From:	Zeitlin, Daniel (ESD)
To:	Sundt, Joshua (OAH)
Cc:	McDermott, Douglas (OAH); Michael, Scott E (ESD)
Subject:	RE: OAH comments on UI reasonable assurance rules
Date:	Thursday, July 12, 2018 10:01:04 AM

Josh:

Thank you for the input. I am adding Scott who is managing the rule and will be in touch with any follow up.

Thanks,
Dan

From: Sundt, Joshua (OAH)
Sent: Thursday, July 12, 2018 9:32 AM
To: Zeitlin, Daniel (ESD) <DZeitlin@ESD.WA.GOV>
Cc: McDermott, Douglas (OAH) <douglas.mcdermott@oah.wa.gov>
Subject: OAH comments on UI reasonable assurance rules

Good morning, Dan -

We appreciate the opportunity to weigh in on your proposed reasonable assurance rules. We have done a review, looking especially for those provisions which might impact an ALJ's handling of a case. Below are our comments:

- Overall, the rules are an improvement. Eliminating the distinction between community/technical colleges and other educational institutions will make the regulation simpler and will provide greater fairness and appearance of fairness. In addition, the proposed changes lend greater definition and transparency to the matter of how the issue of reasonable assurance will be determined and adjudicated.

- "Highly probable" will be a new standard of proof for OAH and CRO to apply. Adding a definition of this standard would support consistency in application, especially as there is not yet an established body of precedent judges can rely on for guidance. The UIPL does provide some help in defining the standard, as follows: "For a state agency to find that it is highly probable that a job is available does not require it to find that there is a certainty of a job." And "[T]he term "highly probable" is intended to mean it is very likely that the contingency [in the offer] will be met." UIPL No. 5-17, section 4(c).

Please let me know if you would like any further information about these comments.

Thank you,

Josh Sundt
Deputy Chief Administrative Law Judge
For Legal and Policy
Office of Administrative Hearings |Olympia, WA
T - 360.407.2765| joshua.sundt@oah.wa.gov

From:	Billy Rudnick
To:	Michael, Scott E (ESD)
Cc:	Zeitlin, Daniel (ESD); Streuli, Nick (ESD); Billy Rudnick
Subject:	Equifax Workforce Solutions - Comments on SB 2703 and proposed WACs
Date:	Friday, July 13, 2018 1:18:21 PM
Attachments:	image003.png image006.png image007.png 2018 Rule Amendments.pdf

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Scott:

The Arizona case I referenced that addressed Educational Service Agencies (ESA) as Head Start programs, and other related non-profit entities is still under review by the AZ Court of Appeals District 1. The findings under advisement were made by the Arizona UI Board of Review. The merits of the case involves whether or not Head Start employees - where the Head Start operates under a memorandum of understanding with the educational institution - are subject to the same wage credit exclusion during breaks as school employees. The definition of ESA is noted in the Board decision, but the focus of the case is not what is an ESA.

- My suggestion is that you search online for information on ESAs. Your point at the meeting – if I understood you correctly - is that you think the State of Washington Educational Service Districts (ESDs), in some instances, employ individuals from local school districts and therefore are ESAs impacted by UIPL 18-78. That is not the case. ESDs are setup as umbrella business management groups, and are usually run by a handful of individuals. They generally function year round. The may handle cost/risk management, UI and WC funding pools, payroll reporting, etc. for individual local school districts. For example, our client, North Central Educational Service District, manages business matters for some 30 school districts in their region. North Central Educational Service District is not involved with the employment or day to day direction and control of the Wenatchee School District employees.

  ESA: “The term ‘ESA’ refers to a formal or informal entity that provides general and/or special education services for school districts.” (Educational Service Agencies: Their Role in Special Education Project Forum at NASDSE, Eileen Ahearn, 2006).

  You can also refer to a stricter definition under Individuals with Disabilities Education Act (IDEA) and the No Child Left Behind Act (NCLB):

  ” EDUCATIONAL SERVICE AGENCY The term `educational service agency'-- (A) means a regional public multiservice agency-- (i) authorized by State law to develop, manage, and provide services or programs to local educational agencies; and (ii) recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and secondary schools of the State; and (B) includes any other public institution or agency having administrative control and direction over a public elementary school or secondary school”. [P. L. 108-446 §602(5)]

I would have thought ESD staff would research this before undertaking a hasty response to the federal guidance; changing the definition and application of reasonable assurance and contracts as it relates to educational employees.

- I don't see how *In re Anderson*, Empl. Sec. Comm'r Dec. 1101 (WA), 1974 WL 177469, can be considered "good law" currently. It predates FUTA 3304(a)(6)(A), numerous UIPLs that came out after the decision, and changes to our own state statutes.

  For example:

  RCW 50.04.310 (as amended by SSB 3561: 1984):

  (2) An individual shall be deemed not to be "unemployed" during any week which falls totally within a period during which the individual, pursuant to a collective bargaining agreement or individual employment contract, is employed full time in accordance with a definition of full time contained in the agreement or contract, and for which compensation for full time work is payable. This subsection may not be applied retroactively to an individual who had no guarantee of work at the start of such period and subsequently is provided additional work by the employer.

  In re Caudill was a VQ, not a reasonable assurance issue as anticipated by Anderson (1974). Therefore Caudill did not "re-affirm" Anderson. You never answered my question highlighted below.

- My read, under paragraph 4 §3 in UIPL 05-17, the 90% threshold is the *wage* earned year to year, not the "wages earned" (total). Take a look at what John Miley, General Counsel for Oklahoma Employment Security Dept. (OESC) drafted in collaboration with the Oklahoma State School Board Association (OSSBA). OSSBA is the TPA that represents the majority of educational institutions in that state for UI matters. This change was done via *agency regulation.* OESC was transparent with, and did outreach with their stakeholders before proposing changes that could have a drastic effect on school board budgets.

  On that note, budgets, WA ESD included with SB 2703 a fiscal note. As I mentioned at the April 27th meeting, the fiscal note appears to be off the mark and not a sound estimate of potential costs to local school districts. Dierk Meierbachtol from OSPI stated that he thought the increased UI benefit costs to school districts would be covered by legislative appropriations. The administrative and operational costs, including reimbursements to the UI Trust Fund, for local school districts, comes from local levies on property tax. So in essence, the WA ESD changes for this matter is potentially impacting local property tax increases.

- WA ESD should replace the terms “certified” and “classified” that is in your proposed WAC changes with “professional” and “non-professional”. That aligns the terms with UIPL 05-17, its non-rescinded predecessors and FUTA 3304(a)(6)(A).

- I did mention that I thought Minnesota DEED provided their school employers with a reasonable assurance letter template. The Washington school districts refer to the letter as NORA (notice of reasonable assurance). MN DEED does provide a template notification for staffing agencies so they can comply with legal definitions of voluntary quit separations. MN DEED does not have a template for NORA letters, but they told me that might be something they will draft in the future. However, other Washington agencies provide legal compliance templates to employers. For example L&I provides a step by step FAQ for employers for Paid Sick Leave:
  https://www.lni.wa.gov/WorkplaceRights/LeaveBenefits/VacaySick/PaidSickLeave.asp

  The Washington State Courts provides constituents with hundreds of legally compliant forms and instructions: http://www.courts.wa.gov/forms/. If WA ESD is directing school employers to provide legally compliant NORA letters to their employees, then I feel it is incumbent upon the agency to provide the school employer with a template of such.

My position is that WA ESD could have handled this matter better. There is no impending urgency or threat to WA ESD from the USDOL requiring the agency to make such far-reaching changes to the state reasonable assurance statutes and associated WACs. At the very least, WA ESD leadership could have consulted with stakeholders (as it did in the past to address the changes mandated by Section 252) before taking action on agency request legislation. Any number of better paths could have been taken, including push back on the USDOL. We could have requested they take another look at the UIPL 05-17 guidance as it relates to K-12 educational institutions.

Sincerely,

William Rudnick
Manager, Government Relations
Equifax Workforce Solutions

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C 206-948-3057
william.rudnick@equifax.com

From: Michael, Scott E (ESD) [mailto:SEMichael@ESD.WA.GOV]
Sent: Thursday, May 03, 2018 10:15 AM
To: Billy Rudnick
Cc: Zeitlin, Daniel (ESD); Streuli, Nick (ESD)
Subject: [IE] RE: Invitation to Meet and Discuss Reasonable Assurance Rule Draft - Friday, April 27, 10:30 a.m.

Billy,

The Commissioner's decision was reaffirmed by *In re Caudill,* Empl. Sec. Comm'r Dec.2d 561 (1979). I could not find any precedential decisions since *Caudill* addressing this subject. Until there is a different precedential decision, the Department is obligated to follow *Anderson* and *Caudill*.

Scott E. Michael
Legal Appeals Manager
Employment System Policy
Employment Security Department
(360) 902-9587
semichael@esd.wa.gov

From: Billy Rudnick [mailto:William.Rudnick@equifax.com]
Sent: Thursday, May 03, 2018 9:47 AM
To: Michael, Scott E (ESD) <SEMichael@ESD.WA.GOV>
Cc: Zeitlin, Daniel (ESD) <DZeitlin@ESD.WA.GOV>; Streuli, Nick (ESD) <NStreuli@ESD.WA.GOV>
Subject: RE: Invitation to Meet and Discuss Reasonable Assurance Rule Draft - Friday, April 27, 10:30 a.m.

Scott:

This Commissioner's decision precedes FUTA 3304(a)(6)(A) correct? I think the provisions of 3304(a)(6)(A) respective to state K-12 employees came into effect in 1976. The Commissioner decision also is specific to the nature of the wording of the contract in question, correct? And lastly if *Anderson* did apply to all certificated, full-time, contracted K-12 teachers for the purposes of UI benefits based on school wages during academic year summer breaks – then they would have received benefits from 1974 to now unless otherwise disqualified, correct?

Billy

William Rudnick
Manager, Government Relations
Equifax Workforce Solutions

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From: Michael, Scott E (ESD) [mailto:SEMichael@ESD.WA.GOV]

Sent: Thursday, May 03, 2018 7:39 AM
To: Billy Rudnick
Cc: Zeitlin, Daniel (ESD); Streuli, Nick (ESD)
Subject: [IE] RE: Invitation to Meet and Discuss Reasonable Assurance Rule Draft - Friday, April 27, 10:30 a.m.

One more thing, during the conversation last Friday, there was one issue that Employment Security Department was unclear on, which was whether educational employees who work 9 months out of the year but have their salary spread over all 12 months can still collect unemployment benefits during the summer break, assuming there is no contract or reasonable assurance for future work. I can now definitively inform you that under a precedential administrative decision called *In re Anderson*, educational employees can collect unemployment benefits during the summer break, even when they collect their salary on a 12 month basis.

Best regards,

Scott E. Michael
Legal Appeals Manager
(360) 902-9587

From: Michael, Scott E (ESD)
Sent: Wednesday, May 02, 2018 11:20 AM
To: 'Billy Rudnick' <William.Rudnick@equifax.com>
Cc: Zeitlin, Daniel (ESD) <DZeitlin@ESD.WA.GOV>; Streuli, Nick (ESD) <NStreuli@ESD.WA.GOV>
Subject: RE: Invitation to Meet and Discuss Reasonable Assurance Rule Draft - Friday, April 27, 10:30 a.m.

Billy,

Thanks for coming and participating in the stakeholder meeting on reasonable assurance last Friday. I want to follow-up on a couple things you said at the meeting:

1) Can you send us a copy of the Arizona court decision you mentioned with regard to Education Service Agencies?
2) Can you send us a copy of any model reasonable assurance letters that other state UI agencies provide to educational employers (I have Minnesota written down as one example, but there may have been others)?

Thanks again for your input,

Scott E. Michael
Legal Appeals Manager
Employment System Policy
Employment Security Department
(360) 902-9587
semichael@esd.wa.gov

From: Michael, Scott E (ESD)
Sent: Tuesday, April 24, 2018 3:58 PM
To: 'Billy Rudnick' <William.Rudnick@equifax.com>
Cc: Zeitlin, Daniel (ESD) <DZeitlin@ESD.WA.GOV>; Streuli, Nick (ESD) <NStreuli@ESD.WA.GOV>
Subject: RE: Invitation to Meet and Discuss Reasonable Assurance Rule Draft - Friday, April 27, 10:30 a.m.

Billy,

Whenever you can let me know is fine. The following school groups have been invited: Office of Superintendent of Public Instruction, State Board for Community & Technical Colleges, State School Directors' Association, Association of School Administrators, and Association of School Business Officials.

Scott E. Michael
Legal Appeals Manager
Employment System Policy
Employment Security Department
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From: Billy Rudnick [mailto:William.Rudnick@equifax.com]
Sent: Tuesday, April 24, 2018 3:08 PM
To: Michael, Scott E (ESD) <SEMichael@ESD.WA.GOV>
Cc: Zeitlin, Daniel (ESD) <DZeitlin@ESD.WA.GOV>; Streuli, Nick (ESD) <NStreuli@ESD.WA.GOV>; Billy Rudnick <William.Rudnick@equifax.com>
Subject: RE: Invitation to Meet and Discuss Reasonable Assurance Rule Draft - Friday, April 27, 10:30 a.m.

Scott:

I need to run this by my manager first. She has already left for the day. I should have a reply from her early tomorrow, and then I can let you know.

Which K-12 and higher-ed school employers have you invited? Since we represent a number of them I need to know who will be either attending or on the call.

Thanks,
Billy

William Rudnick
Manager, Government Relations
Equifax Workforce Solutions

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From: Michael, Scott E (ESD) [mailto:SEMichael@ESD.WA.GOV]
Sent: Tuesday, April 24, 2018 1:22 PM
To: Billy Rudnick
Cc: Zeitlin, Daniel (ESD); Streuli, Nick (ESD)
Subject: [IE] Invitation to Meet and Discuss Reasonable Assurance Rule Draft - Friday, April 27, 10:30 a.m.

Mr. Rudnick,

I am leading the Employment Security Department's rulemaking efforts surrounding when educational employees are eligible for unemployment benefits. Yesterday, I sent an e-mail soliciting stakeholder feedback on a preliminary draft rule. You can read the preliminary draft rule by clicking on the following link: https://esdorchardstorage.blob.core.windows.net/esdwa/Default/ESDWAGOV/rule-making/Resonable-Assurance-WAC-Changes-Stakeholder-Draft-Underline-Strikethrough-V2.pdf.

But, in addition to getting your feedback via e-mail, I would also like to invite you to a meeting with other school and employer groups to discuss the preliminary draft, and talk about any questions or concerns you may have. I have reserved time for the upcoming Friday, April 27, from 10:30 – 11:30. You can either come to our office at 212 Maple Park Ave. SE, Olympia, WA 98507 or if you would like to attend over the phone, I can set up a conference call. Just let me know if you will be able to attend and whether you plan on attending in person or over the phone.

I look forward to meeting with you and discussing the preliminary draft,

Scott E. Michael
Legal Appeals Manager
Employment System Policy
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2018 OESC Administrative Rule Amendments
Prepared by: John E. Miley, General Counsel
Oklahoma Employment Security Commission

240:1-3-9. Release of confidential information to specific government agencies

(a) Pursuant to 40 O.S. § 4-508(C), the government agencies, public entities and political subdivisions specified in part (b) of this rule may obtain confidential information maintained by the Oklahoma Employment Security Commission after entering into an agreement with the Oklahoma Employment Security Commission that sets out the purpose the information will be used for, how the information will be transmitted, and how the information will be safe guarded. All costs involved in providing information to government agencies, public entities, or political subdivisions will be set out in the agreement. The information shall be held confidential by the receiving government agency, public entity or political subdivision at all times and shall not be disclosed or open to public inspection. It shall be allowable for the receiving government agency, public entity or political subdivision to release aggregated data.

(b) Government agencies authorized to obtain confidential information from the Oklahoma Employment Security are:

(1) The Oklahoma Department of Commerce, to accomplish specific goals, missions or tasks of the agency as determined by the Oklahoma Legislature;

(2) The Oklahoma Department of Transportation for use in federally mandated regional transportation planning, which is performed as a part of its official duties;

(3) The Oklahoma State Treasurer's office to verify or evaluate the effectiveness of the Oklahoma Small Business Linked Deposit Program on job creation;

(4) The Oklahoma Attorney General for use in investigation of workers' compensation fraud, insurance fraud and health care fraud;

(5) The Oklahoma Department of Labor for use in investigation of workers' compensation fraud;

(6) The Oklahoma Workers' Compensation Commission for use in investigation of workers' compensation fraud;

(7) The Oklahoma Insurance Department for use in investigation of workers' compensation fraud, insurance fraud and health care fraud;

(8) The Oklahoma State Bureau of Investigation for use in the investigation of insurance fraud and health care fraud;

(9) Any Oklahoma state, Oklahoma county or Oklahoma municipal law enforcement agency for use in criminal investigations and the location of missing persons or fugitives from justice;

(10) The Center of International Trade of Oklahoma State University for the development of international trade for employers doing business in the State of Oklahoma;

(11) The Oklahoma State Regents for Higher Education for use in the default prevention efforts and/or collection of defaulted student loans guaranteed by the Oklahoma Guaranteed Student Loan Program;

(12) The Center for Economic and Management Research of the University of Oklahoma to identify economic trends;

(13) The Center for Economic and Business Development at Southwestern Oklahoma State University to identify economic trends;

(14) The Office of Management and Enterprise Services to identify economic trends;

(15) The Department of Mental Health and Substance Abuse Services to evaluate the effectiveness of mental health and substance abuse treatment and state or local programs utilized to divert persons from inpatient treatment;

(16) Public housing agencies for purposes of determining eligibility pursuant to 42 U.S.C., Section 503(I);

(17) An agency of this state or its political subdivisions that operates a program or activity designated as a required partner in the Workforce Innovation and Opportunity Act One-Stop delivery system pursuant to 29 U.S.C.A., Section 3151(b)(1), based on a showing of need made to the Commission;

(18) The national Wage Record Interchange System, at the discretion of the Commission;

(19) The Bureau of the Census of the U.S. Department of Commerce for the purpose of economic and statistical research;

(20) The Oklahoma Health Care Authority for use in determining eligibility for subsidies for health insurance premiums for qualified employers, employees, self-employed persons, and unemployed persons; or

(21) The Oklahoma State Department of Rehabilitation Services for use in assessing results and outcomes of clients served.

(22) The Office of Juvenile Affairs for use in assessing results and outcomes of clients served as well as the effectiveness of state and local juvenile and justice programs including prevention and treatment programs.

(23) Any county Public Defender's office in the state of Oklahoma and the Oklahoma Indigent Defense System for the purpose of determining financial eligibility for the services provided by these entities.

240:10-3-21. ~~Reasonable assurance~~Educational institutions--between academic terms

~~A **"reasonable assurance"** means a written, verbal, or implied agreement that the employee will perform such service during the ensuing academic year or term or tenure status. A written agreement is preferable.~~

Pursuant to 40 O.S. §2-209 and 26 U.S.C.A. §3304(a)(6)(A) or 40 O.S. §2-209.1, benefits based on service and employment defined in 40 O.S. §1-210(3) or (4) or for an education service contractor shall be payable on the same terms and conditions as benefits payable on the basis of other service subject to the Employment Security Act of 1980, except that individuals providing services to an educational institution shall not be paid benefits based on services to the educational institution for any week of unemployment commencing during the period between two successive academic years or terms, if the individual performs services in the first academic year or term and there is a contract or a reasonable assurance that the individual will perform services for the educational institution in the second academic year or term. A determination of the denial of benefits between an academic year or term shall be made based on the following subsections of this rule:

(a) Prerequisites. Before making a determination concerning the existence of a contract or reasonable assurance of employment in the following academic year or term, the Commission

representative must find that three prerequisites exist. If any one of the three prerequisites is not met, unemployment benefits must be allowed. The three prerequisites are:

1. An offer of employment. The offer may be written, oral or implied. The offer must be genuine and made by an individual with authority to offer the employment.

2. The employment offered in the following academic year or term must be in the same capacity as that of the previous academic year or term.

3. The economic conditions of the job offered in the following academic year or term may not be considerably less than the conditions present in the previous academic year or term. If the claimant is offered a salary or wage for the following academic year or term that is less than 90% of the salary or wage paid in the previous academic year or term, this shall be considered economic conditions that are considerably less from the previous to the following academic year or term.

(b) The term "contract" means an enforceable, non-contingent agreement that provides for compensation: (i) for an entire academic year; or (ii) on an annual basis, though the contract terms describing compensation are not expressed as an annual salary.

(c) The term "reasonable assurance" means that there is a high probability that employment will be available based on the totality of circumstances and contingent nature of the offer made to the claimant. The following rules apply in making the determination:

1. If the offer of employment contains a contingency, the Commission representative must determine if the contingency is within the employer's control or not in the employer's control. If the offer of employment is contingent upon a factor within the employer's control, such as course programming, allocation of funding, final course offerings, program changes, and faculty availability, the claimant does not have reasonable assurance and benefits shall be allowed. If the offer of employment is contingent on factors outside of the employer's control such as enrollment levels, legislative funding, or seniority, this would be considered to not be in the employer's control and further examination of the facts is required.

2. If the employer's offer to a claimant contains a contingency that is not in the employer's control, the Commission representative must examine the contingent nature of the offer. The Commission representative must give primary weight to the contingency when making the determination on the claim. If the Commission representative finds that it is highly probable that the contingency will be met, that is, the issue upon which the contingency is based will probably be concluded in a way that will allow employment to occur in the next academic year or term, then reasonable assurance can be found. If it is not highly probably that the contingency will be met, that is, there is a good probability the contingency will be resolved in a way that will prevent employment from occurring in the next academic year or term, then reasonable assurance cannot be found.

3. The Commission representative must analyze the totality of circumstances for each offer of employment to determine whether it is highly probable that there will be a job available for the claimant in the following academic year or term. This element requires considering factors such as legislative appropriations, funding levels, enrollment, the nature of the course of study to be taught, the claimant's seniority, budgeting and assignment practices of the school, the number of offers made in relation to the number of potential teaching assignments, the period of student registration, and any other contingencies. In order to find that there is reasonable assurance, the Commission representative is required to find, through

evidence presented by the employer and the claimant, that it is highly probable that a job is available in the next academic year or term. In making a determination of reasonable assurance, the Commission representative is not required to find that there is a certainty of a job.

(d) Employer requirements.

1. If the educational institution employer or educational service contractor did not enter into a formal employment contract with the claimant, the employer shall submit a written statement to the Commission representative explaining the manner in which the employee was given a reasonable assurance of employment in the following academic period or term. The employer shall state whether the assurance was given in writing, orally, or implied through other means. The employer shall state the information that was given to the claimant about the offer of employment in the next academic year or term, including contingencies.

2. If the educational institution employer or educational service contractor entered into a formal employment contract with the claimant, the employer shall provide a copy of the contract to the Commission representative.

3. The educational institution employer or educational service contractor will be responsible to provide any other information necessary to make the determination of a contract of employment or reasonable assurance and any other information requested by the Commission representative.

(e) Claimant requirements.

The claimant will be responsible to provide sufficient information for the Commission representative to make a determination of reasonable assurance of employment or a contract of employment in the next academic year or term, and the claimant shall provide any information or documents requested by the Commission representative.

240:10-5-10. Payment of contributions

(a) Date payment due. Contributions shall become due and be paid on or before the last day of the month following the calendar quarter to which they relate, provided that:

(1) If, under the provisions of 40 O.S. Section 3-306, the Commission shall declare the period for which any contribution may become due to have terminated for an employer, and assesses the contributions for such period, such contributions shall immediately become due and be paid by such employer; and

(2) If an employing unit has not previously qualified as an employer under the Employment Security Act of 1980 and first qualifies as an employer during a calendar year, the employing unit shall pay contributions for all past periods of that year for which said employer is liable for the payment of contributions, on or before the due date for that quarter in which such employing unit becomes an employer subject to the Employment Security Act of 1980.

(b) Date of receipt defined.

(1) Payments of contributions received through the mail shall be deemed to have been received as of the date shown by the postmark on the envelope properly addressed to the Commission's office and containing such payment. If there is no proof from the Post Office of the date of mailing, the date of receipt by the Commission shall constitute the date of payment.

(2) Payments of contributions received from a private delivery service shall be deemed to have been received as of the date the private delivery service received the item according to

the receipt or delivery document of the private delivery service. If there is no documentation of the date on which the private delivery service received the item, the date of receipt by the Commission shall constitute the date of payment.

(3) Payment of contributions received through an electronic fund transfer system shall be deemed to have been received by the Commission on the date on which the electronic payment was authorized for immediate payment to the Oklahoma Employment Security Commission.

~~(3)~~(4) All other payments of contributions shall be deemed to have been received on the date on which payments are received by a representative of the Commission.

From:	Streuli, Nick (ESD)
To:	Zeitlin, Daniel (ESD); Michael, Scott E (ESD)
Subject:	Fwd: written response to Rules for HB 2703
Date:	Thursday, July 12, 2018 4:22:39 PM
Attachments:	SB 2703 rules response.docx ATT00001.htm

FYI

Nick Streuli
Legislative & Executive Operations Director
Employment Security Department
Cell Phone: (360) 485-5175
Sent from my iPhone

Begin forwarded message:

From: "Wendy Rader-Konofalski [WA]" <WRader-Konofalski@WashingtonEA.org>
Date: July 12, 2018 at 3:57:58 PM PDT
To: "Streuli, Nick (ESD)" <NStreuli@ESD.WA.GOV>
Cc: "bbaca@aftwa.org" <bbaca@aftwa.org>
Subject: written response to Rules for HB 2703

Nick,
I am attaching the written response and requests regarding the draft rules on HB 2703 from WEA and AFT and will bring 10 copies for tomorrow.

See you then,

Wendy Rader-Konofalski
WEA Lobbyist
724 Columbia St. N.W
Olympia, WA 98501
Cell: (206) 300-1682
Office: (360) 704-5639

Public Rulemaking Hearing
HB 2703
July 11, 20 18
WEA/AFT Response and Requests

WAC 192-210-005:
Consistent and clear terminology in the definitions section needed that

1. **Covers all education employees** in all educational settings. The use of "classified" and "certificated" to cover every employee group misleading at best and only specifically oriented to K-12 at worst.
    - Only k-12 teachers are required to be certificated and that term is set in law clearly under **RCW 28A.410**. So it's a legal term so strongly interwoven in the fabric of K-12 that it is both legally inaccurate to apply to "all" employees in every ed. sector and it simply leaves out higher ed faculty.
    - Also since the classified definition refers back to NOT being certificated, you leave out all the higher ed classified employees for whom "certificated" is also not applicable.

2. **Defines "educational institutions."** Schools are understood as being K-12, institutions of higher education encompass four year, regionals, CCTC colleges. If you mean everyone then you may want to define "education intuitions" as referring to both K-12 schools and higher ed institutions.

   This could help clear up the confusion that occurs in, for example, the definitions section under "Same Capacity": when you give examples of people working in different capacities. Is working in K-12 and working in Higher Ed different capacities? That whole section is very confusing and needs clarity and a more consistent, comprehensive, term or set of terms.

Suggestion:
Put back in the crossed out definition of "faculty" and "full-time employment" (suggest you substitute RCW 28B.50.851 for full-time CCTC faculty with RCW **28B.50.489** that specifies difference between full and part-time faculty) and add the fuller spectrum of employees affected by the law. That would include:

certificated in K-12 (RCW 28A.410), classified in K-12, classified in four year and community colleges (RCW 41.80), technical college classified (RCW 41.56.).

And add definitions of education institutions as mentioned above.

Other ideas would be a definition of "classified" that added the words "services performed in a higher education capacity" after "not performed in a certificated capacity" to capture both K-12 and higher ed. Could also remove the term "Certificated" and leave "instructional, research or principal administrative staff in both k-12 and institutions of higher education (more consistent with RCW 50.44.040.) Or perhaps just "non-classified capacity." There is no way that the term "certificated" can be the default for all employees that are not "classified."

Question:
Why can't you just combine the categories to say "all education employees"? For wages and hours for most everything there seems not be need to be this distinction and in at least one case there shouldn't be a distinction made. I'll talk about that in the last section.

Also define "contract" and "reasonable assurance" for use throughout the WACs. Suggest reasonable assurance should be defined in rules as a "non-contingent offer of future employment. The initial determination of whether a claimant's offer of employment rises to the level of reasonable assurance is made by the Employment Security Department."

WAC 192-210-010 about the academic year definition which derives out of a Superior Court case called Evans v ESD from decades ago that determined (only for community and technical colleges) that summer is always a bona fide quarter in the academic year. A special compromise rule was created that is based on a yearly determination comparing staffing and enrollment to other quarters and is pegged to the past year. It really is only relevant to the CC/TC system. We would suggest you specifically clarify that it applies to "a higher education institution." However, since the four years didn't really buy off on that whole summer quarter thing and aren't used to reporting information that is required for CC/TCs, it might be considered a workload issue for staff. Just a thought.

WAC 192-210-015 (4). This section appears to assign automatic determination of reasonable assurance based on all contingencies being outside employer's control. Statute does not do that. Statute puts emphasis on what is NOT reasonable assurance and makes clear that if there are "any" contingencies within the employers control they do NOT have RA. However, the rule seems to assert a pre-fixed determination of RA if all contingencies are outside employer's control. And the statute does NOT do that. We were assured that the distinction between the two kinds of contingencies was a trigger to further consideration evaluation and applied no automatic determining effect. Contingencies are contingencies whether inside or outside the employer's control.

Suggestion: Use the statute language for this section. Trying to rewrite the statute to emphasize what establishes RA in this way will be very unfavorable to our members and allow employers to assert to our part-time faculty that they DO have RA and no reason to even apply. *Recently we have heard that at one of our college's part-time faculty are provided "letters of Reasonable Assurance." If the employees sign it, they fear that they have cannot apply for benefits because since the letter says Reasonable Assurance that must be what they have. If they don't sign it they could be accused of refusing work. This is a perfect example of how the colleges try to prevent their employees for applying to benefits for which they are legally entitled and to have it both ways—that is to SAY they are providing RA but to continue to exercise the right to not rehire any part-timer for any reason. It is ESD that makes the decision.*

Suggestion:
Under 4 (B), where you describe the contingencies outside of the employer's control, add this sentence: **"However, a contingency outside of the employers' control does diminish it as a contingency or preclude a determination of no reasonable assurance."** During the bill process in the legislature, we were assured that contingencies "outside the employer's control" would only trigger a further look so maybe a reference to that would help.

4 (B) ii and iii are unnecessarily redundant.
Suggestion: Combine into just one (4) (B) (ii): **"Considering the totality of the circumstances, it is highly probably that the contingencies will be met and that there will be a job available for the claimant in the following academic year or term."**

Then add a (C) under that which is consistent with federal guidelines that says: **"Primary weight MUST BE (consistent with previous legislation) given to the contingent nation of an offer of employment whether or not the contingency is within or outside the employers' control."** The "primary weight" phrase gets hidden and swallowed up and seems to be a throwaway line as currently drafted. It needs to be more prominent to maintain good faith with the original intent of this whole statute now and previously. And it needs to maintain its meaning by assuring there are no double values to the bottom line notion of "contingencies." Otherwise it simply has no meaning.

Finally, WAC 192-210-060 in which classified employees (at least in K-12) have the right to receive retroactive payment when the employer does not re-hire the employee even though they said the employee had RA and "other" employees do not have this right. It is a huge injustice that other employees for whom the RA rules apply are subjected to employers who can claim they have RA and then turn around and not re-employ that person with total impunity. If it is wrong for the classified than it is simply wrong for any claimant.

Suggestion:
Remove the word "classified" and replace with "educational employee."

EMPLOYMENT SECURITY DEPARTMENT

PUBLIC RULES HEARING

Rule Topic(s):	Reasonable Assurance	**Date/Time: July 13, 2018, 9:00 a.m.**
Rule Coordinator:	Scott E. Michael	**Location: 212 Maple Park Ave. SE, Olympia, WA 98507, Maple Leaf Conference Room.**

Name	Agency/Organization	Phone	Email
Wendy Rader-Konofalski	WEA	206 3001682	wrader-konofalski@washingtonea.org

PROPOSED RULEMAKING HEARING

EMPLOYMENT SECURITY DEPARTMENT

212 MAPLE PARK AVENUE SE

OLYMPIA, WASHINGTON

FRIDAY, JULY 13, 2018

Reported by:

MARYSOL RYDER

CSR No. 3440

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EXHIBITS FOR IDENTIFICATION

OLYMPIA, WASHINGTON, FRIDAY, JULY 13, 2018

9:00 a.m. - 9:34 a.m.

-o0o-

MR. MICHAEL: Pursuant to the authority given under the Washington State law, this hearing is hereby convened. RCW 50.12.010 and 040, Chapter 42.30 RCW of the Open Public Meetings Act and Chapter 3405 of the Administrative Procedures Act.

For the record, this hearing is beginning at 9 o'clock a.m. on July 13th, 2018, at 212 Maple Park Avenue, Olympia, Washington. This hearing is convened.

Considered testimony concerning the rule related to clarifying requirements for educational employees to qualify for unemployment benefits. Notice of this hearing was published in the Washington State Register June 1st, 2018, as No. WSR 18-12-076 and sent to interested parties.

My name is Scott Michael, and I am the legal services coordination manager for the Washington State Employment Security Department. I represent commissioner Suzi LeVine as hearing officer presiding at this public proposed rulemaking hearing.

There are several staff from the Employment Security Department attending this hearing. Please

introduce yourself.

MR. ZEITLIN: My name is Dan Zeitlin. I am the director of the Employment Policy Division.

MR. SHEAHAN: My name is Larry Sheahan. I'm the co-manager of the Unemployment Insurance Policy Division.

MR. MICHAEL: If you have not already done so, please sign the hearing attendance log. The attendance log is kept as a permanent record of this hearing. Please be advised this hearing is being transcribed, and the transcript will become a part of the official rulemaking file.

This hearing is convened to consider written submissions and oral testimony presented on the proposed rule. A concise explanatory statement of the agency's reasons for adoption of the rule including a summary and response to all comments received will be sent to all requesting and commenting parties and placed in the permanent rulemaking file. It will also be published on the agency's rulemaking web page, which is www.esd.wa.gov/newsroom/rulemaking.

I will now provide a brief explanation of the proposed rule: The department is amending the rule relating to when educational employees are entitled to receive unemployment benefits within and between

academic terms. This area of agency regulation has often been referred to as the Reasonable Assurance Rules.

The Employment Security Department receives funding from the federal government to administer the Unemployment Insurance Program. As a condition of receiving that funding, the department must make sure its regulations are in conformity with certain federal statutes and federal guidance.

26 U.S. C. Section 3304A6A sets out certain federal requirements with regard to the payment of unemployment benefits to educational employees within and between academic terms. On December 22nd, 2016, the United States Department of Labor issued Unemployment Insurance Program Letter or UIPL No. 5-17, which significantly amended federal guidance pertaining to this statute.

Then, just this past legislative session, the legislature passed, and the governor signed Substitute House Bill 2703 which amended state statutes pertaining to when educational employees are entitled to unemployment benefits under state law. The proposed rules are intended to bring the department into compliance with UIPL No. 5-17 and substitute House Bill 2703.

Amendments to WAC 192-210-001 are proposed to update terminology so as consistent with other parts of the rule. Proposed amendments to WAC 192-210-005 create updated definitions. Amendments to WAC 192-210-010 update a cross reference to a statute that was changed by Substitute House Bill 2703. Amendments to WAC 192-210-015 contain the test required by the United States Department of Labor for when an educational employee has a contract or reasonable assurance of future work. Amendments to WAC 192-210-045 clarify when benefits are allowed when an educational employee works for more than one employer.

New WAC 192-210-055 is proposed to explain the impact of a voluntary quit for educational employees. New WAC 192-210-060 explains when educational employees are entitled to retroactive payments of unemployment benefits.

The department proposes repealing WAC 192-210-020 to eliminate distinctions between employees of community and technical colleges and employees of other types of educational institutions which were also eliminated by Substitute House Bill 2703.

The department has determined that changes to

other rules or statutes would not achieve the same regulatory objective. The language of the proposed rule has been shared with the United States Department of Labor. There are no other state agencies that deal with the subject matter of this regulation. The department has chosen a reasonable, cost-effective manner of achieving the regulatory objective of the rule. There are no anticipated environmental consequence associated with the rule.

In the preliminary cost benefit analysis, the department predicted it would incur $529,500 in the 2017 to 2019 fiscal years to implement the changes necessitated by the federal guidance, state statute, and these rules. The department also predicted a 15 percent increase in the amount of benefits paid to educational employees, which would result in a comparable cost to educational employers who either have to reimburse the department for those benefits paid or see an increase in their unemployment tax rate.

Specifying performance standards is not appropriate for the rule. The proposed regulation does not require a small business economic impact statement as the rule is being adopted for the purposes of conforming with UIPL No. 5-17. Input was solicited from state holders during the development of the

proposed regulation.

You will now hear testimony from those logged in attendance concerning the proposal. Please state your name, spelling your last name, and if you are here on behalf of a company or organization, who you represent.

MS. RADER-KONOFALSKI: I'm Wendy Rader-Konofalski. That's, R-a-d-e-r, hyphen, K-o-n-o-f-a-l-s-k-i. And I'm here today speaking on behalf of the Washington Education Association with permission to speak as well on behalf of AFT Washington.

And for the record -- do I just start talking?

MR. MICHAEL: This is your testimony.

MS. RADER-KONOFALSKI: For the record, I just want to thank the department for having involved the state holders in such a genuine way through the bill making process before the bill was passed this session. We supported this bill, and we felt that it was a good move that the Peckham versus ESD decision was overturned by this. It was very positive to our members.

We basically represent community and technical colleges, faculty who are adjunct faculty. We also represent faculty at four-year universities. We

represent both full and part-time faculty. This legislation has always mostly affected our community college adjunct faculty.

Also for the record, you know, I've been a party to legislation previous to this in 1996 and 2001, so I'm very familiar with the issues and appreciate the opportunity to express some of our concerns and suggestions on the current draft rules for -- connected to House Bill 2703.

So I have provided electronically to the department a copy of written response, but I also have brought some so that you can follow along the dotted lines here.

I'll give this to Dan. And I don't know --

MR. MICHAEL: Would you like one of these submitted for the rulemaking file as well?

MS. RADER-KONOFALSKI: Yes. Thank you.

So first of all, there are several points in the draft that I have some points about. Starting with the definition section that's specifically referenced under 19221005, and I see that it may also weave back a little bit to 192-210-001 called "Definitions of Educational Employees."

And we're concerned that we need to have consistent and clear terminology in the definition

section for, you know, a couple of reasons.

Number one is, since this is going to cover all education employees in all educational settings, we need to have some clear definition of what that is. Our concern is that the use of "classified" and "certificated" to cover every employee group is misleading and only specifically orientation to K-12.

So only K-12 teachers are required to be certificated. And that's not just a lose term. It's a term of law, and it's covered under RCW 28A.410. It's very strongly interwoven in the fabric of K-12. It's both legally inaccurate to apply it to all employees in every educational sector, and it also leaves out higher ed faculty for whom "certificated" means absolutely nothing.

Also since the classified definition refers back to not being certificated, it leaves out all the other higher ed classified employees that are in the community colleges and in the technical colleges for whom "certificated" is not an applicable term. So that's one piece.

Also, it seems like in the original statute there were some clear definitions of educational institutions which have been removed. I think it's important that, you know, when you use the different

terms it's clear who they're referring to. So if you call an institution a school, it's understood as a K-12 institution.

And then on top of that, we have institutions of higher education that encompass the four-year regionals and research institutions and the community and technical colleges. So if you mean everyone, then you may want to define education and institutions as referring to both K-12 schools and higher ed institutions or find some way to make that more all-encompassing and clear, if you have to use the one term to make sure that it's clear that it's either K-12 or higher ed.

So this could help clear up the confusion that occurs in that section. For example, under the definition of what is the same capacity, which as I have discussed with staff before gave me a lot of trouble, I did not quite understand who you were talking to when you gave the examples of people working in the different capacities. So it appears that it was mostly K-12 oriented, but it was a little bit confusing. So I think that if there's some more clarity and consistency in the terms that you used there that would be good.

So my suggestion is that you put back into the

crossed out definition of "faculty" and "full-time employment" what was in the statute. With one substitution, you refer to -- in the -- now, this is all the crossed out section. You refer to "full-time employment," and you've listed the faculty and the public institutions and so on. You refer them, to the community and technical colleges, and instead of referring to RCW 28B.50.851 I recommend that if you do put this back that you refer to 28B.50.489. And that's the one that specifies the differences between full and part-time faculty and what that definition is.

And then again, if you're going to list everybody, because everybody's included, then you need to list the certificated staff in K-12 under 28A.410, the classified in K-12 -- and I don't know the designation for that. And the classified in the four-year and communities colleges under the Civil Service Reform law 41 A, and the technical college class RCW 41.56; that is if you're going to, you know, revise the idea of using a definition that includes everybody.

Then another idea that we had on your definition of classified employees is that -- I think currently it simply defines them as everybody who is not certificated, which, again, doesn't cover folks in

higher ed. So you might want to say "classified" and add the words "services performed in a higher education capacity after not performed in the certificated capacity" to capture both those levels of education.

You could also remove the term "certificated" and leave "instructional research of principal administrative staff in both K-12 and institutions of higher education," which would be more consistent with RCW 50.44.040, or perhaps just nonclassified capacity.

But in any case, there's no way that the term "certificated" can be used as the default for all employees that are not classified. So -- and we had discussed this before, but for the record, I just pose the question of why you can't just combine the categories to say "all education employees," since for wages and hours and most everything else there seems to be no need to make this distinction except in one case, which we'll talk about a little bit later, in which I think there really shouldn't be a distinction made. So.

I know the answer to that has do with some federal guideline issues. But it does raise the question since this legislation was intended to remove any specific reference to any specific group in education and open it wide to everyone. That question

stands: Why can't you just say all education employees?

Also a suggestion for a definition in your definition list of the "contract and reasonable assurance" for use throughout the WACs, you do have a good definition of it somewhere in the draft for "contract." But since reasonable assurance is not something that is black and white and the whole reason for the rules and the legislation is to discuss how do you determine what is reasonable assurance, we would suggest that you not put them side by side, you know, in references to if an employee has a contract or reasonable assurance but to make sure that "reasonable assurance" is defined as a noncontingent offer of employment and a suggestion to add that the initial determination of whether a claimant's offer of employment rises to the level of reasonable assurance is made by the Employment Security Department.

And if that we're in the definition section, it would make it clear that colleges and institutions don't simply send a letter and stamp and state, This person has reasonable assurance. That's the purview of the ESD to make that decision.

Then in WAC 192-210-010 -- I know we discussed this -- but there is a specific definition there about

the difference between what are now called the 9-month and the 12-month colleges. It comes out of a superior court decision called the Evans versus ESD case way back in the early 90s that determined that -- and again only for community technical colleges summer is always a bonafide quarter and work period in the academic year. So the feds -- the Federal Department of Labor determined that that was absolutely not consistent, and they were recommending overturning that completely. But then a special compromise was created that determine that in fact summer would be considered a part of the academic year except in certain cases, and they developed certain rules for that.

So, you know, we would suggest that you specifically clarify that this applies only to a higher education institution. And I guess I'm going to make a link because we did discuss this. I know it's probably not going to hurt that this applies to everybody. So conversely I would suggest if you're going to apply this, which was originally designed specifically for community and technical colleges, then by the same token there's something at the very end unclassified that I would argue should also be opened up to all employees. So I'm just going to leave that there for a minute so that I can stay consistent with the order of

the WACs.

So then on WAC 192-210-015 Sub-Section 4 -- and I don't know if you guys are all looking at this at the same time. I want to make this -- I want to make some sense. This section appears to assign automatic determination of reasonable assurance based on all of the contingencies being outside of the employer's control.

So the statute does not do that. The statute puts emphasis on what is not reasonable assurance and makes it clear that if there are any contingencies within the employer's control that -- that the claimant does not have reasonable assurance. However, the rules seem to assert a prefix determination by saying that if -- of reasonable assurance if all contingencies are outside the employer's control, and the statute clearly does not do that, in the run up to the bill we were assured that the distinction between the two kinds of contingencies, which never existed before I will say, which is the contingencies that are so called within the employer's control and contingencies that are so-called outside of the employer's control was to simply trigger a further consideration and evaluation and apply no automatic determining affect.

Contingencies are contingencies whether inside

or outside the employer's control, and I think that -- I think that -- the way that that's written there will be -- will be first of all inaccurate and very confusing. So the suggestion would be to use the statute language for this section.

We think that trying to rewrite the statute to emphasize what establishes reasonable assurance in this way will be very unfavorable to our clients and to our members and to other claimants and allow employers to assert to our part-time faculty upfront that they do not -- that they do have reasonable assurance and will -- which will make it then sort of a chilling affect to even apply.

So -- and I -- I've put into the record here that recently we have heard that one of our colleges -- and this may be at others -- that the faculty are being provided with so-called letters of reasonable assurance. And if they sign it, then they fear that they can't apply for benefits because they have reasonable assurance, and they've signed off to that. If they don't sign it, they're afraid that they're going to be accused of refusing work.

So it's -- I think it's important in the rules not to kind of encourage that kind of behavior. I think the best way would be to just repeat the language

from the statute. And a suggestion there under 4-B where you describe the contingencies outside of the employer's control you add this sentence, and that is -- I suspect if you choose not to completely use the language from the statute and you use this, the language you have, to make it very clear that a contingency outside of the employer's control does -- I'm sorry. That should be "does not diminish it." I left the word "not" out. "Does not diminish it as a contingency or preclude a determination of no reasonable assurance."

Then under 4-B two and three in that section, there are -- two and three we feel say basically the same thing or could be combined to include portions of both that say the same thing, so that it doesn't just, sort of, look like it's giving added emphasis to proving that somebody has reasonable assurance. So the suggestion would be to combine into just one 4-B two, quote, Considering the totality of the circumstances, it is highly probable that the contingencies will be met and that there will be a job for the claimant in the following academic year or term.

I'm close to the end. And then I was happy to see when I looked back at the statute that there is a sentence, a very clear sentence that says "primary

weight will be given to the contingent nature of an offer of employment," which is not necessarily connected to only one piece of the process but is just overall primary weight given to the contingent nature. Whether it's inside or outside of the employer's control, that language is quite powerful and that language reflects the intent of the statutes from 1996 until this change.

So we would suggest that -- and I believe as well for our last conversations that this is consistent with the federal guidelines. Primary -- and so this suggestion is in a special sentence, "primary weight must be or will be given to the contingent nature" -- nature not nation -- "of the offer of employment whether or not the contingency is within or outside the employer's control."

If you don't want to put in that last little piece, just, you know, please make that primary weight sentence stands on its own. I suggest that it just be a C unto itself. By putting it in that section above, it gets sort of hidden and swallowed up. It seems to be a throwaway line as it's currently drafted, and that's not what it was meant to be. So we would suggest that that be set out quite clearly.

Then finally, WAC 192-210-060, this is the

section in which classified employees, at least in K-12, have the right to receive retroactive payment when the employer does not rehire the employee even though they said the employee had reasonable assurance, and other employees explicitly do not have this right. So just as a general rule, I think it's a huge injustice that other employees for whom the reasonable assurance rules apply are subjected to employers who claim that they have reasonable assurance and then can turn around with impunity and not re-employ that person.

And I guess I'm going to link this back to this, the colleges in the 9-month, 12-month. That's a section which I had lobbied it originally should be specifically referenced to higher ed. However, it looks like that's not going to happen. And so my question really is, if you have something in this rule that is specifically -- that was specifically for one group and is now been expanded to everybody, and in this section which was specifically for classified but you're not expanding it to everybody, I think it would be a really positive thing if the department took the Feds on this.

I know that you would have to do that, and I know that it would maybe not be easy, but I think it

would potentially be consistent with what this department has done from day one on this issue since '96 or whenever the first law was drafted and passed in 2001.

This state has pushed the envelope on this issue of contingencies, and I think even to the point where the Federal Government has adopted some of our language and put it into their federal guidelines. So I don't think it's inconsistent that you push the envelope a little bit on that to see if we can't get that expanded. It may not be possible in rules; I understand that, but I am just putting it out there. Then the change would simply be "classified" would be replaced with "educational employee."

With that, that concludes our comments and suggestions and remarks. And I don't know if it's appropriate for questions, but if anybody had questions, I'd be happy to answer them.

MR. MICHAEL: Thank you for your feedback. We will take all of that under advisement.

Is there any further testimony concerning the proposed rulemaking before us before I conclude this hearing?

We're going to check the sign in sheet, see if anyone else has signed in after Ms. Rader-Konofalski.

Seeing that no one else has physically appeared or signed in, I will conclude the comment period.

This hearing was convened considered testimony on proposed rules clarifying requirements for educational employees to qualify for unemployment benefits. All oral testimony and written comments presented at this hearing will become part of the official record.

The deadline for submitting written comments is today, July 13th, 2018. A final decision regarding adoption of this proposed rule will be made after all testimony and written comments have been considered with the target date of June 12th -- not June that was a month ago. With the target date of sometime next week of either moving forward with the rules as they are written or proposing additional proposed rules for another PROPOSED RULEMAKING HEARING.

On behalf of Suzi LeVine, thank you for participating in this hearing. We are adjourned at 9:34 a.m. on July 13th, 2018.

(Concluded at 9:34 a.m.)

REPORTER'S CERTIFICATE

I, MARYSOL RYDER, CSR No. 3440, do hereby certify that the foregoing transcript, consisting of pages 1 through 23, inclusive, is a true and correct transcript of my shorthand notes and is a full, true and correct statement of the proceedings had in said hearing.

IN THE WITNESS WHEREOF, I have subscribed my name this 23rd day of July, 2018.

/s/ Marysol Ryder

_____

MARYSOL RYDER, CSR No. 3440

Public Rulemaking Hearing
HB 2703
July 11, 2018
WEA/AFT Response and Requests

WAC 192-210-005:
Consistent and clear terminology in the definitions section needed that

1. **Covers all education employees** in all educational settings. The use of "classified" and "certificated" to cover every employee group misleading at best and only specifically oriented to K-12 at worst.
    - Only k-12 teachers are required to be certificated and that term is set in law clearly under **RCW 28A.410**. So it's a legal term so strongly interwoven in the fabric of K-12 that it is both legally inaccurate to apply to "all" employees in every ed. sector and it simply leaves out higher ed faculty.
    - Also since the classified definition refers back to NOT being certificated, you leave out all the higher ed classified employees for whom "certificated" is also not applicable.

2. **Defines "educational institutions."** Schools are understood as being K-12, institutions of higher education encompass four year, regionals, CCTC colleges. If you mean everyone then you may want to define "education intuitions" as referring to both K-12 schools and higher ed institutions.

   This could help clear up the confusion that occurs in, for example, the definitions section under "Same Capacity": when you give examples of people working in different capacities. Is working in K-12 and working in Higher Ed different capacities? That whole section is very confusing and needs clarity and a more consistent, comprehensive, term or set of terms.

Suggestion:
Put back in the crossed out definition of "faculty" and "full-time employment" (suggest you substitute RCW 28B.50.851 for full-time CCTC faculty with RCW **28B.50.489** that specifies difference between full and part-time faculty) and add the fuller spectrum of employees affected by the law. That would include:

certificated in K-12 (RCW 28A.410), classified in K-12, classified in four year and community colleges (RCW 41.80), technical college classified (RCW 41.56.).

And add definitions of education institutions as mentioned above.

Other ideas would be a definition of "classified" that added the words "services performed in a higher education capacity" after "not performed in a certificated capacity" to capture both K-12 and higher ed. Could also remove the term "Certificated" and leave "instructional, research or principal administrative staff in both k-12 and institutions of higher education (more consistent with RCW 50.44.040.) Or perhaps just "non-classified capacity." There is no way that the term "certificated" can be the default for all employees that are not "classified."

Question:
Why can't you just combine the categories to say "all education employees"? For wages and hours for most everything there seems not be need to be this distinction and in at least one case there shouldn't be a distinction made. I'll talk about that in the last section.

Also define "contract" and "reasonable assurance" for use throughout the WACs. Suggest reasonable assurance should be defined in rules as a "non-contingent offer of future employment. The initial determination of whether a claimant's offer of employment rises to the level of reasonable assurance is made by the Employment Security Department."

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Suggestion: Use the statute language for this section. Trying to rewrite the statute to emphasize what establishes RA in this way will be very unfavorable to our members and allow employers to assert to our part-time faculty that they DO have RA and no reason to even apply. *Recently we have heard that at one of our college's part-time faculty are provided "letters of Reasonable Assurance." If the employees sign it, they fear that they have cannot apply for benefits because since the letter says Reasonable Assurance that must be what they have. If they don't sign it they could be accused of refusing work. This is a perfect example of how the colleges try to prevent their employees for applying to benefits for which they are legally entitled and to have it both ways—that is to SAY they are providing RA but to continue to exercise the right to not rehire any part-timer for any reason. It is ESD that makes the decision.*

Suggestion:
Under 4 (B), where you describe the contingencies outside of the employer's control, add this sentence: **"However, a contingency outside of the employers' control does diminish it as a contingency or preclude a determination of no reasonable assurance."** During the bill process in the legislature, we were assured that contingencies "outside the employer's control" would only trigger a further look so maybe a reference to that would help.

4 (B) ii and iii are unnecessarily redundant.
Suggestion: Combine into just one (4) (B) (ii): **"Considering the totality of the circumstances, it is highly probably that the contingencies will be met and that there will be a job available for the claimant in the following academic year or term."**

Then add a (C) under that which is consistent with federal guidelines that says: **"Primary weight MUST BE (consistent with previous legislation) given to the contingent nation of an offer of employment whether or not the contingency is within or outside the employers' control."** The "primary weight" phrase gets hidden and swallowed up and seems to be a throwaway line as currently drafted. It needs to be more prominent to maintain good faith with the original intent of this whole statute now and previously. And it needs to maintain its meaning by assuring there are no double values to the bottom line notion of "contingencies." Otherwise it simply has no meaning.

Finally, WAC 192-210-060 in which classified employees (at least in K-12) have the right to receive retroactive payment when the employer does not re-hire the employee even though they said the employee had RA and "other" employees do not have this right. It is a huge injustice that other employees for whom the RA rules apply are subjected to employers who can claim they have RA and then turn around and not re-employ that person with total impunity. If it is wrong for the classified than it is simply wrong for any claimant.

Suggestion:
Remove the word "classified" and replace with "educational employee."

From:	Wendy Rader-Konofalski [WA]
To:	Zeitlin, Daniel (ESD); Michael, Scott E (ESD); lsheehan@ESD.WA.Gov
Cc:	Streuli, Nick (ESD); Baca, Bernal
Subject:	corrected testimony
Date:	Friday, July 13, 2018 10:28:41 AM
Attachments:	SB 2703 rules response (corrected version).docx

Scott,
I have attached the corrected version of the testimony we provided today. There were two errors—one was a missing "not" on page three under the second Suggestion and one was changing "nation" to "nature" on page four. Those changes are included in the attached document.

Thanks again for your attention today.

Best,

Wendy Rader-Konofalski
WEA Lobbyist
724 Columbia St. N.W
Olympia, WA 98501
Cell: (206) 300-1682
Office: (360) 704-5639

Public Rulemaking Hearing
HB 2703
July 11, 2018
WEA/AFT Response and Requests

WAC 192-210-005:
Consistent and clear terminology in the definitions section needed that

1. **Covers all education employees** in all educational settings. The use of "classified" and "certificated" to cover every employee group misleading at best and only specifically oriented to K-12 at worst.
    - Only k-12 teachers are required to be certificated and that term is set in law clearly under **RCW 28A.410**. So it's a legal term so strongly interwoven in the fabric of K-12 that it is both legally inaccurate to apply to "all" employees in every ed. sector and it simply leaves out higher ed faculty.
    - Also since the classified definition refers back to NOT being certificated, you leave out all the higher ed classified employees for whom "certificated" is also not applicable.

2. **Defines "educational institutions."** Schools are understood as being K-12, institutions of higher education encompass four year, regionals, CCTC colleges. If you mean everyone then you may want to define "education intuitions" as referring to both K-12 schools and higher ed institutions.

   This could help clear up the confusion that occurs in, for example, the definitions section under "Same Capacity": when you give examples of people working in different capacities. Is working in K-12 and working in Higher Ed different capacities? That whole section is very confusing and needs clarity and a more consistent, comprehensive, term or set of terms.

Suggestion:
Put back in the crossed out definition of "faculty" and "full-time employment" (suggest you substitute RCW 28B.50.851 for full-time CCTC faculty with RCW **28B.50.489** that specifies difference between full and part-time faculty) and add the fuller spectrum of employees affected by the law. That would include:

certificated in K-12 (RCW 28A.410), classified in K-12, classified in four year and community colleges (RCW 41.80), technical college classified (RCW 41.56.).

And add definitions of education institutions as mentioned above.

Other ideas would be a definition of "classified" that added the words "services performed in a higher education capacity" after "not performed in a certificated capacity" to capture both K-12 and higher ed. Could also remove the term "Certificated" and leave "instructional, research or principal administrative staff in both k-12 and institutions of higher education (more consistent with RCW 50.44.040.) Or perhaps just "non-classified capacity." There is no way that the term "certificated" can be the default for all employees that are not "classified."

Question:
Why can't you just combine the categories to say "all education employees"? For wages and hours for most everything there seems not be need to be this distinction and in at least one case there shouldn't be a distinction made. I'll talk about that in the last section.

Also define "contract" and "reasonable assurance" for use throughout the WACs. Suggest reasonable assurance should be defined in rules as a "non-contingent offer of future employment. The initial determination of whether a claimant's offer of employment rises to the level of reasonable assurance is made by the Employment Security Department."

WAC 192-210-010 about the academic year definition which derives out of a Superior Court case called Evans v ESD from decades ago that determined (only for community and technical colleges) that summer is always a bona fide quarter in the academic year. A special compromise rule was created that is based on a yearly determination comparing staffing and enrollment to other quarters and is pegged to the past year. It really is only relevant to the CC/TC system. We would suggest you specifically clarify that it applies to "a higher education institution." However, since the four years didn't really buy off on that whole summer quarter thing and aren't used to reporting information that is required for CC/TCs, it might be considered a workload issue for staff. Just a thought.

WAC 192-210-015 (4). This section appears to assign automatic determination of reasonable assurance based on all contingencies being outside employer's control. Statute does not do that. Statute puts emphasis on what is NOT reasonable assurance and makes clear that if there are "any" contingencies within the employers control they do NOT have RA. However, the rule seems to assert a pre-fixed determination of RA if all contingencies are outside employer's control. And the statute does NOT do that. We were assured that the distinction between the two kinds of contingencies was a trigger to further consideration evaluation and applied no automatic determining effect. Contingencies are contingencies whether inside or outside the employer's control.

Suggestion: Use the statute language for this section. Trying to rewrite the statute to emphasize what establishes RA in this way will be very unfavorable to our members and allow employers to assert to our part-time faculty that they DO have RA and no reason to even apply. *Recently we have heard that at one of our college's part-time faculty are provided "letters of Reasonable Assurance." If the employees sign it, they fear that they have cannot apply for benefits because since the letter says Reasonable Assurance that must be what they have. If they don't sign it they could be accused of refusing work. This is a perfect example of how the colleges try to prevent their employees for applying to benefits for which they are legally entitled and to have it both ways—that is to SAY they are providing RA but to continue to exercise the right to not rehire any part-timer for any reason. It is ESD that makes the decision.*

Suggestion:
Under 4 (B), where you describe the contingencies outside of the employer's control, add this sentence: **"However, a contingency outside of the employers' control does not diminish it as a contingency or preclude a determination of no reasonable assurance."** During the bill process in the legislature, we were assured that contingencies "outside the employer's control" would only trigger a further look so maybe a reference to that would help.

4 (B) ii and iii are unnecessarily redundant.
Suggestion: Combine into just one (4) (B) (ii): **"Considering the totality of the circumstances, it is highly probably that the contingencies will be met and that there will be a job available for the claimant in the following academic year or term."**

Then add a (C) under that which is consistent with federal guidelines that says: **"Primary weight MUST BE (consistent with previous legislation) given to the contingent nature of an offer of employment whether or not the contingency is within or outside the employers' control."** The "primary weight" phrase gets hidden and swallowed up and seems to be a throwaway line as currently drafted. It needs to be more prominent to maintain good faith with the original intent of this whole statute now and previously. And it needs to maintain its meaning by assuring there are no double values to the bottom line notion of "contingencies." Otherwise it simply has no meaning.

Finally, WAC 192-210-060 in which classified employees (at least in K-12) have the right to receive retroactive payment when the employer does not re-hire the employee even though they said the employee had RA and "other" employees do not have this right. It is a huge injustice that other employees for whom the RA rules apply are subjected to employers who can claim they have RA and then turn around and not re-employ that person with total impunity. If it is wrong for the classified than it is simply wrong for any claimant.

Suggestion:
Remove the word "classified" and replace with "educational employee."

From: Wendy Rader-Konofalski [WA]
To: Michael, Scott E (ESD)
Subject: RE: Thank you
Date: Monday, July 30, 2018 10:36:35 AM

Hi, Scott,
I just wanted to let you know that I have read through the amended rules and I think you have done an excellent job. The definitions seem to be just right and you've dealt with the K-12/higher ed confusions very handily. I also think the big piece we worked on around RA and the process for determining it is really well done. Thanks for the responsiveness and the good wordsmithing.

Having said that, I'm waiting to hear back from Bernal Baca. I suspect he will be fine as well, but we'll go through it together just to make sure.

Thanks again, Scott, for being willing to make the changes. I think it will facilitate a better process for all.
Best.

Wendy Rader-Konofalski
WEA Lobbyist
724 Columbia St. N.W
Olympia, WA 98501
Cell: (206) 300-1682
Office: (360) 704-5639

From: Michael, Scott E (ESD) [mailto:SEMichael@ESD.WA.GOV]
Sent: Friday, June 29, 2018 11:08 AM
To: Wendy Rader-Konofalski [WA] <WRader-Konofalski@WashingtonEA.org>; Streuli, Nick (ESD) <NStreuli@ESD.WA.GOV>; Zeitlin, Daniel (ESD) <DZeitlin@ESD.WA.GOV>
Cc: Lucinda Young [WA] <LYoung@WashingtonEA.org>; Baca, Bernal <bbaca@aftwa.org>
Subject: RE: Thank you

Ms. Rader-Konofalski,

Thank you for bringing to our attention your concerns and suggestions. Our plan is to move forward with the rulemaking hearing on July 13th, so please bring your input again to the hearing where we can take it under formal consideration. We will then collect your input with any other input others may bring to the hearing and go from there. At this point, we think we will probably make at least some changes to the rule based on the feedback you presented and issue a new CR 102 shortly after the July 13 hearing.

Best regards,

Scott E. Michael
Legal Appeals Manager
Employment System Policy
Employment Security Department
(360) 902-9587
semichael@esd.wa.gov

From: Wendy Rader-Konofalski [WA] [mailto:WRader-Konofalski@WashingtonEA.org]
Sent: Friday, June 29, 2018 10:55 AM
To: Streuli, Nick (ESD) <NStreuli@ESD.WA.GOV>; Michael, Scott E (ESD) <SEMichael@ESD.WA.GOV>; Zeitlin, Daniel (ESD) <DZeitlin@ESD.WA.GOV>
Cc: Lucinda Young [WA] <LYoung@WashingtonEA.org>; Baca, Bernal <bbaca@aftwa.org>
Subject: Thank you

Nick, Scott, and Dan,

Just want to thank you all for meeting with me and Lucinda (with Bernal there in spirit) about our concerns with the draft rules for HB 2703 earlier this week.

You have been more than accommodating, respectful, and responsive to our questions, requests, suggestions, and input both before and during the legislative process and now.

I feel confident that we'll get through this rule-making process in a way that keeps us in good stead with the DOL as well as remains true to our state's specific needs, values, and commitments to those education employees in need of unemployment benefits.

Let us know how you plan to proceed with the results of our meeting—whether we will still have the July 13th public hearing and should come prepared with our points or whether you want to work up a new draft before then that will require a postponement of the hearing.

Either way works for us.

Again, please know how much we appreciate the multiple times you have scheduled and held meetings with us on both the PFML and this UI bill, sometimes on very short notice, to address our specific issues.

Respectfully,
Wendy

Wendy Rader-Konofalski
WEA Lobbyist
724 Columbia St. N.W
Olympia, WA 98501
Cell: (206) 300-1682

Office: (360) 704-5639

Michael, Scott E (ESD)

From: Bernal Baca <bbaca@aftwa.org>
Sent: Monday, July 30, 2018 3:55 PM
To: Rader-Konofalski, Wendy; Nancy Kennedy; ESD GP Rules
Cc: Nancy Kennedy
Subject: RE: Feedback on Reasonable Assurance

Thanks Nancy and Wendy for addressing these issues, I agree with your comments.

Bernal C Baca, Ed.D., Lobbyist

AFT Washington AFL-CIO
625 Andover Park W, Ste 111
Tukwila, WA 98188
Direct: 206.432.8086
Cell: 509.961.7840
FAX: 206.242.3131
Web: http://wa.aft.org
Become a fan Facebook

From: Wendy Rader-Konofalski [WA] [mailto:WRader-Konofalski@WashingtonEA.org]
Sent: Monday, July 30, 2018 3:45 PM
To: Nancy Kennedy <outlook_0B6C1CB285BD1F6F@outlook.com>; rules@esd.wa.gov
Cc: Bernal Baca <bbaca@aftwa.org>; Nancy Kennedy <nkennedy@aftwa.org>
Subject: RE: Feedback on Reasonable Assurance

Nice!

From: Nancy Kennedy [mailto:outlook_0B6C1CB285BD1F6F@outlook.com]
Sent: Monday, July 30, 2018 3:25 PM
To: rules@esd.wa.gov
Cc: bbaca@aftwa.org; Nancy Kennedy <nkennedy@aftwa.org>
Subject: Feedback on Reasonable Assurance

For some reason this is coming in from my home email. This is Nancy Kennedy with AFT Washington and I have added my work address to the CC line.

I have attached a copy of the amended rules with a couple of highlighted sections that my questions are about. Both are under definitions.

The first one is in section (2). I am uncertain as to why technical colleges are not being referred to as such. Technical schools still exist and the technical colleges were considered vocational schools or vocational technical institutes until

1991 when they were added to the college system. Once that happened they became technical colleges. Is the assumption that they are either included as a technical “school” or are included in the vague “college” after community colleges? For clarity, we would suggest replacing “community colleges” to “community and technical colleges.”

The second question is in regards to Section (7)(b). Does this language refer to the roving nurses or counselors hired by school districts but visit various K-12 schools within that district on a rotating basis? Does this mean that if I was hired as a counselor for a K-12 District and roved between schools but then got a job at a community college with a fixed location and assignment, they would not be considered the same? I may not even be close in my understanding so I hope you can help.

On a first read, the other changes look to be ok. N

Nancy Kennedy
AFT Washington

Sent from Mail for Windows 10

PROPOSED RULEMAKING HEARING

DATE: 9-4-18

TIME: 1:00 P.M.

PLACE: Employment Security Department
212 Maple Park Avenue SE
Olympia, WA 98501

PRESENT: Scott Michael, Esq.
Legal Services Coordination Manager
Juliet Wochholz, Esq.
Legal Appeals and Rules Coordinator

MR. MICHAEL: Pursuant to the authority given under Washington State law, this hearing is hereby convened.

For the record, this hearing is beginning at 1:02 p.m. on September 4th, 2018, at 212 Maple Park Avenue in Olympia, Washington. This hearing is convened to consider testimony concerning the rule related to clarifying requirements for educational employees to qualify for unemployment benefits. Notice of this hearing was published in the *Washington State Register* as number WSR18-16-061 and sent to interested parties.

My name is Scott Michael and I'm the Legal Services Coordination Manager for the Washington State Employment Security Department. I represent Commissioner Suzan Levine as Hearing Officer presiding at this public rulemaking hearing. There's another staff member from the Employment Security Department attending this hearing. Could you please introduce yourself?

MS. WOCHHOLZ: My name is Juliet Wochholz and I am the Legal Appeals and Rules Coordinator.

MR. MICHAEL: All right. There is no one else in attendance, so I'll ask anyone else to sign the attendance log. The attendance log is currently

sitting over there blank. The attendance log will nonetheless be kept as a permanent record of this hearing.

Please be advised that this hearing is being transcribed and the transcript will become a part of the official rulemaking file.

This hearing is convened to consider written submissions and oral testimony presented on the proposed rules. A concise explanatory statement of the agency's reasons for adoption of the rule, including a summary and response to all comments received, will be sent to all requesting and commenting parties and placed in the permanent rulemaking file. It will also be published on the agency's rulemaking web page, which is www.ESD.wa.gov/newsroom/rulemaking.

I will now provide a brief explanation of the proposed rule. The Department is amending the rule relating to when educational employees are entitled to receive unemployment benefits within and between academic terms. This area of agency regulation has often been referred to as the reasonable assurance rules. The Employment Security Department receives funding from the federal government to administer the state's unemployment

insurance program. As a condition of receiving that funding, the Department must make sure its regulations are in conformity with certain federal statutes and federal guidance.

26 USC, Section 3304(a)(6)(A) sets out certain federal requirements with regard to the payment of unemployment benefits to educational employees within and between academic terms.

On December 22nd, 2016, the United States Department of Labor issued unemployment insurance program letter or UIPL, No. 5-17, which significantly amended federal guidance pertaining to this statute. Then, just this past legislative session, the Legislature passed and the governor signed Substitute House Bill 2703 which amended state statutes pertaining to when educational employees are entitled to unemployment benefits under state law. The proposed rules are intended to bring the Department into compliance with the UIPL No. 5-17 and Substitute House Bill 2703.

The regulation is as -- and changes are as follows: Amendments to WAC 192-210-001 updates terminology so it is consistent with other parts of the rule.

Amendments to WAC 192-210-005 create

updated definitions.

Amendments to WAC 192-210-010 update the cross reference to a statute that was changed by Substitute House Bill 2703.

Amendments to WAC 192-210-015 contain the test required by the United States Department of Labor for when an educational employee has a contract or reasonable assurance of future work.

Amendments to WAC 192-210-045 clarify when benefits are allowed when an educational employee works for more than one employer.

New WAC 192-210-055 explains the impact of a voluntary quit for educational employees.

New WAC 192-210-060 explains when educational employees are entitled to retroactive payments of unemployment benefits.

Repealed WAC 192-210-020 eliminates distinctions between employees of community and technical colleges and employees of other types of educational institutions which were also eliminated by Substitute House Bill 2703.

The Department has determined that changes to other rules or statutes would not achieve the same regulatory objectives.

The language of the proposed rule has been

shared with the United States Department of Labor. There are no other state agencies that deal with the subject matter of this regulation.

The Department has chosen a reasonable cost effective manner in achieving the regulatory objective of the rule. There are no anticipated environmental consequences associated with the rule.

In the preliminary cost benefit analysis the Department predicted it would incur $529,500 in the 2017 to 2019 fiscal years to implement the changes necessitated by the federal guidance, state statute, and these rules. The Department also predicted a 15% increase in the amount of benefits paid to educational employees, which would result in a comparable cost to educational employers who either have to reimburse the Department for those benefits paid or see an increase in their unemployment tax rate.

Specifying performance standards is not appropriate for the rule.

The proposed regulation does not require a Small Business Economic Impact Statement as the rule is being adopted for the purposes of conforming with UIPL No. 5-17.

Input was solicited from stakeholders during the development of the proposed regulation.

We will now hear testimony from those logged in attendance concerning the proposed rules. There's currently nobody logged in to testify. We will wait until 1:15 and if no one comes in to testify, we will conclude this rulemaking hearing.

Can we go off the record for five minutes?

(Break taken from 1:10 to 1:15 p.m.)

It is now 1:15 p.m. There is no one else in attendance in this hearing -- meeting room and no one else has signed the -- or, actually, no one has signed the attendance log.

I'm now going to conclude the hearing. This hearing was convened to consider testimony on proposed rules clarifying requirements for educational employees to qualify for unemployment benefits.

All testimony, which is mine, presented at this hearing will become part of the official record. The deadline for submitting written comments is today, September 4th, 2018. A final decision regarding adoption of the proposed rules will be made after all testimony and written comments have been considered.

On behalf of Commissioner Suzan Levine, thank you for participating in this hearing.

This hearing is adjourned at September 4th,

2018, at 1:16 p.m.

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss.
County of Pierce)

I, the undersigned Notary Public in and for the State of Washington, do hereby certify:

That the foregoing verbatim transcript of proceedings was transcribed under my direction; that the transcript is a full, true and complete transcript of the testimony of said witness, including all questions, answers, objections, motions and exceptions;

That I am not a relative, employee, attorney or counsel of any party to this action or relative or employee of any such attorney or counsel, and that I am not financially interested in the said action or the outcome thereof;

That I am herewith securely sealing and digitally signing this transcript and delivering the same via electronic filing to Mr. Scott Michael for filing.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 11th day of September, 2018.

/S/ Catherine M. Vernon
Notary Public in and for the
State of Washington, residing at
Tacoma.