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ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 10-20, Change 1

TO: STATE WORKFORCE AGENCIES

FROM: JOHN PALLASCH 
Assistant Secretary

SUBJECT: Unemployment Compensation (UC) for Individuals Affected by the Coronavirus Disease 2019 (COVID-19) – Interpretation of “Between and Within Terms” Denial Provisions in Section 3304(a)(6)(A) of the Federal Unemployment Tax Act (FUTA)

1. **Purpose.** To provide guidance to states regarding UC flexibilities related to COVID-19, specifically in determining eligibility of an individual whose employment is subject to the “between and within terms” denial provisions of Section 3304(a)(6)(A), FUTA.
2. **Action Requested.** The Department of Labor’s (Department) Employment and Training Administration (ETA) requests that State Workforce Administrators provide the information in this Unemployment Insurance Program Letter (UIPL) to appropriate program and other staff in state workforce systems as they respond to the economic effects of COVID-19.
3. **Summary and Background.**
 - a. Summary – This UIPL provides guidance to states on UC eligibility for an individual affected by COVID-19 whose employment is subject to the “between and within terms” denial provisions.

This UIPL includes: 1) an explanation of the “between and within terms” denial provisions; 2) application of these provisions within the context of responding to the spread of COVID-19; 3) application of these provisions as they relate to an individual working remotely; 4) application of these provisions as they relate to an individual working in a nonprofessional capacity; 5) guidance for determining whether an individual has a “reasonable assurance” of continued employment within the context of COVID-19; and 6) application of the “between and within terms” denial provisions for programs included in the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Public Law 116-136).

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- b. Background – The UI program is facing an unprecedented demand due to the economic effects of efforts to mitigate the spread of COVID-19. Many educational institutions are temporarily closing, changing semester and term dates, or changing dates for scheduled breaks in response to COVID-19.

The Department addressed permissible flexibility for states under existing federal law in response to the COVID-19 pandemic with the publication of UIPL No. 10-20, *Unemployment Compensation (UC) for Individuals Affected by the Coronavirus Disease 2019 (COVID-19)*, issued on March 12, 2020.

On March 27, 2020, the President signed into law the CARES Act. This legislation provides emergency assistance and health care response for certain individuals, families, and businesses affected by the COVID-19 pandemic. The CARES Act includes the Relief for Workers Affected by Coronavirus Act set out in Title II, Subtitle A. UIPL No. 14-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Summary of Key Unemployment Insurance (UI) Provisions and Guidance Regarding Temporary Emergency State Staffing Flexibility*, issued April 2, 2020, summarizes the various UC-related provisions within the CARES Act.

- 4. **Guidance.** Section 3304(a)(6)(A), FUTA (26 U.S.C. § 3304(a)(6)(A)), requires, as a condition for employers in a state to receive credit against the Federal unemployment tax, that the state law provide that UC be payable based on services to which Section 3309(a)(1), FUTA (26 U.S.C. § 3309(a)(1)), applies, in the same amount, on the same terms, and subject to the same conditions as UC payable on the basis of other service subject to state law.

Major mandates in this section include: 1) coverage of services performed for state and local governments and their instrumentalities and certain nonprofit organizations, and Federally-recognized Indian tribes; 2) that the payment of UC to employees of such entities be made in the same amount, on the same terms, and subject to the same conditions as other service subject to UC law, otherwise known as the “equal treatment” provision; and 3) an exception to the “equal treatment” provision requiring denial of UC based on certain educational services performed for such entities between and within academic terms. These conditions are required for employers in a state to receive credit against the Federal unemployment tax.

The denial of UC based on services for educational institutions and educational service agencies between academic years and terms to certain employees is described in clauses (i) through (v) of 3304(a)(6)(A), FUTA (26 U.S.C. § 3304(a)(6)(A)).

These exceptions apply to three categories of employees: 1) employees of an educational institution; 2) employees of an educational service agency; and 3) if the state law provides for the optional denial in clause (v) of Section 3304(a)(6)(A), FUTA (26 U.S.C. § 3304(a)(6)(A)), employees who provide services to or on behalf of an educational institution.

Clause (i) of Section 3304(a)(6)(A)(i), FUTA (26 U.S.C. § 3304(a)(6)(A)(i)) applies to services “in an instructional, research, or principal administrative capacity” (professional capacity).

Clause (ii) of Section 3304(a)(6)(A)(ii), FUTA (26 U.S.C. § 3304(a)(6)(A)(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 (nonprofessional capacity).

Under these provisions, certain employees in specified categories may not be paid UC based on such educational employment between academic years or terms if the employees have a “contract” or “reasonable assurance” of performing services in such educational employment in the following year or term. Additionally, certain employees in these categories may also not be paid UC based on such educational employment during vacation periods or holiday recesses (*i.e.*, within terms) if the employees have “reasonable assurance” of performing services in such educational employment in the remainder of a term.

“Between Terms” Denial Provision

The “between terms” denial provision is mandatory when services are performed in a professional capacity. The state has discretion in determining whether its state law includes the “between terms” denial provision to services in a nonprofessional capacity.

When state law applies the “between terms” denial provision to services in a nonprofessional capacity, if a claim is denied based on the “between terms” denial provision, retroactive payment is required if no job is offered in the second year or term and the individual has filed timely continued claims.

Specifically, the “between terms” denial provision applies:

with respect to services in an instructional, research, or principal administrative capacity for an educational institution to which section 3309(a)(1) applies, compensation shall not be payable based on such services for any week commencing during the period between two successive academic years or terms (or, when an agreement provides instead for a similar period between two regular but not successive terms, during such period) to any individual if such individual performs such services in the first of such academic years (or terms) and if there is a contract or reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms. (26 U.S.C. § 3304(a)(6)(A)(i)).

“Within Terms” Denial Provision

Application of the “within terms” denial provision is mandatory when services are performed in a professional capacity. The state has discretion in determining whether its state law includes the “within terms” denial provision to services in a non-professional capacity (*See* Section 3304(a)(6)(A)(vi), FUTA and page 3 of UIPL No. 05-17).

Specifically, the “within terms” denial provision applies:

[d]uring an established and customary vacation period or holiday recess if such individual performs such services in the period immediately before such vacation period or holiday recess, and there is a reasonable assurance that such individual will perform such services in the period immediately following such vacation period or holiday recess. (26 U.S.C. § 3304(a)(6)(A)(iii)).

UIPL No. 05-17, *Interpretation of “Contract” and “Reasonable Assurance” in Section 3304(a)(6)(A) of the Federal Unemployment Tax Act*, issued December 22, 2016, clarifies the Department’s interpretation of the terms “contract” and “reasonable assurance” as used in Section 3304(a)(6)(A), FUTA, and assists states in applying these terms consistent with federal law requirements.

- a. **Application of the “between and within terms” denial provisions as it relates to responding to the economic effect of the COVID-19 pandemic.** As discussed in UIPL No. 10-20, the Department has a longstanding legal interpretation of Federal UC law that “unemployment” includes a reduction of both work hours and earnings. Therefore, an individual who is not working, but has not experienced a reduction in income (including earnings, paid sick leave, and paid family leave), is not eligible to receive UC for the week.

If the school schedule changes because of the COVID-19 pandemic and an individual experiences both a reduction of work hours and earnings, UC would generally be payable to such individual to whom the “between and within terms” denial provisions would otherwise apply. This is because weeks the individual would ordinarily be working (but not due to circumstances surrounding the COVID-19 pandemic) are not considered to be “between two successive years or terms,” nor are they considered to be part of an “established and customary vacation period or holiday recess.”

Below are three examples addressing changes to school operations and how they affect an individual’s eligibility for UC during the COVID-19 pandemic.

Example 1 (Between Terms): Semester or term ends earlier than usual. If the educational institution or school system elects to end a semester, term, or school year earlier than usual in response to COVID-19, and there is a corresponding reduction in pay, the individual’s week or weeks of unemployment are not considered to be “between two successive academic years or terms.” Therefore, the “between terms” denial provision does not apply to those weeks between the early termination date and the end of the regularly scheduled year or term.

At the end of the regularly scheduled year or term, the state must reassess the benefit entitlement of the individual to determine if the individual has a reasonable assurance or a contract to return at the start of the next regularly scheduled academic year or term.

Example 2 (Within Terms): Dates of a scheduled break are changed, but the length of time remains the same. Where the educational institution or school system merely changes the dates of the break, without extending its duration (*e.g.*, the break is earlier or later than usual but still one week or whatever the length of the normal break would be), this break would be deemed “established and customary.” Therefore, if the individual has “reasonable assurance” of immediately returning after the break, the “within terms” denial provision would apply.

Example 3 (Within Terms): Dates of a scheduled break are extended. If the educational institution or school system extends the length of the break from the “established and customary vacation period or holiday recess,” the state must consider the normal length of the vacation or break period for that educational institution as an “established and customary vacation period or holiday recess” during which time the denial applies. However, any additional time included in the break would not be considered as part of the “established and customary” break. Therefore, the “within terms” denial provision would not apply to the additional time beyond the normal period of the break.

- b. **Application of the “between and within terms” denial provisions to an individual working remotely.** As noted above, the definition of “unemployment” includes both a reduction in hours and a reduction in pay. Thus, an individual who continues to work remotely, and is being paid, is not considered “unemployed,” and is therefore, not eligible for UC. However, to the extent the individual experiences a reduction in hours and a reduction in pay, the individual may be entitled to partial benefits under state law.
- c. **Application of the “between and within terms” denial provisions to an individual working in a nonprofessional capacity.** As discussed earlier, the state has discretion in determining whether to apply the “between and within terms” denial provisions to services in a nonprofessional capacity.

In a state where state law requires that either the “between terms” or “within terms” denial provision applies to an individual working in a nonprofessional capacity, the same analysis as set forth in the three examples above will apply.

In a state where state law requires that the “between terms” denial provision applies to an individual working in a nonprofessional capacity, the state should encourage the individual who has a contract or reasonable assurances of employment in the following semester or term to continue claiming benefits on a weekly basis so that, should no job result pursuant to the contract or reasonable assurance, the individual may be paid benefits retroactively.

In response to the spread of COVID-19, it is permissible for a state to temporarily suspend the “between and within terms” denial provisions in state law for individuals working in a nonprofessional capacity, consistent with the provisions under Section

3304(a)(6)(A)(ii) and Section 3304(a)(6)(A)(vi), FUTA. If a state chooses to do so, it should consider the impacts on trust fund solvency.

d. Determination of reasonable assurances in the context of the COVID-19 pandemic.

The state must make a determination at the time of filing that reasonable assurances exist for employment in the fall semester or term based on information provided by the individual and the employing educational institution or school system. In the event a decision is later made by the employer that the educational institution or school system will not reopen as regularly scheduled, or that a specific individual does not have a reasonable assurance of employment in the same or similar capacity due to budget cuts or declining enrollment, or for any other reason, the state agency must re-assess the individual's entitlement to benefits. See UIPL No. 05-17 for further guidance on the interpretation of "contract" and "reasonable assurance."

e. Application of the "between and within terms" denial provisions to the CARES Act programs.

- i. *Pandemic Unemployment Assistance (PUA) under Section 2102 of the CARES Act.* PUA eligibility requires that an individual is not eligible for regular UC, Pandemic Emergency Unemployment Compensation (PEUC), or Extended Benefits (EB) and that the individual is unemployed, partially unemployed, or unable or unavailable for work because of a listed COVID-19 related reason in Section 2102(a)(3)(A)(ii)(I) of the CARES Act.

Between academic years or terms and during established and customary vacation periods or holiday recesses, the individual is unemployed from the educational employment because they are between and within terms. Therefore, an individual is not unemployed from the individual's educational employment for one of the listed COVID-19 related reasons and cannot establish eligibility for PUA based on services subject to the between and within terms denial.

However, if an individual has *other* employment between academic years or terms or during established and customary vacation periods or holiday recesses that is not included in the "between and within terms" denial provisions discussed in this UIPL, and is unemployed from that *other* employment because of a listed COVID-19 related reason, the individual may be eligible for PUA.

If an individual qualifies for PUA during the time period in which the "between or within terms" denial provisions would apply, then wages from the educational institution may not be used to establish the individual's weekly benefit amount for PUA.

See UIPL No. 16-20, Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Pandemic Unemployment Assistance (PUA) Program Operating, Financial, and Reporting Instructions, issued April 5, 2020, for additional details.

- ii. *Federal Pandemic Unemployment Compensation (FPUC) under Section 2105 of the CARES Act.* The “between and within terms” denial provisions do not apply specifically to FPUC because it is based upon the individual’s eligibility for an underlying benefit. If the individual is eligible to receive at least one dollar (\$1) of benefits for the claimed week, the individual will be eligible for the \$600 FPUC payment. *See* UIPL No. 15-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Federal Pandemic Unemployment Compensation (FPUC) Program Operating, Financial, and Reporting Instructions*, issued April 4, 2020, for additional details.
- iii. *PEUC under Section 2107 of the CARES Act.* The terms and conditions of state law that apply to claims for regular UC also apply to claims for PEUC. If an individual is not eligible for regular UC because of the “between and within terms” denial provisions, the individual is also not eligible for PEUC. *See* UIPL No. 17-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Pandemic Emergency Unemployment Compensation (PEUC) Program Operating, Financial, and Reporting Instructions*, issued April 10, 2020, for additional details.

5. **Inquiries.** States should direct inquiries to covid-19@dol.gov and copy the appropriate Regional Office.

6. **References.**

- Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. 116-136, including Title II, Subtitle A, Relief for Workers Affected by Coronavirus Act;
- Sections 3304(a)(6)(A) and 3309(a)(1) of the Federal Unemployment Tax Act (FUTA), 26 U.S.C. § 3304(a)(6)(A);
- UIPL No. 17-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Pandemic Emergency Unemployment Compensation (PEUC) Program Operating, Financial, and Reporting Instructions*, issued April 10, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=8452;
- UIPL No. 16-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Pandemic Unemployment Assistance (PUA) Program Operating, Financial, and Reporting Instructions*, issued April 5, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=4628;
- UIPL No. 15-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Federal Pandemic Unemployment Compensation (FPUC) Program Operating, Financial, and Reporting Instructions*, issued April 4, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=9297;
- UIPL No. 14-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Summary of Key Unemployment Insurance (UI) Provisions Regarding Temporary Emergency State Staffing Flexibility*, issued April 2, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3390;
- UIPL No. 10-20, *Unemployment Compensation (UC) for Individuals Affected by the Coronavirus Disease 2019 (COVID-19)*, issued March 12, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=8893; and

- UIPL No. 05-17, *Interpretation of “Contract” and “Reasonable Assurance” in Section 3304(a)(6)(A) of the Federal Unemployment Tax Act*, issued December 22, 2016, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=8999.