



December 19, 2014

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

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

Dear Assistant Secretary Wu:

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

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

There is nothing in the statute—or in any regulation with the force of law—that would prevent ETA from clarifying how the “reasonable assurance” standard should apply in particular factual settings. The statute does not define “reasonable assurance,” much less mandate a formless “facts and circumstances” analysis of a kind that would preclude guidance as to how the standard applies in particular factual settings. Indeed, the existing UIPL provides just such guidance in a number of instances—none of which, unfortunately, shed any light on the phenomenon of contingent offers of employment in higher education. And the approach we have proposed, which focuses on the contingent nature of the offer of employment, is entirely consistent with the definition of “reasonable assurance” that ETA

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has adopted in its guidance—*viz.*, “a written, verbal, or implied *agreement that the employee will perform services* in the same capacity during the ensuing academic year or term” (emphasis added). Indeed, our approach gives full weight to the phrase “reasonable assurance of continued employment,” given that an offer of employment that is revocable at will by the employer for reasons wholly outside the employee’s control is the very antithesis of “reasonable assurance of continued employment.”

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

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

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

¹ A copy of Administrator Gilbert’s letter to the Commissioner of New Jersey’s Department of Labor and Workforce Development, stating that pending legislation addressing reasonable assurance in the context of contingent faculty would violate federal law, is attached. A copy of the current guidance from the Massachusetts Department of Unemployment Assistance after an apparent recent intercession by the Department, with the relevant language on page 2 highlighted, also is attached.

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ETA appear to have instead interceded with states that are attempting to address this issue to force them to take exactly the opposite of the approach we have urged. If in fact ETA's view is that the guidance revisions we have proposed conflicts with FUTA or would have some unintended consequences that we have not grasped, we would appreciate a clear response to that effect so that we can proceed as necessary to secure what we all believe to be a critical benefit for an extremely economically vulnerable group of our members.²

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

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

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

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

³ Harrington, C., & Schibik, T., "Caveat Emptor: Is there a Relationship Between PartTime Faculty Utilization and Student Learning Retention?" 91 Association for Institutional Research (2004), available online at <http://airweb3.org/airpubs/91.pdf>.

⁴ See Audrey J. Jaeger & M. Kevin Eagan, "Effects of Exposure to Part-time Faculty on Community College Transfer," *Research in Higher Education*, No. 0361-0365 (2008); Betheny Gross & Dan Goldhaber, "Community College Transfer and Articulation Policies:

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efforts of part-time faculty members. Given the predominance of part-time adjunct faculty in the teaching of many core subject areas that are gateways to future college access (*e.g.*, English composition, foreign languages, and mathematics), these findings ought to be of grave concern to everyone who cares about the success of American college students. On the other hand, many studies have demonstrated that proper integration of part-time faculty into higher educational institutions—the kind of integration that occurs when institutions and part-time faculty share a plan for the long-term presence of particular part-time faculty on a campus—can mitigate these negative effects.⁵

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

Sincerely,

/s/

Alice O'Brien

Phil Hostak

NEA Office of General Counsel

On behalf of the coalition reflected on the
letterhead

Looking Beneath the Surface," Center on Reinventing Public Education, Working Paper No. 2009_1 (2009).

⁵ See, *e.g.*, Audrey J. Jaeger & M. Kevin Eagan, "Examining Retention and Contingent Faculty Use in a State System of Public Higher Education," *Educational Policy* Vol. XX(X) at 1-31 (2010); Paul Umbach, "How Effective Are They? Exploring the Impact of Contingent Faculty on Undergraduate Education," *The Review of Higher Education* at 91-123 (Winter 2007).