

‘Tis the Season: Appellate Court Holds That Reasonable Assurance Letters Are Required Before Holiday Recess

Last week in the case of [Matter of Papapietro](#), (3d Dep’t Dec. 7, 2017), the Third Department of the New York State Appellate Division reversed the Unemployment Insurance Appeal Board’s prior holdings and ruled that individual reasonable assurance letters are required before a holiday recess in order to avoid potential unemployment insurance liability.

Under N.Y. Labor Law § 590(10), employees who work for educational institutions are precluded from receiving unemployment insurance benefits for “any week commencing during the period between” successive academic years or terms if the institution provides the employee with a “reasonable assurance” of continued employment. A reasonable assurance is a representation by the employer as to future employment, and is usually provided in the form of a letter or notice to the employee. In light of this, it is common practice for school districts to send out reasonable assurance notifications to employees to cover summer breaks.

Notably, Section 590(10) also contains a separate provision regarding the application of reasonable assurances for “any week commencing during an established and customary vacation period or holiday recess, not between such academic terms or years, provided the claimant performed services for such institution immediately before such vacation period or holiday recess.” The Unemployment Insurance Appeal Board historically held that an employer is not obligated to issue individual reasonable assurance letters regarding continued employment for the period immediately following a recess or vacation for substitute teachers so long as the substitute teacher was placed on a “priority list.” As such it has become common practice to place substitute teachers who have worked in the seven day period prior to the vacation or holiday on a priority list in order to ensure that they receive assignments during the week immediately following the vacation.

However, the Third Department’s decision held this practice is not sufficient and remanded the case back to the Board for a decision in accordance with its holding. In [Matter of Papapietro](#), a per diem substitute teacher worked three days in the week immediately prior to a holiday recess. The substitute teacher applied for unemployment insurance benefits during the recess due to a “lack of work.” The Department of Labor denied the substitute teacher’s claim for benefits based on a finding that he had received a reasonable assurance of employment after the recess because he had been placed on the District’s priority list. The Administrative Law Judge (ALJ) overruled the initial determination finding the substitute teacher had not received a reasonable assurance. The Unemployment Insurance Appeal Board then reversed the ALJ’s decision in favor of the District, finding that the District utilized a “programming preference” (which was found to be similar to a priority list), the substitute teacher’s name was placed on the preference list, and he was called twice for assignments in the week following the holiday.

In a surprising decision, the Third Department reversed the Board and held that no representation was made to the substitute teacher – *i.e.*, no reasonable assurance was given – regarding employment immediately following the recess. Despite the Board’s longstanding interpretation of Section 590(10), the Court held the plain language of the law is clear that individual reasonable assurances, in the form of a letter or other type of notice, must be supplied to employees for week-long vacation periods and holiday recesses.

Since substitute teachers are typically not covered by collective bargaining agreements or other employment contracts, it is those individuals who may be impacted by this decision. As a cautious approach, and until we have more guidance on this issue, school districts may want to consider sending out reasonable assurance letters for the upcoming holiday break to substitute teachers who have worked in the week immediately preceding the holiday break.

If you have any questions about this Information Memo, please contact [Christa Cook](#) or [Jacqueline Smith](#), or any of the attorneys in our [School Districts Practice](#) or [Higher Education Practice](#).



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