Employment Security Department
WASHINGTON STATE

CONCISE EXPLANATORY STATEMENT
(RCW 34.05.325(6))

Reasons for Adopting the Rule

These rules are being adopted to assist the Employment Security Department (Department) in the implementation of Substitute House Bill 2703 (Laws of 2018, ch. 97) and new federal guidance issued by the United States Department of Labor in Unemployment Insurance Program Letter (UIPL) No. 5-17 (Dec. 22, 2016) with regard to when educational employees are eligible for unemployment benefits within and between academic terms.

Variance Between Proposed Rule and Final Rule

The proposed rule defines educational institution to include "any public or private preschool, elementary school, secondary school, technical or vocational school, community college, college, and university." The final rule defines educational institution to include "any public or private preschool, elementary school, secondary school, technical or vocational school, community or technical college, college, and university." This change was made based on stakeholder feedback stating it was unclear whether the proposed definition of educational institution included technical colleges.

The final rule also adjusted some of the subsection numbering under WAC 192-210-015(4) to resolve a potential ambiguity regarding the criteria for when an educational employee has reasonable assurance.

Summary of Comments to First Set of Proposed Rules and Agency Response

Comments of Josh Sundt, Deputy Chief Administrative Law Judge, Office of Administrative Hearings

Comment 1: The rules are an overall improvement, eliminating the distinction between community/technical colleges and other types of educational institutions will be fairer, and the changes regarding reasonable assurance provide greater definition and transparency to how the issue is decided.

Comment 2: The Department should define the standard of proof "highly probable" using the definition contained in UIPL No. 5-17, § 4(c).

Response to Comment 2: The Department added a definition of "highly probable" to the second set of proposed rules.

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Comments of William Rudnick, Manager, Government Relations, Equifax Workforce Solutions

Comment 1: State of Washington Educational Service Districts are not educational service agencies "impacted by UIPL 18-78" and the Department should use a different definition of educational service agency, such as a definition proposed by Eileen Ahearn, or the definition contained in the Individuals with Disabilities Education Act and the No Child Left Behind Act.

Response to Comment 1: 26 U.S.C. § 3304(a)(6)(A)(iv) says states should not pay unemployment benefits to employees of "educational service agencies" who perform services in an educational institution when the employee has a contract or reasonable assurance of future work. RCW 50.44.050(4) echoes the language of the federal statute, except the Legislature used the term "educational service district which is established pursuant to chapter 28A.310 RCW." The Department interprets this statute as a deliberate choice by the Legislature to define Washington "educational service districts" as the equivalents of a federal "educational service agency." The Department therefore declines to utilize a different definition than the one adopted by the Legislature.

Comment 2: *In re Anderson*, Empl. Sec. Comm'r Dec. 1101 (1974) is no longer good law.

Response to Comment 2: Whether educational employees have a contract or reasonable assurance of future work was not at issue in *In re Anderson*, Empl. Sec. Comm'r Dec. 1101 (1974). Therefore, *Anderson* is not relevant to the proposed rules.

Comment 3: "Under paragraph 4 §3 in UIPL 5-17, the 90% threshold is the *wage* earned year to year, not the "wages earned" (total)" so the Department should do what Oklahoma did when it did its agency regulations.

Response to Comment 3: SHB 2703 § (1)(c) used the phrase "wages earned" when defining the term "considerably less." Since the Legislature used the term "wages" (plural), the Department also chose to use the term "wages" (plural) and not the term "wage" (singular). Furthermore, UIPL No. 05-17, § 4(a)(3) does not use the word "wage" or "wages," but instead uses the term "economic conditions."

Comment 4: The fiscal note the Department included with SB 2703 was "off the mark" and the Department's "changes for this matter is [sic] potentially impacting local property tax increases."

Response to Comment 4: The legislative fiscal note was written to provide the best projection of costs based on available information. While the Department is cognizant of the potentially increased costs to educational employers as a result of the federal guidance and state legislation, and notes those costs in the cost-benefit analysis, the Department has no control over how educational employers fund their increased costs.

Comment 5: The Department should change the terms "certified" [sic] and "classified" with "professional" and "non-professional" to align with the terms used in UIPL 5-17.

Response to Comment 5: The Department made the suggested change in the second set of proposed rules.

Comment 6: The Department should provide employers with a reasonable assurance letter template.

Response to Comment 6: The Department will consider the request but will not formally write a template into the rules.

Comments of Wendy Rader-Konofalski, Representative of American Federation of Teachers and AFT Washington

Comment 1: The Department's use of the terms "classified" and "certificated" is "misleading."

Response to Comment 1: The Department changed those terms to "professional" and "non-professional" in the second set of proposed rules to try to alleviate any potential confusion.

Comment 2: The Department should define "educational institution."

Response to Comment 2: The Department added a definition of "educational institution" in the second set of proposed rules.

Comment 3: Reasonable assurance should be defined as a "noncontingent offer of employment." The Department should use the language in the statute to define reasonable assurance. The "primary weight" language, as currently written in the rule, gets "hidden and swallowed up and seems to be a throwaway line." The Department should combine the second and third reasonable assurance criteria as they seem to be redundant.

Response to Comment 3: The Department cannot define reasonable assurance as a "noncontingent offer of employment" as it would be inconsistent with UIPL No. 5-17. The Department did make some adjustments to the reasonable assurance criteria in the second set of proposed rules to address the commenter's concerns.

Comment 4: The Department should 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."

Response to Comment 4: Under current law, the Department always makes the determination whether a claimant is eligible for unemployment benefits, subject to the right of administrative appeal. The Department views it as unnecessary to amend the rule to explicitly add the requested language.

Comment 5: WAC 192-210-010 (the "objective criteria used to define 'academic year'") should be specifically clarified so that it applies only to a "higher education institution" as the term "is only relevant to the CC/TC System."

Response to Comment 5: In SHB 2703, the Legislature simply moved the statutory definition of "academic year" from RCW 50.44.050(5) to RCW 50.44.050(6) without making any substantive changes. The proposed change to WAC 192-210-010 only reflects the change in subsection in the statute. The underlying statutes make no distinction between higher education and other types of educational employers when it uses the term "academic year." Therefore, the Department is declining to draw that distinction in rule.

Comment 6: Under WAC 192-210-060, it is a "huge injustice" that "classified employees" can receive retroactive payments while other educational employees cannot.

Response to Comment 6: Under 26 U.S.C. § 3304(a)(6)(A)(ii), the U.S. Congress allowed retroactive payments only to educational employees who do not work in an "instructional, research, or principal administrative capacity." The Washington Legislature, under RCW 50.44.050(2) only permitted retroactive payments to educational employees who do not work in an "instructional, research, or principal administrative capacity." The Department does not have the authority through rulemaking to eliminate a distinction made in both federal and state statute.

Summary of Comments to Second Set of Proposed Rules and Agency Response

Comments of Nancy Kennedy, Representative of AFT Washington (Comments seconded by Wendy Rader-Konofalski, Representative of Washington Education Association and Bernal C. Baca, Representative of AFT Washington)

Comment 1: It is unclear whether the definitions of "educational institution" includes technical colleges. "Community colleges" should be replaced with "community and technical colleges."

Response to Comment 1: The Department made the suggested change in the final rule.

Comment 2: Does the language "Section (7)(b)" refer to "roving nurses or counselor 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 be considered the same?"

Response to Comment 2: As the comment only seeks legal interpretation of the proposed rule, without requesting a particular change to the rules, the Department has no response.