Maine Department of Labor
Bureau of Unemployment Compensation

Basis Statement
and
Summary of Comments and Responses

Chapter 14: Education Institutional Employees

The repealed and replaced Rule clarifies the analysis as to whether an education institution employee is eligible for unemployment benefits during an established and customary vacation period. In particular, this Rule clarifies the criteria for determining whether a "written reasonable assurance" exists and defining a "contract" as those terms are used in 26 M.R.S. § 1192(7). The rule further provides clarity and guidance on when adjunct faculty may qualify for unemployment benefits, as directed by Resolves 2023, ch. 38. In developing the changes to the Rule, the Bureau of Unemployment Compensation ("Bureau") looked to guidance from the United States Department of Labor (USDOL), including USDOL's Unemployment Insurance Program Letter (UILP) No. 5-17.

This rulemaking of the Bureau of Unemployment Compensation is authorized by 26 M.R.S. § 1082 and Resolves 2023, ch. 38. The proposed Rules were posted on November 29, 2023. A public hearing was scheduled for December 19, 2023, but was rescheduled due to closings of state offices. The public hearing was rescheduled and held on February 2, 2024 at the Maine Department of Labor, Frances Perkins Conference Room, 45 Commerce Drive, Augusta ME 04330.

Comments were submitted by:

Commenter # 1: Maine Equal Justice
Commenter # 2: Peer Workforce Navigator Project
Commenter # 3: Maine AFL-CIO
Commenter # 4: Tim McCord, President of the Part-time Faculty Association of Maine
Commenter # 5: Andrea LaFlamme, President of the adjunct union with MSEA-SEIU and an adjunct professor at Eastern Maine Community College in Bangor
Commenter # 6: John J. Kosinski, Maine Education Association (MEA)

The public comment period ended on February 13, 2024.

Minor changes were made in response to comments, as set forth below. In addition, the Bureau made formatting and grammatical changes.

Summary of Public Comments and Responses

Limitation not on other employees. The rule does not address the underlying inequity that school employers who are given "reasonable assurance letters" are denied unemployment for the

summer whereas private sector employees are not subject to the same limitations on employment. (6)

Response: *The Federal Unemployment Tax Act (FUTA) states that a state law may not provide benefits between terms for individuals providing services in an instructional, research, or principal administrative capacity for an educational institution. 26 U.S.C. § 3304(a)(6)(A)(i) through (iv). The Bureau must comply with FUTA in order to receive millions of dollars of annual funds for the administration of the unemployment program and receive over $200 million for federal unemployment tax credits.*

Paragraph 1(A). Definition of "Annual Written reasonable assurance."
2(1) Remove "oral, written or implied".

Several commenters requested that the rule make it clear that "reasonable assurance" must be in writing, as state law requires.

Commenters also asked that the two sets of paragraphs 1, 2 and 3 be renumbered. (1,2,3)

Response: *The Bureau agrees that it was the intention that both the contract and reasonable assurance be in writing. Indeed, the heading on Section 2 of the proposed rule specifies "written" reasonable assurance. The Bureau has made changes to the first sentence under section 2, the sentence numbered 1 in the second part of section 2, the first sentence in Section 3. Contract, to clarify that either a contract or written assurance must be in writing. The Bureau further notes that the current rule contains the requirement that reasonable assurance must be written.*

The Bureau also renumbered the paragraphs in Section 2 as 1 through 6.

Clarification of the word "annual." Several commenters requested clarification as to what is meant here by the word "annual" in Section 2. Commenters, in particular adjunct faculty, noted that a contract or written assurance may be by term or semester, rather than by year. (1, 2, 3, 4)

Response: *The Bureau agrees that the analysis may be for each term (or semester) and need not be "annual." Accordingly, the Bureau will remove the word "annual" before the term "written reasonable assurance" throughout the Rule.*

Paragraph 1(D). Definition of "contract." Several commenters asked that the Bureau define the term "contract" as a *written* agreement. (1,2, 3, 6)

Response: *The Bureau agrees that a contract must be written, as a reasonable assurance must also be written. The Bureau is therefore removing the language that says a contract may be implied or oral. To further clarify, the Bureau added a note to the Rule explaining that a contract is not required, but that a contract is deemed to fulfill the requirements of reasonable written assurance, pursuant to the Chart attached to the Rule and to the UIPL.*

3. Contract

Commenters suggested simply removing the following language from the final rule:

> "Individuals under contract with an educational institution will not be considered unemployed for the duration of the contract and will be denied benefits until the agreed upon contract period ends."

We suggest that the analysis be based on the totality of factors described above, not simply on the existence of a contract. For example, factors would include: does the contract actually provide a high probability that the job will be available after the break? If not, was there other reasonable assurance, in writing and given the totality of the circumstances that the job will be available as described above? (1,2, 3)

Response: *The Bureau declines to make this requested change. If an individual is under contract, that individual is employed, and hence, not unemployed, during the term of the contract.*

Paragraph 2. Annual Written Reasonable Assurance.

Create and enforce a strong annual written reasonable assurance requirement.

We base these concerns on advice given on the website of the Maine School Management Association, which first explains to school systems that reasonable assurance notices greatly reduce potential unemployment liability and that all non-professional employees are "eligible" for such notices. It goes on to state:

> "One safe rule of thumb is that *if you are not certain whether or not to issue reasonable assurance, issue it.* If, after issuing reasonable assurance for the summer break, the school department realizes that the individual will not be offered a position the next semester, a written notice should be sent to the employee revoking the original reasonable assurance notice." (Emphasis added).

In other words, employers presently are being advised to issue written reasonable assurance not to accurately advise their workers of *actual* reemployment prospects, but in a manner that minimizes their own liability for unemployment benefits. (1, 2, 3)

Response: *The Bureau agrees with the commenter's concern. Employers should not be issuing Written Reasonable Assurance if it is not highly probable that the worker will have a job available in the next term or school year. If the employer has a pattern of always providing Written Reasonable Assurance as a "safe rule of thumb" and the jobs regularly do not materialize, that can be evidence of a lack of reasonable assurance when reviewing the totality of the circumstances.*

Claimants who are non-professional employees should continue to file claims.

A decision denying benefits between terms advises non-professional workers that they may be entitled to retroactive benefits if the opportunity to perform the services for the second term, if they file weekly benefits. The Bureau declines to make a change to the rule.

Under federal law, professional employees are not able to obtain benefits retroactively, but are entitled to benefits from the date the employer reasonably knew the work was not available. As further explained below, this clarification is made in Section 4.3.

Reasonable assurance must be timely. Several commenters asked that for a requirement that written reasonable assurance must be given to the employee in a timely manner.

Additionally, some commenters asked that if there is a contingency such as uncertain outside funding or an uncertain appropriation that makes timely reasonable assurance uncertain, then there is, in fact, no reasonable assurance until that contingency is removed. That requirement should also be included here as well. (1,2)

Other commenters recommended that reasonable assurance letters must be given at least 45 calendar days before the end of the term. (3, 6).

Response: In response to the comments, a change will be made to Section 4.3. to insert the following language: *Benefits are allowed going forward from the date that the employer reasonably knew that the work would not be available, not the date that revocation of reasonable assurance or revocation of contract was provided to the claimant.*

Adopt notice requirements that improve understanding and increase access to UI for educational employees. In our experience, the educational institution exclusion is not well understood and employees, especially non-professional employees, find it difficult to navigate. We believe that these problems can be mitigated with better notice similar to that required by California law. We strongly recommend that the final rule establish a process requiring the educational institution to provide written notice to any individual subject to the "between terms" provision of 26 MRSA §1192(7) explaining their rights and responsibilities under this law no later than 30 days before the end of the first of the academic year or term. This notice must be, to the greatest extent feasible, readable at a 6th grade level and provide the following information to the individual:

- Whether or not the individual has "reasonable assurance" of reemployment in the next year or term;
- That "reasonable assurance" means that the job offer must be:
    - A genuine offer of employment made by someone with the authority to make that offer *and* it is "highly probable" (very likely) that the job will be available;
    - For work in the same capacity as in the previous academic year or term (meaning that if work in the previous period was in a professional capacity, the offer must be for work in a professional capacity); and
    - For work that is economically comparable to that performed in the last year or term. This means that the value of wages *and* benefits together must be at least equal to 90% of the amount that the person earned in the prior period;
- That individuals have the right to apply for unemployment benefits whether or not they have been given "reasonable assurance" by their employer;
- If they have been given reasonable assurance and do not believe it meets this requirement they should apply for unemployment benefits and continue to file weekly claims until the Bureau makes a decision on their eligibility for unemployment benefits;
- The Bureau will make eligibility decision, and not the employer;

- If the individual was given reasonable assurance that was later revoked by the employer they should apply for unemployment benefits immediately. They may be eligible for retroactive benefits as follows:
    - Professional employees: May be eligible for retroactive benefits back to the date that the revocation of reasonable assurance was given. They must apply for unemployment benefits in that week and continue to file weekly claims for benefits so long as they remain totally or partially unemployed; and
    - Non-professional employees: May be eligible for retroactive benefits for *any* week in which they were denied benefits because they were given reasonable assurance that was later retracted. They may be eligible for benefits from the time that they were previously laid off. To qualify for retroactive benefits, they must have filed weekly claims for benefits in accordance with this Chapter.

We believe that this advance notice, including these contents, is one of the single most important improvements that can be made to make these benefits more accessible to people who are eligible for, but may not receive them. By clearly establishing standards for both the notice and process educational employees will have a much better understanding of their rights to benefits under these circumstance, thus increasing the recipiency rate for eligible employees. (1,2)

Response: *A change will be made so that benefits are allowed for professional employees from the date that the employer reasonably knew that work was not available, not the date notice is provided to the claimant.*

Paragraph 2(1). With respect to what contingencies are *not* within the employer's control, we recommend that you use the term "funding outside the employer's control" rather than simply "funding." Some funds may be within the employer's control, while grant funding or funding appropriated by the State, City or Town may not be. The UIPL No. 5-17 makes the point that the employer's choice to fund one thing and not another is clearly within their control. This clarification should be included in the final rule. (1,2)

Response: *The Bureau will add a clarifying sentence to the Rule that decisions as to* ***allocations*** *of funding are considered to be within the employer's control.*

2(2). "Highly probable." We strongly urge you to remove the parenthetical "(more likely than not)" to define that it is "highly probable" under the totality of the circumstances that the person will have a job. The standard "more likely than not" is one that can be met with 51% of the weight of evidence–a mere preponderance. In contrast, the "highly probable" standard that is required by law must be met with clear and convincing evidence. The UIPL No. 5-17 defines "highly probable" as "very likely" although complete certainty (beyond a reasonable doubt) is not needed. (1,2)

Response: *The Bureau will remove the parenthetical "(more likely than not)." The Bureau notes that this will remain to be a case-by-case analysis. It is not a simple analysis of whether reasonable assurance was met in half of the last ten semesters. For example, if the job*

actually resulted in each of the last five semesters, that fact may outweigh the lack of the job resulting in more distant years.

Totality of the circumstances. We also strongly urge the Bureau to add more guidance to the rule to assist in more accurately evaluating the "totality of the circumstances." We urge that the rule explicitly state that the totality of the circumstances must show that there are no contingencies within the employer's control (including internal budget or staffing decisions) that would prevent the job from being available to the employee and that there is a high probability that contingencies outside of the employer's control (such as funding, appropriations, enrollment, and similar factors) will be met so that the job will be available to the employee. (1, 2)

All three criteria must be met. Finally, we also urge you to add an "and" at the end of the first set of paragraphs 1, 2, and 3 at (2) to make clear that all three of the subparagraphs' criteria must be met. (1,2)

Response: *In response to these comments, the Bureau will add an introductory statement that all criteria must be met.*

2(2). Capacity. We recommend clarifying that the term "capacity" refers to the professional or nonprofessional nature of the job, with the appropriate cross reference. Moreover, we request that the rule make clear that capacity is determined by looking at the actual job duties and responsibilities, not simply the job title. (1, 2)

Response: *Based on the Bureau's experience, this change is not necessary.*

2(3) Comparable economic conditions. Some commenters suggested using the term "economic conditions, *including pay and benefits*…" in order to account for factors in addition to pay that affect the employee's economic circumstances. We suggest adding the sentence "In no event should pay and benefits be worth less than 90% of the previous year's value" to provide further guidance, per guidance in UIPL No. 5-17. (1, 2)

Another commenter noted that "reasonable assurance" – previous work history should not be taken into account – because employees punished for long-term contracts; applicants being unfairly denied UI during a period of unemployment; or should be guidance as to a specific work history so claimants not denied due to poor planning on part of employer; MDOL should hold employers "accountable" who hire adjunct faculty employed in a temporary position for a decade or more. (5)

Response: *The Bureau made a change to clarify that less than 90% of pay and benefits will be presumed to not meet the definition of "written reasonable assurance." The unemployment system does not provide a mechanism for prohibiting employers from using adjunct faculty.*

Clarification needed on the relationship between voluntary quit and disqualification under "between terms" law. We urge you to add more explicit guidance to this section to clarify how circumstances in which an individual voluntarily quits employment with good cause pursuant to

§1193 (1) are analyzed under the "between and within term denials" provisions of state and federal law.

The key factor considered by Congress in analyzing whether or not there is "reasonable assurance" is whether "a job is available to the individual" in the following academic year or term. The UIPL interprets this language to mean that if there is no job available because the individual quit that job for non-disqualifying reasons, the 'within and between terms' UI law does not apply. This interpretation applies even if the reason for the quit, or not returning to the job were among the listed "personal" reasons not attributable to the employment provided they are not disqualifying under UI law or rules.

We suggest that language be added at the end of this section that reads as follows:

"For example, an individual who has voluntarily quit employment with good cause pursuant to 26 MRSA §1193(1) will no longer have reasonable assurance or a contract that a job is available to them as their employment relationship has ended." (1, 2)

Response: *The Bureau declines to make any change in Rule as a result of this comment. These cases are analyzed dependent upon the specific circumstances, including whether the claimant is under contract.*

4. Eligibility for Benefits during the customary vacation period or holiday recess period or between terms.

The information presented in this section is at the heart of this rule, to which all else applies. We suggest that it would provide for greater understanding by readers if it was placed immediately after the definitional section.

Opening paragraph of 4: between "successive" terms. We urge you to clarify in rule that temporary lay-offs of employees of educational institutions are not subject to disqualification if they are not "between successive terms" (with the exception of professional employees with designated time off in their contracts per 26 MRS 1192(7)(A)). We request that you edit the first sentence of this paragraph to read as follows:

> "An individual is not eligible for unemployment benefits for established and customary vacation period or holiday recess periods, or breaks between successive terms (or in the case of professional employees during a non-working period between non-successive terms or a sabbatical, designated by agreement or contract as described in 26 MRS § 1192(7)(A)) if such individual performs services immediately before and has written reasonable assurances or a contract and will perform such services immediately following the vacation or between-term break."

Both the federal and state statutes treat vacations and holidays, where it is clear the employee is still employed and will return to work shortly, differently than breaks between academic years or terms. For a nonprofessional employee, or a professional employee without an annual contract, to be denied unemployment, they must be "between 2 successive academic years or terms." Successive means "coming one after another in an uninterrupted sequence…" Thus, as with the

example in UIPL No. 5-17, if an educational institution runs all year around, with quarterly terms (typically designated as fall, winter, spring and summer), an employee who worked in the spring, was not offered work in summer, but was provided assurance of a job in the fall, is not unemployed between "successive" terms in the summer; they have been temporarily laid off through the course of a term and are not disqualified from receiving UI benefits under this provision of law.

This distinction is key to proper implementation of this provision of law, as today educational institutions often no longer conform to the traditional academic schedule and operate year-round. For nonprofessional employees and professionals without an ongoing contract who work for a year-around educational institution, a summer lay-off is just that–a temporary lay-off, not a lay-off between successive terms subject to disqualification. The final rule should address this important distinction. (1, 2)

Response: *We agree that UIPL 5-17 applies, and Bureau staff rely upon it in making determinations. We are not making a change to the Rule as a result of this comment.*

4(3). Retroactive benefits for nonprofessional employees.

Several commenters noted: This proposed rule reflects the federal requirement to provide retroactive benefits to nonprofessional employees who were denied UI between terms based on written reasonable assurance that they would have a job which was later revoked. In such a case, benefits are available for "each week for which the individual filed a timely claim for compensation." We urge the Bureau to adopt a rule that defines "timely claim" in this circumstance in such a way as to make these retroactive benefits practicably available to persons in this situation as suggested below.

As written, a claimant can only receive retroactive benefits if, once given reasonable assurance that they have a job, they file a claim, are denied, and then file another claim after reasonable assurance is revoked. We suggest that the rule provides for the late filing of weekly claims under these circumstances. (1, 2,3).

Response: *The Rule clarifies that benefits are allowed going forward from the date that the employer reasonably knew that the work would not be available, not the date that revocation of reasonable assurance or revocation of contract was provided to the claimant. The Bureau is revising its templates and will make clarifications in notices as appropriate. No changes will be made in this rule with respect to backdating claims, but may be addressed more globally, for all unemployment benefit claimants, when the Bureau revises Chapter 3 in the future.*

Paragraph 1(E). Definition of "educational institution." Several commenters noted: The definition of educational institution in the proposed rule, as in state statute, includes "nursery schools." We are concerned that without further definition in rule this term could result in unintended denial of benefits to low-wage early childhood staff. The term "nursery school" is defined in Maine state law, 22 MRS § 8301 The commenters recommended that the rule define "nursery school" for this purpose as one meeting the definition of state law under -A *and* adding that it must also primarily provide a curriculum of "school-like" educational instruction provided

by appropriately licensed teachers. The rule should specifically state that Head Starts operated by nonprofits and not schools are not "educational institutions" and that this provision does not apply to them. (1, 2)

Response: The Bureau added a clarification to the definition of "educational institution" as to the meaning of "nursey school" as follows: *A "nursery school" has the same meaning as in 22 M.R.S. § 8301-A(1-A((D) and provides a curriculum of educational instruction provided by appropriately licensed teachers.*

5. Substitute teachers.

Some commenters found this paragraph confusing as to the key question of whether or not a substitute teacher is between terms and has written reasonable assurance of a comparable job in the second term. Here are some suggestions which we think will aid readers in understanding how the law applies to substitute teachers.

First, to aid in the distinction between professional and "other" substitute employees perhaps amend the first sentence to read as follows:

"An individual who is employed in an instructional capacity by an educational institution for the purpose of replacing a teacher in that same capacity who is temporarily absent shall be termed to be a "substitute teacher." This emphasizes the professional capacity of the work. Also, we suggest changing the reference in the last sentence of this paragraph which currently refers to subsection 7 of section 1192 to refer instead to subsection 7(A) of section 1192. (1,2)

Response: *The Bureau has made both of the recommended changes.*

The commenters also noted that the language "If such an individual has a contract or annual written reasonable assurance that he will serve as a "substitute teacher" for one or more educational institutions for an academic year ***or term,*** or two successive years or terms" (emphasis added) may unintentionally bring in situations where the law should not apply.

Finally, the paragraph concludes that under these circumstances the individual "shall be deemed subject to" Section 1192(7) of the Employment Security Law. We fear that this will be misinterpreted to mean disqualified, rather than simply subject to the analysis under the law. We suggest that it read instead, that "claims for benefits between and within academic terms must be considered pursuant to section 4 of this rule." This will lead the reader to the full analysis required by this Chapter rather than possibly assuming that they are simply ineligible. (1, 2)

Response: *The Bureau will add "and section 4 of this rule" at the end of the paragraph.*

6. Other Substitute employees.

Some commenters were confused by this section, and suggested clarifying that it be explicitly noted that this paragraph applies to nonprofessional employees so that readers do not have to know or look up the reference to section 1192(7)(B). (1,2)

Response: *The Bureau has added "non-professional" as recommended.*

Paragraph 6(A). Paragraph A refers to evidence presented "*during* the academic year or term," but the law affects claims *between* two successive years or terms. Is this paragraph intended as a reminder that people who lose work during the term are not subject to the law? Or is this paragraph trying to say that people who are not being called to work in the first term, though technically a substitute, should not be subject to disqualification between terms? We recommend that it serve as a reminder for both, stating "disqualification under section 4 of this rule does not apply when a substitute has evidence that they are no longer being called to work during the term. Ordinary unemployment rules apply both during the term and after the term is over because the unemployment occurred during the term, not between terms." (1, 2)

Paragraph B. We have similar confusion about Paragraph B. The analysis required under the law is whether a person is eligible for benefits *between two successive terms.* Yet this paragraph reads as if the UI system will wait until the entire 2nd term is over, requiring that the person be entirely unemployed and uncompensated all the while, to determine whether they were eligible for benefits for the period months earlier, between the 1st and 2nd term. We doubt this is the Bureau's intent and believe that greater clarity is needed. We recommend that this paragraph be struck and replaced with a reminder of how to analyze unpredictable situations for substitute employees. Here is our suggestion to describe when the disqualification does **not** apply:

> "An individual does not have reasonable assurance and may not be disqualified under section 1192(7) if:
>
> a. between two successive academic years or terms the totality of the circumstances does not show that it is highly probable that they will be called to work in the same capacity under comparable economic conditions (considering hours, pay and benefits) in the 2nd term as they were in the 1st term; or
> b. the employee cannot reliably predict the number of hours or amount of work they may be offered during the second term." (1, 2)

Response: *We have added clarifying language re: retroactive payments to non-professional employees for whom written reasonable assurance does not apply after the start of the new term for which written reasonable assurance was initially granted. No other changes are made as a result of this comment.*