DEPARTMENT OF UNEMPLOYMENT ASSISTANCE
UI POLICY & PERFORMANCE
INTEROFFICE MEMORANDUM

DATE: May 25, 2017

RESCISSION(s): None

REFERENCE NO.: UIPP 2017.02

TO: All DUA Managers, Job Service Representatives, Review Examiners, Compliance Officers, and Call Center Staff and Senior Staff Directors

FROM: Jennifer Lavin, Director, UI Policy and Performance

SUBJECT: School Employees, G.L. c. 151A, §28A

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1. PURPOSE.

To discuss the concept of 'reasonable assurance' as it applies to claims based on services performed for, and wages earned from, an educational institution as set forth in G.L. c. 151A, §28A.

2. REFERENCES.

- G. L. c. 151A, § 28A
- G.L. c. 71, § 41
- *Edward W. Pepyne & City of Springfield (BR-121272)*

3. ATTACHMENTS.

- *Edward W. Pepyne & City of Springfield (BR-121272)*
- Wage Exclusion Instructions
- Examples for Determining Reasonable Assurance

4. BACKGROUND.

The provisions of Section 28A apply to the period between two academic years or terms and to certain customary holidays or vacations that occur within a term. Section 28A states:

Benefits based on service in employment as defined in subsections (a) and (d) of section four A shall be payable in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to this chapter, except that:

(a) with respect to service performed in an instructional, research, or principal administrative capacity for an educational institution, benefits shall not be paid on the basis of 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, or during a period of paid sabbatical leave provided for in the individual's contract, 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 a 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;

(b) with respect to services performed in any other capacity for an educational institution, benefits shall not be paid on the basis of such services to any individual for any week commencing during a period between two successive academic years or terms if such individual performs such services in the first of 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; provided that, if 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 benefits for each week for which the individual filed a timely claim for benefits and for which benefits were denied solely because of a finding that such individual had reasonable assurance of performing services in the second of such academic years or terms;

(c) with respect to services described in subsections (a) and (b), benefits shall not be paid to any individual on the basis of such services for any week commencing 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;

> (d) with respect to any services described in subsections (a) and (b) benefits shall not be paid as specified in subsections (a), (b), and (c) to any individual who performed such services in an educational institution while in the employ of an educational service agency, and for the purpose of this clause the term "educational service agency" means a governmental agency or governmental entity, including an educational collaborative board established by section four E of chapter forty, which is established and operated exclusively for the purpose of providing such services to one or more educational institutions.

The provisions of §28A govern the services of those employed as follows:

- §28A(a) pertains to *professionals* or those who provide services in an instructional, research, or administrative capacity for an educational institution, such as principals, teachers, adjunct professors, and substitute teachers having reasonable assurance;

- §28A(b) applies to those who provide services for cities and towns in *nonprofessional positions*, namely cafeteria workers, teacher's aids (paraprofessionals), bus drivers, and crossing guards who are under the direction and control of the educational establishment;

- §28A(c) applies to both *professionals and nonprofessionals* with reasonable assurance during vacations if working before and after the vacation period;

- §28A(d) refers to individuals who provide services for an educational service agency, which is defined as a *governmental agency or governmental entity*, including an educational collaborative which operates for the purpose of providing educational services to educational institutions.

When issuing determinations that involve circumstances under §28A, it must be decided whether:

1. The employer is an educational institution.

An educational institution includes nursery schools, preschools, Head Start programs (if operated by a local Board of Education), specialized Title I programs funded by the federal government, and charter schools. The Division of Inmate Training and Education within the Department of Corrections, as well as the Bureau of Institutional Schools Establishments also qualify as "educational institutions."

2. **The requested week(s) begin during the period between two successive academic years, terms, term holidays or vacations.**

Reasonable assurance only applies to weeks that begin during a period when school is not in session. In determining whether the claim is being filed for any week commencing between two academic years or terms, assess if the claimant is currently out of work, but worked the last school semester and is returning the subsequent school semester.

***Example*:** The claimant gets out of school on Wednesday June 21, 2017. The week ending June 24, 2017 would be adjudicated as a Still Employed/Part Time issue because the claimant worked for part of the week and reasonable assurance only applies to a period when **school is not in session;** during the week ending June 24, 2017, school was still in session.

The reasonable assurance wage exclusion would begin the following week, the week ending July1, 2017, because that is the first full week school will not be in session. School resumes on Wednesday September 6, 2017, which means that school will be in session during the week ending September 9, 2017; reasonable assurance does not apply to a week when school is in session. For this example the reasonable assurance wage exclusion would end with the week before school began, which would be the week ending September 2, 2017.

3. **The claimant had 'reasonable assurance' of re-employment for the next academic year or term.**

Reasonable assurance is a written, oral or implied offer that the employee will perform services in the same or similar capacity during the ensuing academic year, term, or remainder of term. The offer of employment must be a genuine offer, that is, an offer made by an individual with actual authority to offer employment.

- If the offer of reemployment is written or oral, it must be received by the claimant.
- If the offer is implied by conduct, the conduct must be known to the claimant. (For example, for the past X years, the claimant has not received any written or oral job offer at the end of the school year, but has always been returned in the same or similar capacity in the following year(s). This could be considered an implied offer of reasonable assurance.)

The date in which the claimant is given either verbal or written communication of the offer is considered the date of notification. However, in cases where the employer mails

the notice, the date of receipt (not to exceed 3 days after the date of mailing) is considered the date of notification. If the day of notification falls on a Monday, Tuesday, or Wednesday, the claimant is ineligible effective that week. However, if notification is received on a Thursday or Friday a lost time charge is applicable in accordance with 430 CMR 4.04(6)[1], for either one or two days, whichever is appropriate.

The 'same or similar capacity' refers to the type of services provided, such as professional or nonprofessional, as well as the economic terms and conditions, which must not be considerably less. Established DUA procedure considered 'considerably less' to be a reduction of greater than 20% in wages or benefits. **However, the Department of Labor has recently issued guidance that interprets "considerably less" to mean that the economic conditions of the job will be considerably less if the claimant will not earn at least 90% of the amount that the claimant earned in the first academic year or term (a reduction of 10% or less), or in a corresponding term, if the claimant does not regularly work successive terms (ex: the claimant works the spring term each year).**

The employer must be given the opportunity to provide a written statement to the DUA that the employee has been given a bona fide offer of a specified job in the next academic term and a claimant must be given the opportunity to rebut/refute that evidence.

Note: In accordance with G.L. Ch. 71, §41 (Tenure of Teachers and Superintendents; Persons Entitled to Professional Teacher Status; Dismissal; Review), public school employees in a professional capacity (teacher, school librarian, school adjustment counselor, school nurse, school social worker, school psychologist), "who have served in the public schools of a school district for the three previous consecutive school years shall be considered a teacher, and shall be entitled to professional teacher status as provided in section forty-two…A teacher without professional status shall be notified in writing on or before June fifteenth whenever such person is not to be employed for the following school year. Unless such notice is given as herein provided, a teacher without such status shall be deemed to be appointed for the following school year." **This means that professional public school employees automatically have reasonable assurance of re-employment in the following academic year unless they are officially notified by the school system on or before June 15th of the academic year that they will not be returning to their position in the following September semester.**

Remember:

- An offer of employment will not be considered bona fide if only the possibility of work exists.

[1] 430 CMR 2.02 was rescinded 05/06/2016.

- A possibility of work, as opposed to a reasonable assurance, exists if the conditions under which the individual would be employed are not within the educational institutions control **and** the educational institution cannot provide evidence that such claimants normally perform services in the following academic year. But if the educational institution can establish a pattern showing that the individual is likely to be reemployed in the second academic period, a reasonable assurance exists, unless the claimant presents evidence that a change in circumstances has occurred.

Example: a professor in a program for adult students with disabilities is offered the same job in the second academic year in a special program which is funded from an outside source. This program has been funded for the past four years. However, at the beginning of summer recess, no notification of the following year's funding has been received. Other than this lack of notification, which usually arrives late in the summer, no reason exists to indicate that the program will be suspended or abolished. While the circumstances under which the professor is employed are not within the school's control, the school can still establish a pattern showing that the program is likely to be funded in the second academic year. Therefore, the offer of work is bona fide and a reasonable assurance exists.

When addressing adjunct professors, adjudicators/review examiners must document the number of schools, the number of courses and wages paid per course in the previous semester, term or year (at each school if the claimant taught at multiple schools), and compare it to the terms and conditions of the work offered in the next successive period. Additionally, some adjunct professor collective bargaining agreements provide for payment of canceled courses, or guarantee a minimum amount of courses to be offered each term, so these scenarios should be addressed in fact finding. Some employers may also reduce the adjunct professor's salary if class size does not meet minimum thresholds; this should also be explored in the fact finding.

The *Pepyne* decision issued by the Board of Review in April 2012 requires that the service performed for each educational institution in the base period be examined to establish if there is a reasonable assurance of the claimant performing those particular services in the next academic year or term.

In *Pepyne,* the claimant was laid off in June 2010 from a full time teaching position, after which he filed a claim and was approved for UI benefits. In October of 2010, the claimant was placed on the employer's substitute teacher list and he worked as a substitute teacher for the remainder of the 2010-2011 school year. In June 2011, at the end of the school year the claimant was given reasonable assurance of reemployment as a substitute teacher for the next school year. On June 24, 2011, the claimant filed a new claim for benefits. The

claim was denied because the claimant had received reasonable assurance of reemployment as a substitute teacher. The claimant appealed. After hearing, the determination was affirmed and the claimant appealed to the Board of Review who reversed the denial of benefits.

In its analysis the Board of Review acknowledged that the clamant received reasonable assurance of reemployment as a substitute teacher, which barred the use of those wages on the UI claim. However, it ruled that since the claimant's base period wages also included wages earned when the claimant was employed in the full time teaching position, the reasonable assurance received had no effect on his service or wages earned in that capacity and therefore the wages from the full-time teaching position could be used to establish a claim for benefits.

- **An opportunity to "perform service" was given during the second of two academic years or terms (only if the claimant is a non- professional).**

The opportunity to perform services in the second academic year or term applies to those in **nonprofessional positions**. The employer must make this offer in writing, by the end of the second full week from the beginning of the academic year or term, to those individuals who are not currently employed. In addition, the individual must begin performing services by the end of the fourth full week from the beginning of the academic year or term. The opportunity to perform services, even if it is an offer of short term employment, is sufficient as long as the terms and conditions of the job are the same as those in the most recent academic year or term. If the claimant is not offered the opportunity to work once the next academic year begins or does not begin work by the end of the fourth full week, the claimant may be entitled to retroactive payment of benefits if otherwise eligible.

5. ACTION.

When making a determination on whether to use wages earned in the employ of an educational institution for the purposes of UI benefits, staff must establish that a contract or a reasonable assurance of reemployment exists for services performed for some or all base period employment. If it is determined that reasonable assurance was received as to a specific service, staff should investigate whether the claimant performed other services in the base period and whether those services were also subject to a reasonable assurance. Unless the service for a particular employer was subject to a reasonable assurance, the wages may be used and the claimant could qualify for benefits based upon such service. Adjudicators/review examiners must then indicate which wages may be used (if any) when processing the reasonable assurance determination (see attached implementation directions).

6. <u>QUESTIONS</u>.

If you have any questions regarding reasonable assurance determinations, please contact the UI Policy & Performance Department at (617) 626-6422.