subject to the

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

- (5) **Multiple-employer situations** – Some claimants subject to the between and within denial provisions provide services for more than one educational employer. When the claimant provides services for more than one educational employer, the state agency may not determine that a claimant has a contract or "reasonable assurance" based solely on the finding that the claimant has a contract or "reasonable assurance" from one of the employers without further analysis. In these situations, state agencies must first determine whether the claimant has a contract or reasonable assurance with each of the educational employers. If, for example, there is reasonable assurance with all employers, the claimant has a reasonable assurance and UC may not be paid based on any of these services. Similarly, if, for example, there is no contract or reasonable assurance with any employer, the claimant does not have a reasonable assurance overall and UC must be paid based on all of these services. However, if the claimant has a contract or reasonable assurance with at least one but not all employers, states have two options when determining which services would be the basis for UC payments.
- a. Option 1: The state determines UC eligibility between or within terms, in accordance with state law, based on the services performed for the employer(s) for which there is no "contract" or "reasonable assurance". The services for the educational employers for which there is a "contract" or "reasonable assurance" are not available for determining eligibility for UC between terms.
 - b. Option 2: The state agency looks at all of the services and determines whether, as a whole, the economic conditions prerequisite requirement is met. If it is, UC is not payable between or within terms based on any of these services. If the economic conditions requirement is not met, all of the services would be used to determine eligibility for UC. (If the state uses this option, the state may, if permitted under state law, determine that the unemployment is not attributable to those educational employers who provided a contract or reasonable assurance and relieve them of charges or reimbursement for their portion of the UC paid in accordance with UIPL Nos. 21-80 and 44-93.)

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

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

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

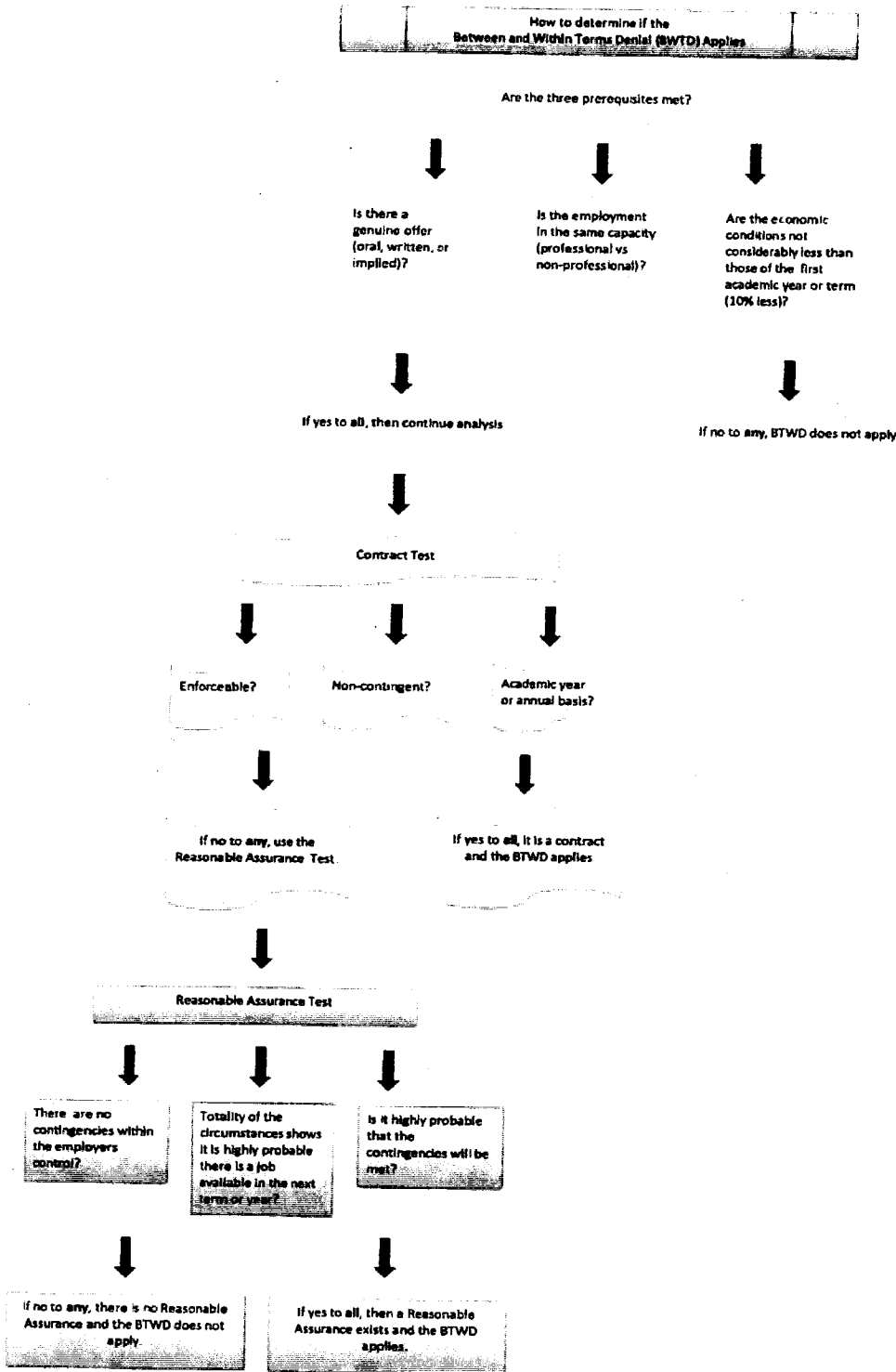
5. **Action Requested.** State agency administrators are requested to provide the information contained in this UIPL to appropriate staff and are requested to review their laws and procedures and make any changes needed to conform to this interpretation.

6. **Inquiries.** Please direct questions or requests for technical assistants to the appropriate regional office.

7. **Attachments.**

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

Attachment I



Examples for Determining Reasonable Assurance

* The responses in the first four examples carry out the full analysis described in the UIPL. The remaining examples only conduct the analysis until a determination can be reached or only address the main issue the example is intended to illustrate.

I. Contingent On Enrollment and/or Funding

a. Enrollment

1. An adjunct instructor taught three classes of English 101, a required course, during the spring semester. Notwithstanding the fact that the offer of employment to teach this course has always been contingent on enrollment, the instructor has taught three classes of English 101 for ten consecutive semesters. There is no information indicating that enrollment will decline in the fall semester. At the conclusion of the spring semester, the instructor was given an offer to teach three classes of English 101 in the fall contingent on enrollment. Is UC payable between academic years based on her services as an adjunct instructor for the school district?

No. The State agency made the prerequisite determinations that the educational institution made an offer to the claimant, the employment offered is in the same capacity, and the economic terms and conditions of the job are not considerably less. Because the claimant does not have a contract, the State agency must determine if the claimant has a reasonable assurance. The State agency determined that the contingency (enrollment) is not within the control of the employer but reasonably concluded that it is highly probable there would be a job available to the claimant as enrollment (no indication it was declining), teaching history (ten consecutive semesters teaching the course), and nature of the course (intro-level required course taught every semester) indicate that the institution will offer the instructor the opportunity to teach the class the following term. Giving primary weight to the contingent nature of the offer, the State agency reasonably concluded that it was highly probable the enrollment contingency would be met and therefore, the between and within term denial applies and the claimant may not be paid UC based on the educational wages.

2. An adjunct instructor taught an intermediate level political science course that is not required for all students during the spring semester. The instructor has been teaching this course at this educational institution during the last five academic years. However, because student interest in this course varies from semester to semester, she only taught it during six of the last ten semesters even though she was available to teach during each semester. The four semesters in which she did not teach the class were Spring Semester Year One, Fall Semester Year Three,

Spring Semester Year Four, and Fall Semester Year Five. Both funding and enrollment at the educational institution have increased and the political science department recently expanded, but there is no information indicating that enrollment patterns for this course will substantially change. The institution is advertising the course in its course catalog with the adjunct instructor's name. The claimant's employer offered the claimant the opportunity to teach the course again in the fall subject to enrollment. Is UC payable between academic years based on her services as an adjunct instructor?

Yes. Considering the totality of circumstances, a State agency determined that it is not highly probable that a job in the same capacity with the same or similar economic terms and conditions is available to the claimant in the following term because, even though the claimant was available to teach the course during each of the past 10 semesters, the school did not hire claimant to teach this course during 4 of the last 10 terms. Giving primary weight to the contingent nature of the offer the State agency reasonably concludes that it was not highly probable that the enrollment contingency would be met as enrollment in the course had varied during the last five academic years, resulting in the claimant not being hired to teach the course. Therefore, the contingency outweighs any of the facts that would indicate the claimant has a reasonable assurance. Therefore, the claimant does not have a reasonable assurance and may be paid UC based on these services.

3. In the Fall semester, the claimant taught one course of English 101 class at College A, two courses of advanced political science at College B, and one course of renaissance literature at College C. All three colleges have made offers of employment to the claimant to teach again in the spring semester, and each offers the same per course rate of pay, but College B is only offering the claimant one course, not two. All of the offers are contingent on enrollment. At College A, English 101 is a required course and College A has recently increased enrollment. No additional information is available on enrollment in advanced political science courses at College B. College C has an innovative program on renaissance studies, which has increasingly attracted students to the College; however, the College has only taught renaissance literature in the Spring semester three out of the five most recent spring semesters due to lack of enrollment. How does the between and within term denial apply to this claim?

In order to make a determination the State agency must apply the prerequisite determinations to each of the offers received. The offers from College A and C meet the prerequisite determinations as each offer is to provide services in the same capacity and the economic terms and conditions are not considerably less as the offer is to teach the same number of courses. College B's offer does not meet the prerequisite determination as the offer is only to teach half the number of classes previously taught, and therefore, is considerably less than the prior term. Thus, College B has not met the prerequisite determinations. Because the claimant does not have a contract with Colleges A and C, the State agency must

determine if the claimant has a reasonable assurance from each of the institutions.

College A: The state agency determines that the enrollment contingency is not within the employer's control. In considering the totality of circumstances, the State agency reasonably concludes it is highly probable that a job will be available to the claimant as the course is required and enrollment has increased. Similarly, giving primary weight to the contingency, the State agency determines it is highly probable that the enrollment contingency will be met as enrollment has increased at College A. Therefore, the claimant has a reasonable assurance from College A.

College C: The enrollment contingency is not within the employer's control. In considering the totality of circumstances, the State agency reasonably concludes that it is not highly probable that there will be a job available to the claimant as the course has only been offered three of the last five semesters.

State law/policy may provide for either of two options for determining which wages the claimant may use to establish monetary eligibility. However, whichever option is used must be used consistently.

a) Option 1: Because the claimant has a reasonable assurance from one college, but not from the other two, UC is payable based on the services from the two schools for which there is no reasonable assurance. UC is not payable based on the services from the school that provided a reasonable assurance.

b) Option 2: Because there is only a reasonable assurance for one class from one of the schools making up 25 percent of the wages from the previous term, the economic conditions as a whole are considerably less in the following academic year or term than in the first academic year or term, and UC is payable between or within terms based on all of the educational services.

(Note that, if permitted under state law, the educational institution that provided a reasonable assurance may be relieved of reimbursement for their proportional share of the UC paid.)

b. Funding

1. An adjunct instructor taught three cyber-security courses at a community college, which were funded by a one-year pilot grant from a national association during the fall and spring semesters of an academic year. It was the first time that the school had received the grant. The instructor received an offer, contingent on funding, to teach the same courses in the next academic year. However, at the time of application for unemployment compensation, the association had not made any decision to continue funding the pilot program during the next academic year. Is UC payable between academic years based on the services as an adjunct instructor at the community college?

Yes. The State agency determined that the prerequisite determinations are met as the educational institution made an offer to the claimant, the employment was in the same capacity, and the economic conditions of the job were not considerably less. Because the claimant does not have a contract, the State agency must determine if the claimant has a reasonable assurance. The State agency determined that the contingency (funding) is not within the control of the employer. Therefore, in giving primary weight to the contingent nature of the offer, the agency reasonably concluded that it was not highly probable that the contingency would be met as funding is not certain. Therefore, the claimant does not have a reasonable assurance and the State agency may not deny the claimant benefits based on the between and within term denial provision.

2. A teacher is offered the same job, contingent on the availability of funding, in the second academic year in a special program that is funded from an outside source. This program has been funded for the past four years. No facts indicate that funding will not be available, though 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 not continue in its current form. Is UC payable between academic years based on the services as a teacher in the special program?

No. Analyzing the totality of circumstances, the State agency reasonably concluded it is highly probable that there will be a job available to the claimant as the employment history shows there was funding from the outside source and a job available to the claimant for the past four years. Giving primary weight to the contingency, the state agency reasonably concluded it is highly probable the funding contingency will be met as there had been funding available for the past four years. Therefore, UC is not payable based on these services.

II. Contract Reduction, Changes in Terms and Conditions of Employment, and Substitutes

a. *Contract Reduction Is Loss of Work*

1. A full-time teacher during the first academic year is offered a contract to teach one day per week during the second academic year with the salary reduced proportionally. Rather than refuse the contract and risk no earnings at all, the teacher accepts the offer. Is UC payable based on the services as a teacher?

Yes. The State agency adjudicating the claim reasonably determined the economic terms and conditions offered are considerably less than the previous academic year because there is a salary reduction of greater than 10%. Therefore, the State agency may not deny the claimant benefits based on the between and within term denial provision.

b. Change in Economic Terms and Conditions of Employment

1. A school assistant principal was informed that because of a restructuring of the administrative offices of the county school system, her position would be filled by an administrator whose position at the central office had been eliminated. Therefore she would be offered a position as a teacher in another school within the school system at no reduction in pay for the next academic year. Does the change in position mean that the between and within terms denial provisions do not apply?

No. Because both positions are "in an instructional, research, or principal administrative capacity" (professional capacity) and the offer meets the other prerequisite determinations, the between and within terms denial provisions apply and the claimant cannot receive UC based on these services if a reasonable assurance of employment in the next academic year or term exists.

2. A full time teacher at a local high school was offered a position as a full time teacher at another school system in a different part of the state for the following year. Because her husband has been transferred to that part of the state, she told the new school system that she would like to take the job. The terms of the offered position are identical to those that she had in the first job. Is UC payable between academic years based on the services for the local high school?

No. Even though the offer that she accepted is from a different school system, it is still in an instructional capacity and the offer meets the other prerequisite determinations. As such, she has a reasonable assurance of performing services in an instructional capacity during the next academic year and she may not use these services to establish eligibility for UC.

3. An on-call substitute teacher in the first academic year is offered a contract to remain on the on-call list for the next year for the same per diem wage. 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. Is UC payable between academic years based on the services as an on-call substitute?

Yes. To determine whether the economic conditions requirement is met, the State must first compare the offer to the offer from the prior year to determine if the terms of the employment offered in the following academic year or term are not considerably less. However, the state must also determine whether any changes in circumstances have occurred affecting the likely amount of work offered. In comparing the offers and considering the new collective bargaining agreement, the state agency determines that the offer does not meet the prerequisite determination that the economic conditions of the job offered are not considerably less because the claimant will likely have a greater than 10 percent

reduction in hours and a corresponding reduction in compensation. Thus, the offer for the second academic year is considerably less than that of the first academic year.

4. A full-time teacher is told that their 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. Is UC payable between academic years based on the teacher's services as a full-time teacher?

No. In this case, the State agency determined that the contract was offered by an individual with authority to do so, the employment is in the same capacity (professional), and the economic terms and conditions of the contracts are identical. Therefore, the between and with terms denial provision applies and the UC may not be paid between terms based upon those services.

5. Claimant, a full-time tenured teacher, has been employed by a school district for three years as a Spanish language teacher. The District notifies the claimant and six other tenured teachers that due to budgetary cutbacks, the District will be reducing services and that their positions will be eliminated. After a formal hearing, the District notified the claimant and six other tenured teachers that they were terminated effective the end of the academic school year. Because the teacher has tenure, the claimant has certain reemployment rights with the District under provisions of the Education Code, as did the other tenured teachers who were terminated. Therefore, the District notifies the teachers that they have been placed on the substitute teacher list. The District informed the claimant that he would receive his regular pay rate when he worked as a substitute only if he worked 21 days or more within a 60-day period. If he worked less than that, the rate of pay as a substitute would only be half of that, determined on a per diem basis. There is no information suggesting that the claimant will be called to substitute on any regular basis, or at all. Is UC payable between academic years based on the services as a Spanish-language teacher for the school district?

Yes. In making the prerequisite determinations, the state agency determines that because the rate of pay depends on the frequency of work and there is not sufficient information to determine what the rate of pay will be, the economic terms and conditions prerequisite determination test is not met as the employer is not ensuring that the economic terms and conditions will not be considerably less. Therefore, the claimant does not have reasonable assurance.

6. A college employee performs research as a biochemist at a salary of \$75,000 a year. At the end of the school year, he is informed that the grant for the research has ended and he will be offered a position as an associate professor of biochemistry for the upcoming school year. Associate professors with his

credentials are paid \$45,000 a year. Is UC payable between academic years based on the services as a researcher for the college?

Yes. Even though he was offered a position in a professional capacity, the pay is considerably less than in the previous term because he will not earn at least 90 percent of what he earned in the prior year. Therefore, the offered employment does not meet the economic terms and conditions prerequisite determination.

III. Voluntary Quit with Good Cause

a. Good cause related to the work

1. An adjunct professor at a public university was instructed by the Dean of Students to make sure that no scholarship athletes received a grade of less than a C in any of the classes he taught. When the professor refused to do so, and gave a failing grade to two members of the football team who performed substandard work in the class, the Dean had the grades changed to a C. During the next semester the professor gave failing grades to three members of the football team because they skipped class on a regular basis and did not turn in any of the required work. Again the Dean had the grades changed to a C. When the professor complained to the President of the College, he refused to take any action and told the professor to keep quiet about the situation. The professor was offered a position as an adjunct professor with a minor increase in pay for the next academic year if he agreed to stop "making waves." Rather than continue to falsify grades, which constituted a violation under both the university code of conduct and the state professional credentialing board rules, the professor resigned his position. When the school year ended the professor applied for UC. The state agency ruled that he voluntarily quit work with good cause related to the work. Under State law, a voluntary quit with good cause related to the work is not disqualifying. Is UC payable between academic years based on the services as an adjunct professor for the public university?

Yes. Even though the individual had an offer to perform services in the same capacity with a raise in pay for the next academic year, the individual's separation from employment was a voluntarily quit with good cause and not disqualifying under state law. As such, the offer is not considered when determining whether claimant had a reasonable assurance of employment in the next academic year.

b. Good personal cause

1. At the end of the academic year a teacher informs the school that his wife, an officer in the United States Army, has been transferred to a new duty station in another state. He will be accompanying her to her new assignment and therefore will not be able to accept an offer to teach for the school system during the next school year. Under State law, a voluntary quit to follow a military spouse to a

new duty station is not disqualifying. Is UC payable between academic years based on his wages as a teacher?

Yes. Even though the individual had an offer to perform services in the same capacity for the next academic year, the individual's separation from employment was a voluntarily quit with good cause and not disqualifying under State law. As such, the offer is not considered when determining where there is a reasonable assurance in the next academic year and the wages are available for use to determine eligibility for UC.

(If UC is paid to individuals who are eligible due to a voluntary quit with good cause under state law, the state may relieve the employer of reimbursement if such relief is permitted under State law.)

IV. Retroactive Payment of UC

a. *Non Professional*

1. An individual performed services as a custodian for a school dormitory for a major university. It was the first year of his employment. During the summer semester the dormitory is not used to house students, but at the end of the academic year he is given assurances by his manager that he will be employed in the same position and under the same terms in the upcoming academic year. When the custodian was hired, he was told the previous custodian worked with the university for the past twenty years and left to retire. The university also told the custodian that although he was hired on an academic year to year basis, they hoped that he would be willing to work with them every year. The state has adopted the optional between and within term denial provisions for individuals providing services in a non-professional capacity. Because he is not sure whether he will be working the next year, he continues to file for unemployment during the summer, though the state does not pay the claims because it has determined that he has a reasonable assurance of employment in the next academic year. One week before the new school year starts, a fire destroys one of the dormitories and the school contracts with a local hotel to house the students. Due to a lack of seniority, the claimant is not retained for the second year. Is he eligible to receive UC retroactively for the weeks for which he filed, but was denied UC because he had a reasonable assurance of employment?

Yes. Clause (ii) of Section 3304(a)(6)(A), FUTA, requires the retroactive payment of UC if the individual "was not offered an opportunity to perform such services" if the claimant filed a timely claim for compensation for that week and it was denied solely because he had a reasonable assurance of performing the services. Note, clause (ii) only applies to services in the non-professional capacity. Because he performed services in a non-professional capacity, for each week that he timely filed a claim for compensation and was denied because he had a reasonable assurance, he is entitled to retroactive payment of UC.

b. Professional

1. An adjunct professor taught three upper level courses in ceramics at a local university. He filed claims for UC at the end of the term, but was denied because he had a received reasonable assurance that he would teach the three courses during the next academic year. One month before the school year began, the legislature introduced and enacted an appropriations bill that cut the funds for fine arts courses. As a result, the university was required to cease offering the course and the adjunct professor's employment was not renewed. Is he eligible to receive UC for the weeks that he was denied between terms if he had continued to file claims?

No. Because the individual performed instructional services, which is in the professional capacity category, Section 3304(a)(6)(A)(i) applies. That clause does not contain language permitting retroactive payment of UC. In this case, the reason the job is no longer being offered was out of the control of the university and was not reasonably foreseen when the assurance was given. Thus, retroactive payment of UC under these circumstances would not be permissible. However, if the professor files a new claim for UC, he may receive UC if he is otherwise eligible.

V. Other Potential Reasonable Assurance Topics

1. A software developer works at a software development company and in the evenings the claimant teaches an intro to computer science at a public community college. In late-May, the software developer is laid off from the job at the software development company in a routine company downsizing and applies for unemployment insurance. The claimant has a signed contract with the community college to teach intro to computer science for the next academic year for the same compensation as in the previous academic year. Is UC payable based on the claimant's services for the software development company?

Yes. The claimant's services for the software company are not subject to the between and within term denials because they are not for an educational institution. Therefore, if the claimant is otherwise eligible, the claimant can receive UC for the claimant's services at the software development company.

2. A lawyer employed full-time as an associate in a large law firm also teaches a law class in the evening as an adjunct faculty member at the local public university. Although the lawyer has taught the class during both the fall and spring semesters for the past three years, she does not have a reasonable assurance that she will be teaching the class again in the next semester. Is UC payable based on the lack of reasonable assurance?

An individual must meet all eligibility requirements in order to receive UC. In this case, the individual would not be considered unemployed under any state law because she is employed full-time. For this reason, she is not eligible to receive UC based upon her services as an adjunct faculty member even though she does not have a reasonable assurance with her educational employer.

3. A graduate student is enrolled in the first year of a three-year Ph.D. program at a state university and is employed by the university as a teaching assistant for three required freshman English courses for a fixed salary of \$8,000 as part of his financial aid package. At the end of the spring semester he is told that he will be expected to work as a teaching assistant for two courses for a different professor in the upcoming school year for the same per course salary as a continuation of his financial aid package. In the upcoming school year, the graduate student will take three courses for the Ph.D. program. Is UC payable between academic years based on his services as a teaching assistant?

Before determining whether the graduate student can be paid UC based on his services as a teaching assistant, the state agency must first determine whether the graduate student's services are covered employment under state UC law. If the graduate student's services are not covered employment, no determination of reasonable assurance needs to be made. If however, under state law, the services are covered employment, the between and within terms denial provisions apply and the state must determine whether a reasonable assurance exists. For purposes of FUTA, the graduate student in this example is not in covered employment as he is enrolled in a state university and is regularly attending classes. For the purposes of this example, the graduate student is also not covered under state law. Therefore, these services cannot be used to establish monetary eligibility for UC.

4. The claimant from the example above files a claim for benefits again in June 2016, when the summer recess begins. During the summer recess, is UC payable based on the services for the school?

No. The claimant may not be paid UC, based upon those wages during the 2016 summer recess period because the claimant has a contract to perform services in the 2016 fall semester and the summer recess falls between two regular but not successive terms.

5. For the past 5 years, an adjunct instructor has been teaching political science courses during all four quarters (fall, winter, spring, summer) at a community college. The college operates on an academic year consisting of four quarters. Each quarter consists of 11 weeks of classes, with a two-week break between each quarter. At the conclusion of the spring quarter, she is informed that she will not be teaching during the summer quarter. However, she will teach the same number of courses in the fall quarter as she has in the previous quarters. The state agency

determines that there is a reasonable assurance that she will be teaching the courses during the fall quarter. Is UC payable during the summer quarter based on her services as an adjunct instructor?

Yes. The state agency must determine whether the individual is in a period between academic terms and whether or not the individual has a reasonable assurance of providing services in the next academic term. Because the college has a 12-month academic year, consisting of four quarters, the summer quarter is not a period between academic years.

Section 3304(a)(6)(A)(i), FUTA, requires that the denial apply between successive terms unless there is a specific agreement that provides for providing services between regular, but not successive terms. In this case, the adjunct instructor had been performing services every year in an instructional capacity during all four quarters of the academic year and there is no agreement to provide services only during non-successive terms. Therefore, a reasonable assurance for the fall term does not affect the determination of whether she has a reasonable assurance in the summer term. In this case:

- 1) the period between successive terms is the two-week period between the spring and summer quarters;*
- 2) the claimant performed services in the first academic term (spring);*
- 3) the state agency determines that the claimant does not have a contract or reasonable assurance of performing services in the successive term (summer) because she has been informed that she will not be performing services during that term;*

Therefore, the claimant would be paid UC during the summer quarter and during the two-week periods before and after that quarter based on her services as an adjunct instructor because she does not have a reasonable assurance of performing service in the successive academic term.

Historical and Legal Analysis

This attachment provides an explanation of the legislative history of sec. 3304(a)(6)(A), FUTA, and the reasoning behind the Department's interpretation of these provisions.

In 1970, Congress amended FUTA to require states to extend coverage to, among others, employees of State institutions of higher education and certain non-profits.¹ Although States were required by this amendment to provide coverage for these employees, FUTA was also amended to require that benefits be denied to those employees providing services in an instructional, research, or principal administrative capacity² (professionals) during periods between two successive academic years or during a similar period between two regular terms, whether or not these terms are successive, when the employee had a contract to perform service in the same capacity in the following year or term. These amendments also allowed states to require political subdivisions to extend coverage to employees of institutions of higher education operated by political subdivisions, such as municipalities and counties, rather than the state itself, providing services in a professional capacity. If the state chose to extend coverage, the state was required to apply the same limitation on benefit payments between and within academic years and terms as required for professional employees of State or non-profit institutions of higher education.

Then, in 1976, Congress again amended FUTA³ by requiring, among other things, the coverage of state employees, with certain limited exceptions, as well as employees of nonprofit elementary and secondary schools. These amendments also extended the prior limitation on the payment of benefits between school terms to certain categories of college and university employees to situations where the employee had a "reasonable assurance" of reemployment in the following year or term, rather than limiting the exclusion to those with a contract.

In 1970, when Congress originally amended FUTA to extend coverage to employees of state institutions of higher education and non-profits, the Senate Finance Committee explained that it understood employment at institutions of higher education to be relatively stable and "...not subject to the same degree of fluctuation..." as other industries.⁴ The Committee Report noted that unemployment for those individuals was low and it was common for faculty and other professional employees of a college or university to be employed pursuant to an annual contract at an annual salary, but for a work period of less than 12 months.⁵ The annual salaries, the Report continued, were intended to cover the entire year, including the summer periods, a

¹ See the Employment Security Amendments of 1970, Pub. L. 91-373 (Aug. 10, 1970).

² Later amendments have required or allowed the states to extend the exemption from benefits for certain other classes of employees, including employees of State or non-profit institutions of higher education who provide services in a non-professional capacity, employees of educational services agencies, and those providing services on behalf of a covered educational entity.

³ See The Unemployment Compensation Amendments of 1976, Pub. L. 94-566 (Oct. 20, 1976).

⁴ Senate Finance Committee Report, 91st Congress, 2d Session, Senate Report No. 91-752, at p.14 (March 26, 1970).

⁵ *Id.* at 16.

semester break, a sabbatical period or similar non-work period during which the employment relationship continues.⁶

In the 1976 amendments to FUTA, the Joint Explanatory Statement of the Committee of Conference explained that the Conference Committee considered a “reasonable assurance” to mean a written, verbal, or implied agreement that the employee would be performing services in the same capacity during the ensuing academic year or term.⁷ In distinguishing the term “reasonable assurance” in this FUTA provision from the term “contract,” the report noted that a contract was intended to include tenure status. The Senate Finance Committee, in explaining this provision noted the committee intended for the determining factor in the “reasonable assurance” analysis to be if “a job available to the individual” in the following academic year or term.⁸

Since the 1970s amendments to FUTA, the employment model for institutions of higher education has changed. For example, in 1970, the Senate Finance Committee noted that employment at institutions of higher education was relatively stable in comparison to employment in other industries. The statistics demonstrate that the Committee’s understanding was correct and show the change in the employment model. In the 1975-1976 academic year, approximately twenty-five percent of instructors in institutions of higher education were part-time faculty. However, by 2011 that number had increased to over forty percent.⁹

Moreover, since the Department’s 1987 UIPL on the interpretation of “reasonable assurance,” considerable inconsistencies both between and within states have developed in the interpretation of the term “contract or reasonable assurance,” particularly in the context of instructional positions in higher education. Therefore, this UIPL is being issued to clarify the Department’s interpretation of the terms “contract” and “reasonable assurance” in sec. 3304(a)(6)(A), FUTA, and to assist States in consistently applying these Federal law requirements.

The Department’s interpretation of the term “contract” is based, in part, on the legislative history which shows that sec. 3304(a)(6)(A)(i), FUTA, was only intended to deny benefits to claimants who had enforceable, non-contingent agreements that provide for compensation on an annual basis. When this provision of FUTA was enacted, the Senate Finance Committee report demonstrated that the Committee was only intending to exclude individuals who were “employed pursuant to an annual contract at an annual salary, but for a work period of less than 12 months.”¹⁰ As noted above, in the 1970s, this described the position of approximately three quarters of faculty. Therefore, the Department is interpreting the reference to “contract” in sec. 3304(a)(6)(A)(i) to only refer to an enforceable, non-contingent agreement that provides for compensation on an annual basis, though the contract terms describing compensation do not have to be expressed specifically as an annual salary.

⁶ *Id.*

⁷ The Joint Explanatory Statement of the Committee of Conference, 94th Congress, 2d Session, Report No. 94-1745, at p. 12 (October 1, 1976).

⁸ Senate Report on the Unemployment Compensation Amendments of 1976, 94th Congress, 2d Session, Report No. 94-1265, at p.9 (September 20, 1976).

⁹ John W. Curtis, *The Employment Status of Instructional Staff Members in Higher Education, Fall 2011*. AAUP (April 2014).

¹⁰ Senate Finance Committee Report, 91st Congress, 2d Session, Senate Report No. 91-752, at p.16 (March 26, 1970).

The Department's interpretation of the term "reasonable assurance," as further explained in the body of this UIPL is based, in part on the legislative history and in part on successful approaches in other states. The standards the Department is implementing through the Two Step "reasonable assurance" test were created to determine if a job is available to the claimant, which the Senate Finance Committee Report specified as the determining factor on whether a claimant has a "reasonable assurance."¹¹ This is in line with the approach many courts interpreting their States' legislation implementing the between and within terms denial have taken in requiring the State agency to analyze the totality of circumstances to determine if the claimant has a reasonable assurance in the following academic year or term. Courts considered a variety of factors under a totality of the circumstances analysis, such as enrollment, funding availability, the nature of the course, and the claimant's employment history. Each of these factors are included in this UIPL. As explained in the body of the UIPL, the Department has concluded that this approach allows the states to answer the crucial question articulated in the Senate Report on this issue – is a job available to the claimant – and has adopted a modified approach in its interpretation of the term "reasonable assurance."

The 1976 Senate Finance Committee's report on the amendment to FUTA to add the term "reasonable assurance" stated "if a job is available to an individual, and he does not want to accept it, he would be disqualified *just as any other individual who refuses employment is disqualified.*"¹² The Department interprets this language to mean that claimants who are subject to the between and within terms denial are still subject to state laws on disqualification. The implication of this statement is that if a state's disqualification provision provides that a claimant is not disqualified for voluntarily quitting with good cause, then a claimant who is subject to the between and within terms denial should similarly not be denied benefits based upon the employment which they quit with good cause.

Moreover, the legislative history also states that the key inquiry for determining if an individual has a reasonable assurance is whether there will be "a job available to the individual" in the following year or term. Therefore, if a claimant has voluntarily quit with good cause, whether it is for good cause related to the work or good cause for personal reasons, the Department has determined that a job is not to be available to the claimant. Thus, a claimant who voluntarily quits with good cause, whether for work related or personal reasons, does not have a reasonable assurance or a contract that a job is available to the claimant.

As noted in previous guidance, such as UIPL Nos. 15-92 and 43-93, states have discretion on how to implement the between and within term denials for individuals performing services in a non-professional capacity under FUTA sec. 3304(a)(6)(A)(ii) because that provision grants states the option to apply the denial. In this previous guidance, the Department interpreted this to provide certain flexibilities to the states, including limiting the provision to certain classes of services subject to the denial (*i.e.*, bus drivers, janitors, etc.), higher standards for the "reasonable assurance" test such as requiring a contract, and choosing to which breaks the denial applies. See UIPLs 15-92 and 43-93. The Department has determined it is appropriate to extend these

¹¹ Senate Report on the Unemployment Compensation Amendments of 1976, 94th Congress, 2d Session, Report No. 94-1265, at p.9 (September 20, 1976).

¹² *Id.*

flexibilities in this context. Therefore, if a state's law provides that non-professionals are subject to the between and within terms denial, states have the flexibility to determine how to apply the voluntary quit analysis to these claimants.