



# LAW UPDATE

## LABOR AND EMPLOYMENT

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Memo 4

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### UNEMPLOYMENT INSURANCE AND REASONABLE ASSURANCE OF REEMPLOYMENT FOR DISTRICT EMPLOYEES

Generally, California Unemployment Insurance (UI) Code section 1253.3 disqualifies school district employees from receiving UI benefits during a recess period between regular academic terms if those employees receive “reasonable assurance” of returning to work after the recess period is concluded. It is important that districts provide employees with correct notifications of reasonable assurance because failure to provide the proper “reasonable assurance”, where appropriate, can result in improper claims for UI benefits, and can result in increased UI benefits rates for the district in future years.

This memorandum discusses the law regarding UI benefits and reasonable assurance letters for both certificated and classified employees, along with the procedure for providing appropriate notice.

#### A. Certificated Employees

UI Code section 1253.3 (b) provides that certificated employees are not eligible for UI benefits for a break in employment between academic years so long as the employee has a reasonable assurance of reemployment. The UI Code requires this notice 30 days before the end of the “term.”<sup>1</sup> The notice requirement for the various categories of certificated employees is discussed below.

1. Full-Time Certificated Employees (Tenured and Probationary Teachers). Regular certificated employees working less than 12 months, including tenured and probationary teachers, administrators, and all other certificated employees, who have a continuing contract with the district, and who have not received administrator release letters under Education Code section 44951, layoff notices under Education Code section 44955, or notices of non-reelection under Education Code section 44929.21, have automatic reasonable assurance.<sup>2</sup> No special letter of reasonable assurance is required.

2. Certificated Temps. Districts are authorized to employ teachers as long-term substitutes or temporary replacements with a contract that expires at the end of the school year.<sup>3</sup> All teachers employed on a temporary contract that expires at the end of the school year are considered to be released from employment and eligible for UI benefits unless and until the district can offer a new contract or position providing substantially similar economic terms and conditions. As such, the district cannot offer reasonable

<sup>1</sup> Unemployment Insurance Code section 1253.3(i).

<sup>2</sup> Unemployment Insurance Code section 1253.3(b).

<sup>3</sup> Education Code sections 44917, 44919, and 44920.

assurance letters unless the employee's contract is renewed. If a teacher is rehired soon after their release or over the summer, a reasonable assurance letter should be issued to the temp with the new contract.

3. Certificated Categorical Temps. Other temporary employees (normally referred to as "categorical temps") can be released at the end of the categorical project. If they are released prior to expiration of the categorical funding, they must be treated as probationary employees and released by termination for cause, non-reelection, or layoff.<sup>4</sup> At the expiration of the categorical funding or upon discontinuation of funding, categorical temps are considered released from employment and eligible for UI benefits unless and until the district can offer a new contract position providing similar economic terms and conditions. If the contract for the categorical temp does not explicitly terminate at the end of the school year and the categorical funding is expected to resume at the start of the next school year, these teachers should be sent reasonable assurance letters at the same time notice is being sent to any classified staff working under the same categorical funding stream. If the contract for the categorical temp is year-to-year but up for renewal contingent on continued funding, a reasonable assurance letter should be issued when the contract is renewed, however, the district should not automatically send notice if there is a strong reason to believe the program will not be funded or if the contract is set to expire by the end of the school year.

**Remember that categorical temps do not include tenured teachers temporarily assigned to a categorical program; as tenured teachers, they have automatic assurance and notice should not be sent.**

4. Certificated Employees at a Regional Occupational Service Program. Certificated instructors in classes conducted at a regional occupational center or program are considered temporary employees who do not have permanent status.<sup>5</sup> As such, upon expiration of their contract at the end of the school year, they are considered to be released from employment and eligible for UI benefits unless and until the program can offer a new contract or position providing substantially similar economic terms and conditions. Therefore, a reasonable assurance notice should only be sent 30 days before the end of the school year if the instructor is under a contract that covers employment for the next school year, otherwise, if the contract is renewed after the notice has gone out, a reasonable assurance letter should be issued with a new contract.

5. Teachers Hired Under a STSP or PIP, etc. Teachers can be employed under a provisional/emergency credential, STSP, PIP, or waiver authorization that expires at the end of the school year.<sup>6</sup> The fact that these teachers are hired under provisional credentials does not render them temporary employees.<sup>7</sup>

To determine if a certificated employee hired under a credential waiver is a temp, the district should examine why the employee was hired under contract without regard to the credentialing issue. If the teacher was contracted to replace a regular certificated employee who was temporarily absent, that teacher is a temp, likewise, if the teacher was contracted to work on a limited categorical program, that teacher is a categorical temp. However, if the teacher was contracted on a waiver to fill a previously unfilled vacant position, that teacher is not a temp regardless of their credential status. As such, prior to the expiration of a PIP, STSP, or other credential waiver, the district should consider sending a notice stating that the contract

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<sup>4</sup> *Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260.

<sup>5</sup> Education Code section 44910 and *Reis v. Biggs Unified School Dist.* (2005) 126 Cal.App.4th 809.

<sup>6</sup> Education Code section 44911; and California Code of Regulations, Title 5, sections 80021 and 80021.1.

<sup>7</sup> *Bakersfield Elementary Teachers Association v. Bakersfield City School Dist.*, *supra*, at 1278-1286.

will expire at the end of the school year and the teacher is non-reelected under Education Code section 44929.21 for failure to hold a credential.

In any event, districts should consult with legal counsel prior to sending any notice of reasonable assurance to an employee hired under a credential waiver.

## B. Substitute Employees

Substitute employees the district expects to use in the subsequent term are considered to have reasonable assurance of returning to work, provided they have been given notice of the district's intent to retain them on the substitute list and they have indicated they want to return to work in the same capacity for the next school year.

If a district's summer school program consists of a shortened summer session with limited enrollment and course offerings, substitute teachers will not be eligible for UI benefits over summer break. However, in the case where a district has, or will have, a summer session that resembles the fall and spring semesters in terms of enrollment, staffing, budget, and instructional program offered, this summer session would qualify as a "regular" term, and as such, a substitute teacher may qualify for UI benefits over the summer if they do not receive notification of reasonable assurance of employment for the "enhanced" summer term.<sup>8</sup>

Send notifications only to those substitutes the district intends to continue to use for the next school term (including an enhanced summer term, if appropriate). Notification should be sent no later than 30 days before the end of the academic year or term. NOTE: Districts should also be aware of the rights of laid-off certificated employees to receive first consideration for work as substitute teachers. The number of employees on a certificated reemployment list may impact the number of regular substitutes who can be provided with reasonable assurance letters.

It is also recommended that districts establish a separate substitute list to be used exclusively for the 2020-2021 summer school session. A more in-depth discussion on enhanced summer school session follows further below in this update.

## C. Classified Employees and Categorically-Funded Classified Employees

Reasonable assurance notifications should be sent to 12-month employees who have at least a one-week, unpaid, scheduled break during a recess period. Employees working less than 12 months must receive notification of reasonable assurance to return to work for the next school year as required by UI Code section 1253.3(I). Notification of reasonable assurance should be clear and sent no later than 30 days before the end of the academic year or term. Any format may be used, but the notification should contain the following statements:

- The employee has reasonable assurance of returning to work after all recess periods.
- The employee may file a claim for UI benefits (determinations regarding entitlement are made by the Employment Development Department (EDD), not by the school district).

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<sup>8</sup> *United Educators of San Francisco, etc. v. California Unemployment Ins. Appeals Bd.*, (2020) 8 Cal.5th 805, 815-816.

- If not offered an opportunity to perform services for the district in the next academic year or term, the employee may be entitled to UI benefits retroactive to the date the claim is filed. This would apply if the employee was otherwise eligible and filed a claim for each week benefits were claimed, and if the claim for retroactive benefits was made no later than 30 days following the commencement of the next academic year or term.
- The status of the employee remains the same throughout the school year, including winter and spring breaks.

Education Code section 45117 provides that employees in categorically-funded programs must be notified by April 29 if their employment will terminate at the end of the school year because the funding has not been renewed. If a program expires at a date other than June 30, the 30-day notice requirement applies.

It has been the practice in some districts to avoid giving notice to categorically-funded classified employees (such as aides) by April 29 because funding (especially for federal programs) is not assured until late summer and the districts wish to avoid paying UI benefits. If program funding is later denied and employees are not rehired, EDD will probably grant benefits retroactive to June. If funding is continued, employees who received April 29 notices and collected UI benefits during the summer may legally be required to repay those benefits if they are rehired; however, EDD rarely seeks repayment. It is important to consider it may be argued that Education Code section 45117 requires that a categorically-funded employee who has not been given timely notice by April 29 is entitled to work 30 calendar days in the fall before termination is effective.

Merit System rules can sometimes be inconsistent with the above discussion. Please contact legal counsel to review the law in light of Merit System rules.

**D. Newly Hired Classified Employees and All Substitute Employees (Hired After Regular Reasonable Assurance Notifications Have Been Mailed)**

All newly hired classified employees and all substitutes (classified and certificated) should be given notification of reasonable assurance at the time of hire. This will inform the employee that they have reasonable assurance of returning to work after all recess periods during the current school year.

**E. Year-Round Employees**

Year-round certificated and classified employees should receive some type of written communication informing them of their schedule for the school year. The purpose of the communication is to confirm that the employee has reasonable assurance of returning to work after the break. Notification should be sent out prior to July 1 of each year.

**F. Summer School Sessions and AB 86 Expanded Learning Opportunity Programs**

Even in ordinary years, preparation for the summer school session deserves careful attention so that districts can avoid paying unnecessary UI claims for employees who had reasonable assurance of returning to work after the summer recess. For the 2020-2021 summer session, and the expanded learning opportunity programs required by AB 86, districts should give special consideration to meeting the staffing needs for the expanded summer school session without running afoul of this issue.

Districts should begin the staffing process for the expanded summer school session by providing notice to employees' associations of the district's required summer school plans, the staffing needs for the program(s), and any proposed increased rates of pay for the positions. Districts should review their current collective bargaining agreements (CBA) for existing contract provisions on staffing summer school that will apply. If the applicable CBA has summer school provisions, districts should review the provisions to ensure they are sufficient to meet the needs for the expanded summer school session. If a district does not have any CBA provisions on summer school, or the existing provisions may not fully meet the needs of the expanded summer school session, we advise contacting your employees' associations as soon as possible to provide notice of the expanded summer school session and the staffing needs for the program. It is recommended that districts post available summer school positions as soon as possible to ensure there is adequate time to meet enhanced staffing needs. Districts should attempt to ensure that only a select and necessary number of summer school applicants are actually assigned, contracted, or committed to the expanded summer session.

Another important consideration is that EDD allows payment of UI benefits to teacher claimants whose classes are canceled due to insufficient enrollment, funding, or changes in the program.<sup>9</sup> If the district's plans for the expanded summer session may be impacted by student enrollment, the best approach for staffing the session is by seeking volunteers. Districts could utilize a staff survey to determine who is willing to volunteer to work the expanded summer session. A review of employee responses to the survey will need to take into consideration seniority and other CBA summer school provisions that apply. To the extent there are insufficient volunteers to meet the district's expanded summer school needs, districts are permitted by Education Code section 43522(h) to utilize the expanded funding to engage, plan, and collaborate with community partners to provide the expanded learning programs required by AB 86. Our office is available to assist districts with CBAs, MOUs, and contracts with community partners as needed.

#### G. Summary of Recommendations

It is our recommendation that reasonable assurance notifications be sent as described in this memo. Notifications should be dated and mailed as close to that date as possible. It is suggested that districts have a method of ensuring that employees receive the notifications, either by signatures on a roster, using certified mail, or some other means. (The district's UI carrier or this office can provide sample notifications as needed.)

If the district is planning on offering an "enhanced" summer term with sizable enrollment and extended course offerings, it is recommended that you contact legal counsel and your UI carrier for specific recommendations regarding notices of reasonable assurance for substitute teachers and 10-month classified employees.

**CAUTION - Do not send a blanket notice of reasonable assurance to all employees. Districts should evaluate their own staffing needs and circumstances. A notification of reasonable assurance should never go to anyone receiving: (1) a layoff notice, (2) notice of a reduction in hours or pay that is greater than 20 percent, or (3) notice of non-reelection under Education Code section 44929.21.**

Please do not hesitate to contact our office for a specific legal consultation related to this update.

- Schools Legal Service

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<sup>9</sup> [https://edd.ca.gov/Unemployment/FAQ\\_-\\_School\\_Employees.htm](https://edd.ca.gov/Unemployment/FAQ_-_School_Employees.htm)