

Memorandum

To: DUA UITCC & CAU DIRECTORS AND MANAGERS, ET AL.

From: TRACEY RAGLAND-KELLEY, PROGRAM DIRECTOR
UI POLICY & PERFORMANCE DEPARTMENT

Date: JUNE 11, 2012

Re: SCHOOL EMPLOYEES, G.L. c. 151A, § 28A

In light of academic terms ending, as well as recent decisions issued by the Board of Review, it is necessary to revisit 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.

The provisions of Section 28A apply only to the period between two academic years or terms and cite:

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 aforementioned provisions govern the services of those employed as follows: §28A (a) pertains to professionals or those employed in an instructional, research, or administrative capacity for an educational institution, such as principals, teachers, and substitute teachers having reasonable assurance; §28A (b) applies to those employed by cities and towns in nonprofessional positions, namely cafeteria workers, teacher's aids, bus drivers, and even 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 vacation period, with the following exception:

On-call substitute teachers are not entitled to UI benefits under this section, if the terms of employment are the same before and after a vacation week, regardless of whether work was performed immediately before and after the vacation period. Regarding on-call substitute teachers, it is also important to remember that they are only eligible to receive unemployment benefits for weeks in which they are in 'total unemployment'. To be in 'total unemployment' an individual must be capable of and available for work, but unable to obtain work. Therefore, an on-call substitute teacher is disqualified from receiving UI benefits during any week in which an offer of work is refused.

Section 28A (d) refers to individuals employed by an educational service agency, which is defined as a governmental agency or governmental entity, including an educational collaborative board which operates for the purpose of providing educational services to educational institutions.

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

1. The employer is an educational institution.

An educational institution includes nurseries, preschools, head start program (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 claim is being filed between two successive academic years or terms.

In determining whether the claim is being filed 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.

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

Reasonable assurance is a written, oral or implied agreement that the employee will perform services in the same or similar capacity during the ensuing academic year, term, or remainder of term. The claimant must receive notice of the offer of reemployment. 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) is considered the date of notification. If the day of notification falls on a Monday, Tuesday, or Wednesday, the claimant is disqualified effective that week. However, if notification is received on a Thursday or Friday, lost time charge is applicable in accordance with 430 CMR 2.02, 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 substantially less, as in greater than a 20% reduction in wages or benefits.

The employer must also provide a written statement to the DUA that the employee has been given a bona fide offer of a specified job in the second academic term. A "bona fide" offer is an offer of employment which cannot be tentative and must be made by an individual authorized to do so. The employer does not have to show that work or funding will definitely be available in order for it to be a bona fide offer.

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

The opportunity to perform actual services in the second academic year or term, applies only to those in a nonprofessional position. 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, 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, if otherwise eligible, the claimant may be entitled to retroactive payment of benefits.

A recent decision rendered by the Board of Review, *Edward W. Pepyne & City of Springfield (BR-121272)*, changes the way in which cases involving reasonable assurance are adjudicated:

Background

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 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, at which stage the denial was reversed.

In its analysis, the Board of Review focused on the following language within the statute (in parts):

§28A (a) - "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;"

§28A (b) - "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;"

The board acknowledged that the claimant received reasonable assurance of reemployment as a substitute teacher, thus barring the use of those wages. However, it ruled that since the claimant's base period wages also included wages earned when he was employed in the full-time teaching position, the reasonable assurance received had no affect on his service or wages earned in that capacity. Therefore, the wages from his full-time teaching position could be used to establish a claim for benefits.

Action

Although certain *services* may not provide a basis for UI, due to reasonable assurance barring the use of those wages, other *services* could. If it is determined that reasonable assurance was received as to a specific service covered by §28A (a) or §28A (b), investigate whether the claimant performed other *services* in the base period and whether those *services* were also subject of a reasonable assurance. Unless the *service* was subject to a reasonable assurance, the wages may be used and the claimant could qualify for benefits based upon such *service*.

System implementation instructions pertaining to the application of the recent BOR decisions are forthcoming. If you come across cases involving these circumstances, prior to receiving such direction, please contact UI Policy & Performance at (617) 626-6422.

However, the following wage data instructions are to be used in all circumstances other than those involving the application of 28A as discussed above in reference to *Edward W. Pepyne & City of Springfield (BR-121272)*.

**WAGE DATA INSTRUCTIONS
HI/LO WAGE DATA ENTRY OF SCHOOL SYSTEM EMPLOYEES**

When the wage processor or claims agent indicates the claimant is a school system employee on the UEH screen, the automated system creates two monetary rates, one using the non school wages set on the LO setting and another using the school wages on the HI setting.

When a form 1062, Request for Separation and Wage Information or Form 1074 Request for Separation and Wage Information – Reopened Claim is returned and the employer has checked the box marked “Reasonable Assurance” an issue code “06” is established on the UI automated system and the issue is referred to the adjustment unit.

The claimant will have a monetary determination using all of the employment he/she had in the base period (HI) and one with the school wages deleted (LO). The designation of whether the claim is set to HI or LO is on the QSGN and QMON screens.

If there is reasonable assurance at the time of filing:

If the claimant has reasonable assurance of returning to work for any school system employer the JSR is responsible for issuing the disqualification on a Form 3724 and to verify that the system automatically set the claim on the LO rate at the time the claim was filed.

LO: USE OF NON SCHOOL WAGES: TO PAY ON LO ACCESS THE “HILO” SCREEN AND ENTER: THE DATES OF DISQUALIFICATION UNDER 28A IN THE START AND END FIELDS.

If the claimant did not have reasonable assurance at the time of filing:

If the claimant did not have reasonable assurance at the time of filing, the CSR must access the HILO screen to change the automated system to pay on the HI monetary rate.

HI: USE OF ALL WAGES: TO PAY ON HI ACCESS THE “HILO” SCREEN AND ENTER 000000-000000 IN THE START AND END FIELDS.

If you have any questions pertaining to the issues covered by this memorandum, please contact the UI Policy & Performance Department at 617-626-6422.