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Maribeth Wilt-Seibert

Department of Labor and Industry, Commonwealth of Pennsylvania

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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*

In 1976, Congress amended the Federal Unemployment Tax Act of 1954 (FUTA)¹ to require the states to pay unemployment compensation benefits to employees of educational institutions provided that certain federal statutory criteria were met. Since 1976, all states have enacted nearly identical versions of the federally mandated language. Although the language of state statutes is nearly identical, interpretations of that language by state courts have been diverse and sometimes inconsistent. This Abstract and the Article which will follow discuss the diversity of these interpretations and present suggestions as to how the varying interpretations can be reconciled.

FUTA permits employers to take a credit against federal taxes for contributions required to be paid into a state unemployment compensation fund as long as the State's unemployment compensation statute contains certain provisions.

One mandated provision under FUTA of 1954 allowed the payment of unemployment compensation benefits to school employees, but only at the level of an institution of higher education. The 1976 Amendments to FUTA extended the scope of unemployment compensation coverage to *all* employees of educational institutions, provided that the employees did not fall under one of the disqualifying provisions of the Amendments.

The disqualifying provisions were designed to address the tradition, common to educational institutions, of vacation periods, holiday recesses, or breaks between academic terms or academic years during which classes are not held, but employees—teachers, non-professionals, and educational service agency workers—have a reasonable expectation of employment

* The opinions expressed herein are those of the author and have not been approved, endorsed, or otherwise adopted by the Unemployment Compensation Board of Review, Department of Labor and Industry, or the Commonwealth of Pennsylvania.

1. Current version codified at 26 U.S.C. §§ 3301–3311 (1988 & Supp. V 1993).

recall at the start of the next term or year, or at the end of the vacation period or holiday recess.

Specifically, the 1976 Amendments provide that instructional, research, or principal administrative employees of educational institutions are ineligible for unemployment compensation benefits during those periods if they have a "reasonable assurance" of returning to work in "any such capacity." Similarly, all other educational institutions employees also are ineligible for unemployment compensation benefits during those periods if they have a "reasonable assurance" of returning to work in "any such capacity." Finally, employees of educational service agencies which are established and operated exclusively for the purpose of providing such services to one or more educational institutions are ineligible for unemployment compensation benefits during those same periods if they have a "reasonable assurance" of returning to work in "any such capacity."

Following the inclusion of the 1976 Amendments in the statutes of every state with nearly identical language, the states developed case law that inconsistently interpreted the key words and phrases of the federally mandated language.

The phrase "reasonable assurance" generally was held to be a written, verbal, or implied agreement that an employee would return to work based on the totality of the employment relationship. As educational institutions became adept at the practice of designing "reasonable assurance letters," some states have held that where the institution is in the middle of a financial crisis, where layoff notices have been received, where the student population is in decline, and where funding has been reduced or budgets have been slashed, reasonable assurance does not exist. Other states have held that reasonable assurance does exist even if funding for the employees is uncertain or the employees have been laid off from their prior positions.

For example, California, by statute, provided that an assignment contingent on enrollment, funding, or program changes is not a reasonable assurance of employment. Pennsylvania case law provides that, despite having a reasonable assurance of employment in the academic year immediately after the period between two terms or years or a vacation period, a claimant is eligible for benefits corresponding to that period as long as the claimant was receiving benefits before the start of that period based upon full-time employment in the base year.

Further divisions in statutory interpretation appeared when the state courts decided the meaning of the words "in any such

capacity.” The 1976 Amendments provide that instructional, research, or principal administrative employees of educational institutions have a reasonable assurance of performing services in the next period if they will perform services in the next period “in any such capacity.” Originally, many states held that “in any such capacity” meant that an employee had a reasonable assurance of performing services in an instructional, research, or principal administrative capacity even if the terms and conditions of the employment offered in the second period were substantially less. Some states, however, have held that the phrase “in any such capacity” meant that the economic terms and conditions of the employment offered in the second period must not be substantially less than the terms and conditions in the first period. This view was later adopted by the federal authorities.

Furthermore, although the phrase “academic term or year” generally has been defined not to include the summer months, some states have held that when the academic term or year ends early or starts late, the employees of the educational institution are eligible for benefits. Other states have held that when the academic year starts or ends early, the employees of the educational institution are not eligible for benefits.

Pennsylvania stands alone in this area and has focused on the word “regular” found in the statute. Its courts have held that the summer is not a “regular” academic term. Therefore, instructional, research, and principal administrative employees are not eligible for benefits during the summer months as long as the term is not a “regular” academic term. However, Pennsylvania also has held that other employees are eligible during the summer months if there is a non-regular academic term, because the word “regular” does not appear in the section of the 1976 Amendments disqualifying *other* employees.

There have also been diverse and inconsistent opinions among the states as to what comprises “educational institution.” One state has held that a Headstart program is an educational “institution,” while another has held that Headstart employees work for a day care entity, not an educational institution. A third view holds that Headstart employees are employees of an educational institution only if they are employed by a school. Thus, if the Headstart employees are county employees, they are entitled to benefits because counties are not educational institutions.

Other states have held that where school crossing guards are employed by a city or borough, the guards are not employees of an educational institution and are, therefore, not covered by the disqualifying provisions of the 1976 Amendments. Further, school bus drivers and school food service workers who are employed by private companies also are not deemed to be employees of educational institutions and thus are not covered by the disqualifying provisions of the 1976 Amendments.

Finally, there has been a division in the treatment of year-round employees of educational institutions who become academic year employees. Some states have held that when the terms of employment change from year-round to academic year positions, the employees are eligible for benefits for the first year *only* because once having accepted a position designated as an academic year employee, they now fall within the disqualification applicable to such employees. Other States have held that when the terms of employment are changed from year-round to academic year positions, employees are not eligible for benefits as long as they have a reasonable assurance of returning to work.

In conclusion, this writer submits that the Advisory Counsel on Unemployment Compensation should propose that the federal government enact statutory amendments, regulations, or unemployment insurance program letters to assist the states in interpreting the federal statutory language consistently with regard to unemployment compensation for employees of educational institutions. In the alternative, this writer would suggest that the states themselves cooperate and coordinate their decisions in order to ensure more consistency.