

Regulatory Analysis Form

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RENEW CERTIFICATION

IRRC Number: 2160

(1) Agency

Department of Labor and Industry
Bureau of Unemployment Compensation Benefits and Allowances

(2) I.D. Number (Governor's Office Use)

12-56

(3) Short Title

Reasonable Assurance Regulation

(4) PA Code Cite

34 Pa. Code, Chapter 65,
Subchapter I, §65.161

(5) Agency Contacts & Telephone Numbers

Primary Contact: Jeri Morris

(717) 787-6337

Secondary Contact: Pete Cope, Director, (717) 787-3547

(6) Type of Rulemaking (Check One)

Proposed Rulemaking

Final Order Adopting Regulation

Final Order, Proposed Rulemaking Omitted

(7) Is a 120 Day Emergency Certification Attached?

No

Yes: By the Attorney General

Yes: By the Governor

(8) Briefly explain the regulation in clear and nontechnical language.

The regulation will provide criteria for determining eligibility for unemployment compensation (UC) benefits based on service for governmental and nonprofit educational institutions and educational service agencies (educational employers). This regulation provides that a reasonable assurance of returning to work for an educational employer includes: (1) a bona fide offer, and (2) an economically equivalent position from one academic period to the next.

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

The regulation is promulgated under Section 201(a) of the Unemployment Compensation Law (Law) (43 P.S. § 761(a)), which authorizes the Department of Labor and Industry (Department) to promulgate and amend rules and regulations necessary to administer the Law.

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(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

Yes, the regulation is necessary in order to bring Pennsylvania's UC eligibility criteria into conformity with the requirements of the United States Department of Labor (USDOL) under Section 3304(a)(6)(A) of the Federal Unemployment Tax Act (FUTA) (26 U.S.C. § 3304(a)(6)(A)), as set forth in Unemployment Insurance Program Letter (UIPL) 4-87. USDOL has required that Pennsylvania implement UIPL 4-87, and supports this regulation defining reasonable assurance.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

There is a compelling public interest to avoid nonconformity with federal law, which threatens federal funding and tax credits. Without federal funding, the UC and employment service (ES) programs could not successfully function.

If the FUTA tax credit were lost because Pennsylvania was ruled to be out of compliance with FUTA, the resulting loss of FUTA credit would increase the FUTA taxes paid by Pennsylvania employers as much as \$378 per employe per year. Based on calendar year 1998 data, Pennsylvania employers would have experienced an estimated increase of \$1.8 billion in FUTA taxes had they lost their FUTA tax credit.

Based on federal program year 1998-1999 data for ES and federal fiscal year 1998-1999 data for UC, a loss of UC and ES administrative funding from the federal government would cost Pennsylvania \$148.76 million.

(12) State the public health, safety, environmental or general welfare risks associated with non-regulation.

There are no public health, safety or environmental risks associated with nonregulation. However, the general welfare risk associated with nonregulation is that Pennsylvania could lose tax credits and federal funding for its UC and ES programs, which would adversely affect all employers and employes in the Commonwealth.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

Employes of educational employers will benefit from the regulation.

Section 402.1 of the Law requires a denial of benefits to an employe of an educational employer during breaks between academic years or terms, or breaks for vacations or holidays, if the employe performed services in the academic period prior to the break and has a reasonable assurance of performing services in the subsequent academic period. Under current law, however, the economic terms and conditions of the job offered in the subsequent academic period are not considered.

For example, a professional school employe who worked as a full-time substitute teacher in the first academic year is told that his name is being placed on the per diem substitute teacher list for the second academic year. Although the economic terms and conditions of the employment offered in the second academic year could be substantially less favorable for the employe, under current law he has a reasonable assurance of performing services in an "instructional" capacity following the summer break and is denied benefits under Section 402.1(1) of the Law during the break.

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(13) Continued.

The regulation will require that the economic terms and conditions of the work offered in the second academic period should not be substantially less than the economic terms and conditions of the work performed in the first academic period in order for the employe to have reasonable assurance of performing services in the second period. This requirement is consistent with USDOL's interpretation of FUTA in UIPL 4-87. The regulation would permit employes of educational employers to qualify for UC benefits during regularly scheduled non-school periods, if they are offered an economically inferior position.

There are 3,863 (Second Quarter 1999) educational employers in Pennsylvania and they employ a total population of 443,073 (April 1999). The total population of school employes will not benefit by the regulation. It is impossible to determine how many school employes, out of the total population, will benefit.

2,303 claimants were denied benefits under Section 402.1 of the Law during calendar year 1998. Assuming that all of these claimants would have been eligible for benefits if the regulation had been in place at that time, UC benefit payments to employees of educational employers would have increased by an estimated \$2.9 million for 1998.

NOTE: The number of claimants who did not apply for benefits under the current law, but may apply for benefits as a result of the regulation, cannot be determined and, therefore, the amount of additional benefits attributable to them is not provided.

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

Pennsylvania's 3,863 educational employers (elementary and secondary schools, colleges, universities, professional schools, junior colleges and employer service agencies) could be adversely affected by the regulation.

Under current law, a reasonable assurance of returning to work can exist even if the employment offered for the second academic period is not economically equivalent to the employment in the first academic period. Under the regulation, the requirements for establishing the existence of reasonable assurance will be more rigid. It may be difficult for school employers to assure economically equivalent employment for persons who had been full-time teachers but are now day-to-day substitutes who will be called to work as needed.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

The regulated community consists of educational employers (3,863) and their employes (443,073). However, the regulation will not require any action by the employes. The regulation provides for more rigid standards for a school employer to establish that an employe has a reasonable assurance of performing services in the next academic period.

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(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

Before publishing the proposed rulemaking in the *Pennsylvania Bulletin*, the Department solicited comments on the proposed regulation from the following individuals and entities:

Mr. Leon Boncarosky, Director
Bureau of Personnel
Pennsylvania Department of Education
333 Market Street, Harrisstown 2
Harrisburg, PA 17126

Mr. Greig W. Mitchell, Vice Chancellor
Finance and Administration
State System of Higher Education
Dixon University Center
2986 North Second Street
Harrisburg, PA 17110

Ms. Rosalie Bloom-Brooks, Manager
UC Benefits
Pennsylvania State University
120 South Burrowes Street
University Park, PA 16801

Ms. Nancy Robbins, Executive Director
Pennsylvania Intermediate Unit Association
Central IU 10
RD 1 Box 374
West Decatur, PA 16878

Mr. Joseph V. Oravitz, Executive Director
Pennsylvania School Boards Association
774 Limekiln Road
New Cumberland, PA 17070

Dr. Carolyn C. Dumaresq, Executive Director
Pennsylvania State Education Association
400 North Third Street
Harrisburg, PA 17101

Mr. John Tarka, Executive Director
Pennsylvania Federation of Teachers Union
10 South 19th Street
Pittsburgh, PA 15203

Mr. Geoffrey D. Moomaw, Partner
Interstate Tax Service Bureau
P.O. Box 247
Camp Hill, PA 17001-0247

Mr. Scott D. Briggs, President
Heiss, Gibbons and Company, Inc.
7 East Main St.
Mechanicsburg, PA 17055

Mr. Richard Fellars, Business Manager
Pittsburgh City School District
341 South Bellefield Ave.
Pittsburgh PA 15213-3516

Ms. Sharon Kirk, Superintendent
DuBois Area School District
500 Liberty Blvd.
DuBois, PA 15801-2401

Ms. Brenda Conner, Business Manager
Harrisburg School District
P.O. Box 2645
Harrisburg, PA 17105

Mr. Gregg Sunday, Business Manager
Scranton City School District
425 North Washington Ave.
Scranton, PA 18503-1396

Mr. Ronald Engleman, Business Manager
Allentown City School District
Box 328
Allentown, PA 18105-0328

The Department received responses from Heiss, Gibbons and Company, Inc.; Interstate Tax Service Bureau (ITSB); the Pennsylvania Department of Education; Pennsylvania State Education Association, Pennsylvania School Boards Association (PSBA); and R.E. Harrington, who was asked to comment by PSBA.

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(16) Continued

After the proposed rulemaking was published and pursuant to the 30 day public comment period, the Department received comments from ITSB. The Department received one comment from the Independent Regulatory Review Commission (IRRC).

Employees of educational employers agree with and support the regulation, because the economic equivalency part of reasonable assurance ensures the payment of UC benefits absent an offer of a financially equivalent position. The Department of Education also agrees with the proposed regulation because it clarifies the meaning of the term "reasonable assurance." However, educational employers do not agree with the regulation. With economic equivalency as a factor, fewer offers of work will constitute reasonable assurance of employment in the next academic period.

IRRC's suggestion, which would improve the clarity of the regulation, was incorporated into the final-form regulation. Although educational employers disagree with the regulation, it is necessary in order to incorporate USDOL's interpretation of reasonable assurance into Pennsylvania law, and avoid the serious consequences of nonconformity with federal requirements.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

2,303 claimants were denied benefits under Section 402.1 of the Law during calendar year 1998. Assuming that all of these claimants would have been eligible for benefits if the regulation had been in place at that time, UC benefit costs for educational employers would have increased by an estimated \$2.9 million for calendar year 1998.

Note: The number of claimants who did not apply for benefits under the current law, but may apply for benefits as a result of the regulation, cannot be determined and, therefore, an estimated cost for them is not provided.

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

UC benefit costs for local governments that are educational employers would have increased by an estimated \$1.8 million for calendar year 1998. This is part of the \$2.9 million increase referenced in Item 17 for all educational employers. See note in Item 17.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required.

Pennsylvania, as an educational employer, would have experienced an estimated increase of \$200,000.00 in UC benefit costs for calendar year 1998. This is part of the \$2.9 million increase referenced in item 17 for all educational employers. See note in item 17.

Any increase in the cost of administering the UC program would be nominal, because no measurable increase in personnel, time or resources will be necessary to administer Section 402.1 as impacted by the regulation.

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(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	State Fiscal Year					
	1999	2000	2001	2002	2003	2004
SAVINGS:						
Regulated Community						
Total Savings						
COSTS: (In Millions)						
Regulated Community	\$3.0	\$3.1	\$3.2	\$3.3	\$3.4	\$3.6
Local Government	-----	-----	-----	-----	-----	-----
State Government	-----	-----	-----	-----	-----	-----
Total Costs						
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses						

(20a) Explain how the cost estimates above were derived.

2,303 claimants were denied benefits under Section 402.1 of the Law during calendar year 1998. Assuming that all of these claimants would have been eligible for benefits if the regulation had been in place at that time, UC benefit costs for educational employers would have increased by an estimated \$2.9 million for calendar year 1998. Cost estimates associated with these claimants were derived using average payments and average duration for claimants who were determined eligible for benefits under Section 402.1.

Estimates for State Fiscal Years 1999 through 2004 were calculated by inflating benefit costs by projected increases in the average benefit payment since calendar year 1998. The cost impact does not include an estimate of benefit payments to individuals who did not file for benefits but who would be eligible for benefits under the regulation.

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(20b) Provide the past three year expenditure history for programs affected by the regulation.

State Fiscal Year/Federal Program Year				
Program	1997-1998	1998-1999	1999-2000	2000-2001
ES Administrative Expenditures (in millions)	\$34.821	\$30.592	\$27.433	\$27.641
UC Program Expenditures (in millions)	\$1,391.8	\$1,464.1	\$1,435.2	\$1,713.1
Federal Fiscal Year*				
	1997-1998	1998-1999	1999-2000	2000-2001
UC Administrative Expenditures (in millions)	\$123.365	\$125.726	\$126.410	\$131.947

*Figures for State Fiscal Year not available.

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

In order for a state to receive federal funding and tax credits, its UC law must conform to FUTA. The emergence of a conformity issue could have substantial impact on the Commonwealth. If the Commonwealth does not adopt the regulation and is ruled to be out of conformity with federal law, the Secretary of USDOL would withdraw certification from the Commonwealth, which would abrogate funding for both the UC system and the ES. In addition, employers within the Commonwealth would lose the FUTA tax credits to which they are entitled by virtue of paying state UC taxes.

If the FUTA tax credit were lost because Pennsylvania was ruled to be out of compliance with FUTA, the resulting loss of FUTA credit would increase the FUTA taxes paid by Pennsylvania employers as much as \$378 per employe per year. For calendar year 1998, Pennsylvania employers would have experienced an estimated increase of \$1.8 billion in FUTA taxes had they lost their FUTA tax credit.

For federal program year 1998-1999 for ES, and federal fiscal year 1998-1999 for UC, a loss of UC and ES administrative funding from the federal government would have cost Pennsylvania \$148.76 million.

Therefore, the yearly maximum cost of the regulation (\$2.9 million for 1998) is less than the yearly potential loss of administrative funding and tax credits, totaling almost \$2 billion dollars, if the regulation is not adopted.

(22) Describe the non regulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

The Commonwealth could challenge USDOL's position that Pennsylvania is out of conformity with federal law with regard to reasonable assurance. However, if the Commonwealth contests USDOL's position unsuccessfully and is adjudged to be out of conformity with federal law, the Secretary of USDOL would withdraw certification from the Commonwealth, which would abrogate funding for the UC system and ES program, and threaten federal tax credits, worth almost \$2 billion annually.

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(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

No alternative regulatory schemes appear to be available.

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

No, the regulation adopts the federal standard as articulated in UIPL 4-87.

(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

The regulation would not put Pennsylvania at a competitive disadvantage because the federal requirements with regard to reasonable assurance are applicable to all states.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

The regulation would not affect other regulations of the Department or the regulations of other state agencies.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

To the extent necessary, the Department will provide informational outreach to groups affected by the regulation.

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(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

No new reporting, record keeping or other paperwork will be required by this regulation. However, existing UC program forms will be amended, at nominal cost, to ask questions which address the reasonable assurance criteria established by the regulation.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

None.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The regulation will be effective upon its final publication in the *Pennsylvania Bulletin* and will apply to applications for benefits effective on or after the date of publication.

(31) Provide the schedule for continual review of the regulation.

A sunset date will not be necessary for this regulation because it will be continuously monitored by the Bureau and the Department in the day-to-day administration of the Law and the UC program. If needed, amendments can be initiated based on the experience obtained from these operations.

CDL-1

**FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU
(Pursuant to Commonwealth Documents Law)**

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Copy below is hereby approved as to Form and legality. Attorney General.

By: _____
DEPUTY ATTORNEY GENERAL

DATE OF APPROVAL

Check if applicable.
Copy not approved.
Objections attached.

Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:

DEPARTMENT OF LABOR & INDUSTRY
(AGENCY)

Document/Fiscal Note No. 12-56

Date of Adoption: _____

By: JSB
JOHNNY V. BUTLER

Title: Secretary Of Labor & Industry
(Executive Officer, Chairman or Secretary)

Copy below is hereby approved as to form and legality. Executive or independent Agencies.

By: _____
08/19/02
DATE OF APPROVAL

(Deputy General Counsel)
(Chief Counsel, Independent Agency)
(Strike inapplicable title)

Check if applicable. No Attorney General approval or objection within 30 days after submission.

**NOTICE OF
FINAL FORM RULEMAKING**

TITLE 34. LABOR AND INDUSTRY

DEPARTMENT OF LABOR AND INDUSTRY

[34 PA. CODE CH. 65]

REASONABLE ASSURANCE

FINAL-FORM REGULATION

Title 34. - Labor And Industry

Department Of Labor And Industry

[34 Pa. Code, Part II, Chapter 65] Reasonable Assurance

The Department of Labor and Industry (Department), by this order, amends Chapter 65 (relating to employe provisions) by adding § 65.161 relating to reasonable assurance, to read as set forth in Annex A.

Statutory Authority

The regulation is promulgated under Section 201(a) of the Unemployment Compensation Law (Law) (43 P.S. § 761(a)), which authorizes the Department to adopt and amend rules and regulations necessary to administer the Law.

Background and Purpose

The purpose of this regulation is to bring the Pennsylvania unemployment compensation (UC) eligibility criteria into conformity with the United States Department of Labor's (USDOL) requirements under Section 3304(a)(6)(A) of the Federal Unemployment Tax Act (FUTA) (26 U.S.C. § 3304(a)(6)(A)) with regard to a principle known as "reasonable assurance."

FUTA requires the states to deny UC benefits based on services in an instructional, research or principal administrative capacity for an educational institution, for any week between two academic years or terms, if the claimant performed services in any of those capacities in the first year or term and there is a contract or reasonable assurance that the claimant will perform services in any of those capacities in the second year or term. States must also deny benefits based on services in an instructional, research or principal administrative capacity for an educational institution, for any week during a vacation period or holiday recess, if the claimant performed services in any of those capacities before the vacation or holiday and there is a reasonable assurance that the claimant will perform services in any capacity after the vacation or holiday. States may deny benefits based on services for an educational institution in a capacity other than instructional, research or principal administrative, for any week between 2 academic years or terms, or any week during a vacation period or holiday recess, if the claimant

performed these services in the first year or term or before the vacation or holiday, and there is a reasonable assurance that the claimant will perform services in any capacity in the second year or term or after the vacation or holiday. These denial provisions also apply to claimants who are employed by an educational service agency. These provisions apply to governmental and nonprofit educational institutions and educational service agencies (collectively, educational employers). 26 U.S.C. § 3304(a)(6)(A).

The USDOL imposes requirements on the states regarding the interpretation and application of the statute. Unemployment Insurance Program Letter 4-87 (52 FR 3889) sets forth USDOL's official interpretation of "reasonable assurance" in FUTA. It provides that a reasonable assurance of employment in the second academic period exists only if there is a bona fide offer of employment and the economic terms and conditions of the employment in the second academic period are not substantially less than the terms and conditions of the claimant's employment in the first academic period. For example, if a full-time teacher is given an offer to return to work as a part-time substitute teacher in the following academic year, his employment in the second academic period would not be economically equivalent to his employment in the first academic period, as required by the USDOL. Therefore, there is no reasonable assurance and the teacher should be eligible for benefits for the summer.

Pennsylvania's implementation of the FUTA provisions regarding the eligibility of employees of educational employers is found in Section 402.1 of the Law (43 P.S. § 802.1). Subsections (1) and (2) of Section 402.1 deny benefits based on services for an educational institution, for any week between two academic years or terms. (Subsection (1) applies to services in an instructional, research or principal administrative capacity, and subsection (2) applies to services in any other capacity.) Subsection (3) denies benefits based on services in any capacity for an educational institution, for any week during a vacation period or holiday recess. Subsection (4) extends the denial provisions of subsections (1), (2) and (3) to services performed in the employ of an educational service agency. All of the denial provisions of Section 402.1 require the existence of a contract or reasonable assurance of employment in the second academic period.

Currently, Pennsylvania does not include economic equivalency as a necessary element of reasonable assurance. In *Musko v. Unemployment Compensation Bd. of Review*, No. 2740 C. D. 1997 (Pa. Cmwlth., filed June 23, 1998) (unreported), *appeal denied*, 558 Pa. 624, 737 A.2d 745 (1999), the claimant was a full-time school teacher in the first academic year and received an assurance of returning to work as a per diem or long-term substitute teacher in the second academic year. Commonwealth Court held that the claimant was ineligible for benefits for the summer, because he worked in an instructional capacity in the first year and had an assurance of returning to work in an instructional capacity for the second year. However, the economic terms and conditions of the position offered to him for the second year were substantially less than the terms

and conditions of his job in the first year. If the economic equivalency test had been applied as required by USDOL, the claimant would have been eligible for UC benefits.

To conform to FUTA, Pennsylvania and the other states can deny benefits to employees of educational employers only to the extent authorized by federal law. In *Musko*, Pennsylvania went beyond the scope of the federal law as interpreted by USDOL when it denied benefits to a claimant who was not offered an economically equivalent position for the next school year. As a result, the USDOL informed the Department that it was out of conformity with the federal law.

In order to conform to the USDOL's reasonable assurance requirements, the Department adopts this regulation.

Comments

The Department published notice of the proposed rulemaking at 31 Pa.B. 1564 (March 24, 2001). Pursuant to the 30-day public comment period, the Department received comments from the Interstate Tax Service Bureau (ITSB). The Senate Labor and Industry Committee and the House Labor Relations Committee (Committees) did not comment. The Independent Regulatory Review Commission (IRRC) submitted one comment to the Department.

Comment: ITSB stated that Pennsylvania is following USDOL's interpretation of reasonable assurance and that *Musko* is an isolated departure from federal requirements.

Response: Pennsylvania does not include economic equivalency in its analysis of reasonable assurance, as required by USDOL. Although *Musko* is the case that precipitated notice from USDOL that the Commonwealth is out of conformity with Federal law, it is not a unique case. There are other similar cases where a claimant was denied benefits, but likely would have been granted benefits if economic equivalency had been a factor. See, *Neshaminy School District v. Unemployment Compensation Bd. of Review*, 426 A. 2d 1245 (Pa. Cmwlth. 1981) (long term substitute teacher converted to day to day substitute teacher for next school year); *Richland School District v. Unemployment Compensation Bd. of Review*, 459 A. 2d 1358 (Pa. Cmwlth. 1983) (tenured, contract teacher and tenured, preferred substitute teacher placed on substitute call list for next year); *Board of Education, School District of Philadelphia v. Unemployment Compensation Bd. of Review*, 609 A. 2d 596 (Pa. Cmwlth. 1992) (long term substitute teachers converted to per diem substitute teachers for following year).

Comment: ITSB is concerned that the requirements for a "bona fide offer of employment" under the regulation will be the same as the requirements for an offer of work under section 402(a) of the Law (43 P.S. §802(a)).

Response: Under section 402(a), a claimant may be ineligible for benefits if the claimant refuses an offer of suitable work. Section 402(a) requires an unconditional offer of work and a guarantee of employment if the offer is accepted. *McKeesport Hospital v. Unemployment Compensation Bd. of Review*, 619 A.2d 813 (Pa. Cmwlth. 1992). The requirements under section 402(a) will not extend to the regulation, as the analysis under section 402(a) is different than the analysis under section 402.1. Section 402.1 requires only a reasonable assurance of employment. While a possibility or hope of employment does not rise to the level of reasonable assurance, there need not be a guarantee of employment. Reasonable assurance necessitates mutual commitment or assurance between the teacher and the educational employer, so the teacher has a reasonable expectation of employment in the next academic period. *McCuen v. Unemployment Compensation Bd. of Review*, 486 A. 2d 552 (Pa. Cmwlth. 1985).

Comment: ITSB commented that the regulation contradicts section 402.1 of the Law.

Response: Section 402.1(1) and the regulation are not inconsistent. Under section 402.1(1) of the Law, a claimant is ineligible for benefits between academic periods if the claimant worked in an instructional, research or principal administrative capacity during the first academic period and has a reasonable assurance of returning to work in any one of those capacities for the second academic period. The regulation does not contravene the provision in section 402.1(1) that a claimant is ineligible for benefits if the claimant has a reasonable assurance of reemployment, or the requirement that reasonable assurance relate to employment in specified capacities. Rather, the regulation defines reasonable assurance and sets forth criteria that must be met for reasonable assurance to exist.

Comment: IRRC stated that the regulation should include factors that will be used to determine whether the economic terms and conditions of the employment offered to the claimant for the second academic period are, or are not, substantially less than the terms and conditions of the claimant's employment in the first academic period.

Response: The Department agrees with IRRC's comment. The Department added subsection (c) to the regulation, which provides that economic terms and conditions of employment include, but are not limited to, wages, benefits and hours of work. Therefore, these factors will be used to compare the employment offered to the claimant for the second academic period with the claimant's employment in the first academic period.

Effective Date

The regulation will be effective immediately upon publication in the *Pennsylvania Bulletin*.

The regulation will apply to applications for benefits effective on or after the date of publication.

Fiscal Impact

The regulation is necessary to bring the Law into conformity with FUTA and avoid substantial adverse impact to the Commonwealth. If the Commonwealth does not adopt the regulation and is adjudged to be out of conformity with federal law, the Secretary of USDOL would withdraw FUTA certification from the Commonwealth. This would abrogate administrative funding for both the UC system and the employment service. In addition, Pennsylvania employers would lose the FUTA tax credits to which they are entitled by paying state UC taxes. The loss of administrative funding and tax credits would cost the Commonwealth approximately \$1.95 billion annually, based on figures for the 1998 calendar year, 1998-1999 program year and 1998-1999 fiscal year.

It is uncertain whether the regulation will have a fiscal impact on the UC Fund. Employees of educational employers who are not given a reasonable assurance of returning to work, in accordance with the regulation, would be eligible for UC benefits. However, eligibility for these employees could prompt affected employers to provide the level of reasonable assurance required by the regulation, and cause an eventual decrease in benefit payments.

Any increase in the cost of administering the UC program would be nominal, because no measurable increase in personnel, time or resources will be necessary to administer Section 402.1 as impacted by the regulation.

Paperwork Requirement

No new paperwork is required.

Sunset Date

The regulation will be monitored through practice and application. Thus, no sunset date is designated.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. §745.5(a)) the Department submitted a copy of the proposed rulemaking, published at 31 Pa.B 1564 to IRRC and the Chairpersons of the Committees for review and comment on March 8, 2001.

Under section 5(c) of the Regulatory Review Act (71 P.S. § 745.5(c)), the Department provided IRRC and the Committees with a copy of the comments received during the public comment period. In preparing this final-form regulation, the Department considered the comments received from IRRC, the public and stakeholders.

Under section 5.1(d) of the Regulatory Review Act (71 P.S. § 745.5a(d)), this final-form regulation was deemed approved by the Committees on _____. IRRC met on _____, and approved this regulation in accordance with sections 5.1 (e) of the Regulatory Review Act (71 P.S. §§ 745.5a(e)).

Contact Person

Questions regarding this final-form regulation may be directed to Jeri Morris, Department of Labor and Industry, Bureau of Unemployment Compensation Benefits and Allowances (BUCBA), 6th Floor, Labor and Industry Building, Seventh and Forster Streets, Harrisburg, Pennsylvania. Phone: 717-787-6337, E-mail: jemorris@state.pa.us

Findings

The Department finds that:

- (1) The Department gave public notice of its intention to promulgate this regulation under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and the regulations thereunder at 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law, and all comments received were considered.
- (3) This final-form regulation does not enlarge the purpose of the proposed regulation published at 31 Pa.B 1564 (March 24, 2001).
- (4) This regulation is necessary and appropriate for the administration of the Law.

Order

The Department, acting under the authority of the Law, orders that:

- (a) The regulations of the Department, 34 Pa. Code Chapter 65, are amended by adding § 65.161 to read as set forth in Annex A.
- (b) The Secretary of Labor and Industry shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval as required by law.
- (c) The Secretary of Labor and Industry shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.
- (d) The regulation shall take effect immediately upon publication in the *Pennsylvania Bulletin*, and shall apply to applications for benefits effective on or after the date of publication.



JOHNNY J. BUTLER, Secretary

FISCAL NOTE

ANNEX A

TITLE 34. LABOR AND INDUSTRY
PART II, SUBPART A. UNEMPLOYMENT COMPENSATION
CHAPTER 65. EMPLOYEE PROVISIONS
SUBCHAPTER I. BENEFITS BASED ON SERVICE FOR EDUCATIONAL INSTITUTIONS

§ 65.161. Reasonable Assurance.

- (a) For purposes of Section 402.1 of the Law (43 P.S. § 802.1), a contract or reasonable assurance that an individual will perform services in the second academic period exists only if both of the following conditions are met:
 - (1) The educational institution or educational service agency provides a bona fide offer of employment for the second academic period to the individual.
 - (2) The economic terms and conditions of the employment offered to the individual for the second academic period are not substantially less than the terms and conditions of the individual's employment in the first academic period.
- (b) For the purposes of subsection (a), an offer of employment is not bona fide if both of the following conditions exist:
 - (1) The educational institution or educational service agency does not control the circumstances under which the individual would be employed.
 - (2) The educational institution or educational service agency cannot provide evidence that the individual or similarly situated individuals normally perform services in the second academic period.
- (c) FOR THE PURPOSES OF SUBSECTION (A), ECONOMIC TERMS AND CONDITIONS OF EMPLOYMENT INCLUDE WAGES, BENEFITS AND HOURS OF WORK.



Harrisburg, PA 17120

DEPARTMENT OF
LABOR & INDUSTRY
COMMONWEALTH OF PENNSYLVANIA

www.dli.state.pa.us

September 27, 2002

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

**Re: Final-Form Rulemaking
Title 34. Labor and Industry
Section 65.161-Reasonable Assurance
Document I.D. No. 12-56**

Dear Sir or Madam:

Enclosed please find the regulatory package for the final form regulation on "reasonable assurance."

The following commentator requested information on the final-form regulation. On this date the Department sent a Notice of Submission and a copy of the final-form regulation to the commentator:

Geoffrey D. Moomaw, Partner
Interstate Tax Service Bureau
Post Office Box 247
Camp Hill, PA 17001-0247

Very truly yours,

Brian Abela
Director of Legislative and Public Affairs

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 12-056
 SUBJECT: Reasonable Assurance
 AGENCY: DEPARTMENT OF LABOR & INDUSTRY

TYPE OF REGULATION

- Proposed Regulation
- X Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation
 - a. With Revisions
 - b. Without Revisions

RECEIVED
 SEP 27 11 30 AM '02
 DEPARTMENT OF LABOR & INDUSTRY

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
9/27/02	<i>Lisle Coates</i>	HOUSE COMMITTEE ON LABOR RELATIONS
9/27/02	<i>T. F.</i>	
9/27/02	<i>J. Merrill</i>	SENATE COMMITTEE ON LABOR & INDUSTRY
9/27/02	<i>R. J. ...</i>	
9/27/02	<i>C. ...</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL
		LEGISLATIVE REFERENCE BUREAU

August 14, 2002