

DEFENDING AGAINST UNEMPLOYMENT INSURANCE CLAIMS

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AGENDA

- Determining eligibility for UI benefits
- Disqualification of eligible employees
- Mechanics of a claim for UI benefits

DETERMINING ELIGIBILITY FOR UI BENEFITS

- Employee eligibility
- Chargeable employer

EMPLOYEE ELIGIBILITY

- Earned wages
- Unemployed
- Vacation/severance pay
- Underemployed
- Employee/Independent Contractor – be careful, could trigger an audit!

EMPLOYEE ELIGIBILITY – “EARNED WAGES”

- AZ – (1) EE must have earned 390 times the AZ minimum wage (\$3,900) in the highest earning quarter and the total of the other three quarters must equal at least one half of the amount of the highest quarter; or (2) EE must have earned at least \$7,000 in total wages in at least two quarters of his/her base period (12 months), with wages in one quarter equal to \$5,987.50 or more
- CA – (1) EE must have earned at least \$1,300 in the highest quarter of his base period; or (2) EE must have earned at least \$900 in the highest quarter and earned total base period earnings of at least 1.25 times the high quarter earnings
- IL – EE must have earned at least \$1,600 during base period

EMPLOYEE ELIGIBILITY – “EARNED WAGES”

- MI – (1) EE must have earned at least \$2,871 during one quarter of the base period, and earnings during the base period must be at least 1.5 times higher than the wages earned in the highest paid quarter; or (2) EE must have made at least 20 times the state’s minimum wage during the entire base period. Current minimum wage is \$17,868.
- PA – (1) EE must have earned at least \$116 per week during the last 18 weeks in the base period; (2) EE must have earned at least \$1,688.00 during the highest quarter in the base period; and (3) EE must have earned at least \$3,391 in total wages during the base period
- DC – Uses a 12-month base period. EE must have earned at least \$1,300 in wages in at least one quarter and least \$1,950 in total wages for the entire 12-month base period. Additionally, the wages for the entire base period must be at least 1.5 times the highest quarter or be within \$70 of that amount.

EMPLOYEE ELIGIBILITY – “UNEMPLOYED”

- Suspension without pay – be careful!
- Voluntary termination/resignation
- Retirement

EMPLOYEE ELIGIBILITY – “VACATION PAY”

- AZ – Unemployment benefits reduced if an EE receives vacation pay upon separation that is less than EE’s weekly benefit amount (“WBA”). However, if vacation pay exceeds WBA, EE is ineligible for benefits
- CA – If EE is **not** given a definite date to return to work, any vacation pay paid upon separation is not deducted from EE’s weekly benefit amount. If EE is given a definite date to return to work (*i.e.* laid off with RTW date), any vacation pay for the period of the temporary layoff is deductible from EE’s unemployment benefits

EMPLOYEE ELIGIBILITY – “VACATION PAY”

- IL and DC – EE separated and/or laid off from employment is ineligible to receive benefits for any week in which he receives payments made in connection with a layoff or separation that are in the form of vacation pay and equal or greater to weekly benefit amount
- MI – If vacation pay vests within 14 days of the vacation and the employer allocates the vacation pay to a specific week or weeks, it may be used to reduce benefits
- PA – Vacation pay that is more than an EE’s partial benefit credit are deducted from an EE’s unemployment benefits for the week in which the vacation occurs. However, vacation pay is not deducted if the EE has permanently or indefinitely lost his/her job

EMPLOYEE ELIGIBILITY – “SEVERANCE PAY”

- Amounts paid to an employee for past services rendered to the employer, or to an employee for pension or seniority rights lost upon separation
- Depends on the state, if severance pay is considered wages (disqualifying income)
 - AZ – Unemployment benefits reduced if an EE receives severance pay upon separation that is less than EE’s weekly benefit amount. However, if severance pay exceeds weekly benefit amount, EE is ineligible for benefits
 - CA and IL – Severance pay is not deducted from unemployment insurance benefits and does not affect an EE’s eligibility to receive benefits. Status as severance not altered if the payments are made periodically instead of a lump sum.

EMPLOYEE ELIGIBILITY – “SEVERANCE PAY”

- MI – Counts severance pay as wages that may reduce unemployment benefits. *E.g.* If severance equals or exceeds 1.5 times WBA, then the EE is not entitled to benefits. If severance is greater than the WBA, but less than 1.5 times the WBA, then the full amount of severance is subtracted from 1.5 times the EE’s WBA.
- PA – Counts severance pay as wages that may reduce unemployment benefits. Severance pay received by an EE that exceeds 40 percent of PA’s average annual wage is deducted from the EE’s unemployment compensation.
- DC – If severance pay is made in installments, EE will be ineligible for the period for which such payments are made. If severance pay is made in a lump sum but attributable to a specific period, EE will be ineligible for that specific period. If severance pay is made in a lump sum and not attributable to any specific period, EE will be ineligible for the week in which the lump sum payment is made.

EMPLOYEE ELIGIBILITY – “FULL-TIME AND PART-TIME”

- In most states, an individual is ineligible for benefits for any week in which he performs full-time work, regardless of whether the amount of wages received during that week equal or exceed the WBA because the individual is not considered unemployed
- Part-time employment may not render the EE ineligible for unemployment; varies by state
 - AZ – Any part-time work in which an individual makes over \$30.50/week will be deducted from the weekly benefit amount
 - CA – Partial benefits may be received for part-time work. If a person’s regular wages minus \$25 or 25% of those wages (whichever is more) is less than he is receiving from an unemployment benefit, then the person is still considered unemployed and may receive unemployment benefits
 - IL – If an EE’s part-time earnings are less than his WBA, the EE can receive reduced benefits

EMPLOYEE ELIGIBILITY – “FULL-TIME AND PART-TIME”

- MI – Unemployment benefits may still be collected for part-time work so long as the part-time wages plus the WBA are not greater than 1.5 times the WBA
- PA – Partial benefits may be awarded for part-time employment. If the part-time wages are not greater than partial benefit credit, then the WBA will not be reduced. If they are greater than the partial benefit credit, the amount that exceeds the partial benefit credit will be reduced from the benefits for that week.
- DC – Partial benefits may be awarded for part-time employment. The amount is determined by first adding \$20.00 to the WBA, then subtracting 80% from the gross weekly wages

EMPLOYEE ELIGIBILITY

- Generally, no hours requirement needed for a claimant to be eligible for benefits
- In most states, an individual can receive up to 26 weeks of state unemployment benefits
 - This is also true of Arizona, California, Pennsylvania, and DC
 - Michigan only allows state unemployment benefits for up to 20 weeks

WEEKLY BENEFIT AMOUNT

- Arizona
 - Maximum WBA is \$240
- California
 - Maximum WBA is \$450
- Illinois
 - Maximum WBA \$613 (w/child); Individual \$449
- Michigan
 - Maximum WBA is \$362 w/dependents
- Pennsylvania
 - Maximum WBA is \$573, plus \$8 per week for each dependent
- Washington, DC
 - Maximum WBA is \$425

CHARGEABLE EMPLOYER

- The employer whose account will fund the unemployment compensation benefits
- IL and DC – The last employer with whom the employee worked for 30 days. The 30 days do not have to be consecutive. A “day” is considered any day in which compensable services are actually performed for the employer
 - Paid sick days, vacation days, holidays, or other non-working days (“show up” or stand-by pay days) are not counted toward 30-day requirement
 - Arizona, California, Michigan, and Pennsylvania do not have a 30-day requirement. The claimant must merely meet the threshold requirements for eligibility.

DISQUALIFICATION OF ELIGIBLE EMPLOYEES

- Discharge for misconduct
- Specific cases and problems involving misconduct
- Voluntary termination
- Specific cases involving voluntary terminations
- Refusal of work
- Able and available for work
- Practice tips

DISCHARGE FOR MISCONDUCT

- Definition of misconduct
 - Misconduct is defined as the deliberate and willful violation of or gross negligence involving a reasonable rule or policy of the employing unit, governing the individual's performance of his work, provided such violation has harmed the employing unit or other employees or has been repeated by the employee despite a warning or instruction

ELEMENTS OF “MISCONDUCT” DEFINITION

- Deliberate and willful violation
 - Question is whether the employee *intended* to do the act that caused the harm
 - *Intentional* misconduct does not include inefficiency, accidents, normal negligence, or errors in judgment when made in good faith

ELEMENTS OF “MISCONDUCT” DEFINITION

- Gross negligence
 - *Non-intentional* conduct
 - Examples:
 - Intoxication (drugs or alcohol) at work
 - Repeated absences
 - Falsification of employment application
 - Damaging employer’s property
 - Dishonesty

ELEMENTS OF “MISCONDUCT” DEFINITION

- Of a reasonable rule or policy of the employing unit
 - The rule or policy does not have to be written (but should be) or even articulated where the behavior violates a rule or policy that is self-evident (“common sense” rule, e.g., sexual harassment)
 - But proof of a rule or policy is required where an employee would not be aware that certain conduct is proscribed

ELEMENTS OF “MISCONDUCT” DEFINITION

- Governing the individual’s behavior in the performance of his work
 - If an employee violates a rule that does not govern the behavior of the employee in his work performance, may not be misconduct, even though the employer may feel the conduct is contrary to its interests
 - Off-duty actions that materially jeopardize the public’s perception of the employer’s services or a claimant’s ability to properly and fully carry out his duties, such as committing a felony in connection with the employee’s work

ELEMENTS OF “MISCONDUCT” DEFINITION

- Violation that harms the employing unit or other employees
 - The phrase “harm” includes, but is not limited to:
 - Generally, no *actual damage* is required for an employee to meet “misconduct” standard
 - Employers, therefore, do not necessarily have to present evidence of a specific tangible harm, but rather, the existence of an actual or potential harm that can be *presumed from the circumstances* may be sufficient
 - Other damage or injury to other employees’ well-being or morale or to the employer’s property, operations, or goodwill

ELEMENTS OF “MISCONDUCT” DEFINITION

- Violation that is repeated after a specific warning or instruction
 - Always good practice to have documented at least one prior written warning/counseling because a misconduct finding may be premised on an employee’s cumulative rules violation
 - Generally, however, stay away from laundry list of unrelated incidents
 - “Final incident is what matters!”

INSUBORDINATION

- The refusal to perform a job or work function as directed by a supervisor
- Refusal to obey an employer's reasonable and lawful instruction likely rises to "misconduct," unless the refusal is due to the lack of ability, skills, or training for the individual required to obey the instruction or the instruction would result in an unsafe act
- Being argumentative in a conversation with a supervisor, even in a loud voice, generally is not misconduct. The critical component is whether there is a disregard of the employer's interests
- However, choosing to "have it out" with your supervisor in front of other employees may rise to misconduct because the words are considered insubordinate in that they violate expected behavioral standards

JOB PERFORMANCE PROBLEMS

- Poor work performance, such as inefficiency or failure to perform to the employer's expectations because of inability or incapacity, inadvertence, skill or ordinary negligence generally is not misconduct
- "Stupidity" is not misconduct (your fault for hiring)

JOB PERFORMANCE PROBLEMS

- If the performance fails to improve after repeated counseling and repeated harm caused to the employer, the result may be different. May establish “intentional” and/or “grossly negligent” element
- Be sure to reinforce the notion that continued poor performance will result in harm
- The risk to the employer, the knowledge of that risk by the employee, coupled with efforts to assist and re-train the employee are crucial components to the difference between discharge for poor performance (eligible for benefits) and discharge for misconduct (ineligible for benefits)

ATTENDANCE OR TARDINESS

- Generally, attendance or tardiness is not misconduct if:
 - The claimant has a good reason for being absent and notifies the employer
 - The claimant has a good reason for not doing so because of something out of the EE's control (e.g., babysitter cancelled at the last minute)
- However, attendance or tardiness may be considered misconduct if:
 - *Knowing*, repeated violation of an attendance policy that is in *compliance with state and federal law* following a written warning for an attendance violation
 - The employee could have avoided being absent or tardy
 - The employee fails to notify the employer when he/she could have done so

ATTENDANCE OR TARDINESS – PRACTICE TIPS

- Issue written warnings for every attendance and tardy violation
- On the final warning, specify that pursuant to policy, the EE must provide documentation upon returning to work to verify any further absence, tardiness or leaving early. Failure to provide this documentation could result in termination due to insubordination

VOLUNTARY TERMINATION

- For an individual's separation from work to be a voluntary, the individual must have the option to remain employed
- The separation is an involuntary discharge if the individual does not have the option to remain employed
- Employee submits two-week voluntary resignation, employer tells employee to leave immediately. Employee likely eligible for two weeks of benefits

VOLUNTARY TERMINATION

- Examples:
 - The individual is told that he will be discharged because of insubordination. However, in order to avoid having a discharge on his record, he is given the option to resign voluntarily, which he accepts. This separation is likely not a voluntary separation because the individual does not have the option to remain employed.
 - The employer tells the individual that his position has been eliminated, but a similar position with the same pay is available. The employee leaves rather than accept the new position. This is likely a voluntary separation.
 - Employer hires an individual for a part-time, temporary project and tells the person at the outset that the job will end in two months. Once project is completed, the individual files for benefits. Likely, an involuntary separation because the person did not have the option to remain employed.

VOLUNTARY TERMINATION

- An individual has **good cause** for leaving work when there is a real and substantial reason that is **attributable to the employer** and that would compel a **reasonable person** who was genuinely desirous of remaining employed to leave work and the employee has provided the **employer with a reasonable opportunity to resolve** the issue prior to leaving, when such effort is possible
 - Arizona (15 days), California, Michigan, Pennsylvania, and Washington DC all have similar voluntary termination exceptions
 - Washington DC does not have a notice requirement
- Example:
 - An individual's paychecks are repeatedly returned due to insufficient funds, despite the individual's numerous complaints to his employer. Upon having another paycheck returned due to insufficient funds, the individual resigns. The individual likely has good cause for leaving

VOLUNTARY TERMINATION

- To be attributable to the employer, the reason for leaving also must be within the control of the employer. Situations attributable to an employer, include but are not limited to a substantial and unilateral modification of the employee's
 - working conditions
 - duties and responsibilities
 - reasonable expectations associated with the job position

VOLUNTARY TERMINATION

- Examples:
 - When hired, the individual commuted five miles each way to work. The employer then relocates to a town more than 100 miles from the EE's residence, causing a substantial increase in the EE's commuting time. As a result, the individual leaves his job. The individual has good cause for leaving.
 - The individual relocates to a town more than 150 miles from his job. Because the commute would take more than two hours each way, the individual resigns. The individual's reason for leaving is not attributable to the employer because the employer had no control over where the EE chose to live.

VOLUNTARY TERMINATION – EXCEPTIONS

- Leaving work after having been deemed physically unable to work by a physician or leaving work upon the advice of a licensed physician to care for a spouse, child, or parent (must present doctor's note)
- Leaving work due to domestic violence
- Accepting other unsuitable work (trial period, less than 30 days)
- Because, due to a change in location of employment of the individual's spouse, the individual left work to accompany his or her spouse to a place from which it is impractical to commute or because the individual left employment to accompany a spouse who has been reassigned from one military assignment to another
- Despite EE “voluntarily leaving, and reason not being attributable to employer, EE will be deemed “eligible,” but employer’s account likely won’t be charged

ABLE AND AVAILABLE

- EE must be able to work and be available for work to be eligible for benefits
 - **Able** – EE must be physically and mentally able to perform work
 - **Available** – EE must be ready and willing to accept suitable work
- A temporary removal from the labor market due to incarceration, vacations, or school attendance may also adversely impact availability
- Jury duty – possible exception, if more than a week

REFUSAL OF WORK

- Refusing either to apply for available, suitable work when so directed by the Department of Employment Security or to accept suitable work, may result in a disqualification of benefits
- However, the following are considered “acceptable” reasons for rejecting suitable work:
 - Significantly lower wages or skills
 - Safety or other potential hazards
 - Other “good cause” factors

PRACTICE TIPS FOR ESTABLISHING DISQUALIFYING EVENTS

- Documentation of warnings, suspensions, and terminations:
 - List the violation of the rule or policy; do not use general statements such as insubordination, attitude, poor work, or lack of performance
 - Time and date of violation
 - State facts of violation; do not make general statements, personal comments, or bring in additional issues
 - Document the employee's reason for the rule or policy violation
 - Give the employee an opportunity to read, sign, and make comments on the document
 - If the employee refuses to read, sign, and make comments, then have a witness sign the form that the employee refused to sign

MECHANICS OF A CLAIM FOR UI BENEFITS

- Notice to employer from the Department of Employment Security
- Challenges by employer
- Written determination
- Telephone hearing
- Appeal to Board of Review and Circuit Court

NOTICE TO EMPLOYER FROM IDES

Illinois Department of Employment Security

www.ides.illinois.gov



Date Mailed: [REDACTED]

Reply Due Date: [REDACTED]

Notice of Claim to Chargeable Employer

[REDACTED] has filed a claim for Unemployment Insurance benefits effective 07/14/2013.

Date of Claim: [REDACTED]

Benefit Year Begin Date: [REDACTED]

Claimant Resides In: [REDACTED]

Claim Type: [REDACTED]

Program: Regular

Dependent: [REDACTED]

Last Day Worked: [REDACTED]

Reason for Separation: [REDACTED]

State Worked In: [REDACTED]

The wages shown represent earnings the claimant received from you during the base period. A worker's base period consists of the first four of the last five completed calendar quarters immediately preceding the month in which the benefit year begins. The alternate base period is the last four completed calendar quarters immediately preceding the benefit year.

Benefit Year Begin Date: [REDACTED]

Total Base Period Wages: [REDACTED]

Base Period Qtr: 2

Base Period Year: 2012

Wages: [REDACTED]

Base Period Qtr: 3

Base Period Year: 2012

Wages: [REDACTED]

Base Period Qtr: 4

Base Period Year: 2012

Wages: [REDACTED]

Base Period Qtr: 1

Base Period Year: 2013

Wages: [REDACTED]

You are the Chargeable Employer. Unless you request reconsideration of your chargeability by [REDACTED] this decision will become final.

CHALLENGES BY EMPLOYER

- A protest or challenge filed by an employer triggers the employer's right to receive an Adjudicator's Determination as to the claimant's eligibility for benefits
- A protest should contain the name, job title, and telephone numbers of any person having first-hand knowledge or information supporting the protest
- The ability to make successful protests regarding disqualification issues requires a strong familiarity with all of the different grounds for disqualification

CHALLENGES BY EMPLOYER

- Protests asserting only general conclusions of law may be deemed insufficient, and the protest likely will be disregarded
 - Unacceptable conclusions of law:
 - “The claimant quit.”
 - “The claimant is not available for work.”
 - “The claimant was fired for misconduct.”
 - “The claimant has another job.”
- The reasons supporting the protest must be factual, not conclusory in nature

CHALLENGES BY EMPLOYER

- Acceptable statements of supporting facts:
 - The claimant stormed into my office on 8/6/17 at 10:30 a.m. and told me to “take this job and shove it!”
 - The claimant was terminated for excessive tardiness. He was tardy on [] because he overslept and had been warned on [] that the next time he was late for oversleeping he would be terminated
 - The claimant is unavailable for work because he has enrolled as a full-time student at Marquette University
 - The claimant voluntarily quit her employment because she informed us that she wanted to spend more time with her two children

CHALLENGES BY EMPLOYER

- If an employer anticipates a challenge to a UI claim, the employer should begin gathering and assessing all relevant information as soon as possible, preferably before receiving a Notice of Claim
 - The policy or rule that was violated; all documented suspensions, warnings, counseling and coaching forms; performance improvement plans; and termination notice; and statements from individuals with first-hand knowledge

CHALLENGES BY EMPLOYER

- DES Adjudicators greatly appreciate a well-organized package of information and material that supports a protest
- The key here is “well-organized”
- Bad strategy:
 - DES Adjudicators receive bundles of information, in no particular order with the expectation that they will “sort through it”
- Good strategy:
 - A well-organized presentation makes the DES Adjudicator’s job easier

WRITTEN DETERMINATION

- Following an investigation, assessment of the claim and review of information provided in support of a protest, the Adjudicator generally will issue a written Determination
- The decision should describe the factual and legal basis underlying the Adjudicator's written Determination
- A claimant can appeal the Adjudicator's Determination to an DES Hearing Referee within a certain time frame (30 or 15 days) after the Determination was mailed or hand delivered to the parties

TELEPHONE/IN-PERSON HEARING

- The telephone/in person hearing is scheduled fairly soon after an Adjudicator's Determination
- This is the time to submit all the evidence needed to support your position
 - Generally, the claimant and Hearing Referee must receive all evidence you may conceivably use to support your position at least 24 hours before the telephone/in-person hearing, otherwise it may not be admitted during the telephone/in-person hearing and excluded from the record on appeal
- However, while all documents may be admitted and incorporated into the record, they may be given little or no “weight”

TELEPHONE/IN-PERSON HEARING

- During the telephone/in-person hearing, matters of witness credibility or believability are left to the discretion of the Referee
- Do not rely on second hand testimony, *i.e.*, “hearsay.” All relevant individuals with first hand information should be present and available to testify. Do not duplicate testimony.
- Once the Hearing Referee’s decision is issued, it becomes a guide for any basis to appeal to the Board of Review, upon an adverse finding

APPEAL TO BOARD OF REVIEW AND CIRCUIT COURT

- Set time from to appeal from “date mailed” as noted on the Hearing Referee’s decision to appeal to the Board of Review
- On appeal to the Board of Review, a party can argue against the factual findings as well as the manner in which the facts were applied to the law. You can also argue that the decision applied the wrong law.
- Judicial Review from the Board of Review to the Circuit Court – set time after the receipt of Board of Review’s decision

QUESTIONS?



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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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