Attachment III

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 capacity[2] (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 FUTA[3] 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.

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[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.