

## Seasonal Work and Occupational Exclusions Overview

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### **Question: Do all employees falling within UI coverage rules have UI protection?**

**Answer:** No. There are a wide variety of statutory rules that exclude employees from UI programs. For example, most states have special rules regarding students. Federal law mandates that states exclude many categories of immigrant workers from UI. Professional athletes are largely excluded, again a mandate of federal law. Insurance and real estate agents are excluded in many states. For our purposes, discussion in the Toolkit is focused on limitations that impact large numbers of lower-wage workers and that have been the subject of ongoing legislative and administrative discussion.

In this section of the Toolkit, we will first discuss special rules that apply to seasonal workers in some states. We next discuss special federal-state rules that impact public school employees. These are known as the “between and within terms” school denial rules. Next, we cover specific state UI rules that, in effect, have expanded school denial rules to cover employees of private-sector contractors in Indiana, Georgia, Michigan, and Wisconsin. Based upon recent legislative activity on these subjects, we anticipate that further proposals will arise in other states in the coming years.

### **Question: What is seasonal work?**

**Answer:** Seasonal work involves jobs that exist for a specific time period, usually defined by the impact of weather or underlying business conditions on the business. For example, ski resorts operate in the winter and agricultural work is concentrated in the warmer seasons in many states. Construction and retail employers often have seasonal employees as well.

Seasonality provisions in state UI laws vary. Despite calls for seasonal exclusions by some employers, most states have no specific statutes or regulations outside of what is mandated by federal unemployment insurance law. As a result, seasonal employees draw UI benefits on the same basis as other employees in most states.

### **Question: How do states with UI seasonal restrictions determine which employers are seasonal?**

**Answer:** The first step in developing a seasonality provision requires that states define “seasonal.” Currently states with seasonality provisions rely upon one, or a combination of the following factors:

- Industry, employer, or occupation type;
- Length of employer operating period;
- Types of worker.

Industries generally receive seasonal classification based on the length of operation as defined by state laws. Employees in seasonal industries receive the same designation by fact of employment in that industry. However, some states have additional requirements for both industries/employers and workers affected by seasonal classifications. In

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some instances, employers must also verify that certain proportions of their workforce or payroll is reserved exclusively for a seasonal operating period. States may also require employees to earn specified amount of wages in seasonal work before drawing UI benefits during the designated seasonal period.

**Question: How many states have UI seasonal work laws?**

**Answer:** In 2015, 17 states (AZ, AR, CO, DE, IN, ME, MA, MI, MS, NM, NC, OH, PA, SC, SD, WV, WI) have seasonal work provisions. Tennessee has adopted a seasonal work provision that goes into effect in 2016.

Seasonality provisions remain an active area for proposed legislation. In 2011, 10 states introduced some type of seasonal work legislation. Most of the bills sought to implement a new law or amend an existing one. In Maryland, a bill was passed to formally study the issue. The one bill to successfully pass was in the state of South Carolina. That state passed legislation that makes it easier for employers, and their employees, to be classified as seasonal. Seasonal workers in South Carolina do not receive benefits during the off-season if there is a reasonable assurance of work at the beginning of the next season.

In most states with seasonal UI rules seasonal workers cannot draw UI benefits outside the “season” based upon wages earned during the season. Depending upon the specific work record of these individuals, this means they are not monetarily eligible for any benefits when laid off at the end of the season, or that they draw low weekly benefits based upon non-seasonal wages.

These seasonal work provisions vary greatly in terms of their definitions of seasonal work or occupations, their scope, and how they operate. Some are quite narrow. For example, New Mexico’s seasonal work provision only applies to ski area operators, while Mississippi’s excludes cotton ginning. On the opposite end of the scale, Ohio covers employers who operate up to 40 weeks a year, and South Dakota deems some employers seasonal so long as they operate for 7 months or less a year.

**Question: What is the basic argument about seasonal employment and UI?**

**Answer:** Because seasonal employment is not offered year round, seasonal workers typically experience unemployment during the “off season” period when their seasonal employers cannot offer them work. As a result, seasonal employers face higher unemployment insurance (UI) tax rates under “experience rating” mechanisms that raise UI payroll tax rates whenever former employees of a firm draw jobless benefits. However, because seasonal work by its nature is limited in duration (and states often have low taxable wage bases and modest maximum tax rates), seasonal employers’ payroll taxes do not fully compensate trust funds for UI benefits drawn by their employees. In effect, seasonal employers use off-season UI benefits to subsidize their limited labor utilization patterns. In response, some states have enacted seasonality provisions that limit seasonal workers’ ability to draw UI benefits during the off season.

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Since the early days of UI, seasonal work has been a subject of debate. The overall number of states with seasonality provisions has declined over the decades. According to Saul Blaustein, author of a leading UI history, during the beginning years of UI programs as many as 33 states adopted special laws limiting benefits for workers laid off from seasonal work. Blaustein said that these seasonal work limitations were motivated by fears that UI benefits paid to seasonal workers would be a drain on state trust funds and concerns that seasonal employers would face unduly high tax rates under experience rating. By 1971, more than half the states that had experimented with seasonality provisions had abandoned them. The number dropped to only 13 states with seasonality provisions in 1990.

**Question: What are the main arguments in favor of UI seasonal work laws?**

**Answer:** Saul Blaustein reports that early seasonal work limitations were motivated by fears that UI benefits paid to seasonal workers would be a drain on state trust funds and concerns that seasonal employers would face unduly high tax rates under experience rating. Similar concerns motivate contemporary advocates of seasonality provisions. Experience rating produces two related objections to seasonal work from employers. First, seasonal employers complain of their higher UI payroll tax rates. Second, non-seasonal employers complain about the degree to which they bear social costs for seasonal benefits that are not recovered directly from seasonal employers. While initially plausible, neither rationale for restricting UI benefits for seasonal workers holds up under serious scrutiny.

The objections of seasonal employers to higher costs are based upon the false assumption that since they are not “at fault” for seasonal work patterns, they should not bear higher costs related to that pattern of seasonal layoffs. However, experience rating is not based upon a concept of employer fault. In fact, the central rationale for experience rating is higher tax rates for employers that have laid off employees due to economic conditions. Proponents of experience rating do not characterize employers forced to lay off employees as bearing “fault” for those layoffs. But, under experience rating their UI tax rates increase without respect to their fault. If states wish to address limitations of experience rating directly, rather than putting new burdens on seasonal employees, they can do so by raising taxable wage base levels and increasing low maximum tax rates.

Objections to seasonal workers getting UI benefits arising from non-seasonal employers concern the fact that no experience rating mechanism captures 100 percent of costs, including those originating from seasonal employment. And, in the case of seasonal employment, this cost shifting is often even more prevalent than with layoffs from other types of employment. But, the fact that some social costs are created as part of a social insurance program is not a compelling reason for denying UI benefits to seasonal workers. Seasonal workers are involuntarily unemployed when laid off at the end of a season, no less so than those laid off by employers for other economic reasons. And, for this reason, limiting their rights to UI benefits is bad policy.

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Finally, it is worth noting that while the degree to which social costs are shifted to other employers is dictated by the experience rating mechanism created by each state law, 100 percent effective charging is neither practical nor desirable. Indeed, 100 percent experience rating would put some employers, both seasonal and non-seasonal, out of business. (For more details on [experience rating](#), see our discussion of this topic.)

**Question: What are the main arguments against seasonal work laws?**

**Answer:** Practical experience in the majority of states indicates that seasonality provisions are not necessary to deal with seasonal workers. Expert opinion agrees. The Advisory Council on Unemployment Compensation (ACUC, 1995), a Presidentially-appointed, bipartisan group that met from 1993 through 1995, studied state seasonality provisions. In its report, the ACUC recommended that states repeal seasonal work exclusions and subject seasonal employees “to the same eligibility requirement as all other unemployed workers.” (Page 18.) Saul Blaustein (1990) concludes his discussion of seasonal work with a similar recommendation as did Merrill Murray (1972). Weighing all these competing considerations, NELP believes that the best approach to state seasonality provisions is not having any specific seasonal work provisions.

In short, involuntary unemployment is what UI programs are primarily concerned with, and seasonal employment involves involuntary unemployment that should be compensated under UI programs. In some cases, employers are required to have seasonal employment patterns and they need to employ workers in those seasonal jobs. Limiting UI benefits to seasonal employees shifts too much of the burden of seasonal employment upon the employees, who are no more responsible for their seasonal unemployment than other laid off employees who are unquestionably eligible for UI benefits.

**Question: What are the special rules governing UI benefits for educational employees?**

**Answer:** Although federal law does not generally control state UI law on the overall question of covered employment, there are significant occupational exceptions mandated in federal law for educational employees. Federal law requires both coverage of public educational employees (K-12 as well as post-secondary employees) and the denial of UI benefits during customary vacations and breaks in the school calendar. This federal mandate results in special school denial rules in all state UI laws. In the UI field, these rules are known as the *between and within terms* denial provisions, or school denial rules.

The history and evolution of the school denial rules is key to understanding them. Prior to 1970, FUTA did not cover state and local government employees, including public education employees. Between 1970 and 1983, Congress passed a number of FUTA amendments that extended UI coverage to various public and nonprofit employees, including higher education and K-12 public school employees. As Congress extended FUTA’s reach, it also passed legislation that denied UI benefits to educational employees laid off during summer vacations or other customary school breaks. After

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1976, these amendments gradually expanded the scope of school denial rules. These provisions are now codified as 26 U.S.C. § 3304(a)(6)(A).

The intent of the school denial rules is to deny UI benefits to educational employees who are unemployed during school vacations or breaks, but who have “reasonable assurance” that they will return to work as soon as school resumes. Initially, the rules applied to administrators and tenured teachers, many of whom were paid on a 12-month basis. However, Congress soon expanded the rules to cover non-professional public school employees for both higher education and K-12 employers, including educational service agencies. Ultimately, six clauses of Section 3304(a)(6)(A) were put in place.

As a practical matter, Congress’ motivation for passing the expanded school denial mandates was avoiding the expense of paying UI benefits to school employees during summer breaks. Since public educational entities are reimbursing employees, they are billed directly for any benefits paid to former employees. Although Congress wished to bring these employees within the scope of UI, at the same time it did not wish to saddle these employers with new obligations.

The main legal controversy regarding the application of the between and within terms denial rules involves the meaning of “reasonable assurance.” A considerable body of state case law has developed about meaning and application of the between and within terms school denial rules. This state case law is consistent with the U.S. Department of Labor’s broad interpretation of reasonable assurance and its longstanding resistance to state limitations on reasonable assurance. The Department’s broad interpretation of reasonable assurance has been reflected in many UI program letters through the years.

In 1992, Congress made certain clauses of the federal school denial rules optional for purposes of federal law. The 1992 changes mainly permit states to pay UI benefits to non-professional employees. They also give states some additional flexibility regarding denial periods and placing restrictions upon reasonable assurance requirements for employees subject to the optional denials (Labor Department, 1993). No state has acted to lift school denial rules for school employees covered by the denial rules since Congress gave them this option. This lack of action by states again most likely falls back on concerns by public educational entities about the costs of providing UI benefits to employees during school breaks.

As a result of these developments, educational occupations like school bus drivers, cafeteria workers, adjunct faculty, and classroom aides are denied UI during summer vacations and school breaks. These non-professional educational employees are usually not paid on a 12-month basis and they would work during school vacations if work was made available to them. Ideally, a distinction between employees paid on an annual basis who have tenure or another tangible assurance of reemployment should have benefits denied during summer breaks. However, non-professional employees who are paid monthly or hourly are without income and would work during school breaks if work was available. Denying benefits to these individuals is unjust and a cause of significant hardship. Other than outright repeal at a state level, which is politically unlikely, there is no good solution for these workers other than Congressional action.

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A partial solution which remains within state discretion is paying retroactive claims for employees who are not hired the next school session despite receiving reasonable assurance. Retroactive payments are explicitly authorized by federal law, but much more could be done to ensure that affected employees know about these rules and that mechanisms for filing retroactive claims are easily accessible.

**Question: How are special seasonal work rules developed for public school employees laid off during summer vacations and school breaks getting applied to private sector employees?**

**Answer:** Because employees of private contractors providing services to K-12 and post-secondary educational institutions have private employers subject to UI payroll taxation, they should not be subject to special rules that apply only to school employees laid off during school breaks and vacations. By their own terms, the school denial rules only apply to public educational entities and non-profits providing services to public educational entities.

Starting in 2011, state-level efforts emerged to extend the “between and within terms denial rules” mandated by federal law from public school employees to private-sector employees who are working for firms who have contracted with schools to provide services (for example, cafeteria workers, school bus drivers, crossing guards, etc.). Since employees of these private firms have similar layoff patterns during breaks in the school year, advocates of more restrictive rules argue that the same school denial rules should apply.

Two approaches expanding school denials to private employers have become law. First, in Georgia, the legislature statutorily extended its school denial rules to employees of private contractors. The legislation, effective in 2015, amends Georgia’s school denial rules to include private employers contracting to provide services to educational entities. Georgia Code Sec. 34-8-196(b)(1)(B). Second, Indiana amended its definition of “unemployed,” which is a condition of eligibility, to exclude individuals on an “unpaid vacation,” an Orwellian concept. Instead, if employees are out of work because of a vacation period and have a reasonable assurance of returning to work, they are deemed “not unemployed.” Indiana Code Sec. 22-4-3-5. These amendments took place in 2011 and 2012. In addition to these provisions, Wisconsin and Michigan have specific amendments applying to private school bus contractors.

**Question: What are the arguments against extending school denial rules to employees of private contractors?**

**Answer:** Extending school denial rules to non-public employees ignores the fact that the mandated school denial rules were designed for public and nonprofit agencies—who do not pay UI payroll taxes, but instead reimburse trust funds directly for any benefits paid to their employees. In addition, these rules were developed in reaction to teachers and others with an assurance or reemployment drawing UI benefits during summer school vacations. For this reason, school denial rules have no proper applicability to

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for-profit, non-educational employers whose employees are subject to experience-rated taxes and whose employees are typically “at will” employees.

School contractor employees generally work as much as 39 weeks a year, and to advocate special seasonal treatment for these involuntarily jobless workers goes well beyond the normal scope of seasonal work provisions. Their wages are subject to UI payroll taxes, and, since employers have paid premiums on those wages, they should be insured when laid off.

**Resources:**

- Advisory Council on Unemployment Compensation, Unemployment Insurance in the United States: Benefits, Financing, Coverage (February 1995), [http://workforcesecurity.doleta.gov/dmstree/misc\\_papers/advisory/acuc/February\\_1995/adv\\_council\\_0295.pdf](http://workforcesecurity.doleta.gov/dmstree/misc_papers/advisory/acuc/February_1995/adv_council_0295.pdf).
- Saul Blaustein, Unemployment Insurance in the United States: The First Half Century. (Upjohn Institute (1993).
- Merrill G. Murray, The Treatment of Seasonal Unemployment Under Unemployment Insurance (Upjohn Institute, 1972).
- U.S. Department of Labor, “Optional Between and Within Terms Denial Provisions of Section 3304(a)(6)(A) of the Federal Unemployment Tax Act,” Unemployment Insurance Program Letter No. 43-93, (April 23, 1993), [http://workforcesecurity.doleta.gov/dmstree/uipl/uipl93/uipl\\_4393.htm](http://workforcesecurity.doleta.gov/dmstree/uipl/uipl93/uipl_4393.htm).