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Maribeth Wilt-Seibert
Pennsylvania Department of Labor and Industry

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UNEMPLOYMENT COMPENSATION FOR EMPLOYEES OF EDUCATIONAL INSTITUTIONS: HOW STATE COURTS HAVE CREATED VARIATIONS ON FEDERALLY MANDATED STATUTORY LANGUAGE

Maribeth Wilt-Seibert*

Over the past sixty years, Congress has enacted a system of unemployment insurance for workers who have become unemployed through no fault of their own. While the Social Security Act of 1935 created much of the statutory framework for this system of insurance, Congress did not include employees of educational institutions within its system of unemployment insurance until 1970, when it amended the Federal Unemployment Tax Act of 1954 (FUTA). Since Congress enacted those amendments, each of the fifty states has passed legislation that substantially conforms to the FUTA amendments. Yet, despite the uniformity of state statutory language, state appellate courts have interpreted the language in diverse and even contradictory ways; a result that leaves uncertain the unemployment insurance status of employees of educational institutions. This Article surveys the diverse state court case law and emphasizes the extent to which these varying interpretations fulfill—or fail to fulfill—the congressional intent behind the FUTA amendments on which the state legislatures based their statutory enactments. The author concludes by recommending that the federal government enact a system of statutory or regulatory monitoring, in order to ensure the fulfillment of the congressional intent behind the FUTA amendments.

INTRODUCTION

In the Social Security Act of 1935, Congress established the United States system of unemployment insurance.1 The program

* Pennsylvania Supervisory Attorney, Unemployment Compensation Board of Review, Department of Labor and Industry. B.A. 1977, Pennsylvania State University; J.D. 1980, Dickinson School of Law. I would like to thank Clifford F. Blaze, James K. Bradley, Lea Judson, Stacy Bagley, and Michelle L. Klinger for their assistance in preparing this Article. The opinions expressed in this Article are my own and have not been approved, endorsed, or otherwise adopted by the Pennsylvania Unemployment Compensation Board of Review, the Department of Labor and Industry, or the Commonwealth of Pennsylvania.

aimed, in part, to provide an initial line of economic defense for working Americans who become unemployed through no fault of their own.\(^2\) However, not until 1970 did the United States Congress amend the Federal Unemployment Tax Act of 1954 (FUTA)\(^3\) to require the states to pay unemployment compensation benefits to employees of educational institutions and educational service agencies when these employees met the FUTA’s criteria.\(^4\) Since 1970, in an effort to remain in conformity with the FUTA, each of the fifty states has enacted nearly identical versions of the federally mandated language.\(^5\) While the language in each statute is nearly identical, the interpretations of that language by the state appellate courts have been diverse and even contradictory.\(^6\) This Article focuses on the diverse

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2. See Advisory Council on Unemployment Compensation, supra note 1, at 3.


judicial responses to this language and the extent to which appellate interpretation conforms with federal legislative intent, suggesting how these varying interpretations may be reconciled with the legislative intent behind the federal statutory amendments. In particular, this Article discusses the amendments to the FUTA that provide for the payment of unemployment compensation benefits to employees of educational institutions and surveys the state court interpretations of important statutory language. This Article recommends the adoption of the interpretations of the federal language that best serve the legislative intent behind the FUTA amendments.

I. BACKGROUND

The FUTA permits employers to take a credit against federal taxes for contributions required to be paid into a state unemployment compensation fund if the state’s unemployment compensation statute conforms with federal specifications. In 1970, the federal government amended the FUTA to require state legislatures to amend their unemployment compensation statutes to provide for the payment of unemployment compensation benefits to employees of institutions of higher education. This amendment aimed to permit the employees of institutions of higher education to enjoy the same kind of unemployment insurance protection provided to management personnel in private industry. However, the amendment does not provide for the payment of unemployment compensation benefits between academic terms or years, or to employees who work in an instructional, research, or principal administrative capacity and have contracted to return to work. The exception eliminates the payment of unemployment compensation benefits to

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employees who can plan for temporary unemployment and thus do not truly suffer from economic insecurity.\textsuperscript{11}

In 1976, Congress again amended the FUTA to extend unemployment compensation to employees of elementary and secondary schools.\textsuperscript{12} The 1976 amendment also denied compensation coverage between academic terms or years to elementary and secondary school employees who work in an instructional, research, or principal administrative capacity and have a reasonable assurance of returning to work.\textsuperscript{13} Additionally, the 1976 amendment permitted the states to deny benefits to employees of elementary and secondary schools who are employed in other capacities, so long as they have a reasonable assurance of returning to work.\textsuperscript{14} In a report on the proposed language, the Joint Explanatory Statement of the Committee of Conference defined reasonable assurance as "a written, verbal, or implied agreement that the employee will perform services in the same capacity during the ensuing academic year or term."\textsuperscript{15}

In 1977, Congress again amended the FUTA to permit the denial of benefits during established or customary vacation periods or holiday recesses to all employees employed in an instructional, research, or principal administrative capacity in institutions of higher education and to employees working in any capacity in elementary and secondary schools.\textsuperscript{16} The 1977 amendment also permitted the denial of unemployment compensation benefits between academic terms or years and during established or customary vacation periods and holiday recesses to employees of educational service agencies.\textsuperscript{17} Congress included educational service agencies in the 1977 amendment to prevent the collection of benefits by employees who are employed by a central state agency and who provide specialized services to educational institutions.\textsuperscript{18}

\textsuperscript{11} See, e.g., Haynes v. Commonwealth, 442 A.2d 1232, 1233 (Pa. 1982) (providing school employees during summer months or scheduled vacations as examples).
\textsuperscript{14} Id.
\textsuperscript{17} 26 U.S.C. § 3304 (1994).
In 1982, Congress passed an amendment that enabled states to deny benefits to employees of educational institutions employed in capacities other than instructional, research, or principal administrative during established or customary vacation periods or holiday recesses. The language of the FUTA also requires the retroactive payment of benefits to nonprofessionals who were denied benefits if, in fact, they were not offered work in the following academic year or term.

Finally, the 1983 amendment to the FUTA required states to deny benefits to all employees of educational institutions and educational service agencies between academic years or terms and during established or customary vacation periods or holiday recesses. The federal language also permitted states to deny unemployment compensation benefits to any employee performing services for or on behalf of an educational institution.

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20. Id.
22. 42 U.S.C. § 3304 (1994). Thus, the federally mandated statutory language, as it currently appears, is as follows:

(a) Requirements.—The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that—

(6)(A) compensation is payable on the basis of service to which section 3309(a)(1) applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law; except that—

(i) 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,

(ii) with respect to services in any other capacity for an educational institution to which section 3309(a)(1) applies—

(I) compensation payable on the basis of such services may be denied to any individual for any week which commences during a period between 2 successive academic years or terms if such individual performs such services in the first of
II. AN ANALYSIS OF THE CASE LAW: IRRECONCILABLE VARIATIONS IN THE INTERPRETATIONS OF THE FEDERAL LANGUAGE

After each of the fifty states enacted the federally mandated language requiring states to pay unemployment benefits to employees of educational institutions, unless those employees had a reasonable assurance of returning to work, the states developed two types of reasonable assurance cases. One type concerns whether an employee has reasonable assurance for purposes of entitlement under the law. The second type focuses

such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms, except that

(ii) if compensation is denied to any individual for any week under subclause (I) and such individual was not offered an opportunity to perform such services for the educational institution for the second of such academic years or terms, such individual shall be entitled to a retroactive payment of the compensation for each week for which the individual filed a timely claim for compensation and for which compensation was denied solely by reason of subclause (I),

(iii) with respect to any services described in clause (i) or (ii), compensation payable on the basis of such services shall be denied to any individual for any week which commences during 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,

(iv) with respect to any services described in clause (i) or (ii), compensation payable on the basis of services in any such capacity shall be denied as specified in clauses (i), (ii), and (iii) to any individual who performed such services in an educational institution while in the employ of an educational service agency, and for this purpose the term "educational service agency" means a governmental agency or governmental entity which is established and operated exclusively for the purpose of providing such services to one or more educational institutions,

(v) with respect to services in which section 3309(a)(1) applies, if such services are provided to or on behalf of an educational institution, compensation may be denied under the same circumstances as described in clauses (i) through (iv) . . . .

Id. § 3304(a)(6)(A).
23. See supra note 5 and accompanying text.
on what circumstances will result when no reasonable assurance exists. While the state courts generally agree on whether an employee has reasonable assurance, they have interpreted the consequential circumstances when reasonable assurance exists in diverse, and even contradictory, ways.

In cases involving the first type of reasonable assurance issue, state courts determine whether employees of educational institutions have a reasonable assurance of returning to work only after the courts have examined the totality of the employment relationship. Courts have defined reasonable assurance as a written, verbal, or implied agreement that the employee of the educational institution will return to work following the period between two academic years or terms, or following a vacation period or holiday recess. As a result, while an employee who has a written or verbal contract to return to work has a reasonable assurance of returning to work, an employee who does not have a written or verbal contract to return to work may also have a reasonable assurance of returning to work. Where no contract exists, the employee’s reasonable assurance arises out

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28. E.g., Allen, 658 P.2d at 1344–45 (finding an agreement where a bilingual instructor had a heavy workload and there was no indication that she would not be rehired); Prosser v. Everett, 631 S.W.2d 24, 25 (Ark. 1982) (finding no assurance where there was no contract or promise of contract); Denver Pub. Sch. v. Industrial Comm’n, 644 P.2d 83, 85 (Colo. Ct. App. 1982) (finding adequate assurance existed where a form indicated that claimant’s name would be placed on the substitute teacher list for the fall term); Redmond v. Employment Div., 675 P.2d 1126, 1128–29 (Or. 1984) (finding no assurance where the decision to reemploy was contingent on student registration).

29. E.g., Caldwell v. Carswell, 280 S.E.2d 171 (Ga. 1981) (holding that a teacher was not entitled to benefits during the period between contracts where the second contract had been signed before the first contract had expired); McCuen v. Unemployment Compensation Bd. of Review, 486 A.2d 552 (Pa. 1985) (holding that a teacher has reasonable assurance where her name has been placed on a substitute list and where the teacher has been informed of such placement); Jennings v. Employment Sec. Dep’t, 663 P.2d 849 (Wash. Ct. App. 1983) (holding that the term reasonable assurance does not require a guarantee of work, only a good faith expectation on the part of the school board); Davenport v. Gatson, 451 S.E.2d 57 (W. Va. 1994) (holding that a contract need not specify the number of days to be worked in order to give reasonable assurance to substitute teacher).

of an implied agreement to continue employment. State courts have found an implied agreement to continue employment where the employee has a past history of returning to work; where the employee receives a letter indicating that the employee has a reasonable assurance of returning to work; where the employee receives no notification that the employee will not be rehired; where the employee receives notice of recommendation for employment; where the employee has been offered training; where the employee receives a verbal assurance that she will receive an offer of employment; where the employer expects to recall the employee and the employer has job openings; where the employee completes an application for employment; where the employee returns to work; where the employee expects to return to work; where the employee desires reemployment; where there exists objective evidence of a commitment between an employee and the educa-


32. E.g., Allen, 658 P.2d at 1345; August, 438 N.E.2d at 327; Riekse, 376 N.W.2d at 195; McCuen, 486 A.2d at 555; Goralski, 408 A.2d at 1180; Neshaminy Sch. Dist., 426 A.2d at 1247.


34. E.g., Allen, 658 P.2d at 1344.


37. E.g., Gilbert v. Dep't of Employment Sec., 421 A.2d 1295, 1296 (Vt. 1980).


39. Cf Indianapolis Pub. Sch., 473 N.E.2d 155, 158 (holding that notice of, and application for, available substitute teaching positions and an invitation to a training workshop constitute reasonable assurance); Riekse, 376 N.W.2d at 195 (finding reasonable assurance where a teacher submitted an application, attended an in-service meeting, and had worked two days for her employer).

40. See Riekse, 376 N.W.2d at 195.


tional institution to employ the employee in the next academic year; and, finally, for substitute employees only, where the employer or the employee places the employee's name on the substitute employee list.

Courts have based reasonable assurance on the employer's good faith if both the employer and the employee expect the employment relationship to continue. Some state courts require mutuality of commitment between the employer and the employee for reasonable assurance to exist, while other state courts do not require such mutuality. Even within a single state, courts have, at times, required mutuality of commitment between the employer and the employee for reasonable assurance to exist, but on other occasions have not required such commitment. Most states, however, seem to agree that no reasonable assurance exists when employees have resigned from their employment.

With regard to the second type of case law regarding reasonable assurance, the state courts have developed diverse and contradictory interpretations as to the circumstances under which reasonable assurance may or may not exist. Some state courts have held that assurance given is not reasonable if not...

43. E.g., Goralski, 408 A.2d at 1180.
50. See, e.g., Meyer v. Employment Appeal Bd., 441 N.W.2d 766, 767–68 (Iowa 1989) (holding that the statute's "reasonable assurance" exception to providing unemployment compensation does not apply to a teacher who resigned after receiving notification that her contract would not be renewed); Abel v. Unemployment Compensation Bd. of Review, 517 A.2d 594, 597 (Pa. Commw. Ct. 1986) (finding no reasonable assurance where a teacher resigned after being placed on a daily substitute teacher list).
given in good faith.\textsuperscript{51} For example, California has enacted a provision in its unemployment compensation code which provides that an agreement contingent upon enrollment, funding, or program changes does not reasonably assure employment.\textsuperscript{52} As a result, California case law has held that reasonable assurance may not be contingent on adequate class enrollment,\textsuperscript{53} but may be conditioned on adequate funding.\textsuperscript{54}

While no other states have enacted a statutory provision similar to California's, some state courts have held that both funding and enrollment may be considered when deciding whether an employee has a reasonable assurance of returning to work.\textsuperscript{55} For example, a Michigan court has held that, regardless of the fact that an employee received a reasonable assurance letter from the state Employment Security Commission, the Board of Review must consider whether the employer was in financial crisis, whether employees received layoff notices, whether the student population had declined, whether federal funding was reduced, and whether the employer's budget was reduced before concluding that an employee's assurance of returning to work was in fact reasonable.\textsuperscript{56} Similarly, New York courts have held that whether an employee had a reasonable assurance of returning to work is subject to the "sufficiency of [student] registration, financial ability, and curriculum needs."\textsuperscript{57} The Wisconsin Court of Appeals has held that employees do not have a reasonable assurance of returning to work where the reasonable assurance is contingent upon funding.\textsuperscript{58} Finally, the Supreme Court of Minnesota has held that where an employee has been informed that she

\begin{itemize}
  \item \textsuperscript{52} \textit{CAL. UNEMP. INS. CODE} \S 1253.3(f) (West 1986).
  \item \textsuperscript{53} Cervisi v. California Unemployment Ins. Appeals Bd., 256 Cal. Rptr. 142, 144 (1989).
  \item \textsuperscript{54} Compare Russ v. California Unemployment Ins. Appeals Bd., 178 Cal. Rptr. 421, 429 (Cal. Ct. App. 1981) (finding reasonable assurance where an employee routinely was terminated each spring and reemployed each fall, even though funding had not been secured, where this cyclical pattern had persisted for several years) \textit{with} Farrell v. Labor and Indus. Review Comm'n, 433 N.W.2d 269, 273 (Wis. 1988) (holding that an offer of employment conditioned on funding did not constitute reasonable assurance).
  \item \textsuperscript{56} Falkenstern, 425 N.W.2d at 129-32.
  \item \textsuperscript{57} See \textit{In re} Barton, 510 N.Y.S.2d at 39; \textit{In re} Laudadio, 485 N.Y.S.2d at 658.
  \item \textsuperscript{58} Farrell, 433 N.W.2d at 273.
\end{itemize}
likely will be discharged for lack of funds, the employee has no reasonable assurance of returning to work.\textsuperscript{59}

Some courts have held that an employee may have reasonable assurance where such assurance depends upon minimum student enrollment because the employer has met the minimum student enrollment requirement in the past.\textsuperscript{60} However, the New York, Oregon, and Pennsylvania courts have held that employees do not have reasonable assurance of returning to work where the reasonable assurance is contingent upon past enrollment.\textsuperscript{61}

In direct contradiction to the above line of cases, other state courts have held that an employee has reasonable assurance of returning to employment, despite the uncertainty of funding for the employee’s position.\textsuperscript{62} Specifically, the Supreme Court of North Dakota found that reasonable assurance exists for a public employee, even though the employee received a letter that federal funding was uncertain, because “[f]unding by a legislative body, by its very nature, is not static but always uncertain.”\textsuperscript{63} Similarly, the Washington Court of Appeals has held that, under certain circumstances, an employee still has reasonable assurance of returning to work, notwithstanding the contingency of funding, so long as the employer communicated to the employee its expectation of reemployment.\textsuperscript{64} As a result, depending on the state, employees may or may not be held to have reasonable assurance of returning to work where the reasonable assurance depends upon enrollment, funding, or program changes.

\begin{footnotes}
\item[60] See, e.g., Friedlander v. Employment Div., 676 P.2d 314, 318–19 (Or. App. 1984) (“That his classes had drawn sufficient enrollment to be held in the past makes it reasonable to expect that they would be [held] again and supports a determination that he had reasonable assurances of employment in the fall . . . .”).
\item[62] See, e.g., Goeller v. Job Serv. of N.D., 425 N.W.2d 925, 927–28 (N.D. 1988) (holding that a teacher had reasonable assurance of reemployment where the employer indicated the uncertainty of funding but that it intended to continue its “present staffing pattern”).
\item[63] Id. at 928.
\end{footnotes}
A. "In Any Such Capacity"

Upon a determination that an employee has a reasonable assurance of returning to work, an employee still will not be disqualified from receiving benefits unless there exists a reasonable assurance that the employee will perform services "in any such capacity." The meaning of the phrase "in any such capacity" also has been subject to diverse interpretations by the state courts.

Initially, "in any such capacity" has, as its logical antecedent, the phrase "in an instructional, research, or principal administrative capacity." As a result, Pennsylvania courts have held that where, in the first of two successive academic terms or years, an employee has been employed in an instructional, research, or principal administrative capacity and has a reasonable assurance of employment in any one of those three capacities in the second year or term, the employee has a reasonable assurance of employment "in any such capacity." Further, the Court of Appeals of Iowa has held that where an employee has a reasonable assurance of returning to work for a shortened academic term with reduced work requirements and pay, the employee still has a reasonable assurance of returning to work "in any such capacity."

At first, the New York courts similarly held that where teachers who had taught full-time during the first academic year were given reasonable assurance of returning to work during the second academic year through the placement of their name on a substitute teacher list, they were disqualified from receiving benefits because they had reasonable assurance.

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66. See, e.g., In re Abramowitz, 550 N.Y.S.2d 75, 76 (N.Y. App. Div. 1989) (finding a claimant ineligible for unemployment compensation where she had been dismissed from one position but continued to hold another because she experienced no decrease in earnings); In re Wilson, 438 N.Y.S.2d 603, 604 (N.Y. App. Div. 1981) (finding a claimant ineligible for unemployment compensation where she was reinstated as a substitute teacher after one year as a full-time teacher).


69. Merged Area (Educ.) VII v. Iowa Dep't of Job Serv., 367 N.W.2d 272, 275 (Iowa Ct. App. 1985).
of returning to work "in any such capacity." In 1986, however, the federal government issued a program letter providing that:

[a]n offer of employment is not bona fide if only a possibility of employment exists, and reasonable assurance exists only if the economic terms and conditions of the job offered in the second period are not substantially less than the terms and conditions of the job in the first period.

In response to this letter, New York courts held that, where the economic terms and conditions of the offered employment were substantially less than those provided during the previous academic term, the employee did not have a reasonable assurance of returning to work "in any such capacity." However, if the economic terms and conditions were the same or better in the second academic term or year, the employee did have a reasonable assurance of returning to work "in any such capacity" and would, therefore, be ineligible for benefits.

Prior to this program letter, most other states had already determined that where the economic terms and conditions of the job offered in the second term or year were substantially less than those during the first period, the employee did not have a reasonable assurance of returning to employment "in any such capacity." Initially, Oregon courts held that the phrase "in any such capacity" meant that the employee would perform the same instructional, research, or administrative functions as during the previous year. Later, the Court of Appeals of Oregon held that the phrase meant that the terms and conditions of the employment for the following year must

71. Unemployment Insurance Program Letter No. 4-87 (Dec. 24, 1986).
73. E.g., In re Abramowitz, 550 N.Y.S.2d at 76.
be “reasonably similar” to those of the previous year. The court reasoned that the intent of the statute was to prevent subsidized summer vacations for teachers employed during consecutive academic years but was not meant to apply to continued employment at a substantially lower rate of pay. Similarly, the Supreme Court of Minnesota has held that employees are ineligible for benefits during the period between academic terms or years only where they have received a reasonable written assurance of reemployment in the second term or year under terms that approximate those of the previous term or year.

Following the foregoing decisions, courts in five additional states held that full-time teachers do not have a reasonable assurance of returning to work “in any such capacity” where their names have been placed on substitute teacher lists. One New Jersey court reasoned that the phrase “in any such capacity” contemplates the continuation of full-time services under an actual contract in a similar capacity, and not the continuation of services from day-to-day. The Supreme Court of Wisconsin also held that the phrase “in any such capacity” precludes an employee from collecting unemployment compensation benefits only if the employee had a reasonable assurance of performing services in the following year in an instructional, research, or principal administrative capacity with reasonably similar terms and conditions as those in the preceding year. In response to that decision, the Wisconsin legislature amended its statute, changing the phrase “in any such capacity” to “such services.” The Supreme Court of Wisconsin then held that, under the terms of the amended statute, an employee who had worked a full academic year, but would return to work for only the first semester of the second academic year, did not have a reasonable assurance of

76.  Kelly, 701 P.2d at 450.
77.  Id. at 450-51.
78.  Johnson, 291 N.W.2d at 701.
80.  Sulat, 424 A.2d at 453-54.
81.  Leissring, 340 N.W.2d at 539.
82.  See Wisconsin Dep't of Indus., Labor and Human Relations v. Labor and Indus. Review Comm'n, 456 N.W.2d 162, 166 n.3 (Wis. Ct. App. 1990).
returning to work because the employee would not be employed under the same terms and conditions. In other words, the court interpreted "such services" to mean the same terms and conditions of employment upon return.

Similarly, the Michigan Court of Appeals held that a full-time contract teacher offered work in the following academic year with decreased salary, no paid holidays, no sick leave, and less medical coverage than during the previous academic year did not have a reasonable assurance of returning to work in the same or similar capacity. The Court of Appeals of Illinois further construed the language "in any such capacity" to hold that, where a counselor worked four hours per day, five days per week, in addition to substitute teaching during the first academic year, and then was separated from this employment and offered only substitute teaching during the second academic year, there was no reasonable assurance of being employed "in any such capacity" because the employee was not employed in the same or similar capacity.

With respect to substitute teachers, state courts generally have held that employees who worked as substitute teachers during the first academic term or year and have a reasonable assurance of returning to work as a substitute teacher in the second academic term or year are ineligible for unemployment compensation benefits because the substitute has been offered work in the same or similar capacity. However, some substitute employees may begin their first academic term or year as day-to-day substitute employees and then, at some point during the school year, may become long-term substitute employees. State courts are divided on whether long-term substitutes offered a reasonable assurance to return to work as day-to-day substitutes are eligible for unemployment compensation benefits. The majority of state courts have held that where long-term substitutes have a reasonable assurance of returning to work as

83. Wisconsin Dep't of Indus., Labor and Human Relations v. Wisconsin Labor and Indus. Review Comm'n, 467 N.W.2d 545, 552–53 (Wis. 1991).
day-to-day substitutes, the substitutes are ineligible for benefits because they are being offered a reasonable assurance of returning to similar employment.\textsuperscript{87} For example, the Washington Court of Appeals denied benefits to a long-term substitute who had a reasonable assurance of returning to work as a day-to-day substitute.\textsuperscript{88} The court reasoned that although placement on the substitute list was not in itself reasonable assurance, the school district in good faith expected to offer substitute work to the teachers and had communicated that expectation to them.\textsuperscript{89} Since the claimants had received a reasonable assurance letter, were placed on the substitute list, and had signed a substitute teacher contract, they had received reasonable assurance of returning to work.\textsuperscript{90} Finally, the Court of Appeals of Oregon has suggested that, where a day-to-day substitute teacher received reasonable assurance of returning to work from only three out of five school districts for the following year, the teacher had a reasonable assurance of returning to work in the same or similar capacity.\textsuperscript{91}

Pennsylvania courts continue to construe strictly the statutory language that denies benefits during the summer months to employees who work full time during the first academic term or year and were offered only substitute employment in the second academic term or year.\textsuperscript{92} Nevertheless, Pennsylvania has construed the statute liberally to grant benefits during vacation periods and holiday recesses to employees who have received unemployment compensation benefits prior to a break in academic terms or years, or prior to a vacation period or holiday recess, if they are receiving benefits based on full-time employment in their base year, even though they may have a reasonable assurance of returning to work, because these employees are truly unemployed during the vacation period or holiday recess.\textsuperscript{93}


\textsuperscript{89} Id.

\textsuperscript{90} Id. at 851.


In justifying the granting of unemployment compensation benefits to employees who have a reasonable assurance of returning to work, the Pennsylvania courts have held that the federal language intends to eliminate the payment of unemployment compensation benefits to employees who can plan for non-working periods and who, therefore, do not truly suffer from the economic insecurity which unemployment compensation coverage is intended to alleviate.\(^9\) One court has concluded that since full-time employees may not anticipate being reduced to part-time or day-to-day employment, these employees remain eligible to receive benefits.\(^9\) However, that court declined to grant benefits to a day-to-day substitute receiving benefits prior to a vacation period where the benefits were based on the substitute's day-to-day earnings, not on previous full-time earnings, and the employee had a reasonable assurance of returning to the same earnings after the vacation period.\(^9\)

In contrast to the Pennsylvania courts, the New York and Oregon courts have concluded that base-year wages are not relevant to determining benefit eligibility for any employee who has a reasonable assurance of returning to work.\(^9\) Under this interpretation, if an employee is reasonably assured of returning to the same or similar terms and conditions of employment, the employee remains ineligible for benefits regardless of his full-time base-year wages.\(^9\)

More recently, however, the Oregon Court of Appeals has changed its position to hold that base-year wages are relevant in determining whether an employee with reasonable assurance

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94. Hopewell, 528 A.2d at 1083; Coolidge, 499 A.2d at 410; Haynes, 442 A.2d at 1233.


98. See In re Abramowitz, 550 N.Y.S.2d at 76; Currin, 749 P.2d at 610; Johnson, 651 P.2d at 1368.
of returning to the same or similar terms and conditions of employment remains eligible for benefits.\textsuperscript{99} The court held that an employee with full-time employment in the base year, who was receiving partial unemployment compensation benefits while working part time during the following year, remained eligible for benefits during the summer recess.\textsuperscript{100} The court reasoned that since the employee's benefits were based on her full-time work, rather than on her part-time employment, the employee remained eligible for benefits during the summer.\textsuperscript{101}

Furthermore, the Wisconsin Court of Appeals has held that where an employee has full-time base-year wages and has a reasonable assurance of returning only to day-to-day substitute work, that reasonable assurance does not preclude granting benefits during a holiday recess where those benefits were based on previous full-time employment.\textsuperscript{102} Wisconsin apparently has adopted part of the Pennsylvania Supreme Court's rationale by holding that full-time base-year wages are relevant in determining unemployment compensation benefits during vacations and holiday recesses when the only reasonable assurance given is for day-to-day substitute work.\textsuperscript{103}

\section*{B. "Between Academic Terms or Years"}

Even after having determined that an employee has a reasonable assurance of returning to work "in any such capacity," the employee will not be disqualified from receiving benefits under the statutory language except where the employee is also unemployed between academic terms or years.\textsuperscript{104} The United States Court of Appeals for the Seventh Circuit in \textit{Chicago Teachers Union v. Johnson}\textsuperscript{105} held that where public school teachers lost their jobs three weeks before the end of the academic year because of a lack of funds, they were eligible for

\begin{footnotesize}
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{103} Id.
\textsuperscript{105} 639 F.2d 353 (7th Cir. 1980).
\end{footnotesize}
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three weeks of benefits because they had a reasonable expectation that the academic year would have been three weeks longer. The court reasoned that since the teachers had worked during the academic year, they could not be disqualified from receiving benefits, even though they had a reasonable assurance of returning to work after the summer recess.

Following Chicago Teachers Union, state courts consistently have held that employees who are unemployed during the regular academic term or year are eligible for unemployment compensation benefits during periods between academic terms or years. Further, the Oregon and Michigan courts have granted unemployment compensation benefits during those weeks of the academic term or year when employees are not working. The only state supreme court that has rejected this rule is Rhode Island's, which held that school lunch workers, unemployed as a result of a contract dispute between the school and its teachers that delayed the opening of the school, were not eligible for benefits. The Supreme Court of Rhode Island further determined that the academic year begins when school actually starts and not before.

The Michigan state legislature has defined the academic year to begin when classes are first in session and to last until students have received sufficient instruction or have earned sufficient credit to complete academic requirements for a particular grade level or to complete instruction in a non-credit course. While other states have not statutorily defined the academic year, generally the state courts have adopted the

106. Id. at 357.
107. Id.
111. Id. at 557. State courts generally consider the academic year to occur between September and June in the elementary and secondary schools and during the fall and spring semesters in institutions of higher education. See, e.g., Campbell v. Department of Employment Sec., 570 N.E.2d 812, 819 (Ill. App. Ct. 1991) (indicating that the "summer months" are not included in the academic year); Rogel, 394 N.W.2d at 34 (finding that the school year begins on the scheduled date of commencing classes and not the actual date); Friedlander v. Employment Div., 676 P.2d 314, 318 (Or. Ct. App. 1983) (suggesting that the academic term for a college-level instructor would begin during the fall term).
foregoing definition and have further held that for the purposes of unemployment compensation, the academic year excludes the summer session, even if the employee has worked during the summer in the past. The Court of Appeals of Washington, however, has not adopted this definition. That court has held recently that an employee of an educational institution is eligible for unemployment compensation benefits where the employee is unemployed during the summer session but has a reasonable assurance of returning to work in the fall. The court concluded that diminished enrollment during the summer session provided insufficient justification for concluding that the summer session was not an academic term.

At least one Pennsylvania court similarly has held that employees of educational institutions who are employed in other than an instructional, research, or principal administrative capacity are eligible for unemployment compensation benefits if unemployed during a summer session. In Katz v. Unemployment Compensation Board of Review the court reached its holding by defining academic term as a term in which the courses offered require the same number of course hours and are given the same credit as those in other terms. The court reasoned that since the word "regular" does not appear before the words "academic years or terms" in the Pennsylvania statute with regard to employees who are employed in other than an instructional, research, or principal administrative capacity, these employees are eligible for unemployment compensation benefits if they are unemployed during any academic term.

The Pennsylvania courts, however, have limited the holding of Katz to employees not in instructional, research, or principal administrative capacities. As in other states, instructional, administrative, or

116. Id.
118. See id. at 625.
120. Katz, 540 A.2d at 626.
research, or principal administrative employees who are unemployed are ineligible for benefits in Pennsylvania if they are unemployed during the summer session. The court reasoned that since the word "regular" does appear before the word "terms" in the Pennsylvania statute with regard to employees who are employed in an instructional, research, or principal administrative capacity, these employees are ineligible for benefits if they are unemployed during a non-regular academic term. A non-regular academic term has been defined as a term where fewer classes are offered, where there is no distinction between full and part-time students, where there is a significant decrease in enrollment, where there is a varying length of course instruction, and where the term is not included on the academic calendar.

C. "Established or Customary Vacation Period or Holiday Recess"

State courts have defined the phrase "established or customary vacation period or holiday recess" negatively, by stating what it is not. For example, the Michigan courts have held that "an established or customary vacation period or holiday recess" is not a period in which employees have traditionally worked; not a period in which a collective bargaining agreement provides that employees will work; not a period that varies in length from year to year; and not necessarily a period in which students are not customarily in school. Finally, a Washington court has held that the period does not include the summer because the summer does not occur within a term or year.

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123. *Community College*, 634 A.2d at 848.
124. Id. at 847-48.
126. Id.
128. *Billups*, 423 N.W.2d at 233.
D. "Educational Institutions"

Employees cannot be disqualified from receiving benefits under 26 U.S.C. § 3304 unless they work for either an educational institution or an educational service agency. The FUTA defines "educational service agency" as a governmental agency or entity that has been established and is operated exclusively to provide services to educational institutions. Section 3304, however, does not define "educational institution." A few state courts have considered an educational institution to be a school. Schools have been defined as institutions where the primary objective is the instruction of academic skills in a classroom setting, or where there exists an organized academic course of study with instructor guidance, where students receive academic credit, and where courses are offered on a continual basis.

Courts have disagreed over whether preschool Headstart programs qualify as educational institutions. The Texas Court of Appeals has held that a Headstart program qualified as a day care program and, therefore, would not be considered an educational institution. The Iowa Court of Appeals has held, however, that a Headstart program is an educational institution because it has a preschool license and teaches language, speaking, and self-expression skills. The Colorado Supreme Court has held that, where a county operates a Headstart program, the Headstart employees were eligible for unemployment compensation benefits because the county is not an educational institution.

131. Id.
132. See id.
134. Alexander, 688 P.2d at 525.
136. Texas Employment Comm'n v. Child, Inc., 738 S.W.2d 56, 59 (Tex. Ct. App. 1987) ("[T]he educational aspect of the program was merely incidental to the primary purpose of bringing the participating children to a level of social development where they can better cope with . . . primary school.").
137. Simpson v. Iowa Dep't of Job Serv., 327 N.W.2d 775, 778 (Iowa Ct. App. 1982).
Similarly, the Wisconsin Supreme Court has held that where school crossing guards have been employed by a city, rather than by a school, the school crossing guards remain eligible for unemployment compensation benefits.\textsuperscript{139} A Pennsylvania court has held that school crossing guards remain eligible for unemployment compensation benefits because they are employed by a borough, and the borough is not an educational institution.\textsuperscript{140} Additionally, the Supreme Judicial Court of Massachusetts has held that where a school bus driver is employed by a private bus company, rather than by a school, the bus driver qualifies for unemployment compensation benefits.\textsuperscript{141} The Supreme Court of New Hampshire has held that where a food service employee is employed by a private profit-making corporation that provides food services to an educational institution, the employee did not work for an educational service agency and, therefore, the employee remained eligible for unemployment compensation benefits.\textsuperscript{142}

\textit{E. Year-Round Employment}

Finally, state courts have been divided in their consideration of full-time, year-round employees, such as houseparents of educational institutions.\textsuperscript{143} A Pennsylvania court has held that full-time, year-round employees of educational institutions are eligible for unemployment compensation benefits during periods of unemployment.\textsuperscript{144} That court suggested that the federal language regarding reasonable assurance did not apply to employees who were not academic year or term employees.\textsuperscript{145}

To the contrary, the Supreme Court of Rhode Island has held that year-round employees of educational institutions are

\textsuperscript{139} City of Milwaukee v. Department of Indus., Labor, and Human Relations, 316 N.W.2d 367, 371 (Wis. 1982).


\textsuperscript{141} Town of Milton v. Director of the Div. of Employment Sec., 438 N.E.2d 71, 72 (Mass. 1982).

\textsuperscript{142} In re Locke, 503 A.2d 754 (N.H. 1985).

\textsuperscript{143} Houseparents are year-round employees of schools that require supervision of students in dormitories.


\textsuperscript{145} Id.
ineligible for benefits when the educational institution closes for a customary vacation period or holiday recess.\textsuperscript{146} That court also decided that employees of educational institutions are not entitled to partial benefits even when they work a few hours during their customary vacation period or holiday recess because they had a reasonable assurance of returning to work.\textsuperscript{147}

The state courts also are divided as to whether year-round employees who have become academic year or term employees remain eligible for unemployment compensation benefits. The Minnesota Court of Appeals has held that, where a full-time, year-round employee of an educational institution was laid-off at the end of the academic year, but later offered reasonable assurance of returning to work for the next academic year, the employee was ineligible for unemployment compensation benefits.\textsuperscript{148} Similarly, the Oregon Court of Appeals has held that a year-round employee of an educational institution who did not work during the summer still had a reasonable assurance of returning to work in the same or similar capacity.\textsuperscript{149} Also, both the Michigan Court of Appeals and the West Virginia Supreme Court have held that employees of educational institutions who have a reasonable assurance of returning to work are ineligible for benefits, even when they are not offered the summer work they have been offered in the past.\textsuperscript{150} However, the Supreme Court of Rhode Island has held that where a full-time, year-round employee of an educational institution involuntarily became an academic year employee, the employee was entitled to unemployment compensation benefits during the first summer, even though the employee had a reasonable assurance of returning to work in the fall.\textsuperscript{151} The court reasoned that the claimants were eligible for benefits because the employees' yearly income had been substantially reduced, the employees had been employed year-round for a significant period of time,

\textsuperscript{147} Id. at 223.
\textsuperscript{148} Swanson v. Independent Sch. Dist. No. 625, 484 N.W.2d 432, 434 (Minn. Ct. App. 1992). The court found the employee eligible for benefits for the period following notification of termination and until notification of re-employment for the following year. Id. The employee was not eligible for benefits for the period between notification of re-employment and resumption of work. Id. at 433-34.
the employees had received little notice of unemployment, and because their positions were not tailored to the academic year.\textsuperscript{152}

III. RECOMMENDATIONS

One of the original goals of the Unemployment Insurance program was to provide initial financial support for working Americans who become unemployed through no fault of their own.\textsuperscript{153} Given this intent, where employees of educational institutions have become unemployed through no fault of their own and where they have shown financial attachment to the labor force, state courts should narrowly construe the FUTA's language that denies unemployment compensation benefits. Otherwise, employees of educational institutions will be unable to enjoy the same kind of unemployment insurance protection provided to management personnel in private industry.\textsuperscript{154} Yet the courts should construe this language to eliminate the payment of unemployment compensation benefits to employees who are able to plan for non-working periods and who thus do not truly suffer from the kind of economic insecurity that unemployment compensation coverage was meant to alleviate.\textsuperscript{155}

In light of the legislative intent behind the FUTA, the states should be encouraged by statutory amendments, regulations, unemployment insurance program letters, and by the recommendation of the Advisory Council on Unemployment Compensation\textsuperscript{156} to adopt the following interpretations of the federal statutory language. First, "reasonable assurance" should be defined as a written, verbal, or an implied mutual agreement that the employee of an educational institution or service agency will return to work following the period between two academic years or terms, or following a vacation period or holiday recess. Second, an offer of employment is not bona fide if only a possibility of employment exists. Therefore, state courts should determine whether an offer of reasonable assurance is, in fact,

\textsuperscript{152} Id.
\textsuperscript{153} ADVISORY COUNCIL ON UNEMPLOYMENT COMPENSATION, supra note 1, at 3.
\textsuperscript{156} ADVISORY COUNCIL ON UNEMPLOYMENT COMPENSATION, supra note 1, at 14.
an offer of employment when the offer depends on enrollment, program, or funding. Third, reasonable assurance "in any such capacity" should exist only if the terms and conditions of employment offered in the second academic term or year, or after the customary vacation period or holiday recess, are not substantially less than the terms and conditions of employment in the first academic term or year, or prior to the customary vacation period or holiday recess. Employees who are not reasonably assured of employment in the same or similar capacity should be eligible for unemployment compensation benefits in order to satisfy the legislative intent of providing the same unemployment compensation benefits to those in the academic community as to those in other industries.

Fourth, the holdings of the Pennsylvania courts should be followed by the other states to provide unemployment benefits to employees who have received such benefits prior to a break in academic terms or years or prior to a customary vacation period or holiday recess, and to employees who receive benefits based on full-time employment during the break in academic terms or years and during the vacation period or holiday recess. Even though these employees have a reasonable assurance of returning to work, they clearly suffer from the kind of economic insecurity that state unemployment compensation coverage was meant to alleviate and, therefore, should be eligible for benefits. Fifth, state courts should define an academic term or year as the period of time when classes are in session for the length of time required for students to receive sufficient instruction, or to earn sufficient credit, to complete requirements for a particular grade level, or to complete instruction in a non-credit course. Employees of educational institutions should be eligible for benefits during summer sessions only if the summer session is either an academic term or part of the academic year. Sixth, state courts should define a vacation period or holiday recess as a regularly scheduled period that occurs within a term and is not a period of time in which employees traditionally have worked. Seventh, an educational institution is a school. State courts should define an educational institution as an institution where there exists an organized academic course of study under the guidance of an instructor, where students receive academic credit and courses are offered on a continuing basis. Headstart programs, cities, boroughs, and private employers should not be considered
educational institutions or educational service agencies. Their employees should not be covered by the federally mandated language because they are eligible for benefits regardless of that language.

Finally, state courts should not consider full-time, year-round employees of educational institutions as covered under the federal statutory language. Rather the courts should find them eligible for benefits regardless of that language.

CONCLUSION

This Article has discussed the amendments to the FUTA that provide for the payment of unemployment compensatory benefits to the employees of educational institutions. This Article also has surveyed state court interpretations of the federally mandated statutory language authorizing the payment of unemployment compensation benefits. Finally, this Article has provided recommendations for implementing that language.

The federal government should enact statutory amendments, regulations, or unemployment insurance program letters to ensure that state courts interpret the federal language in accordance with the legislative intent behind the Act. In the alternative, the states themselves should cooperate and coordinate their decisions in order to ensure consistency and equitable treatment of similarly situated employees.