

Title Page

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# Massachusetts Unemployment Advocacy Guide

## About MLRI and GBLS

The Massachusetts Law Reform Institute (MLRI) is a statewide nonprofit legal services organization whose mission is to advance economic, racial, and social justice through legal action, education, and advocacy. MLRI specializes in large-scale legal initiatives and systemic reforms that address the root causes of poverty, remove barriers to opportunity and promote economic stability for low-income individuals and families. For over 50 years, MLRI has been the backbone of the Massachusetts civil legal aid system and is considered one of the premier impact advocacy and poverty law support centers in the country.

Greater Boston Legal Services (GBLS) is the primary provider of basic civil legal assistance to approximately one-third of the state's low-income individuals. Its service area includes 32 cities and towns that constitute all of Suffolk and a significant portion of Middlesex, Norfolk, and Plymouth counties. The program's mission is to provide high-quality legal assistance in a wide range of poverty law matters including housing, elder, and family, welfare, health, disability, consumer, immigration and employment law. In addition, GBLS provides services in immigration cases on a statewide basis. GBLS's Employment Law Unit (EU) represents clients in unemployment insurance appeals, wage-and-hour claims, and tax controversies, as well as clients who have criminal records or other barriers to gaining jobs and job-related benefits. EU also represents individual and community-based organizations in systemic policy campaigns concerning UI, wages, and work-connected benefits such as earned sick time and paid family and medical leave and includes a new focus on individuals in the Asian community.

## Acknowledgments

This Guide is the work of many advocates besides authors Monica Halas and Brian Flynn of GBLS and Margaret Monsell of MLRI. Much of the content builds on significant contributions to prior versions by Patti Prunhuber, formerly of Legal Assistance Corporation of Central Massachusetts; attorneys Peter Benjamin, Andrew Kisselof, Vida Berkowitz, Shoshana Erlich, current and former staff of the GBLS Employment Law Unit—Cyndi Mark, Audrey Richardson, Leonor Suarez, Jennifer Tschirch—and Allan Rodgers, formerly of MLRI. We are grateful to Talia Gee of the Central West Justice Center for past case suggestions and to GBLS's Brian Flynn for case suggestions and for his outstanding work on behalf of Limited English Proficient claimants. We also wish

to acknowledge the helpful discussions of UI practice made by the members of the Massachusetts Employment Lawyers Association.

Research for and edits of the current guide were contributed by GBLS Americorps Fellow Julia Fissore-O’Leary, Paralegal Nourhan Tomoum and Harvard Clinical student Ruofei Qu, and Boston University School of Law student Chris Hamilton. The authors also appreciate contributions made by Peter Benjamin, Litigation Director, Community Legal Aid and the analysis of the new Adjudication Handbook by Melissa Pomfred, private practitioner and Jim Rowan, Director of the Northeastern University School of Law Clinical Programs. The Massachusetts Bar Foundation provided funding for GBLS’s work on the Guide, and the staff of the Massachusetts Continuing Legal Education, Inc., produced the Guide.

The Guide is informed by contributions of the members of the Employment Rights Coalition (ERC), which includes employment practitioners in both legal services and private practice and is led by Peter Benjamin at Community Legal Aid. ERC’s advocacy has encompassed administrative and legislative advocacy and litigation in both individual cases and in declaratory and class actions. These efforts have produced significant improvements in the unemployment insurance system, especially for low-wage workers, workers with children, workers with disabilities, workers without health insurance, and workers who survive domestic violence.

Moreover, ERC has benefited from partnering with numerous effective allies, including the advocates at Eastern Regional Legal Intake (ERLI) who provide intake and referral services for countless claimants; the National Employment Law Project, whose partnership has been instrumental in securing rights for unemployed workers at both the federal and state levels; and our friends in the community and in labor—the Chinese Progressive Association, which has been a driving force for the fair treatment of non-English-speaking claimants; and the Massachusetts AFL-CIO, the Massachusetts Building Trades Council, and the UAW Massachusetts CAP Council—who help to provide an effective voice at the State House for workers. This year, we also thank allies in the Legislature, especially the Chairs of the Joint Committee on Labor and Workforce Development, Senator Patricia Jehlen and then Representative (now Mayor) Paul Brodeur and their wonderful staff, as well as Senator Cindy Friedman for sponsoring legislation to improve access for unemployed workers with fluctuating work schedules to UI benefits to participate in training and Representative Ken Gordon for sponsoring this bill in the House. We also thank Senator Friedman and

Representative Gordon for their work in advocating for improved regulations that expand access to extended UI benefits to participate in training.

Advocates are also directed to *Your Rights on the Job*, by Robert M. Schwartz, an excellent and comprehensive guide to employment laws in Massachusetts. It is available through the Labor Guild of Boston, 66 Brooks Drive, Braintree, MA 02185 or [www.laborguild.com](http://www.laborguild.com).

This Guide is dedicated in memoriam:

To Senator Edward M. Kennedy of Massachusetts, an unequalled champion of the American worker. His legislative achievements include not only significant improvements to the unemployment insurance system, increases to the minimum wage, a better workforce-development system, and family leave legislation, but also a legacy of fighting to improve living standards, expand economic opportunities, and provide health care for every American. His leadership is irreplaceable, but, as he said so fittingly, “the work begins anew, the hope rises again, and the dream lives on.”

To T. Richard “Rick” McIntosh of South Coastal Counties Legal Services, a dear friend and colleague to members of the Employment Rights Coalition and an important contributor to earlier versions of this Guide. During the course of his 40-year career, Rick worked tirelessly to improve the lives of low-income families in Massachusetts. He advocated for thousands of families and individuals facing a wide range of legal challenges, including issues related not only to unemployment but also to health care, disability, nutritional assistance, and housing. His generosity of time and his sound judgment on issues affecting low-income communities will be sorely missed.

To Kenneth J. Donnelly, Senator from the Fourth Middlesex District and the Senate Chair of the Joint Committee on Labor and Workforce Development, whose contributions to the state’s workplace laws, including our Unemployment Insurance statute, have made the state a better place for working families and whose compassion for the plight of poor people has made the state a better place for us all. We redouble our efforts in his memory.



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# Introduction

This Guide is intended to answer questions about applications, eligibility, benefits, and appeals in the unemployment insurance (UI) process, which in Massachusetts is operated by the Department of Unemployment Assistance (DUA). It contains citations to relevant employment statutes, regulations, and case law as well as to policies, practical information, and exhibits useful to those navigating the system. It aims to assist advocates through the maze of laws and regulations and to provide advocates with the tools necessary to help unemployed workers obtain the UI to which they are legally entitled.

We strongly encourage legal services programs, as well as other advocates, to offer representation to low-income claimants in unemployment cases. UI is a crucial income support program for people who have lost their jobs, and representation at a UI hearing significantly increases the claimant's ability to prevail. An unrepresented claimant is at a distinct disadvantage without legal assistance: a UI hearing may very well be the claimant's first experience with the legal system, and, unlike the employer, the claimant will often not have access to employment records or know how to cross-examine a former employer.

The need for UI advocates has increased, as fewer workers have job security ensured by collective bargaining agreements or statutory protections such as antidiscrimination laws. Lacking job security safeguards, these workers are now more vulnerable to periods of job loss and are often entirely dependent on UI for income support. As employers continue to contest their former employees' claims to UI; and following the introduction of an English-only UI Online System (see **Question 1**) -advocacy on behalf of all claimants including Limited English Proficient claimants (see **Question 52**) remains urgently needed. For problems with systems requiring computer access in the UI program and generally, see National Unemployment Law Project, *Closing Doors on the Unemployed: Why Most Jobless Workers Are Not Receiving Unemployment Insurance and What States Can Do About It*, 2017, available at <https://www.nelp.org/publication/closing-doors-on-the-unemployed/>; and *Federal Neglect Leaves State Unemployment Systems in a State of Disrepair*, at 15 n. 76, 2013, available at <http://nelp.org/publication/federal-neglect-leaves-state-unemployment-systems-in-a-state-of-disrepair>, and Danielle Citron, *Technological Due Process*, 85 Wash. U. L. Rev. 1249 (2008).

The legal analysis of a worker's UI claim is fundamentally different from the analysis of that worker's right to employment. The issue in a UI case is not

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whether the employer was justified in discharging the claimant but whether UI benefits should be granted or denied. *Torres v. Director of the Div. of Employment Security*, 387 Mass. 776, 443 N.E.2d 1297 (1982). The UI statute presumes eligibility unless the circumstances of a worker's separation from employment fall within a particular statutory disqualification. And, as described below, section 74 of G.L. c. 151A requires that the statute be liberally construed in favor of the worker and the worker's family.

Over the last few decades, many important court decisions, legislative changes, and regulatory and policy changes have, by and large, improved access to and receipt of UI by unemployed workers. In 2014, the legislature made several reforms to UI law (noted throughout this guide), St. 2014, c. 144. Of particular interest to claimants and their advocates are new protections against retaliation for participating in the adjudication of a UI matter. (See **Question 58**.)

The Supreme Judicial Court issued an important decision interpreting the term "knowing violation" of an employer's work rule to include an element of "intent," thereby ensuring that discharged claimants who do not have the requisite state of mind to violate a work rule will not be disqualified from benefits. *Still v. Commissioner of the Dept. of Employment & Training*, 423 Mass. 805, 672 N.E.2d 105 (1996). (See **Question 13** for further discussion of required state of mind findings in rule-violation cases.) *Still* is an important case to read: in addition to the importance of its holding, it provides a useful overview of how the court has interpreted the UI statute.

Significantly, the *Still* Court noted in arriving at its decision favorable to the claimant that the unemployment statute is a remedial law to be construed "liberally in aid of its purpose, which purpose is to lighten the burden which now falls on the unemployed worker and his family" (G.L. c. 151A, § 74). This statutory purpose has guided many other court decisions in a variety of UI contexts: *Cape Cod Collaborative v. Director of the Dep't of Unemployment Assistance*, 91 Mass. App. Ct. 436, 76 N.E. 3d 265 (2017); *Driscoll v. Worcester Telegram & Gazette*, 72 Mass. App. Ct. 709, 893 N.E.2d 1239 (2008); *Pavian, Inc. v. Hickey*, 452 Mass. 490, 895 N.E.2d 480 (2008); *State St. Bank & Trust Co. v. Deputy Director of the Div. of Employment & Training*, 66 Mass. App. Ct. 1, 845 N.E.2d 395 (2006); *Morillo v. Division of Employment Security*, 394 Mass. 765, 477 N.E.2d 412 (1985); *Emerson v. Division of Employment Security*, 393 Mass. 351, 471 N.E.2d 97 (1984); *Markelson v. Division of Employment Security*, 383 Mass. 516, 420 N.E.2d 328, 329 (1981); *O'Reilly v. Division of Employment Security*, 377 Mass. 840, 388 N.E.2d 1181, 1184 (1979); *Roush v. Division of Employment Security*, 377 Mass. 572, 387 N.E.2d 126, 129 (1979); *Garfield v.*

*Division of Employment Security*, 377 Mass. 94, 384 N.E.2d 642, 644 (1979); *De Cordova and Dana Museum and Park v. Division of Employment Security*, 370 Mass. 175, 346 N.E.2d 699, 703 (1976); *Worcester Telegram Pub. Co. v. Division of Employment Security*, 347 Mass. 505, 198 N.E.2d 892, 897 (1964).

Notwithstanding this large body of jurisprudence requiring a liberal construction of the law in favor of the claimant, DUA has narrowly interpreted this statutory mandate. DUA takes the position that if the facts are equally balanced between the claimant and the employer and the adjudicator is unable to reach a conclusion, the determination must follow the burden of persuasion: against the claimant in voluntary quit cases and against the employer in discharge cases. DUA's Unemployment Insurance Policy and Performance (UIPP) # 2015.04, *Application of the "construed liberally" language in G.L. c. 151A, §74 (7/9/15)*, available at <https://www.masslegalservices.org/content/uipp-201504-application>.

Advocates should be aware that UI can not only provide workers with critical income supports but also can provide up to 26 weeks of extended UI benefits to pursue vocational education and training opportunities. These benefits (discussed in more detail in **Question 53** below) can significantly increase the economic well-being of workers who have lost employment, and we encourage advocates to help workers take greater advantage of them by learning about the range of training programs and also the time limits within which claimants may apply for extended UI benefits. Moreover, rights to extended training benefits were expanded as a result of Congress's passage of the American Recovery and Reinvestment Act of 2009 (ARRA) and the enactment of companion legislation in Massachusetts (St. 2009, c. 30, §§ 1–3 *amending* G.L. c. 151A, § 30). Legislation enacted in 2016, St. 2016, c. 219, §§ 107 - 110 has made access to these extended benefits easier. (See **Question 53**.)

This guide is an overview of the relevant law and regulations of the UI system. In addition to this Guide, advocates should obtain and review DUA's regulations and its sub-regulatory policies promulgated in the *Massachusetts Unemployment Adjudication Handbook*, identified throughout this Guide as "AH" and DUA's Unemployment Insurance Policy and Performance memos, identified throughout this Guide as "UIPP." Both the AH and the UIPP memos discuss some important policy issues, including the agency's comprehensive policy on domestic violence. (See the Sources of Law paragraph below for information about obtaining a copy of the AH or the UIPP memos.) Finally, for an excellent overview on the reforms needed on a federal and state level to ensure appropriate financing of the UI system, adequate reemployment services, and other changes, see Wandner, S. (ed.), *Unemployment Insurance Reforms: Fixing a Broken System*, W.E. Upjohn

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Institute for Employment Research, Kalamazoo, MI (2018), available at [www.upjohn.org](http://www.upjohn.org).

An advocate involved in any DUA appeal should have knowledge of unemployment insurance law (set out in this Guide) as well as a basic grounding in state administrative procedure. For an excellent summary of the principles of judicial review that apply to UI cases, advocates are advised to read *NSTAR Electric Co. v. Dep't of Public Utilities*, 462 Mass. 381, 968 N.E. 2d 895 (2012).

### ***Where to Find Legal Help***

UI applicants whose current income fits within low income guidelines (generally 125% of the federal poverty income guidelines) can request assistance free of charge from various community legal services programs.

To find legal help with an unemployment insurance problem in Massachusetts, use the Legal Resource Finder, [www.masslrf.org](http://www.masslrf.org). The LRF provides contact information for legal aid and other programs that may be able to help for free or at a low cost. It will also provide links to legal information and self-help materials.

Those with incomes of less than 125% of the federal poverty guidelines can also contact one of the following programs for intake and referral:

Eastern Regional Legal Intake (ERLI) (Greater Boston and Metro West):  
800-342-5297

South Coastal Counties Legal Services (Southeastern Massachusetts):  
800-244-9023

Northeast Legal Aid (Northeast Massachusetts): 800-336-2262

Community Legal Aid Worcester (Central Massachusetts): 508-752-3718

Community Legal Aid Springfield (Western Massachusetts): 1-855-252-53425

In addition, the Massachusetts Bar Foundation funds a Pro Bono Unemployment Representation Project through GBLS' Employment Law Unit in cooperation with the Volunteer Lawyers Project, ERLI, and local law school clinical programs. Client referrals are handled through ERLI. Lawyers who participate receive a reduced cost for this Guide and MCLE training, and supervision. If you are a lawyer and want to participate, call the Volunteer Lawyers Project at 617-423-0648 or visit their website at <http://www.vlpnet.org>.

In addition to this Guide, there are many experienced employment advocates who would be happy to discuss case strategy and provide advice for advocates new to this field. Massachusetts is also lucky to have an Employment Rights Coalition that provides information concerning UI policies and strategies as well as other issues impacting low-wage workers. We strongly encourage legal services and workers' advocates to participate in this coalition: send an email to Margaret Monsell ([mmonsell@mlri.org](mailto:mmonsell@mlri.org)), Rochelle Hahn ([rhahn@mlri.org](mailto:rhahn@mlri.org)) or Brian Reichart ([breichart@mlri.org](mailto:breichart@mlri.org)) at MLRI if you would like to do so.

### *Note on Related Laws and Benefits*

Advocates should be aware of other laws and benefits that may affect their clients. DUA and the Department of Career Services (operating MassHIRE Career Centers) are covered under the Americans with Disabilities Act (ADA) and the Americans with Disabilities Amendments Act of 2008 (42 U.S.C. §§ 12101-12213 (2008)). If a client is denied services or needs an accommodation because of a disability, the advocate should consult with disability advocates for advice. Additionally, DUA and the Career Centers have a legal obligation to provide equal services to claimants with limited English proficiency (LEP), under both federal Department of Labor regulations and the Massachusetts unemployment law. 68 Fed. Reg. 32290 (May 29, 2003) codified at 28 C.F.R. §§ 42.101–42.412 (Department of Labor regulations implementing the Title VI prohibition against national origin discrimination affecting LEP persons); G.L. c. 151A, § 62A. The rights of LEP claimants have expanded in Massachusetts as a result of the settlement of a lawsuit brought by Greater Boston Legal Services. (See **Question 52.**)

Workers have additional rights as a result of the 2010 law known as CORI (Criminal Offender Record Information) Reform Law, G.L. c. 6, § 172. This law makes it unlawful to request or require that individuals indicate on an initial application form whether the individuals have a criminal record or provide a copy of their CORI (except under certain circumstances specified in the law) and prohibits employers from requesting, keeping a record of, or otherwise discriminating against any individuals by reason of their failure to furnish certain types of criminal record information, under the Fair Employment Practices Act, G.L. c. 151B, § 4(9) and § 4(9½).

Workers have protection against discrimination on the basis of race, color, religion, creed, national origin, sex, pregnancy, gender identity, sexual orientation, age, handicap, ancestry and genetics, service in the military as well as

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protection against retaliation for opposing discrimination, filing a complaint, testifying or assisting in any proceeding. G.L. c. 151B, §§ 4, 19.

Furthermore, many clients have worked for employers covered under the federal Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 et seq. If a client's separation from work was due to the birth or adoption of a child, or due to a serious health reason for either the client or their immediate family member, the advocate should check to see whether the employer's discharge violated the FMLA (requirements include company size of 50 employees or more and employment of at least 1,250 hours for a year). Most employees working in companies of 6 or more employees in Massachusetts are also entitled to up to 8 weeks of job-protected unpaid leave for birth or adoption under the Massachusetts Parental Leave Act, G.L. c. 149, § 105D, amended to be gender neutral. St. 2014, c. 484. Employees of Massachusetts employers who meet the more stringent requirements of company size and duration of employment for the FMLA may also be eligible for up to 24 hours per year of job-protected unpaid leave to participate in children's school and medical appointments, and to care for elderly relatives, under the Small Necessities Leave Act, G.L. c. 149, § 52D.

The Domestic Violence Leave Act, St. 2014, c. 260, § 13 *amending* G.L. c. 149, § 52E, provides unpaid leave for employees affected by domestic violence. The Act requires employers with more than 50 employees to provide 15 days of leave if an employee or an employee's immediate family member is a victim of abusive behavior, and if the absence is used to seek medical assistance, counseling, or legal assistance, to secure housing, obtain a protective order, or appear in court. Individual employers are given discretion to determine whether such leave will be paid or unpaid. While an employer may require documentation of abusive behavior from the employee (including protective orders, court documents, medical documentation, a sworn statement of a counselor, legal advisor, or healthcare worker, or a sworn statement by the employee), the employer must keep all information related to such leave confidential unless the employee consents to disclose information, if the law requires it, or if disclosure is necessary to protect the safety of the employee or others employed at the workplace.

Employees can also use the Massachusetts Earned Sick Time law, *amending* G.L. c. 149, § 148C. The law guarantees all workers in Massachusetts access to job-protected earned sick time to care for their health and that of their families. Up to 40 hours leave under this law is also available to workers who must deal with the physical, psychological, or legal effects of domestic violence. Leave is accrued at the rate of one hour of leave for every 30 hours worked. At companies with 10 or fewer employees, workers can earn up to 40 hours of unpaid sick time per year;

companies with 11 or more employees must let workers earn up to 40 hours of *paid* sick time yearly. See [www.mass.gov/ago/doing-business-in-massachusetts/workplace-rights/leave-time/earned-sick-time.html](http://www.mass.gov/ago/doing-business-in-massachusetts/workplace-rights/leave-time/earned-sick-time.html).

In the 2018 legislative session, Massachusetts passed a comprehensive paid family and medical leave insurance program. An Act Relative to Minimum Wage, Paid Family Medical Leave and the Sales Tax Holiday, St. 2018, c. 121, §§ 28 – 30, adding chapter 175M. Notably, all employees (including self-employed individuals) who meet the monetary eligibility requirements of the UI program, have 4 consecutive quarters of reported earnings to the MA Department of Revenue and who join the program and pay premiums for at least 3 years are eligible for job-protected leave for family and medical reasons (capped at 26 weeks) and benefits capped at \$850 weekly. The law takes effect on January 1, 2019 and the benefits and protections for taking leave are available starting either January 1, 2021 or July 1, 2021 depending on the type of leave. St. 2018, c. 121 §§ 34, 35. The same act also increased the minimum wage to \$15.00 an hour by January 1, 2023 (with annual increases each January 1st to \$12.00 in 2019, \$12.75 in 2020, \$13.50 in 2021, \$14.25 in 2022). St. 2018, c. 121, §§ 17 – 21, 31 – 37. Additionally, the act increased the wage for tipped employees to \$6.75 an hour effective on January 1, 2023 (with annual increases each January 1st to \$4.35 in 2019, \$4.95 in 2020, \$5.55 in 2021, \$6.15 in 2022). St. 2018, c. 121, §§ 22 – 26, 31 – 37.

Workers who lose their jobs due either to plant closings (or the closing of a significant portion of the plant) or to business closings triggered by NAFTA are eligible for additional pre-separation notice, many weeks of benefits, and/or training. (See **Question 53** for a description of rights under the Trade Adjustment Assistance program.)

On July 1, 2018, an updated equal pay law went into effect in Massachusetts, clarifying what conduct constitutes unlawful wage discrimination and adding protections to ensure greater fairness and equity in the workplace. The statute, Chapter 177 of the Acts of 2016, An Act to Establish Pay Equity, amends the Massachusetts Equal Pay Act, M.G.L. c. 149, § 105A (“MEPA”). The law and guidance by the Attorney General about its application are available at: <https://www.mass.gov/massachusetts-equal-pay-law>.

Low-wage workers, including UI recipients, may also be eligible for other income support programs such as the SNAP program (formerly known as the Food Stamp program). Moreover, they may be eligible for housing assistance, such as the Section 8 program and the Massachusetts Rental Voucher program. Changes in

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the welfare system have forced increasing numbers of single mothers into the low-wage labor market. Some UI claimants may be eligible for cash assistance (Transitional Aid for Families with Dependent Children, or TAFDC) while waiting for approval of their UI claims. Receiving TAFDC during this gap not only provides much needed income, it may also allow the child's parent to secure subsidized childcare when she does return to work. We encourage advocates to become familiar with these other potential sources of income support as part of their representation of their clients. (See **Appendix R** for a listing of these other programs.)

***Massachusetts Legal Services Website: [www.masslegalservices.org](http://www.masslegalservices.org)***

An online version of this Guide with links to many of the decisions issued by the Board of Review and much more information about the UI program in Massachusetts (including the Adjudication Handbook and DUA's Unemployment Insurance Policy and Performance (UIPP) memoranda issued before January 1, 2017), are available to the public via the internet at the address above, under Employment/Unemployment Insurance. Other areas of that website provide information on other antipoverty programs and services.

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## What Is Unemployment Insurance?

The unemployment insurance (UI) system was designed by President Franklin Roosevelt's Secretary of Labor Frances Perkins and enacted by Congress in 1935 as part of the Social Security Act, 42 U.S.C. §§ 501 *et seq.*, to stabilize the economy and to provide short-term relief to displaced workers. UI provides temporary cash benefits to workers with a recent attachment to the workforce who have become unemployed through no fault of their own and are currently capable of, available for, and actively seeking work. G.L. c. 151A, §§ 24, 25.

UI is administered by state agencies. The federal Department of Labor sets up certain guidelines and funds the states' administrative costs. In times of high unemployment, the federal government may also supplement state UI benefits with a federally funded extension. Individual states have wide discretion to determine UI benefit levels, the maximum duration of benefits, and the reasons for disqualification. The Department of Unemployment Assistance (DUA) administers the UI program in Massachusetts.

As of October 1, 2019 (and effective for new benefit years beginning October 7, 2019), the maximum benefit rate in Massachusetts is \$823 per week (not including an additional allowance of \$25 per dependent capped at half of the individual's UI check); the maximum benefit is adjusted annually on October 1 with an effective date for claimants whose benefit year begins on or after the 1st Sunday in October. G.L. c. 151A, § 29(a). Generally, the benefit rate paid to qualified workers is one-half of the claimant's average weekly gross wages up to the weekly maximum, plus any dependency allowance to which the claimant is entitled. Massachusetts currently provides up to 26 weeks of coverage to each eligible claimant (reduced to 26 weeks when, as now, the insured unemployment rate in each of the state's 10 regions is 5.1% or less, or when there is a federal extension in effect G.L. c. 151A, § 30(a)). Claimants who are in a DUA-approved training program, who have been laid off because of a plant closing, or who have lost their jobs due to NAFTA and other foreign competition may also be entitled to additional federal or state benefits. (See **Question 53**.)

Unemployment insurance benefits are generally taxable income for both federal and Massachusetts state tax purposes. Claimants can choose to have federal and/or state taxes automatically withheld from weekly benefits by so indicating on UI Online or by choosing that option by telephone. In January of each year, DUA provides claimants with tax related information based on the amount of UI received in the prior year on a 1099-G-Form, usually available on UI Online by the end of January along with copies of a claimant's 1099-G for the prior 6 years. Claimants needing information and assistance about their taxes can call the 1099-G Helpline at (617) 626-5647.

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## Who Is Covered by Unemployment Insurance?

### *Covered Employees*

Almost every employer in Massachusetts takes part in the unemployment insurance program, which covers almost every worker. The Massachusetts UI law (G.L. c. 151A) covers all employees within the Commonwealth, with the exception of those types of employees listed in G.L. c. 151A, §§ 6, 6A (such as employees of churches, trainees at certain nonprofit organizations, work-study jobholders at a college or university, certain municipal, state and federal

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employees, real estate brokers or salespeople paid solely by commission, prison inmates, certain agricultural laborers, independent contractors (as determined by DUA) and self-employed individuals working independent of the direction and control of the employer, and, most recently, election workers). St. 2014, c. 144, §§ 41 *amending* G.L. c. 151A, § 6A. Although employees serving on a temporary basis in case of fire, snow or other emergencies are exempt under G.L. c. 151A, § 6A (5), the Board held that was not the case for an on-call part-time municipal snow-plow driver who was routinely called on to handle heavy snowfalls. BR-0015 1081 68 (8/26/16) (Key).

Although DUA takes the position that inmates participating in work release programs involving employment outside the prison walls are not eligible for UI when the job ends, *see* UIPP # 2016.03, *Proper Procedure for Processing UI Claims Filed by Former Work Release Inmates* (3/2/16), at least one District Court has ruled otherwise. *Dawson v. Cunningham, et al*, Boston Municipal Court, Civil Action No. 1501 CV 2126, (McKenna, J.)(8/9/16) (reversing the Board decision on which DUA relied in UIPP # 2016.03).

UI legislation enacted in 2014 made it significantly more difficult and cumbersome for farmworkers to obtain UI. Farms are exempted from providing UI coverage if they pay their workers \$40,000 or less during a calendar quarter (up from \$20,000 per quarter). St. 2014, c. 144, §§ 42 – 44, *amending* G.L. c. 151A, § 8A. This change also means that a new determination about a farmworker's UI eligibility must be made every quarter.

Seasonal workers are excluded from collecting UI based those wages earned during seasonal employment of 20 weeks or less. G.L. c. 151A, §§ 1, 24A; 430 CMR 12.03; AH c. 11, § 4.

### ***Employee, not Independent Contractor***

The UI law carries a strong presumption that a claimant is an employee and not an independent contractor. (See **Question 39** for the test that DUA employs to distinguish an independent contractor from an employee.)

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## Sources of Law Governing the UI Program

Chapter 151A of the General Laws of the Commonwealth is the primary source of law governing the UI program. The relevant **Massachusetts law** is found at:

- G.L. c. 151A, especially §§ 1 (definitions), 24, 25, 30, 39–42, 74.
- 430 CMR 1.00 *et seq.*—DUA regulations on selected topics and procedural issues.
- 801 CMR 1.02—rules governing formal/informal hearings.
- Various Massachusetts court decisions, many of which are described in this Guide.
- Decisions made by the Board of Review (the appellate body within DUA). Decisions are referenced in the Guide. Since 2017, the Board is posting all of its decisions on line on a monthly basis. In addition, the Board has categorized under subject matter areas and posted “Key Decisions.” These are decisions that the Board has determined “contain significant issues, create new precedent, or may help parties and their representatives better understand aspects of the Massachusetts unemployment law.” The easiest way to access Board of Review materials is at [www.mass.gov/dua/bor](http://www.mass.gov/dua/bor). For key decisions, go to [www.mass.gov/key-decisions-appeals](http://www.mass.gov/key-decisions-appeals). Key Decisions noted in the Guide are indicated by the term “Key” after the date of the Board decision. Additional pre-2017 Board decisions not on the web are available at the Board of Review, Department of Unemployment Assistance, 19 Staniford Street, 4th Floor, Boston, MA 02114, phone number 617-626-6400. They may also be available on the on-line version of the Guide at [www.masslegalservices.org](http://www.masslegalservices.org) under “Employment.” The Board decisions posted here include a selection of monthly decisions and Key Decisions decided through December 31, 2019. Board decisions in this Guide are designated as BR. Pre-2017 Board decisions are cited with claimant ID numbers; Board decisions since 2017 are cited with Issue ID numbers.
- DUA’s website at <https://www.mass.gov/dua>.
- DUA’s Unemployment Insurance Policy and Performance (UIPP) Memos, available on line for memos issued since January 1, 2017 at

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<https://www.mass.gov/lists/unemployment-insurance-policy-performance-memos>. Memos going back to 2012 are referenced in this Guide and are available through a public records request to DUA (easily done through DUA's website at <https://www.mass.gov/topics/executive-office-of-labor-and-workforce-development-public-records-requests>).

- DUA's Adjudication Handbook (AH), replacing DUA's Service Representative Handbook (SRH), recently published in draft form (10/19) with an expected final publication in March. This Guide cites to the draft version. Advocates are advised to check the published Adjudication Handbook posted on the DUA website and on [www.masslegalservices.org](http://www.masslegalservices.org) when it becomes available this spring. Although UI advocates contest some of the AH interpretations, overall the AH is a useful compilation of DUA's policy and contains fact patterns with interpretations used for initial eligibility determinations. The AH, like the former SRH, does not carry the force of law and does not bind review examiners if they have a contrary view of the law. In *Dicerbo v. Nordberg*, No. 93-5947B, 1998 WL 34644, \*2 (Mass. Super. 1998) (not reported in N.E.2d), the court held that requiring review examiners to adhere to DUA's sub-regulatory legal interpretations violates applicable state and federal law. *Id.* at \*3. (See also **Questions 59 and 63.**)
- Other guides, also available from DUA (in its Boston walk-in offices or on its website) include, for example, Unemployment Insurance: A Guide to Benefits and Employment Services, (<https://www.mass.gov/files/documents/2018/11/02/unemployment%20bro%20P2594-10-07-18.pdf>). This Guide is listed here solely as a reference and not as an endorsement by the authors of its contents.
- Additionally, state law must provide that employees may not waive their right to unemployment compensation; any purported waiver is invalid. All 50 states, as well as the District of Columbia, the Commonwealth of Puerto Rico and the Virgin Islands) prohibit waivers of claims to UI. *Mitchell Energy & Development Corp v. Fain*, 311 F.3d 685 (5th Cir. 2002). The law prohibiting waivers of the right to UI in Massachusetts is G.L. c. 151A, § 35.

The relevant **federal law** governing unemployment compensation law is found at:

- 26 U.S.C. §§ 3301 *et seq.*
- 42 U.S.C. §§ 501 *et seq.*
- 20 C.F.R. pts. 640, 650—Department of Labor regulations.

- U.S. Department of Labor, Employment and Training Administration Directives including Unemployment Insurance Program Letters (UIPL) and Training and Employment Guidance Letters (TEGL) available at: <http://wdr.doleta.gov/directives/>.
- Additional information from the Department of Labor is easily accessible through a dashboard portal at: <http://www.oui.doleta.gov/unemploy/DataDashboard.asp>.
- The National Employment Law Project (NELP) is another very useful source of information and their resources are available on their website: [www.nelp.org](http://www.nelp.org).
- The Department of Labor’s guidance on federal conformance standards that states must follow is available at <http://ows.doleta.gov/unemploy/conformity.asp>. The most important aspects of the overarching federal framework are that it requires the state agency (1) to establish administrative procedures calculated to deliver benefits reasonably promptly “when due,” and (2) to provide parties with procedures (including initial determinations and hearings) that meet federal due process standards. 42 USC § 503(a). Additionally, the Federal Unemployment Tax Act (FUTA) has numerous important requirements that set either a “floor” for or a “ceiling” on the limits of state law. Advocates should review, in particular, 26 USC § 3304(a), which lists the state law requirements to obtain the approval of the Department of Labor. Examples of these requirements include suitability criteria, including the “prevailing conditions of work” test, § 3304(a)(5); UI benefits while in job training, § 3304(a)(8); limitations on canceling wage credits, § 3304(a)(10); protections against the denial of UI solely due to pregnancy, § 3304(a)(12); benefits for noncitizens, § 3304(a)(14); and limitations on deductions from UI for retirement pay, § 3304(a)(15).

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## What Is the Role of the Department of Unemployment Assistance?

The Massachusetts Department of Unemployment Assistance (DUA) is a department within the state’s Executive Office of Labor and Workforce

## Introduction

Development. G.L. c. 23, §1. DUA administers the Commonwealth's unemployment insurance (UI) program. The DUA Director is Richard A. Jeffers and DUA's Chief Counsel is Martha Wishart. DUA performs a wide range of unemployment-related functions, including:

- determining and collecting employer contributions;
- processing claims for UI;
- establishing eligibility for UI;
- job search, retraining, and other reemployment services; and
- collecting employer contributions under the Massachusetts healthcare law.

DUA's administrative costs are funded by the residual amount of federal taxes—after receiving a credit for their state contribution—that employers pay directly to the federal government.

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## What UI Taxes Do Employers Pay?

Employers fund the UI system through federal and state taxes. Federal taxes under the Federal Unemployment Tax Act, 26 USC § 3301 *et seq.*, sets a standard rate of 6% of the first \$7,000 paid during a calendar year. Employers receive a tax credit of up to 5.4% of the state tax paid on the federal UI tax for an effective rate of 0.6% if they make timely payments on their state taxes.

DUA levies a tax on the first \$15,000 of employee wages of every employer covered under the Unemployment Insurance Law, G.L. c. 151A, § 14(a). The tax rate is based in part on the employer's experience rating—the calculation of an employer's average number of employees whose employment ended during the past 3 years who subsequently received UI.

The employer's tax rate is also based in part on the statutory rate schedule in effect for Massachusetts employers. The schedule is designed to automatically increase employer assessments if the UI Trust Fund balance falls too low in relation to UI claims. G.L. c. 151A, §14. Schedules are denoted by a letter (A–G), with higher letters signifying higher overall tax rates. Notwithstanding the

purpose of the employer rate schedule to maintain a sufficient balance in the UI Trust Fund automatically, the legislature has frequently intervened to set a rate lower than the schedule calls for.

Federal regulations now require states to meet several new standards for interest-free federal advances taken during the first five months of a calendar year and repaid in the fall. See 75 Fed. Reg. 57146 (9/17/10) codified at 20 CFR Part 606. Free federal advances are only available if in at least one of the five years prior to the calendar year the advances are taken, the trust fund reserves are equal to an average high cost multiple solvency measure. The measure is phased in over five years from a multiple of .50 for 2014, .60 in 2015 up to 1.0 for advances in 2019.

The Average High Cost Multiple (AHCM) is computed based on the average benefit cost rate for the three highest years in the last twenty or the last three recessions. If federal advances are necessary in 2020 through 2023, Massachusetts with a AHCM of .42 will not even come close to meeting the federal standard for AHCM. See <https://oui.doleta.gov/unemploy/docs/trustFundSolvReport2020.pdf> (last visited 2/25/20); DUA, *Unemployment Insurance Trust Fund Report*, (“Report”), February 2019. As a result of the legislature’s annual overriding the statutory trigger to ensure sufficient funds in the UI Trust Fund, the October 2019 *Report* showed that Massachusetts had the 8th lowest AHCM in the country. *October 2019 Report* at p. 8, Table 5: Solvency of State Trust Funds.

Taxes are assessed against employers in inverse chronological order of the individual’s base period employment, up to 36% of the individual’s wages with that employer. G.L. c. 151A, §14(d)(3). Certain costs are not charged to an insured employer but rather to the solvency account. These costs include dependency allowances, extended UI benefits to participate in training, leaving for urgent, compelling and necessitous reasons, due to domestic violence, or to accept new employment that the claimant leaves for good cause attributable to the new employer and separations during the base period from employers who were not the claimant’s employer during the last 8 weeks of employment before applying for UI. *Id.*

The experience rating was designed to encourage employers to keep people on the payroll. One negative consequence, however, is that it gives the employer a financial incentive to argue that claimants should be denied UI benefits, in order to keep the employer’s experience rating low. Certain nonprofit and government employers can self-insure, i.e., they opt out of paying these taxes and, instead, reimburse DUA for the actual benefits paid to their former employees.

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Reimbursable employers are not relieved of charges for any reason. G.L. c. 151A, § 14A (f). Consequently, these employers may contest claims even more vigorously than employers who pay the taxes, because they have to reimburse UI payments including payments charged to the solvency fund on a dollar-for-dollar basis.

# Part 1

## The UI Claims Process

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### **1** How Does a Worker Apply for Benefits and What Are the Problems with UI Online?

A worker whose employment stops or whose wages are reduced to the point that UI is available should immediately file a claim with DUA to capture all earnings in the worker's base period of the claim. (See **Question 7**). Generally, the later the worker applies, the greater the likelihood of her receiving a reduced amount of unemployment benefits. For this reason, it is best to apply during the first week of total or partial unemployment. (See **Question 9**). The claim begins the Sunday of the calendar week in which the claim is filed, called "the effective claim date." With very limited exceptions, (see **Question 5**), UI will not be paid for any week preceding the effective date of a claim.

Workers who need to file a new claim, reopen a claim, continue to certify for UI benefits, check a claim/payment status, update personal information, file a waiver of overpayment, file an appeal, estimate future benefits, etc. can do so online. UI Online Services is available at <https://www.mass.gov/unemployment-insurance-ui-online>. The website is accessible daily from 6:00 a.m. to 10:00 p.m. Claimants previously using WebCert or TeleCert are able to use UI Online Services by providing their mother's maiden name to set up a new password for UI Online Services.

Additionally, DUA created a *UI Online Claimant User Guide*, which explains how to use the UI Online Services system. It is available at: <https://www.mass.gov/files/documents/2016/08/qk/claimant-uiol-ug-02-claimant-logout-password-and-navigation.pdf>

Claimants can change their correspondence preference (U.S. mail or email) by either calling the DUA call center and speaking with an agent (1-877-626-6800 toll-free for area codes 351, 413, 508, 774, 978 or 617-626-6800) or logging into

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their UI Online account and clicking: *View and Maintain Account Information* → *Contact information* → *Correspondence Preference* → *Edit* → *How would you like to receive your correspondence?*  *Electronic*  *US Mail*. (See *UI Online Claimant User Guide*, Claimant Activities—View and Edit Contact Information [p. 8].)

**Note:** Claimants who select U.S. mail as their correspondence preference will also receive notices in their UI Online Inbox but will not get email alerts. Claimants who select email **will not receive hard copies of DUA’s correspondence and need to be vigilant so that important time-limited opportunities are not lost.** This is especially the case if the claimant is relying on a smartphone rather than a computer. DUA has warned that the UI Online view as it appears on a smartphone is problematic because attachments that contain important information cannot be accessed through a smartphone.

### *Problems with UI Online*

**UI Online is an English-only system.** UI Online is primarily for those English-speaking claimants with high-level reading ability, computer skills, and regular computer access (as over 338,514 households in Massachusetts have no internet subscription and the majority of these households have very low or moderate incomes, the increasing reliance on an on-line system has a disparate negative effect on low wage workers). (For more information about UI Online and LEP claimants, see **Question 52**).

The Board of Review has repeatedly acknowledged the technical barriers imposed on claimants by DUA’s filing and registration system on-line including the requirement to participate in the mandatory Reemployment Services and Eligibility Assessment (RESEA), see **Question 50**) and found good cause in various situations. See BR-0023 4469 28 (12/24/2018) (Claimant had good cause for submitting late certification , when a DUA error caused the online system to not allow him to certify on time); BR 0025 1624 89 (9/24/2018) (Claimant had good cause for failing to complete RESEA review after gaining and losing a job within 10 days, as the email from a career center employee did not indicate the RESEA program would re-open when claimant began collecting UI again); BR-0025 6888 02 (9/6/2018) (Claimant showed justification for a late appeal after being locked out of his online account and repeatedly seeking assistance); BR-0025 1912 55 (7/30/2018) (Claimant had good cause for a late appeal, as his dyslexia rendered him unable to understand the DUA notice, and his multiple attempts to contact DUA for assistance were unsuccessful);BR-0023 4912 20 (4/30/18) (Claimant had good cause for failing to attend RESEA orientation

seminar where he was unable to open the letter issued electronically notifying him to attend and the career counsellor could similarly not open the letter); BR-0022 3860 38 (1/19/18)(Good cause for granting a pre-date was found for a claimant who was forced to re-open his claim as he was in and out of unemployment every other week due to the employer’s unusual furlough program); BR-0020 8343 16 (9/25/17)(Failure of claimant to appeal 3 listed issues due to the “intricacies” of the UI Online system did not preclude Board from considering all 3 appeals); BR-0022 4579 70 (10/17/17)(where claimant received one notice that her training application had been approved and a second notice stating that the extended benefits had been denied, claimant was determined to have properly concluded that her training had been approved and that she did not have to participate in work search).

Workers unable to use UI Online should apply by telephone instead, using the telephone numbers listed below:

- For Area Codes **351, 413, 508, 774, and 978:**                   **877-626-6800**
- For Area Code **617 and all others:**                               **617-626-6800**
- TTY/TTD:   **888-527-1912**

Currently, information is provided to workers in most language either through DUA multilingual staff or through the use of a telephone multilingual language line.

Claimants can also schedule a callback from the TeleClaim Center by visiting [www.mass.gov/dua](http://www.mass.gov/dua) and selecting “Telephone Services.”

DUA’s telephone services run 8:30 am–4:30 pm, Monday through Friday. To reach a DUA agent more quickly, advise claimants to call on Monday if the last digit of their Social Security number (SSN) is 0 or 1; Tuesday for SSN 2 or 3; Wednesday, 4, 5 or 6; Thursday, 7, 8 or 9; any last digit, Friday.

Claimants may also apply in person on a walk-in basis at *the Boston DUA office*, Charles F. Hurley Building, 19 Staniford Street, 1st Floor, Boston, MA 02114. In addition, at each of the MassHIRE Career Centers, claimants can get help from an individual referred to as a “UI Navigator” who will connect the claimant to DUA’s call-in assistance. **Note:** walk-in centers each have different hours of operation. The list of MassHIRE Career Centers and their hours are available at [www.mass.gov/careercenters](http://www.mass.gov/careercenters) or at 1-877-US2JOBS. DUA policy is that Career Center staff will respond positively to all requests by claimants for assistance and

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help them navigate the UI Online system, including providing a tutorial on how to file a claim and/or, in case of hardship, one-on-one assistance on how to enter the claim. As always, staff will serve all customers who come into the centers with questions. Interpreter services remain available for any LEP customers.

By statute, DUA must provide an in-person orientation within 15 days of the application and must inform the claimant about the determination process, eligibility criteria (including worker profiling), health insurance, and extended UI benefits while participating in training. G.L. c. 151A, § 62A (c). However, DUA does not provide this orientation in person any longer, and such failure may provide an advocacy handle.

DUA may impose a sanction on claimants of a 1-week suspension of UI benefits for failure to attend Career Center seminars if requested to do so by DUA, unless they have good cause; and where there is no finding of good cause, the sanction continues until the claimant attends the seminar. DUA imposes even more severe sanctions on claimants during periods of federal extended benefits. To schedule a Career Center seminar, call 1-800-653-5586, or call the nearest MassHire Career Center. (See **Question 50.**)

All DUA notices must contain the address and telephone number of the regional office serving the individual, as well as a statewide toll-free number for telephone claims services (for area codes 351, 413, 502, 774, and 978, the number is 1-877-626-6800; for all other area codes, the number is 617-626-6800). Additionally, the statute requires DUA to prepare notices and materials explaining the right to file in English, Spanish, Chinese, Haitian Creole, Italian, Portuguese, Vietnamese, Laotian, Khmer, Russian, and any other language that is the language of one-half of 1% of all Massachusetts residents. G.L. c. 151A, § 62A (d)(iii). (See **Question 52** for more information on DUA's obligations under this statute.) A claimant is considered to have initiated a claim as of the date that he first contacts or attempts to contact DUA. G.L. c. 151A, § 62A (f). This means that if the claimant is discouraged from filing or delays filing for some other reason determined to constitute “good cause,” the claims filing date relates back to the date of first contact.

**Note:** Advocates have observed many instances where claimants are receiving multiple notices on the same day, e.g. a separation disqualification and a disqualification based on issues concerning availability to work. **It is important that each disqualification is appealed separately to preserve the claimant’s rights.**

A UI Online application is deemed complete only when it is finished and the claimant gets a “confirmation page” that states the application has been submitted online or through the mail.

In 2014, the Massachusetts Legislature created a Special Commission to study the efficacy of the adjudication of claims by DUA. Comprising members of the Legislature, state and municipal governments, and employer and employee advocacy groups, the Special Commission issued a comprehensive report that made eight recommendations to improve the efficacy of the DUA. With respect to UI Online, the Special Commission recommended that the DUA: (1) continue its on-going review of UI Online’s design, accompanied by greater transparency and input by employers and claimants (e.g., focus groups to test new filing/response systems before implementation), and (2) ensure access to claimants of Limited English Proficiency, as well as access to filing by telephone (with the aid of customer assistance personnel) for claimants who cannot use UI Online. See Commonwealth of Massachusetts, Office of the State Auditor, “Report of the Special Commission to Conduct an Investigation and Study of the Activities and Efficacy of the Adjudication of Unemployment Insurance Claims by the Department of Unemployment Assistance,” at pp. 2-3, *available at* [www.mass.gov/auditor/docs/special-reports/2016/ui-commission-report.pdf](http://www.mass.gov/auditor/docs/special-reports/2016/ui-commission-report.pdf).

Advocates are urged to be vigilant when claimants raise issues of ineligibility due to problems with UI Online. A report issued by the National Unemployment Law Project, *Closing Doors on the Unemployed: Why Most Jobless Workers Are Not Receiving Unemployment Insurance and What States Can Do About It*, (“Closing Doors”), 2017, available at <https://www.nelp.org/publication/closing-doors-on-the-unemployed/> has documented that Massachusetts is one of the 10 states with the steepest increase in denials for non-separation reasons and that 5 of these states, including Massachusetts had instituted new claims-filing systems. *Closing Doors*, at p. 11. And in a comparison of UI denial rates between 2012-2016 and 2007-2011, the MA percentage increase was 2266%. *Closing Doors*, at p. 23.

### ***Applying for UI from outside Massachusetts***

Claimants who work in Massachusetts and have moved to another state may still be eligible for UI by filing an “interstate claim.” Interstate claims follow Massachusetts law (which is generally a more generous program than most other states). Interstate claims can be initiated through UI Online or by calling the Teleclaim Center. Claims will not be accepted from outside mainland U.S., Puerto Rico, the US Virgin Islands and Canada and benefits should not be

requested during any time that the claimant is not in the US, its territories or Canada. (See **Question 46** Combined Wage Claims (Interstate Claims)).

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## 2 What Information Does DUA Require?

DUA may ask a worker to furnish some or all of the following information when applying for unemployment:

- name (in English), home address, mailing address, and telephone number;
- Social Security number or card;
- date of birth;
- home address, telephone number and email address (if available)
- proof of citizenship; or, if a non-citizen, proof of satisfactory immigration status, including an “alien” identification number, work authorization including expiration date, permanent resident alien card (“green card”), or other official documentation from United States Citizenship and Immigration Services (CIS, formerly INS) and a copy of the document. (See **Question 51**);
- names, addresses, and telephone numbers of all employers during the prior 15 months and the dates of work for each employer;
- employment start and stop dates and recall dates;
- union name and local number (if a union member);
- check stubs or records of earnings, if available;
- last day of work, reason for separation including any separation notice, termination notice, or pink slip;
- the state and county for any non-Massachusetts Child Support orders;
- if choosing direct deposit (rather than debit card), bank account number and bank’s routing transit number; (**note:** if this information is not provided, DUA will automatically provide UI benefits through a debit card);

- name, date of birth, gender, and Social Security number for each dependent, including proof of dependency (any one of the following is acceptable: birth certificate, “green card,” passport, Social Security card, school document, medical record, health insurance card, tax form). See BR-0027 4975 64 (3/28/19) (child’s birth certificate and Social Security card were sufficient to establish the claimant’s relationship with her child); BR- 0024 6239 17 (12/24/2018) (Dependent child’s Social Security card and signed hospital birth record satisfied DUA identification requirements for a dependency allowance); (See **Question 47**);
- if applicable, a doctor’s certificate of (a) any work restrictions, or (b) the claimant’s capability to work at least part-time for 15 hours a week or more (with or without a reasonable accommodation) (See **Question 8**);
- if applicable, military discharge papers, the DD-124 Member 4 form (can be requested on line at [www.dd214.us](http://www.dd214.us));
- if employed by federal government within the past 18 months, the SF-8 and/or SF-50 form provided by the government employer at the time of separation.

Other information that DUA may require includes that relating to union pension and/or other pension payments, workers’ compensation, vacation or personal time-off pay, severance pay, and enrollment in a school or training program.

**Note:** Advocates should warn claimants *not* to file their UI claim through third parties who charge a fee for this service. DUA will accept only those claims coming directly from a worker.

### ***Investigation and initial adjudication of claim***

If the employer questions the claimant’s eligibility for UI benefits, a DUA claims adjudicator conducts an investigation. DUA will require the claimant and the employer to complete initial questionnaires that are either posted on their account through UI Online or sent by mail, depending on the choice of correspondence. If there are additional questions that have arisen as a result of the employer’s response, DUA requires the claimant to fill out a rebuttal questionnaire that is either posted online on the claimant’s account or mailed to the claimant. The claimant can respond either online or by telephone, to provide their explanation of the reason for separation.

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DUA is under a federal obligation to make a “reasonable attempt to obtain material facts from the parties.” ET Handbook No. 301, 5th ed., Change 1 (10/13/05). However, the timelines offered to the parties to accomplish this are very tight and inexplicably DUA has recently made the requirements even harsher. DUA provides the parties with written notice that information is required by a certain date. The deadline set for receipt of information can be 5 days or 10 days, but no less than 2 business days. AH c. 1, § 2A. DUA provides that if a response to a questionnaire has not been returned by the deadline date, “adjudicators may proceed with adjudicating the issue utilizing the information available.” UIPP # 2018.02, Reasonable Attempts (3/23/2018). If a fact-finding has been timely returned and the adjudicator has further questions and cannot contact the party, the adjudicator must call, leave a detailed message, and provide 48 hours for a response. *Id.*

**Note:** DUA has ended its practice of sending the claimant questionnaires about employment during the claimant’s base period with non-interested party (non IP) employers (employers who did not employ the claimant within the last 8 weeks before filing for UI benefits). Additionally, a claimant’s failure to respond to a questionnaire about employment with a non IP employer should have no impact on the claim. If problems occur, contact DUA Constituent Services preferably by email at [constituentservices@detma.org](mailto:constituentservices@detma.org) or at 877-626-6800 toll free for area codes 351, 413, 508, 774, 978 or 617-603-6800.

DUA states that the claimant and employer statements appear on the claimant’s online account. They are also available in hard copy in the Hearings Department file and advocates should review them as a routine part of hearing preparation. If DUA has not yet scheduled a hearing, documents are available by sending a Public Records Request to DUA. A sample request is at **Appendix I**.

Advocates should look carefully to see whether a DUA staff member in fact made contact with your client; and, if there are language barrier issues, determine if DUA used an interpreter. (See **Question 52.**)

### ***Notice of Approval/Notice of Disqualification***

At the conclusion of this initial adjudication of the claim, the adjudicator issues a Notice of Approval or a Notice of Disqualification on the claimant’s eligibility for unemployment benefits, based on the information gathered. (See **Appeals Process, Part 6**). If the claims adjudicator decides a claimant is eligible, benefits date back to the date of application.

## *Confidentiality*

Generally, information collected under the UI statute is not a public record, not admissible in any other proceeding, and is absolutely privileged. G.L. c. 151A, § 46(a). *Tuper v. North Adams Ambulance Service, Inc.*, 428 Mass. 132, 137, 697 N.E.2d 983, 986 (1998) (affirming that the confidentiality provisions of § 46 provided additional support for a judge’s allowance of defendant’s motion to preclude any reference to a UI decision and proceedings in a subsequent civil action); *Yin v. Biogen, Inc.* 2015 WL 8024542 \*6 (D. Mass. 12/4/15)(same); *Bergeron v. L & M Flooring, LLC*, 92 Mass. App. Ct. 1104, 87 N.E. 2d 1202 (table), 2017 WL 3623500 \* 4 (8/24/17)(same and noting that UI decision cannot be used offensively against the defendants in a subsequent civil action for wrongful termination). Anyone who unlawfully discloses information collected during the claims process may be punished with a maximum fine of \$100 and up to 6 months in jail. G.L. c. 151A, § 46(e). The Appeals Court has ruled, however, that the “basic underlying fact of . . . receipt of benefits” is not information protected by Section 46(a). *Howell v. Enterprise Publishing Co.*, 72 Mass. App. Ct. 739, 752, 893 N.E.2d 1270, 1283 (2008).

Some limited exceptions exist to this confidentiality/non-admissibility rule. See G.L. c. 151A, § 46(b)–(c). The statute allows disclosure to the Division of Health Care Finance and Policy for administration and enforcement of the Massachusetts healthcare law, including the “free rider” surcharge on employers who do not provide health insurance and the employer’s “fair share” assessment, G.L. c. 151A, § 46(c)(7); and to provide information to the Census Bureau and the Bureau of Labor Statistics, G.L. c. 151A, §46 (j). Moreover, an exception to this privilege arises whenever the information is sought for use in “any civil or criminal case brought pursuant to [chapter 151A] where the department or commonwealth is a necessary party.” G.L. c. 151A, § 46(c)(1).

The Superior Court held that when a claimant appeals a Board of Review decision to the District Court, “the records of *that* proceeding . . . [become] a matter of public record outside of the provisions of [G.L. c. 151A, § 46],” *Beaubrun v. Family and Cosmetic Dentistry of North Andover, LLC*, 29 Mass. L. Rptr. 154, 2011 WL 6379299, \*1 (Mass. Super. 2011) (emphasis in original). However, on appeal, the Appeals Court held that the underlying rationale for a DUA decision and the record of the substance of the proceedings are protected by the privacy provisions of G.L. c. 151A, § 46, and that as a consequence, factual findings in a DUA decision may not be accorded issue-preclusive effect, *Beaubrun v. Family and Cosmetic Dentistry*, 85 Mass. App. Ct. 1104, 4 N.E. 3d 939 (2014).

## 3 What Is the Initial DUA Eligibility Process?

An individual initiates a claim for UI benefits by filing a claim through an internet program called “UI Online.” Persons unable to use the internet may apply by telephone. (See **Question 1**.) With the exception of the Boston walk-in office, claimants can no longer apply in person. If the DUA adjudicator initially finds the claimant eligible, the adjudicator mails a UI Request of Information to the employer, which notifies it of the claim. The employer has 10 days in which to respond by returning the completed UI Request to DUA.

### *Employer requirements, reporting information, and employer information for claimants.*

DUA has the responsibility for collecting the wage reports that the state requires employers to file (for UI, taxation, and other purposes). G.L. c. 151A, § 14P, inserted by St. 2009, c. 4, § 78. DUA regulations at 430 CMR 5.20–5.23 set out the procedural requirements employers or their agents must follow in reporting wages.

Section 25(a) of the Unemployment Insurance Law requires that benefits not be paid in any week in which a claimant “fails...to comply with the registration and filing requirements of the commissioner.” G.L. c. 151A, § 25(a) (the position of commissioner is now called “director,” this term will be used in this Guide when not directly quoting the text of a statute or case). The statute goes on to require that “the commissioner shall furnish copies of such requirements to each employer, who *shall notify* his employees of the terms thereof when they become unemployed.” *Id.* (emphasis added).

If DUA finds that a claimant has violated a “registration” requirement, advocates should check that the claimant’s employer has provided the relevant information.

### *Timeliness for employer*

An employer who fails to respond without “good cause” within this 10-day period is barred from participating as a party to any related proceedings. The lead case on the subject of good cause for failing to timely respond is *Torres v. Director of the Div. of Employment Security*, 387 Mass. 776, 443 N.E.2d 1297 (1982). In

*Torres*, the Supreme Judicial Court ruled that an employer who did not receive notice because of a misaddressed envelope had good cause.

An employer who has lost “party” status may, nevertheless, still participate in the UI hearing but only as a witness. This means that the employer may provide testimony and/or documents regarding the claimant’s job separation but has no right to cross-examine the claimant, to postpone the hearing, or to appeal the decision.

**Note:** The timely response to DUA determines the next step and gives the employer an opportunity either to corroborate the employee’s entitlement to benefits or to claim that benefits should not be granted.

### ***Determination of eligibility***

If the employer indicates that the claimant was “laid off,” DUA deems the employee eligible and the employee should begin to receive benefits immediately. (See **Receiving Benefits, Part 5.**)

On the other hand, if the employer indicates one of a range of other options, DUA withholds UI benefits until it determines eligibility through an online process or by telephone. Thus, in certain cases—discharge or quit cases; cases where the circumstances of separation are questionable; cases where there are other issues involved—a claims adjudicator must make an eligibility determination.

Other examples of reasons DUA may investigate a claim include: a claimant is not available for or actively seeking work; a claimant is on a leave of absence; a claimant is receiving other pay or workers’ compensation; a claimant is receiving a pension; the claimant is a non-citizen and lacks proof of current work authorization.

Under DUA policy, DUA adjudicates all separations from different employers if these separations occurred during a claimant’s last 8 weeks of employment. (See **Question 45**), but a claimant who left employment within that period in good faith to accept new employment and became separated from that new employment for good cause attributable to the new employing unit should not be disqualified per G.L. c. 151A, § 25(e), ¶3. BR-0028 2475 22 (6/5/19) (finding that a claimant who leaves their job for another full-time permanent position does so in good faith and shall not be disqualified.)

Further, a claimant may receive more than one DUA notice of disqualification arising from a separation from several jobs or even from the same job. For

example, DUA may disqualify a claimant because of the nature of the separation or because the claimant has not been looking for work since the separation. The claimant must appeal *each* disqualification in order to preserve eligibility for full UI benefits. If a claimant filed the first appeal timely and later files a late appeal on the second notice, DUA should allow good cause for any late appeal.

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## 4 How Are UI Benefits Calculated?

### *Calculating UI Monetary Eligibility and the UI Weekly Benefit Amount*

In order to be monetarily eligible for UI, a claimant's total earnings in their "base period" (see step 1 below for an explanation of "base period") must equal or exceed the claimant's weekly benefit amount multiplied by 30. The steps outlined below describe how the weekly benefit amount, the total amount of UI benefits, and the duration of UI benefits are calculated.

**Step 1:** Figure out the 4 completed calendar quarters prior to the filing of the claim and add up the total wages from these quarters. Calendar quarters are January 1st to March 31st, April 1st to June 30th, July 1st to September 30th, and October 1st to December 31st. The 4 prior *completed* calendar quarters make up the claimant's "primary base period." The claimant may use the most recent wages in an incomplete quarter (called the "lag period") plus the prior 3 completed quarters, called the "alternate base period," if the claimant is ineligible for UI using the primary base period, or if using the alternate base period results in at least a 10% higher benefit credit. (See **Question 7** for a description of primary and alternate base periods.) **Note:** the weekly benefit amount excludes any allowance for dependents.

**Step 2:** Add together the 2 highest calendar quarters of wages in the base period and divide by 26 (the number of weeks in the 2 quarters) to determine the average weekly wage.

**Alternate Step 2:** If the claimant worked only 2 quarters or 1 quarter in the base period, determine the average weekly wage by dividing the highest (or only) quarter by 13. **Note:** This formula is particularly problematic for claimants who have worked for 2 quarters and earned fluctuating wages so that the two quarterly earnings vary greatly (due to slow-downs, overtime, payment of wages that are

illegally late, etc.), resulting in monetary ineligibility because the average weekly wage is based on earnings in the high quarter. Under this formulation, it is often mathematically impossible for total earnings to equal or exceed 30 times the claimant's weekly benefit rate. See G.L. c. 151A, § 1(w). This result has a disparate impact on low wage workers who are the most likely to have volatile work schedules and could be easily remedied by calculating the weekly benefit rate based on the average of the wages in 2 quarters rather than determining the weekly benefit rate on the basis of wages in the high quarter alone.

**Step 3:** The weekly UI benefit amount is the average weekly wage divided by 2 rounded to the nearest dollar.

Under this 3-step calculation, a claimant is monetarily eligible for UI benefits if her total base period earnings equal or exceed 30 times her weekly benefit rate.

### ***Calculating the Total Amount of UI Benefits***

The total amount of UI that a claimant can receive in the benefit year (the 52 weeks after applying for UI benefits) is called the maximum benefit amount (and also referred to as the "total benefit credit.") The maximum benefit amount is the *lesser* of 30 times the weekly benefit amount or 36% of the total wages earned during the base period.

**Step 4:** To determine the maximum benefit amount, calculate which amount is smaller – either 30 times the weekly benefit amount or 36% of the total wages in the claimant's base period.

### ***Calculating the Duration of UI Benefits***

**Step 5:** Calculate the duration of UI benefits by dividing the maximum benefit amount by the weekly benefit amount. The maximum number of weeks is 26 weeks.

A more detailed explanation of calculating UI benefits can be found in *Unemployment Insurance: A Guide to Benefits and Employment Services*, available at <http://www.mass.gov/lwd/docs/dua/p2594-508.pdf> (provided here as a reference and not as an endorsement of its contents).

Claimants can access monetary information (the weekly benefit amount, the maximum benefit amount for the benefit year, and the effective date and end date of the benefit year) through UI Online. Currently the path is: "View and Maintain Account Information," then, "Monetary and Issue Summary," then "Status."

Claimants can also obtain information about potential benefits through UI Online by clicking “Estimate Future Benefits” to access the Benefits Estimator Information page.

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## 5 When Does Eligibility for UI Benefits Begin?

A claimant becomes eligible to begin collecting UI benefits one week after becoming unemployed. This week-long waiting period starts on the Sunday before the date of the claimant’s application. However, if the claimant is reopening a previous claim, the 1-week waiting requirement is waived. Under G.L. c. 151A, § 62A(f), claimants are deemed to have initiated a claim on the first day that they contact or attempt to contact DUA, whether or not they are able to speak with a DUA representative on that day. *The effective date of the claim is the Sunday before the date that the claimant first attempts to contact DUA* (subject to the 1-week waiting period). The employer must display a DUA poster titled “Information on UI Benefits” and provide former workers with written notice of how to file for UI benefits within 30 days of the last day they worked.

**Note:** A UI Online application is not complete until the Confirmation Page appears. If not completed up through Saturday at 9:59 pm of the week it was started, a Request for Benefit Payments is saved on UI Online.

### *Predating a Claim*

If the employer does not give written notice of how to file for UI benefits within 30 days from the last day the claimant provided paid work and the claimant does not file a timely application for benefits, the claimant is *automatically* entitled to have the claim predated to the first week of UI eligibility. G.L. c. 151A, § 62A (g). See BR-0026 0086 90 (2/27/19) (where a claimant is not given written information on filing unemployment claims by their most recent employer, they are automatically entitled to have their claim pre-dated, pursuant to G.L. c. 151A, § 62A(g), *without a showing of good cause*); BR-109713 (1/14/11). Notwithstanding this statutory requirement, DUA repeatedly denied predates and the Board repeatedly reversed these denials on the grounds that the employer has failed to provide written instructions. BR-0024 6139 64 (12/24/2018); BR-0025 1553 94 (9/28/2018); BR-0022 533 19 (4/30/18); BR-0022 4583 16 (3/16/18); BR-0021 6448 96 (11/28/17); BR-0022 1570 69 (9/13/17); BR-0021 1788 30

(8/28/17); BR-0019 9348 56 (6/28/17); BR-0019 9348 56 (6/28/17); BR-0017 7570 67 (8/26/16); BR-112109 (11/30/10) (Key). DUA has now clarified that where the employer has failed to provide information, a predate is required. AH c. 2, § 2C. Moreover, the employer has the burden of proof to show that it provided the claimant with information on how to file for unemployment insurance within thirty days after the employment was severed. BR-0017 7491 67 (6/14/16). If the employer failed to provide the claimant with instructions on how to file the claim, the claimant is permitted to predate the claim.

Predating of claims is also available when the claimant was in partial unemployment during the week prior to filing the claim, and if the claimant is able to establish good cause for failing to file earlier. BR-112109 (11/30/10). BR-109713 (1/14/11); BR-112109 (11/30/10) (Key). Other reasons for predating include the inability to reach a Call Center or DUA representative due to the volume of claims, BR-0017 2892 01 (6/28/16), or the failure of DUA to provide information in a claimant's primary language. Problems with UI Online can also constitute grounds for predating a claim. BR-0022 3860 38 (1/19/18)(holding that technical barriers in DUA's filing and registration system for someone who is in and out of unemployment constitutes good cause for predating). For additional provisions concerning predated claims, see G.L. c. 151A, §23(b); 430 CMR 4.01(3), (4); AH c. 2, §2.

**Note 1:** Using UI Online, claimants can predate their claim back only 1 week. If claimants would like to predate their claim for more than 1 week, they need to call the DUA Call Center at 877-626-6800 toll free for area codes 351, 413, 508, 774, and 978 or 617-626-6800 and speak with an agent.

**Note 2:** The Call Center cannot resolve a request to predate by more than 14 days for an initial claim, or by more than 21 days for a continued claim; an adjuster will resolve this request.

### ***Payment of UI Benefits***

Once DUA determines the claimant eligible for UI, the state will issue UI benefits through a DUA Debit Mastercard (Bank of America), or, if the claimant *affirmatively chooses*, through direct deposit. To activate the Bank of America card, call the bank's customer service at 1-855-898-7292. Information on direct deposit is available at the DUA website at <https://www.mass.gov/how-to/set-up-direct-deposit-for-your-unemployment-benefits>, or by calling 877-626-6800 toll free for area codes 351, 413, 508, 774, and 978 or 617-626-6800. Claimants who lose a paper check, have 12 months from the date of issuance to request a replacement UI payment and similarly have 12 months to activate the DUA Debit

Card. After the 12 month period, unused funds will be credited back to the UI Trust Fund unless the claimant demonstrates “extreme, extenuating circumstances.” See UIPP # 2016.02, *Implementation of Time Limit on Replacement UI Payments* (2/12/16).

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## 6 What Does a Claimant Need to Do to Keep Getting UI Benefits Or to Requalify for UI Benefits & End an Indefinite Disqualification?

### *Certification*

A claimant must certify on a weekly basis and answer whether or not the claimant is currently working and has been looking for work for each week of collecting benefits. DUA has replaced mail certification with the English-only UI Online and with TeleCert in English, Spanish, and Portuguese. **Note:** where a claimant’s certification is late because the requirements were not provided in the claimant’s primary language, the late certification is for “good cause” and must be accepted. See 430 CMR 4.13(4).

Claimants can use TeleCert to certify work search via telephone. To contact the TeleClaim Center, a claimant should call the appropriate telephone number below:

- For Area Codes **351, 413, 508, 774, and 978:**     **877-626-6800**
- For Area Code **617 and all others:**             **617-626-6338**

The TeleClaim Center (listed in **Appendix A**) can provide information about the status of the claim. For information about the issuance of a check, a claimant can call the Claims Center.

Far too often, claimants may experience lengthy wait times or busy signals. To help speed the process, claimants should call on the day of the week that corresponds with the last number of their Social Security number: Monday – 0, 1; Tuesday – 2, 3; Wednesday – 4, 5, 6; Thursday – 7, 8, 9; Friday – any last digit. For questions asked during Telecert (translated into 9 languages) see <https://www.mass.gov/how-to/request-weekly-unemployment-benefits>.

**Note:** *It is critical* that advocates remind claimants to continue certifying online or by telephone (617-626-6800 or 877-626-6800), even if they are initially disqualified, so that they can collect all retroactive benefits if they win their appeal.

### ***Documenting Work Search***

As a condition of receiving UI benefits on a continued basis, DUA requires that claimants:

- make a minimum of 3 work-search contacts for each week in which they claim benefits;
- keep a detailed log of those work-search contacts including emails to and from employers, job application receipts, job postings, job fair announcements, and networking club information; and
- provide a work-search log and supporting documentation to DUA upon request.

Claimants are increasingly denied UI benefits for erroneous reasons because an adjudicator or a review examiner arbitrarily determines that their work search efforts are inadequate as illustrated by the following decisions by the Board of Review reversing those denials. The Board has previously granted a remand in order to afford a claimant the opportunity to consolidate evidence of their work search and present it at a later date. When the claimant was able to provide evidence that she was searching for work 3 to 4 days a week in a range of suitable jobs for a diverse field of employers, the Board reversed her previous denial of UI benefits. BR-0025 1598 07 (3/19/19). Further, the Board reversed a denial of UI benefits where the claimant entered detailed work search efforts in the UI Database but did not keep a separate comprehensive record. The claimant's use of the database was sufficient to establish work search efforts under G.L. c. 151A, § 24(b), although the Board noted that keeping a separate record is preferable. BR-0026 4550 04 (12/24/2018). In another instance, the Board reversed a denial of UI benefits where a review examiner rejected a claimant's work search activity log on the grounds that it was "fabricated and unreliable" because the entries on the log were made with the same penmanship. The Board found the review examiner's decision unreasonable where there is no requirement that the work-search logs must be contemporaneously completed and where the examiner failed to ask the claimant any questions on how the logs were completed. BR-0018 7588 55 (11/7/16). The Board reversed a disqualification where the claimant did not engage in 3 distinct job search activities on 3 different days each week. The Board found that nothing in the DUA's policies required that the job search

## Part 1 ■ The UI Claims Process

contacts be made in different ways. BR-0016 8161 05 (6/30/16). See also, AH c. 4, § 4B (describing a wide range of possible work search activities). The Board reversed a review examiner's decision that the claimant had not fulfilled the "3 methods of work search" where the claimant sought work on-line, through newspaper ads, and by calling several trucking companies on multiple days even though the claimant did not actually speak to someone in the companies about available work. BR-0020 1858 47 (3/29/17). The Board reversed a one-week denial of UI benefits where the review examiner based the decision on the failure to provide a work search log even though the claimant credibly testified, and the review examiner so found, that she had looked for work for 3 to 4 days that week and had a job interview that week. BR-0019 0253 13 (8/31/16). Finally, the Board has found that DUA's guideline of "three methods on three different days," while a rule of thumb applicable to a majority of cases, should not be rigidly applied to deny all claimants under all circumstances. BR-0018 3756 36 (6/14/16)(holding that a claimant who was a ballet dancer travelled and auditioned for various jobs around the country but could not always meet the "three on three."); and reiterated this position reversing a UI denial where an adjunct professor demonstrated that she was both preparing her teaching and looking for full-time work. BR 0022 9460 73 (2/27/18).

Claimants who file their weekly UI claim online have the option of filling out their work-search log as part of that process. (See *UI Online Claimant User Guide: Requesting Weekly Benefits*—Regular UI Work Search Requirements, p. 33.)

For an example of a completed work-search log, see **Appendix G**. Work-search logs can be downloaded at [www.mass.gov/dua/worksearch](http://www.mass.gov/dua/worksearch) and are also available at the local career centers. A sample work-search log is also provided in *A Guide to Benefits and Employment Services for Claimants*, which DUA sends to claimants when they initially file for UI. DUA requires claimants to keep the information and to provide it to DUA upon request.

**Note:** DUA no longer permits claimants to certify while outside the U.S., its territories and Canada and provides this information to employers who are required, in turn, to provide the information to claimants. However, the Board has held that a claimant who is in the US during the majority (at least 4 days) of any week in which they traveled to and certified from a foreign country is entitled to UI if otherwise eligible. BR-0015 1720 09 (12/22/15) (Key).

### ***DUA Language Notice Requirements***

G.L. c. 151A, § 62A(d)(iii) provides that DUA must issue all notices in English, Spanish, Chinese, Haitian Creole, Italian, Portuguese, Vietnamese, Laotian, Khmer, Russian, and any other language that is the primary language of at least one half of 1% of Massachusetts's residents. If DUA does not issue a bilingual notice in the claimant's primary language and this omission results in the claimant's failure to meet a deadline or requirement, then DUA's omission constitutes good cause for the claimant's failure to meet the deadline or requirement. 430 CMR 4.13(4). (See **Question 52** for more information on DUA's obligations under this statute.)

### ***Requalifying for UI Benefits after a Prior Disqualification & Other Indefinite Disqualifications Issues***

There are numerous situations where a claimant is disqualified and subsequent events result in ending the denial. Until recently, claimants were faced with indefinite denials that were often not addressed until the claimant appealed to the Board. DUA has now made clear that the Unemployment Insurance Telephone Claims Center (UITCC) is responsible for ending indefinite disqualifications on issues not appealed to the Hearings Department. Similarly, the Hearings Department must end indefinite disqualifications if relevant information is provided after the hearing decision. See UIPP No. 2020.04, *End Indefinite Denial Procedures*, (2/19/20) (rescinding UIPP No. 2019.02 (2/8/19)). The UIPP addresses the following 3 scenarios:

**1) *Requalifying Wages:*** If a claimant's claim for UI benefits was denied due to separation issues, the claimant can requalify for UI by obtaining new work, for at least 8 weeks and have earned gross wages equal to or greater than 8 times the claimant's weekly benefit amount. If the last claim ended, the claimant must apply for a new claim (which looks at earnings in a new base period, i.e., wages that were not previously used to determine the weekly benefit amount.) If the benefit year has not ended, then DUA reopens the claim and pays the same UI benefits;

**2) *Ending Indefinite Disqualification:*** This scenario insures eligibility where new information is available after an adjudication decision or a decision by the Hearings Department, such as a doctor's note on a capability issue, or showing that a claimant is not still employed, etc.

## Part 1 ■ The UI Claims Process

3) *Other Issues:* E.g., when a claimant is provided a predate on a new claim and payment on the new claim is prevented due to a disqualification on a prior claim (including a disqualification due to a hearings decision or to a default at the hearing) because the prior disqualifying claim is overlapping due to the change in date that the benefit year began. The indefinite denial must be ended when the prior disqualification is no longer applicable.

# Part 2

## Eligibility

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### 7 What Are the Financial (Earnings) and Personal Eligibility Tests?

To qualify for UI, claimants must be:

- **financially eligible**

- That is, claimants must have earned wages of at least 30 times their weekly benefit rate (generally about 15 weeks of earnings) *and* at least \$5,100 (an amount calculated on January 1st based on the prior calendar year's state minimum wage rounded down to the nearest \$100), G.L. c. 151A, § 24(a) during the base period. Effective January 5, 2020, the minimum earnings requirement increased to reflect the 2018 minimum wage increase to \$12 per hour. The base period is determined *either* by using the "primary base period," i.e., the last 4 completed quarters immediately preceding the effective date of the claim; *or* by using the "alternate base period," i.e., the 3 most recently completed calendar quarters plus the "lag period" (the period between the last completed quarter and the effective date of the claim). **A claimant is eligible to use the alternate base period if:** (a) the claimant does not have sufficient wages in the primary base period to meet the earnings requirements of G.L. c. 151A, § 24(a); or (b) the claimant established the UI claim using the primary base period, the total benefit credit is less than \$23,850 (this amount changes annually on Oct. 1 as it represents 30 times the maximum weekly benefit amount), and there is "credible substantiation" that the alternate base period would result in at least a 10% higher benefit level. See 430 CMR 4.81 *et seq.* (establishing procedures under which the alternate base period will be used).

## Part 2 ■ Eligibility

- Only paid wages, rather than earned wages, during a particular period are counted for purposes of base period wages, but an employer cannot manipulate the timing of payments in order to lower the UI rate. *Naples v. Commissioner of the Dep't of Employment and Training*, 412 Mass. 631, 633, 591 N.E.2d 203, 205, n. 2(1992). Arguably, however, the earned wages figure should be used if the late payment is due to violation of wage laws concerning timely payment of wages, G.L. c. 149, § 148, and at least one District Court has agreed. *McLean v. Leary, Commissioner of the Div. of Unemployment Assistance*, Boston Municipal Court, Roxbury Division Docket No. 0502 CV 0073, (Coven, J.) (2005) (deeming late payments of wages as timely paid when “earned” to ensure eligibility for unemployment under G.L. c. 151A, § 1(w)). Moreover, in another successful challenge under the same reasoning, *Gerstein v. Cunningham, Director of Dep't of Unemployment Assistance*, Boston Municipal Court, Docket No. 2015 01 CV 001393, (Coyne, J.) (11/23/15), the DUA appealed the decision to the Appeals Court and then entered a voluntary stipulation of dismissal with prejudice. *Gerstein v. Cunningham, Director*, Mass. Appeals Court, No. 2016-P-0003, (4/14/16).
  
- **personally eligible**
  - in total unemployment or partial unemployment (an individual’s hours have been involuntarily reduced). (See **Question 9**) G.L. c. 151A, §§ 1(r), 29(b);
  - capable of, available for, and actively seeking work. **Note:** To satisfy this element, claimants should **continue certifying eligibility** even if DUA initially denied their application for benefits;
  - unable to obtain work in the claimant’s usual job or another job for which the claimant is reasonably suited. G.L. c. 151A, § 24(b); **and**
  - not disqualified under G.L. c. 151A, § 25(e); i.e., show that the claimant did not leave work:
    - (1) by discharge—Discharge can be shown (by substantial and credible evidence to DUA’s satisfaction) to be attributable to deliberate misconduct (a) in willful disregard of the employing unit’s interest, or (b) due to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to result from the employee’s incompetence; or

(2) voluntarily—The claimant may establish by substantial and credible evidence that there was (a) good cause for leaving attributable to the employer, or (b) left for a reason that is of such an urgent, compelling, and necessitous nature as to make the separation involuntary; or

(3) because of conviction of a felony or misdemeanor.

We discuss each of these three disqualifications in detail in **Part 3**.

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## 8 What Are the Capability, Availability, and Suitability Requirements of the Personal Eligibility Test?

To be personally eligible, a claimant must be

- capable of work;
- available for and actively seeking work; and
- unable to find work in a usual occupation or any other occupation for which the claimant is reasonably suited.

G.L. c. 151A §§ 24(b), 25(c).

### *Capability*

In order for claimants to be considered capable of work, they must be able to perform some type of remunerative work, even though it need not be their most recent or even customary occupation. AH c. 4, § 2. For example, if an individual's physical condition has changed due to illness, injury, or disability, the most recent work performed may no longer be suitable, but the individual may still be *capable* of some other employment. If capability arises as an issue, DUA may require a claimant to submit a health provider form. See **Appendix Q**; 430 CMR 4.45; BR-0025 0197 53 (3/19/19) (a claimant was not disqualified as incapable of working on the grounds that he was only available to work part-time for a period early in his benefit year because the mental health issue that limited his ability during the benefit year also created the urgent, compelling, and

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necessitous reason for leaving his job); BR-10127346 (5/13/14) (claimant awarded benefits where involuntary separation occurred due to urgent, compelling and necessitous reasons, and the claimant established that those reasons required a limited availability for work during the benefit year to part-time employment).

**Note:** Advocates should: 1) ensure that any information provided by the health care provider has been properly included in the claimant's file; and 2) supplement the form, if necessary, by providing additional medical corroboration for claimants who are able to work either full time or part time with or without reasonable accommodations. The mere receipt of disability payments, without any further evidence about them, does not in and of itself mean that the claimant was not able to work while on a leave of absence from the employer. BR-151211 (10/21/14). It must be shown that the disability actually removes the claimant from the labor market (as required under 430 CMR 4.45 (3) (c)). For more information on the relationship between disability payments and unemployment insurance, see **Question 43**.

### *Availability*

Availability is a *continuing week-to-week eligibility requirement*—it can arise at any time in a case, even if not specifically made part of a notice of disqualification. To satisfy this criterion, an individual must be genuinely attached to the workforce and be ready to accept work that is “suitable.” The Board has reversed several denials of UI benefits based on DUA's erroneous conclusion that a claimant refused or was unavailable for work. See e.g., BR-0029 9043 49 (6/20/19) (claimant, a union member, who was temporarily out of work due to inclement weather is not disqualified under the work search requirement of G.L. c. 151A § 24(b), where his union restricts him from obtaining non-union work, and he complied with all requirements of his union regarding what to do during period where there is no work due to temporary, weather-related reasons); BR-0026 7043 89 (3/29/19) (claimant found available for work because her mental health reasons for limiting her benefit year availability to part-time work were the same as those that caused her to leave her full-time job, and this limitation has not effectively removed her from the labor force); BR-0025 1188 61 (12/21/2018) (claimant in a voluntary residential treatment program for anxiety was able and available, as she had been cleared for work by her psychologist and was willing and able to leave program at any time for work); BR-0018 1335 49 (8/2/16) (Key) (claimant determined to be available for work where self-employment was limited to weekends and evenings); BR-0022 5536 94 (2/26/18)(claimant found available for work where she had childcare coverage after the birth of twins that enabled her to work full-time Monday through Friday on the 2nd and 3rd shift after 3

p.m.); BR-0019 5967 49 (3/20/17) (Key) (finding that review examiner’s denial because claimant was unavailable because she had job interview on 3 days, turned on its head the requirement that a claimant make efforts to find suitable work); BR-0018 8829 44 (2/23/17) (claimant who was in part time work with the employer and refused additional assignments in order to engage in work search for suitable full time work, should not be docked “lost time” for refusing suitable work). And importantly, in a decision designated by the Board as “key,” the Board has held that a claimant who attends school full-time is not *per se* disqualified as unavailable where the claimant was looking for work on second and third shifts. BR00011 9491 62 (2/19/15) (Key).

Although the individual may not impose unreasonable restrictions to such an extent that obtaining work would be unlikely, certain “good cause” restrictions are permissible. “Good cause” includes personal reasons such as family responsibilities, health or disability issues, or the unavailability of childcare. *Conlon v. Director of the Div. of Employment Security*, 382 Mass. 19, 22–24, 413 N.E.2d 727 (1980) (claimant’s refusal to seek or accept work at certain times because of personal reasons such as childcare may constitute “good cause” to decline suitable employment, and they need not be willing and able to work full time on any shift to be eligible for benefits); *Hut v. Nordberg*, East Boston District Court, C.A. No. 9505 CV 0046 (1996) (claimant who limited her job search to part time “mother’s hours” did not remove herself from the labor market and the Board should have credited the expert testimony in support of her claim). See BR-0015 4145 42 (11/23/15) (Key) (claimant who chose to take FMLA leave due to sudden childcare issues was determined eligible where child care issues continued during leave but did not limit availability so as to remove him from labor force); BR-1357064 (10/11/13) (claimant has good cause to limit her availability to part-time employment because she is unable to afford daycare for her newborn and shares use of a vehicle with her husband); BR-1945879 (5/15/14) (claimant had good cause to restrict her hours of work due to childcare responsibilities).

The U.S. Department of Labor promulgated regulations governing when a claimant is “able and available” for work: 72 Fed. Reg. 1891 (1/16/07), codified at 20 CFR Part 604. DOL employs a “withdrawal test,” which “balances the need to assure genuine attachment by the individual to the labor market—*which is what the [able and available] requirement is testing* . . . [This test] provides the States with greater flexibility as it permits States to pay [UI] to individuals who have [able and available] restrictions, *such as limiting availability to part-time work*, as long as the restrictions do not amount to a withdrawal from the labor market.” 20 CFR 604.5(a)(1) (emphasis added).

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**Part Time Work.** In addition to the Dept. of Labor regulations described above, the rules governing UI eligibility for unemployed workers available only for part-time work are also set out in 430 CMR 4.42–4.45. DUA amended these regulations in response to a 2009 Superior Court decision invalidating prior regulations that had required a claimant seeking to fulfill the availability requirement through part-time work to have a prior history of part-time work of at least 20 weeks during a 26 week period. See *Leary v. Malmborg*, 2009 WL 2566243.

The regulations eliminated the “20 out of 26 week history” requirement and provide that individuals are UI eligible if: (1) they had an urgent, compelling and necessitous reason for leaving, (2) the *same* reason requires the individual to limit their availability for work during the benefit year to part-time work, and (3) they have not effectively removed themselves from the labor force). See 430 CMR 4.45(1)(b); BR-0026 7043 89 (3/29/19); BR-0018 3314 93 (7/29/16).

The Board of Review has held that a parent who had a history of full-time work was nonetheless able and available for work even though she restricted her work search to part-time hours due to her child’s disability. The Board ruled that her child’s disability qualified her as an individual with a disability within the meaning of the DUA part-time regulation at 430 CMR 4.45(3). BR-108922 (4/30/09)(Key). Moreover, see *Maynard v. King*, Worcester District Court, CA 0262 CV 2501 (2003) (holding that a parent with new child care responsibilities may restrict her work hours to part-time even if she did not work part-time during her base period). Similarly, a claimant who cannot work his regular full-time truck-driving shift due to child care issues, but who remains able and available to perform up to 35 hours of other forms of work, is eligible. BR- 0015 4145 42 (11/23/15) (Key). Also, a claimant who separates from her most recent employer due to childcare issues may restrict work hours to part-time shift that lasts four hours per weekday, which, combined with her weekend availability, indicates that she is still attached to the labor force. BR-0016 3530 74 (9/30/15).

**Note:** DUA uses a Health Care Provider’s Statement of Capability (see **Appendix Q**) that questions whether “the patient [is] currently able to work part-time with no restrictions.” The questions on the form concerning full time and part time work do not comply with the Americans with Disabilities Act because they fail to determine whether or not someone can work either full-time or part-time *with a reasonable accommodation*. The questions erroneously presume that a “restriction” renders the individual automatically ineligible. Consequently, advocates should intervene where claimants are available for work either full-time or part-time with a reasonable accommodation.

**Approved Illness or Bereavement.** The unemployment law also provides an exception to the availability requirement during an approved illness (AI): G.L. c. 151A, § 24, permits up to 3 weeks of AI during a benefit year as long as the individual has not refused an offer of suitable work. BR-1019024 (3/10/14). DUA has extended this exception to a period of bereavement for an individual in the immediate family or household (spouse, child, parent, sibling, grandparent, grandchild, or parent of spouse). AH c. 4, § 2C.3; BR- 0014 3611 80 (6/30/15) (holding that claimant may be paid benefits under G.L. c. 151A, §24(b) because there was a death in the immediate family, as such a period of bereavement is treated as a period of approved illness); BR-0018 3586 32 (7/29/16) (same).

**Medical restrictions.** Medical restrictions to claimants' availability for work do not necessarily preclude them from receiving benefits. In BR-2007804 (1/14/14), a claimant whose physician had cleared her for light duty was able, available, and actively seeking work as a matter of law. *See also President and Fellows of Harvard College v. Director of the Div. of Employment Security*, 376 Mass. 551, 555, 382 N.E.2d 195 (1978). In BR-124156 (3/19/13), although the claimant's physician placed her under a weight-lifting restriction, she was nonetheless capable of, available for, and actively seeking work for which she was reasonably fitted. *See also* BR-700263 (8/29/13); BR-0017 9217 41(9/28/16)(denial of UI benefits reversed where claimant placed on leave and then discharged because she could not do customary work but could do and was seeking other work notwithstanding her medical restrictions). Claimants with a medical condition limiting their job availability to part-time, nonstrenuous work may still be eligible for benefits, as their limitations are not such that it effectively completely removes them from the labor market. BR-1535941 (10/10/14).

**Full-time School Attendance.** The Board has repeatedly cautioned that attending school full-time should not result in a *per se* disqualification or in a presumption that a person cannot be available for full time work and that each case must be considered individually. BR-0030 0102 01 (9/25/19) (holding that where a full-time law student indicated that there were no restrictions on his working full-time, that he had a history of full-time study and work dating back to high school, and that he was actively seeking full-time work, the claimant was eligible); BR-0027 7346 95 (6/14/19) (reiterating that there is no rule stating that attending full-time schooling is a *per se* disqualification and that each person's availability must be assessed on an individual case-by-case basis); BR-0021 3181 94 (2/26/18) (same)); BR-0019 4735 31 (12/30/16) (finding that a student's class time during the later afternoons and evenings 3 days a week did not automatically preclude full-time employment).

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A full-time student may be eligible under two scenarios:

(1) A student who is in an **approved DUA training program**, which waives the requirement that an individual be available for work (see discussion on Section 30 training in **Question 53**). The Board has reversed several denials by Review Examiners relating to DUA's approval under section 30. For example, the Board reversed a denial for weeks during which a claimant was participating in a DUA-approved training program that DUA later determined was not necessary for obtaining suitable employment. The Board found that DUA had issued a confusing and contradictory notice stating that the claimant had both been approved for her training program and that the extension of UI benefits had been denied. BR-0022 4579 70 (10/17/17). The Board also reversed a disqualification of a claimant who was initially approved to commence a training program but then unable to start the program on time due to his case manager's failure to apply for special funding under the Workforce Innovation and Opportunity Act (WIOA). The Board found that DUA erred in failing to consider claimant's good cause for enrolling in the program one-month late. Issue ID #s 0020 3537 83 & 0020 9214 67 (9/25/17). The Board has also reversed the disqualification of a claimant whose chosen program was not DUA-eligible (due to a program eligibility lapse) at the time of application, when the claimant was able to show the program had been approved by the time she started her program. BR-0025 0958 78 (9/27/18).

(2) A full-time student who is not in an approved program may nonetheless be eligible if the student can **demonstrate availability during work hours typical for the student's usual occupation or a willingness to rearrange the school schedule in order to accept employment**. For instance, the Board found that a claimant attending full-time schooling was able and available to do fulltime work because she was searching for jobs at least 4 times per week that would have allowed her to work fulltime with her school schedule. The Board reiterated that while a history of working full time while in school full time can be an indication of meeting the "able and available" requirements, it is not the only way to prove that a claimant is able and available. BR 0021 5678 61 (12/22/17). Similarly, a claimant who attends school during the day time, but who is available to work second or third shift, and who applies for work that could be available at those times, is not disqualified. BR-1021672 (2/19/15). Likewise, a claimant who attends a full-time educational program taking a maximum of 10.5 hours per week, and who is available during the day and nighttime hours, is not disqualified. BR-0015 0186 75 (12/18/15). And a claimant who attends school full-time is eligible where the flexible nature of the type of work performed (home healthcare, personal care attendant, etc.) and their school schedule make it possible to work a

full-time schedule. See BR-0015 4424 19 (9/28/15). Also, a claimant who attends a full-time school program, but who is available to work on the weekends and second shift during the week is eligible. BR-0015 6813 40 (11/10/15). The Board found that a student enrolled in school part-time who was actively looking for work for which she was available after 12:00 p.m. 2 days a week, after 2 p.m. 2 days a week and anytime on 3 days a week was entitled to UI. BR-0024 0569 65 (9/27/2018). Similarly, the Board found that a student taking a course meeting 3 hours once a week who also worked part-time while looking for full-time work was available, BR-0017 3948 16 (8/11/16), as was a claimant who participated in school during the weekends and evenings. BR-0018 4592 56 (8/30/16).

**Free Exercise Defense.** The Supreme Court, in *Frazee v. Illinois Dep't of Employment Security*, 489 U.S. 829 (1989), expanded the protection of the free-exercise clause of the First Amendment by allowing a Christian to refuse work on the Sabbath without disqualifying the individual for UI. The Court went further than prior cases that had required an individual to belong to a particular church or religious sect. Here, even though Frazee was not a member of either and did not rely on a specific religious tenet, the Court nonetheless reversed the Illinois' court's denial of UI. The Court held that a professing Christian, even if not a church-goer or member of a sect, was protected by the free-exercise clause from having to choose between religious belief and work and that denial of UI violated the clause.

**Self-Employment.** Under AH c. 4, § 3B.12, self-employment of 20 hours per week or more may affect availability. Several Board decisions are instructive. BR-0021 2921 77 (12/19/17) (deciding that during weeks that claimant was partially employed, he still remained eligible where he was searching for full-time employment that was either new or supplemental work). A claimant who is self-employed for less than half the hours than customarily worked in the past may still be found to be actively seeking work, where that self-employment was a reasonable means to finding full-time employment. BR-1933134 (6/2/14). An otherwise eligible claimant whose only source of income on a given week was part-time self-employment may qualify for UI benefits if the amount of net earnings is less than the claimant's weekly benefit rate plus the earnings disregard. BR-0018 1355 49 (8/2/16) (finding eligibility under prior SRH §§ 1141 (A) & (B) where claimant's self-employment was not during her "typical shift" and where her net income from self-employment did not exceed her weekly benefit rate). The Board has also found that research into self-employment opportunities does not constitute grounds for a disqualification based on availability. BR-0018 7588 55 (11/7/16).

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### *Actively Seeking Work*

With a few exceptions—including claimants who have a definite recall to work within 4 weeks, BR-354329 (2/25/15); union members in good standing with their unions; and workers in DUA-approved training programs—all other claimants must be able to prove that they are actively seeking work. AH c. 4, § 4C.2, 4.

**Note 1:** DUA has tightened these requirements: *As a condition of eligibility*, claimants must make at least 3 work-search contacts each week; keep a written log of these contacts (noting date, employer name, how contacted, and the results; and provide their work-search log to DUA on request. See AH c. 4, 4B. Claimants' failure to comply with these mandates may lead to being declared ineligible for the weeks that they did not meet these requirements, and they may have to repay the benefits from those weeks.

**Note 2:** Although DUA requires claimants to use three different work-search methods, this requirement does not require a claimant to actually use all three methods in the same week. BR-2021007 (2/25/15).

The following activities are *among others* that may constitute acceptable work-search activities:

- registering with a MassHIRE Career Center
- using the resources available at MassHIRE Career Centers
- sending job applications to employers who may reasonably be expected to have suitable work
- visiting or interviewing with potential employers
- registering with employment agencies
- attending job-search seminars, job fairs, skills workshops, and so on
- reporting to the union hall, if this is the individual's primary work search method
- online: contacting professional associations, reviewing job listings, etc.

DUA provides a work-search log on UI Online or through the mail (see **Appendix G**). Although the sample work-search log can also be downloaded, the

claimant must submit a form with a bar code identifying the form as belonging to the claimant's case.

The requirement that a claimant be "actively seeking work" may be sufficiently flexible to accommodate a claimant's particular method of looking for work. In BR-114970 (2/9/2011), the Board of Review held that where the claimant was homeless, without a personal telephone, and thus unable to be "actively in touch with her recruits or temporary staffing agencies, engaging in networking, or directly applying for jobs," the claimant met the requirements for an active work search through her use of "recruiters, temporary staffing agencies, in-person applications, networking, and internet searches." The Board considered these methods to be reasonable in light of the claimant's "unique circumstances." The Board has also held that a claimant who was required by his union to limit his work-search and availability to work offered through his union's apprenticeship program had met the availability and work-search requirements as long as he was a member in good standing of the union. BR-0012 8417 63 (12/24/15).

In BR-124226 (2/26/13), although the claimant was in Hawaii for 3 weeks she was nonetheless able, available, and actively seeking work because she conducted a job search, applied for jobs, attended a work-related seminar, and had a flexible return ticket so she could return to Massachusetts on short notice if necessary.

The Board has held that a claimant who primarily sought work from her prior employer did not limit her work search to such a degree that she was not attached to the labor market. BR-0016 6597 36 (3/31/16). And a claimant who was temporarily laid off with a definite return-to-work date within 4 weeks was not required to actively search for work from other employers. BR-0012 9990 79 (2/25/15) (Key).

While applying to work is important, it is not the only type of work search effort that meets the actively seeking work requirement. BR-0021 9720 01 (4/24/19) (claimant demonstrated that she was actively seeking work because she was making efforts to become re-employed, even if she did not actually apply to many jobs); BR-0027 3994 96 (4/24/19) (claimant established that she was actively seeking work, by showing that she searched on online job boards, attended an interview, networked, and looked at an in-person board at her college over the course of the three weeks at issue.) These contacts are sufficient to satisfy the work search requirement of G.L. c. 151A, § 24(b).

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### *Suitability*

To be eligible for UI benefits, an individual need only be able and available for “suitable work.” *Conlon v. Director of the Div. of Employment Security*, 382 Mass. 19, 413 N.E.2d 727 (1980). This standard of eligibility has its basis in G.L. c. 151A, §§ 24(b) and 25(c), which are to “be read and construed together,” as §25(c) [suitability] explains, amplifies and qualifies §24 [able and available]. *Pacific Mills v. Director of the Div. of Employment Security*, 322 Mass. 345, 351, 77 N.E.2d 413 (1948).

Statutory suitability standards can be found at G.L. c. 151A, § 25(c); suitable employment is determined by taking into consideration:

- whether the job is detrimental to the health, safety, or morals of the individual;
- whether the job fits the employee, based on training and experience; and
- whether the job is located within a reasonable distance from the employee’s residence or prior job.

In addition, no work is deemed “suitable” if:

- the position offered is vacant due directly to a strike, lockout, or other labor dispute;
- acceptance of the job would require the individual to join a company union or would limit the individual’s right to join or retain membership in any bona fide labor organization; or
- remuneration, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality [the *prevailing conditions of work* test].

#### **The “prevailing conditions of work” test.**

The Federal Unemployment Tax Act (FUTA) requires states receiving FUTA funds to ensure through state law that “compensation shall not be denied . . . to any otherwise eligible individual for refusing to accept new work . . . if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality.” 26 U.S.C. § 3304(a)(5)(B). This is known as the “prevailing conditions of work” test and is codified at G.L. c. 151A, § 25(c). This test is very useful for determining whether

a job is suitable, especially concerning temporary employment. (See **Question 38.**) The U.S. Department of Labor has set out detailed guidelines on how this test should be applied, in the Employment and Training Administration's Unemployment Insurance Program Letters No. 41-98 and No. 41-98, Change 1 (7/19/00), available at <http://wdr.doleta.gov/directives/>. See also AH c. 5, § 4A.

In considering whether or not a job is suitable for a victim of domestic violence, the job must be determined to be one that reasonably accommodates the individual's need to address the physical, psychological, and legal effects of domestic violence. G.L. c. 151A, § 25(c), ¶2; AH c.5, § 5.

Where claimants have failed to accept suitable employment, they may be subject to a reduction of their benefit credit (i.e., a reduction of the total amount of benefits on their claim). **Note:** DUA applies an automatic benefit credit reduction of 4 times the benefit rate. AH c. 3, § 8A. However, the statute provides that the director make a determination "from the circumstances of each case." G.L. c. 151A, § 25(c). This may leave room for an advocate to seek a smaller reduction under compelling circumstances.

Rarely is suitability a sole, separate issue; watch out also for a suitability issue on recall and voluntary quit cases.

**The following are examples of winning suitability cases:**

A job offer from the same employer at substantially reduced wages makes the job unsuitable, *Graves v. Director of the Div. of Employment Security*, 384 Mass. 766, 429 N.E.2d 705 (1981); *President and Fellows of Harvard College v. Director of the Div. of Employment Security*, 376 Mass. 551, 382 N.E.2d 195 (1978); as does "insurmountable" difficulties with transportation. *Uvello v. Director of the Div. of Employment Security*, 396 Mass. 812, 815 (1986). Similarly, the Board of Review held that changes to a claimant's remuneration, hours, and working conditions immediately following the claimant's hiring rendered the job unsuitable. BR-115564 (2/24/11). Claimants are generally not considered to have refused suitable work when they decline to work an assignment on short notice, for an extremely limited amount of time, and at a location far from their residence. BR-0008 9771 96 (5/15/14). Where a claimant turns down offered work that would require driving in violation of a state driving ban, the claimant has not rejected suitable employment. BR-512270 (2/13/14). Similarly, a claimant's disqualification was reversed when she turned down assignments that required her to drive 1 to 2 hours during rush hour without being compensated for this time. BR-0014 3830 98 (8/12/15) (Key). And a home health aide was

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allowed to seek partial unemployment where her work in a nursing home became unsuitable based on her reasonable belief that the job was causing health problems. BR-0014 0062 59 (3/9/15) (Key).

Although the claimant was not physically capable of, available for, and actively seeking work due to his illness, he is eligible for benefits for three of the weeks during which he was ill because he was not offered any suitable work during the period at issue. BR-1019024 (3/10/14). Similarly, the Board ruled that a claimant's post-traumatic stress disorder rendered her partially disabled and thus qualified her to limit her job search to part-time employment. BR-0014 4414 16 (6/25/15).

The appellate courts have also applied a good-faith standard to a UI recipient's alleged failure to seek or accept suitable work, *Haefs v. Director of the Div. of Employment Security*, 391 Mass. 804, 464 N.E.2d 387 (1984), and good-cause standards to a refusal of an offer of suitable work, *Conlon v. Director of the Div. of Employment Security*, 382 Mass. 19, 413 N.E.2d 727 (1980). UI recipients who take another job on a trial basis while receiving UI during the benefit year will not be disqualified if they leave that job because it turns out not to be suitable. See *Jacobsen v. Director of the Div. of Employment Security*, 383 Mass. 879, 420 N.E.2d 315 (1981). The Board has held that a claimant laid off by an employer and offered the "opportunity to apply" for a new job with the employer, should not be denied UI benefits under §25 (c) on the grounds that he rejected suitable work, as a discussion of job possibilities does not constitute a definite offer of employment. BR-0017 5436 74 (10/20/16) (Key).

Where a job is potentially objectively unsuitable from the start of employment, then a claimant should not lose eligibility for UI benefits. *Baker v. Director of the Div. of Unemployment Assistance*, 84 Mass. App. Ct. 1101 (2013) (unpublished opinion) (remanding to Board for a determination of suitability where claimant, a mechanic, took a position that was primarily a management position). And although it appears to state the obvious, it took an appeal to the Board to establish that a claimant who refused an offer of work from one employer because she was working in other suitable employment was not disqualified. BR-0001 1361 33 (9/15/14) (Key).

A claimant has good cause for leaving employment, as being unsuitable, when they left a job that paid less than half what they had earned in prior employment, and it offered at most 20 hours per week with no guaranteed minimum hours, whereas their prior employment had been full time. See BR-118192 (10/31/11). And a claimant cannot be disqualified for rejecting additional hours of work from their part-time subsidiary employer when the offered work was not suitable full-

time employment because it paid less than their customary work and was outside their usual occupational field. See BR-0012 3564 87 (10/10/14) (Key).

A claimant remains eligible for partial UI although they declined some work offered to them, because they continue to work their regular part-time hours and only decline extra per diem shifts that conflict with other suitable work. See BR-0015 7544 19 (11/23/15).

Full time work offered to a claimant is not suitable for a claimant with chronic lower back pain, because it requires long periods of standing, which is detrimental to the claimant's health. BR-0014 5202 03 (9/24/15).

A claimant is not disqualified for partial UI when they decline additional hours, because the hours offered conflicts with their hours from other, higher paying work. See BR-0014 5567 37 (10/29/15).

A claimant is not disqualified for turning down assignments in and around Boston involving one- to two-hour commutes during rush hour for two hours of work. BR- 0014 3830 98 (8/12/15).

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## 9 Who Does DUA Consider to Be Totally or Partially Unemployed?

A claimant must be in total or partial unemployment in order to be eligible for benefits. G.L. c.151A, § 29(b). Claimants will be eligible for benefits in any week in which they are totally or partially unemployed so long as they are otherwise eligible under G.L. c. 151A. BR-0027 3826 76 (5/20/19).

**A person is in total unemployment** in any week in which they perform no wage-earning services, and for which they receive no pay or other remuneration. G.L. c. 151A, §1(r)(2). Examples of remuneration include salaries, bonuses, commissions, reasonable cash value of room and board, other in-kind payments. (For a full description, see G.L. c. 151A, § 1(r)(3)). Examples of payments that are not considered to be “disqualifying remuneration” include severance payments where there has been a release of all claims, payments for unused vacation or sick time, or lump-sum payments made in connection with certain plant closings.

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**A person is in partial unemployment** in any week in which the individual is working less than full-time and has earned less than the weekly UI benefit if totally unemployed during that week, and the failure to work full-time is due to the employer's failure to provide full-time work and not due to the claimant's choice to work part-time. G.L. c. 151A, § 1(r)(1). See AH c. 9, § 2. The Board has held that in determining eligibility for partial UI, the employer's obligation to provide full-time work must include work that is suitable. BR-0014 0062 59 (3/9/15) (Key) (holding that a claimant who turned down a number of hours of work per week from her employer at a location she reasonably believed caused her health problems was entitled to partial unemployment benefits, interpreting the requirements of G.L. c. 151A, § 1(r)(1) to permit a claimant to refuse unsuitable work). Further, under G.L. c. 151A, §§ 29(a), (b), and 1(r), a claimant is in partial unemployment while working part-time, as needed for an employer, and may not be penalized for failing to accept shifts in order to engage in work-search activities designed to return to full-time employment. BR-0027 6968 52 (5/20/2019). Similarly, the Board found that a claimant with medical restrictions for whom no work was available with her primary employer, and who was able to work part-time for her subsidiary employer, was in partial unemployment and eligible for UI. BR 0029 7175 38 (11/25/19); and where a claimant needed to reduce her hours due to medical reasons and her employer could not accommodate her in order to keep her regular schedule, she was entitled to partial UI. BR 0030 0094 06 (11/21/19); see also AH c. 9, § 2.

The following individuals are *not* considered to be unemployed and therefore ineligible for UI:

- A person who is on a leave of absence at the individual's request (see more on leaves of absence, below);
- An employee of an educational institution during a period between academic years or terms if the employee has a "reasonable assurance" of work in the subsequent year or term, G.L. c. 151A, § 28A. (See **Question 37**);
- On-call workers who have *any* work in a given week;
- Any person who is self-employed (generally, 20 hours or more); and
- A person who receives vacation pay when the employer closes a business for vacation purposes.

An employee in partial unemployment may be subject to "lost time" charges in any week that hours of work are turned down. G.L. c. 151A, §1(r) provides that

any loss of remuneration “resulting from any cause other than failure of [their] employer to furnish full-time weekly schedule of work shall be considered as wages....” Therefore, although a claimant was not available for work while attending a wedding, the Board held it was improper to impose lost time charges where the claimant was not in partial employment and did not turn down work during the week of the wedding. BR-0027 7214 67 (8/20/19). The Board has interpreted this provision to incorporate a requirement that the work lost be suitable. In BR-0021 5590 48 (1/31/18) (Key), the Board reversed lost time charges, finding that the claimant’s parental obligations provided good cause for refusing work offered by the employer.

The Board has held that, although a claimant performed services as an on-call emergency medical technician, because she was a municipal worker and was called to work only in the event of a fire or medical emergency and paid only if she actually answered the call, the claimant’s services were exempt under G.L. c. 151A, § 6A (5), and she is ineligible for UI. BR-0011 1365 11 (11/17/15).

The Board has held that a claimant was in “total unemployment” under G.L. c. 151A, § 1(4), when he was between tours of duty on the employer’s merchant marine vessel. BR-111428 (02/25/2011), *available at* <http://www.mass.gov/lwd/unemployment-insur/understanding-ui/bor/unemployment-status/uu-100-00-generally/uu-100-1-merchant-marines/br-111428.pdf>.

Under a 2014 statutory change, crew members on a commercial fishing vessel are deemed to be in total unemployment during any period that fishing operations are closed due to federal fisheries management restrictions, as long as the crew member does not earn other wages during this time. St. 2014, c. 144, §§ 37, 63 *amending* G.L. c. 151A, §§ 1 (r)(2), 25(e), ¶ 5.

### ***Leaves of Absence***

Although the general rule is that individuals cannot be considered totally or partially unemployed if they are on a voluntary leave of absence from employment, there are exceptions to this rule. In BR-116510 (4/4/2011), the Board held that a claimant was still “partially or totally unemployed” for § 29(b) purposes and thus eligible for benefits for a certain week, even though he was still technically on a leave of absence. The Board reasoned that because the leave of absence was more of an “administrative hold” than an actual leave of absence, the claimant had constructively resigned.

If employees takes a leave from employment for a medical procedure with the intent to return to work afterward but are capable of performing other kinds of

work in the meantime, they may be eligible for benefits. In BR-112431-EB-OP (2/23/2011) (Key) (disagreeing with the review examiner’s legal conclusion that a claimant who was injured and who planned to return to work after having surgery was not eligible for UI because she was on an “implied leave of absence” and concluding instead that, in light of the fact she was still available for other forms of work despite her injury, her departure from her job (which required the use of her arm in lifting and carrying) constituted an *involuntary* separation for urgent, compelling, and necessitous reasons under § 25(e)).

Employees may also be eligible for UI when they only require a partial leave of absence yet were forced to separate from their jobs. In one case, a claimant with a recent cancer diagnosis had exhausted her sick time and requested intermittent FMLA leave for treatment. Her employer never responded to her request and instead suggested she resign, which she did after exhausting all other potential remedies. A later note from her nurse indicated that she required 1 - 2 days of leave per week for treatment, but was otherwise able to work. The Board found that the claimant was involuntarily separated from her job for urgent, compelling, and necessitous reasons. (BR-0024 7143 33 (9/24/2018)). Similarly, the Board found that a claimant who went out on short term disability, had been effectively terminated when his employer canceled his health benefits and requested the claimant’s work equipment be returned. BR-0024 4938 00 (9/28/2018).

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## 10 What Happens If Benefits Are Denied, Either Initially or After the Claimant Has Begun Receiving Them and When Can the Denial Be Reconsidered?

Claimant who are disqualified from receiving benefits remain disqualified indefinitely and until they have had 8 weeks of work and have earned a total amount “equivalent to or in excess of 8 times the weekly benefit amount.” G.L. c. 151A, §25(e), as amended by St. 2014, c. 144, § 62.

**Note:** If claimants are initially disqualified, it is extremely important that they keep certifying their claim for UI and work search via UI Online or TeleCert. Doing so establishes that job-search requirements are met. (See **Question 6**).

Failure to keep certifying may jeopardize the right to receive retroactive UI in the event of a subsequent determination of eligibility. According to DUA, it informs all applicants of this certification requirement initially, but many claimants do not know that they are supposed to *continue* certifying even after disqualification. Additionally, DUA may have failed to inform claimants of this requirement in their primary language. G.L. c. 151A, § 62A. Where that is the case, the claimant should be permitted to file the weekly certifications late, without penalty. 430 CMR 4.13(4).

### ***Reconsideration of a Claim after the Claimant Has Begun Receiving UI***

G.L. c. 151A, § 71 allows for reconsideration of any DUA determination, within certain time frames and conditions. The criteria and procedures for a party to request a reconsideration, or for the Director to reconsider on her own initiative, are set out in DUA regulations. 430 CMR 4.30 – 4.35; 11.00 – 11.10. See *Peterson v. Seltzer*, Suffolk Superior Court (July 13, 1988) (class action seeking declaratory relief against DUA practice of making redeterminations and stopping benefits without notice and hearing resulting in “due process” protections in DUA regulations.) Under § 71, the Director can reconsider any determination within 1 year of the original determination where there has been a non-fraud error (an accidental act or failure on the part of DUA, claimant, agent, or employer) or where there are newly discovered claimant wages from the benefit year. See BR-0018 5314 44 (7/31/17)(Where the claimant told DUA that she had been “laid off” because she confused the word with “resigned,” the error was due to the claimant’s confusion and not fraud, with the result that DUA’s redetermination made after 1 year was time-barred); BR-0018 8929 07 (2/28/17)(finding disqualification made after 1 year time-barred); BR-0018 5163 61 (12/19/16)(same); BR-0018 0382 50 (6/14/16)(same).

One way that DUA circumvents this 1 year limitation on redeterminations is to re-label a redetermination as a “new” determination. See UIPP # 2014-02, *The DUA Director’s Section 71 Reconsideration/Redetermination Authority* (2/24/14). But see BR-0018 8929 07 (2/28/17) (finding that DUA’s notice of disqualification in September 2016 pertaining to a disqualification of benefits from June through August 2015 was time barred).

If DUA finds that it allowed or denied benefits based on a misrepresentation of facts, the reconsideration period is extended to 4 years. If DUA finds that the misrepresentation resulted from a knowing failure to furnish accurate information, then any overpayment that has resulted is also subject to 12% interest under § 69(a).

## Part 2 ■ Eligibility

Also, under § 69(c), DUA may not waive recovery of any overpayment if there is a finding of fraud. *It is therefore critical to dispute an erroneous fraud finding.* (See **Questions 55 and 62.**)

**Note:** Advocates should check to ensure that DUA has conducted an independent analysis of whether there was a knowing misrepresentation; in the past, DUA has issued fraud determinations without doing the necessary factual inquiry.

When DUA commences a reconsideration of a claim, it notifies the claimant of a Claim Discrepancy. If the claimant is already receiving UI, benefits are continued to the Saturday *prior* to the date of the notification. The claimant has 14 days to rebut the new evidence or allegations before DUA terminates benefits. Following this fact-finding, DUA issues a Notice of Redetermination and Overpayment. 430 CMR 11.01–11.10.

**Note:** At one time DUA provided a procedure to ensure that UI benefit payments would not be interrupted pending a redetermination of eligibility in cases where receipt of a late protest from an interested-party employer creates new issues. However, DUA no longer follows that procedure. An argument still exists in these cases that for DUA not to provide an opportunity to be heard before interrupting benefits violates the claimant’s right to due process (secured in DUA’s regulations as a result of the *Peterson* case described above and through numerous federal decisions interpreting the due process protections under the Social Security Act that govern the administration of a state’s UI program). *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970)(“Relevant constitutional restraints apply as much to the withdrawal of public assistance as to the disqualification for unemployment compensation ...”); *Commissioner of Labor of the State of Conn. v. Steinberg*, 419 U.S. 379, 388 (1971).

Any party may request a reconsideration. The request must: be in writing, be addressed to the DUA Director, be served on all parties to the original determination, and state the reasons for the reconsideration. 403 CMR 4.33 (2), (3). Claimants may request reconsideration due to (1) newly discovered evidence that suggests the previous decision may be in error; or (2) errors of law or other procedural irregularities underlying the original decision. 430 CMR 4.34 (1).

DUA will consider a request for reconsideration only if no appeal has been taken under G.L. c. 151A, § 12 (determination of whether employer is a covered employer) or § 40 (appeals to the Board of Review). 430 CMR 4.33(1). The reconsideration does not stay any appeal periods and the decision of the Director shall be considered final. 430 CMR 433 (6); 435(1).

# Part 3

## Separation from Work

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A claimant may meet the financial and personal eligibility requirements discussed in **Part 2** but not be entitled to UI benefits because DUA determines that the claimant left work under “disqualifying” circumstances.

As part of the application process, both the claimant and the employer provide their respective versions of events leading up to the employee’s separation from work. (See **Question 3**.) A DUA claims adjudicator then determines if the separation was for disqualifying reasons pursuant to G.L. c. 151A, § 25(e), which states that an individual will be disqualified if they have left work for any one of a number of reasons. The most common are:

- **leaving by discharge** shown, to the satisfaction of DUA, by substantial and credible evidence to be attributable (a) to deliberate misconduct in willful disregard of the employing unit’s interest, or (b) to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be a result of the employee’s incompetence, G.L. c. 151A, § 25(e)(2);
- **leaving voluntarily**, unless the employee establishes by substantial and credible evidence that leaving was (a) for good cause attributable to the employing unit or its agent, or (b) for urgent and compelling personal reasons, G.L. c. 151A, § 25(e)(1); or
- **leaving because of conviction** of a felony or misdemeanor G.L. c. 151A, §25(e)(3).

Following this statutory scheme, cases are characterized generally as either “discharge cases” (Section 25(e)(2)) or “quit cases” (Section 25(e)(1)).

### Part 3 ■ Separation from Work

#### *A party may dispute DUA's characterization*

For example, DUA may accept the employer's version of facts and treat the case as a quit, whereas the claimant believes they were fired. (See **Question 35.**) This characterization can be challenged in a hearing. (See **Appeals Process, Part 6.**) (In an unpublished opinion, the Appeals Court affirmed DUA's practice of treating the "failure to call in" as job abandonment under §25(e)(1). "An employee who anticipates a legitimate absence from work must take reasonable steps to preserve [her] employment. Where an employee fails properly to notify the employer of the reason for his absence, his resulting termination is tantamount to a voluntary resignation under G.L. c. 151A, § 25(e)(1)." *Flores v. Acting Director of the Div. of Unemployment Assistance*, 70 Mass. App. Ct. 1102 (2007), citing *Scannevin v. Director of the Div. of Employment Security.*, 396 Mass. 1010, 1010-1011 (1986)). Conversely, DUA may accept the claimant's version of the facts and treat the case as a discharge, even when the employer believes the claimant quit. BR-0024 4782 46 (1/17/19) (reasonable for a claimant to think they have been discharged if their employer tells them not to report to work following a heated conversation).

At the outset of the hearing, the review examiner asks preliminary questions and decides whether the hearing will proceed as a discharge case or a quit case. However, the DUA AH makes clear that: "[I]f the parties disagree about the nature of the separation, then the burden of proof is on the employer." AH c. 1, § 3.2A. While the review examiner's decision on whether the case is a quit or discharge will determine the order of the testimony, both the discharge and quit issues remain before the review examiner, who will make findings of fact as to the separation.

Different legal standards apply to each category of case and are discussed separately below.

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## A. DISCHARGE: QUESTIONS 11–20

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# 11 Was the Discharge for Disqualifying Reasons?

Discharge cases are further broken down into “deliberate misconduct” and “rule violation” cases. In some cases both theories may be applicable and arguments should be developed along both theories when appropriate.

An employee who is discharged for misconduct cannot be disqualified under G.L. c. 151A, § 25(e)(2) unless the behavior amounted to *deliberate misconduct in willful disregard of the employing unit’s interest*.

*Deliberate misconduct* and *willful disregard* are separate elements. The employer must establish each element, and the review examiner must make findings of fact on each. *Smith v. Director of the Div. of Employment Security*, 376 Mass. 563, 382 N.E.2d 199 (1978). It is not enough simply to show that employees engaged in a wrongful act; employers must also show that claimants *knew* it was contrary to their employer’s interest.

**The Supreme Judicial Court has repeatedly reaffirmed that the burden of production and persuasion as to each element in a discharge case is on the employer.** *Torres v. Director of the Div. of Employment Security*, 387 Mass. 776, 780 n. 3, 443 N.E.2d 1297, 1330, n. 3 (1982) (discussion of employer’s burden in deliberate misconduct case); *Still v. Commissioner of the Dep’t of Employment & Training*, 423 Mass. 805, 809, 672 N.E.2d 105 (1996) (“[i]n accordance with the directives of § 74 [of G.L. c. 151A, directing that the unemployment statute shall be liberally construed in aid of its purpose, which is to lighten the burden on the unemployed worker and his family], the grounds for disqualification in § 25(a)(2) are considered to be exceptions or defenses to an eligible employee’s right to benefits, and the burdens of production and persuasion rest with the employer.”).

The burden of production and persuasion is not met where the employer fails to attend a hearing. Review examiners should not assume the role of the employer in those instances because they are charged with impartiality under state and federal law and the dictates of due process. G.L. c. 151A, §39(b); 42 U.S.C. § 503(3)(a); *Dicerbo v. Nordberg*, No. 93-5947B, 1998 WL 34644 (Mass. Super. 1998)

### Part 3 ■ Separation from Work

(affirming need for review examiners to be independent and impartial decision-makers). Review examiners far too often assume the role of the absent employer and go beyond establishing that the case is a discharge rather than a quit. Where the review examiner improperly relies on the absent employer's documents submitted to DUA (thereby depriving the claimant of the right of cross-examination of adverse evidence) as well as cross-examines a claimant without a foundational prima facie case having been established by the employer, an advocate should prepare the claimant to address these issues while also making an objection for the record if an appeal is needed.

The examiner must make findings as to the claimant's state of mind at the time of the alleged misconduct to determine whether the conduct was both "deliberate" and in "willful disregard" of the employer's interest. *Jones v. Director of the Div. of Employment Security*, 392 Mass. 148, 465 N.E.2d 245 (1984); *Wedgewood v. Director of the Div. of Employment Security*, 25 Mass. App. Ct. 30, 514 N.E.2d 680 (1987); *South Central Rehabilitative Resources, Inc. v. Commissioner of the Div. of Employment & Training*, 55 Mass. App. Ct. 180, 770 N.E.2d 17 (2002).

When a discharged worker seeks UI benefits, *the issue is not whether the employer was justified in discharging the claimant* but whether the Legislature intended that UI benefits should be denied in the circumstances. The fact that an employer had good cause for discharge under a collective bargaining agreement or statutory scheme will not necessarily mean that the employee can be disqualified for UI benefits. *Director of the Div. of Employment Security v. Mattapoisett*, 1983 Mass. App. Div. 131, *aff'd*, 392 Mass. 858, 467 N.E.2d 1363 (1984) (holding that although teacher was discharged for disruptive, belligerent behavior under "conduct unbecoming" language of G.L. c. 71, § 42, this finding did not preclude the agency from determining that the teacher's discharge was not attributable to deliberate misconduct in willful disregard of the town's interest). Similarly, notwithstanding the gravity of error where a claimant failed to check a patient's IV catheter, where the error was caused by negligence and was not an intentional act, the claimant is entitled to UI benefits. BR-106310 (7/16/08) (Key).

## 12 Did the Claimant Engage in Deliberate Misconduct?

Deliberate misconduct is the **intentional** disregard of standards of behavior that the employer has a right to expect. BR-106310 (7/16/08) (Key) (claimant's negligent failure to check a catheter does not result in disqualification, notwithstanding the gravity of the error). Employers may establish these standards

by rule, policy, warnings, direct order, or otherwise. Furthermore, the employer bears the burden of proving by substantial and credible evidence that the conduct was deliberate. *Hogan v. Director of the Div. of Unemployment Assistance*, Boston Municipal Court, CA 1001 CV 2825 (2010) (holding plaintiff eligible for benefits where he was terminated for falling asleep in a company car after his shift had ended).

Mere unsatisfactory performance is not misconduct, unless the employer proves that the claimant *deliberately* failed to perform their work to the employer's satisfaction. *Trustees of Deerfield Academy v. Director of the Div. of Employment Security*, 382 Mass. 26, 413 N.E.2d 731 (1980); *Reavey v. Director of the Div. of Employment Security*, 377 Mass. 913, 387 N.E.2d 581 (1979); BR-19419 (2/20/14). Employee negligence is not deliberate misconduct. *Garfield v. Director of the Div. of Employment Security*, 377 Mass. 94, 97, 384 N.E.2d 642 (1979); BR-125322 (7/25/14); BR-106310 (7/16/08). See also BR-0019 6517 85 (3/21/17) (Key); BR-0008 9856 93 (1/9/14) (Key); BR-110349 (6/6/10) (Key); BR-109435 (3/15/10) (Key).

Conduct that is generally unsatisfactory does not constitute misconduct. *Nantucket Cottage Hospital v. Director of the Div. of Employment Security*, 388 Mass. 1006, 446 N.E.2d 75 (1983) (poor personal hygiene, inability to accept criticism, and profane language); BR-109435 (3/15/2010), *available at* <http://www.mass.gov/lwd/unemployment-insur/understanding-ui/bor/discharge/dc-500-00-poor-performance/br-110354.pdf> (unsatisfactory performance not deliberate misconduct where workplace errors may have resulted from allergies to mold growing in workplace); BR-123168-A (11/30/12) (profane language toward a customer is not deliberate misconduct where the claimant emotionally reacted to a customer's racist comments about claimant's national origin/ethnicity).

### Part 3 ■ Separation from Work

Absence or tardiness for compelling reasons is not misconduct, but failure to notify the employer in accordance with company rules is. *Hoye v. Director of the Div. of Employment Security*, 394 Mass. 411, 475 N.E.2d 1218 (1985) (employee did not call in absence to appropriate persons, despite many prior warnings); *Moore v. Director of the Div. of Employment Security*, 390 Mass. 1004, 457 N.E.2d 279 (1983) (employee persisted in reporting to work at 9:30 when starting time was 8:30); BR 0030 2225 88 (8/30/19)(Key) (where the employer changed the claimant's shift from 2 p.m. to 6 a.m., although the claimant received multiple warnings for her tardiness, she was not disqualified due to her sincere efforts to get to work on time); BR-1951632 (11/1/13)(arriving late to work is not deliberate misconduct where the claimant set an alarm clock but slept through it; the setting of the alarm demonstrates an intent to arrive at work on time).

Employees who avails themselves of a legal right cannot thereby commit misconduct. See *Kinch v. Director of the Div. of Employment Security*, 24 Mass. App. Ct. 79, 506 N.E.2d 169 (1987) (claimant refused to work hours in violation of wage-and-hour laws). It is immaterial whether the employee is aware of or asserts the legal right, or its source, at the time of the discharge.

Similarly, an employee charged with a crime who avails himself of the “admission to sufficient facts” procedure permitted by the rules of criminal procedure does not thereby commit misconduct. See *Wardell v. Director of the Div. of Employment Security*, 397 Mass. 433, 491 N.E.2d 1057 (1986) (junior college teacher charged with possession of marijuana with intent to distribute). Nor is an admission to sufficient facts a disqualifying “conviction” under §25(e)(3). (See **Question 36**).

An adjudication of the claimed right by a court or another agency, however, may have a preclusive effect. *Lewis v. Director of the Div. of Employment Security*, 379 Mass. 918, 400 N.E.2d 264 (1980) (an adverse arbitration decision under the National Labor Relations Act foreclosed claimant's assertion that the Act protected her wearing a “Strike—G.D.” jacket to work at General Dynamics plant where the claimant and the employer were parties in both the NLRB and UI proceedings).

UI benefits cannot be denied on the basis of misconduct where the claimant is alleged to have violated a rule that was not uniformly enforced. *Encore Images, Inc. v. Director of the Div. of Unemployment Assistance*, 76 Mass. App. Ct., 1109 (2010) (unreported) (employee fired for vulgarity could not be denied UI benefits for misconduct because employees regularly used profanity at work and a different employee had received multiple warnings before discharge); *Wininger v.*

*Director of the Div. of Unemployment Assistance*, 80 Mass. App. Ct. 1116 (2011) (unreported) (employee who was fired for swearing was not disqualified from UI for deliberate misconduct in willful disregard of employer's interests because swearing was directed at supervisor, not clients or outsiders, was in private, was commonplace at the office; there was no rule against swearing; the employer had never warned or disciplined the claimant in any manner in the past; the employer had never disciplined any employee for similar conduct in the past; and the employer gave the employee no opportunity to apologize). A claimant who muttered a profanity regarding a supervisor out of frustration and momentary lapse of judgment, but not actually to the supervisor, did not deliberately commit misconduct. BR-2026705 (5/27/14).

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## 13 Was the Conduct in Willful Disregard of the Employer's Interest?

The main issue in misconduct cases is not usually whether misconduct was committed but whether the claimant willfully disregarded the employer's interest. This determination requires inquiry into the employee's state of mind at the time the wrongful act was committed; the employee must have known that the act was contrary to the employer's interest or expectations. This is sometimes framed as a question of intent: Did the employee *intend* to disregard the employer's interest?

In establishing state of mind, the history of the employment relationship is important. As a general matter, an employee cannot be found to have the requisite state of mind if the employer had not made the employee aware of its expectations through rules, policies, warnings, instructions, and so forth. If, however, the conduct at issue is clearly wrongful, such as theft or falsification of records, a claimant may be found to have acted in willful disregard even in the absence of explicit instructions not to engage in the conduct. *Jorgenson v. Director of the Div. of Employment Security*, 394 Mass. 800, 477 N.E.2d 1005 (1985) (falsifying pay records); *Babize v. Director of the Div. of Employment Security*, 394 Mass. 806, 477 N.E.2d 1009 (1985) (same). Where an allegation of theft or misappropriation of funds is the basis for discharge, the employer must provide "substantial and credible evidence or proof" that the theft or misappropriation occurred and that the claimant was involved in the theft. BR-124433 (7/18/14).

### Part 3 ■ Separation from Work

Where obviously intentional conduct is present, the court will not require specific state-of-mind findings. *Grise v. Director of the Div. of Employment Security*, 393 Mass. 271, 471 N.E.2d 71 (1984) (claimant left at beginning of shift after learning he would be working with supervisor with whom he had personality conflict); *Sharon v. Director of the Div. of Employment Security*, 390 Mass. 376, 455 N.E.2d 1214 (1983) (claimant publicly insulted supervisor, then refused to apologize publicly).

A claimant's open "bad attitude" may facilitate a finding of willful disregard. *Lycurgus v. Director of the Div. of Employment Security*, 391 Mass. 623, 462 N.E.2d 326 (1984) (claimant discharged for tardiness after warnings where he had stated to supervisor that he was not required to be at work until 9:00 a.m. "on the dot").

An employee who reasonably believes that their disobedience of an order is required to further a more important purpose of the employer is not acting in willful disregard of the employer's interest. See *Jones v. Director of the Div. of Employment Security*, 392 Mass. 148, 465 N.E.2d 245 (1984) (employee who continued to work on deadline, although ordered not to do the work, not disqualified although he had previous warning for insubordination). Similarly, a worker who is discharged for refusing to follow an order that requires them to violate state or federal law is not disqualified. AH c. 8, § 1F.12.

Even if the employee's judgment is erroneous, good-faith errors are not willful disregard of the employer's interest. *Garfield v. Director of the Div. of Employment Security*, 377 Mass. 94, 384 N.E.2d 642 (1979) (rearranging the store schedule without notifying district manager); BR-1994619 (1/17/14) (where the claimant mistakenly believed his commute by public transportation would not be affected by a holiday bus schedule).

Personnel policies known to the employee are probative evidence regarding the claimant's state of mind. An employee's reliance on these policies, where they may contradict other statements of the employer, can be used to show a lack of willful disregard. *Goodridge v. Director of the Div. of Employment Security*, 375 Mass. 434, 377 N.E.2d 927 (1978) (employee left to file discrimination charge with Equal Employment Opportunity Commission where he thought personnel handbook gave permission to do so; employer claimed he left without permission).

### *Mitigating Circumstances*

The presence of mitigating circumstances should be explored and presented in both misconduct and rule violation cases. If employees' misconduct is attributable to mitigating circumstances, then they have not acted in willful disregard. In the case of an employee fired for being late after a prior warning, for example, there is no willful disregard if the lateness was due to an extraordinary circumstance, such as sudden illness of a family member. Similarly, falling asleep on the job is not disqualifying if occasioned by mitigating factors. *Wedgewood v. Director of the Div. of Employment Security*, 25 Mass. App. Ct. 30, 514 N.E.2d 680 (1987); *Lengieza v. King, Deputy Director of Employment & Training*, Chicopee District Court, CA 9920 CV 0421 (1999)(same). In *Wedgewood*, the Appeals Court held that the employee's unwillingness to discuss his personal problems with his supervisor, to take a leave of absence, to accept counseling, or to institute a union complaint were not sufficient bases for the denial of UI after the employee was discharged for sleeping on the job, when personal problems caused him to be unusually fatigued. The Court noted that although the employee's reluctance to discuss his personal problems or to accept help from the employer or union did not serve his long-term interests, such reluctance did not constitute deliberate misconduct in willful disregard of his employer's interest under G.L. c. 151A, § 25(e)(2).

The breakdown of the claimant's car plus lack of cell phone with which to contact employer are mitigating circumstances for tardiness, since they show that there was no intent to engage in misconduct. BR-122720 (7/18/14).

The Board found that the combination of a claimant's homelessness and the last-minute refusal of the expected ride to work from her friend only twenty minutes before the claimant was scheduled to leave for work, making her frantic and causing her to forget to call the supervisor to report that she would be late to work, constituted mitigating circumstances of her failure to call in. BR-124425 (7/24/14). Similarly, the emotional trauma of the recent death of the mother of the claimant's fiancé, which affected the claimant's ability to read her schedule properly and thus arrive at work on time, was found to be a mitigating factor beyond the control of the claimant. BR-124136 (7/25/14).

In one matter, a bus driver suffering from an enlarged prostate, having been stuck in unusually heavy traffic, urinated publicly to avoid wetting himself. The Board of Review found that circumstances sufficiently mitigated the claimant's actions. BR-1178833 (11/4/13).

## Part 3 ■ Separation from Work

The Board found a mitigating factor beyond claimant’s control where a claimant’s doctor—in order to treat emergency patients—rescheduled an appointment relating to the claimant’s returning to work after medical leave until after the employer’s deadline for claimant’s return. BR-125549 (11/7/13).

A claimant whose conduct results from alcoholism—a compulsion to drink—does not act with the intent required under the deliberate misconduct standard or the knowing violation of a rule or policy standard. AH c. 8, § 1F.14 (a). At present, with certain exceptions, the DUA does not treat drug abuse in the same manner; thus, a drug-addicted client is more likely to be regarded as having acted willfully even while under the influence. *Id.* (See **Question 34.**)

Any discharge due to circumstances resulting from domestic violence, including the need to address the physical, psychological, and legal effects of domestic violence, is not disqualifying; for example, a claimant discharged for violating the attendance policy due to incidents of domestic violence or due to their need to seek treatment or protection. G.L. c. 151A, § 25 (e), ¶ 7; AH c. 6, § 3. (See **Question 33** for discussion of domestic violence in separation cases.)

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# 14 Was the Claimant Discharged for a Rule Violation?

In 1992, G.L. c. 151A, § 25(e) was amended to add a new disqualification ground. In addition to deliberate misconduct, an employee who is discharged for a “knowing violation of a reasonable and uniformly enforced rule or policy” is disqualified unless the violation is “a result of the employee’s incompetence.” The Supreme Judicial Court’s decision in *Still v. Commissioner of the Dept. of Employment and Training*, 423 Mass. 805, 672 N.E.2d 105 (1996) is the lead case interpreting this ground for disqualification.

According to the G.L. c. 151A, § 25(e), ¶ 2, an employee may be disqualified under this provision if the employer establishes that:

- the rule or policy existed;
- it was effectively communicated to the employee, i.e., in a language and manner understood by the claimant (see AH c. 8, § 1D);

- it was reasonable;
- it was uniformly enforced, both as to the claimant and other employees;
- the claimant knowingly violated the rule or policy; and
- the rule violation was not the result of the claimant’s incompetence.

The employer has the burden of proving these elements by introducing “substantial and credible” evidence on each element. For example, an employee discharged for failing a drug test administered before he was hired could not be disqualified because the employer’s work rule applied only to drug usage during or affecting the employment. *O’Connor v. Commissioner of the Dep’t of Employment & Training*, 422 Mass. 1007, 664 N.E.2d 441 (1996).

Moreover, the Board held that more than a positive workplace marijuana test is required for a claimant to be determined ineligible for UI. The Board pointed out that the marijuana decriminalization statute, G.L. c. 94C, §32L, states that possession of one ounce or less of marijuana shall not provide a basis to deny UI benefits. BR-0012004801-07 (08/04/2014).

However, the Appeals Court has held that an employer who fails to meet its burden under the “knowing rule violation” can still meet its burden of showing deliberate misconduct. *Gupta v. Deputy Director of the Div. of Employment & Training*, 62 Mass. App. Ct. 579, 818 N.E.2d 217 (2004) (an employee’s rude remark to a customer constituted disqualifying deliberate misconduct, even though the employer originally justified the firing on the grounds of a knowing violation of a work rule and had failed to present substantial evidence to support its firing for this reason).

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## 15 Did the Claimant Commit a Knowing Violation?

According to the AH c. 8, §§ 1B and 1C.1, the following elements must be satisfied for a knowing violation:

- the claimant intentionally engaged in conduct (either action or inaction) that violated a rule or policy of the employer;

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- the claimant was consciously aware of engaging in the conduct;
- the claimant, while engaging in the conduct, was aware that the conduct violated a rule or policy of the employer; and
- the violated rule or policy was both reasonable and uniformly enforced.

The adjudicator must consider the circumstances at the time of the violation to determine whether the employer has established that the claimant:

- knew what they were doing;
- knew that the conduct violated an employer rule or policy; and
- intentionally did it anyway.

In *Still v. Commissioner of the Dept. of Employment & Training*, 423 Mass. 805, 672 N.E.2d 105 (1996), the employer discharged the claimant for swearing at a patient who had provoked her. The Commissioner argued that because the claimant had admitted that she had prior knowledge of the employer's policy that patients were to be free from mental and physical abuse and that she understood that the consequences of violating this policy included discharge, this was sufficient to establish that she had "knowingly violated the policy."

The Supreme Judicial Court disagreed. It found that, in the context of G.L. c. 151A, § 25(e)(2), "'knowing' implies some degree of intent, and that a discharged employee is not disqualified unless it can be shown that the employee, at the time of the act, was consciously aware that the act being committed was a violation of an employer's reasonable rule or policy." 423 Mass. at 813, 672 N.E. at 112; *accord, Franclemont v. Commissioner of the Dep't of Employment & Training*, 42 Mass. App. Ct. 267, 676 N.E.2d 1147 (1997).

The *Still* Court explicitly found that "Still's testimony . . . supports a conclusion that she lacked the state of mind required to find a 'knowing' violation." 423 Mass. at 814. The Court further found that although "mitigating circumstances alone will not negate a showing of intent or thereby excuse a 'knowing violation,' [they] may, however, serve as some indication of an employee's state of mind, and may aid the fact finder in determining whether a 'knowing violation' has occurred." 423 Mass. at 815, 672 N.E.2d at 112. Furthermore, *Still* points out that "[t]he presence of mitigating circumstances may also be applicable in determining whether the violated rule was reasonable as applied." 423 Mass. at 815, n.11; 672 N.E.2d at 113, n. 11. In line with *Still*, the

Board held that an employer did not meet its burden of establishing an employee’s knowing violation of an employee handbook rule where the handbook was in English, the claimant could not read English, and the employer did not have the handbook translated for the employee. BR-123671 (2/26/13).

AH c. 8, § 1C sets out a detailed analytical framework for rule-violation cases. While the term “state of mind” is not used, it is clear from the emphasis on “conscious awareness”—both of the act and of the rule violation—that state of mind is a critical element.

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## 16 Was the Rule Reasonable?

The rule or policy must be reasonable in light of an employer’s interest—i.e., there must be a clear relationship between the rule or policy and the employer’s stake in it, and it must be one that could be expected to be adhered to in the normal course of events. A rule that conflicts with or violates any legal right of the employee is *per se* unreasonable. AH c. 8, § 1C.2.a. The reasonableness of a rule must be evaluated in light of a claimant’s protection under the Americans with Disabilities Act, 42 U.S.C. § 12101, and other state and federal laws protecting workplace rights. AH c. 8, § 1C.2a and c. 8 Appendix.

The application of the rule must also be reasonable. Thus, a rule is not reasonably applied where there are circumstances of an “unusual nature.” AH c. 8, § 1D. Examples of such circumstances include the following:

- serious weather-related problems
- unavoidable transportation problems
- contradictory supervisory rules
- family emergencies, such as illness, that may lead to a violation of absence or tardiness rules. To the extent that extensive absences are covered by the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 *et seq.* (FMLA), the Massachusetts Parental Leave Act, G.L. c. 149, § 105D, the Massachusetts Domestic Violence Leave Act, G.L. c. 149, § 52E; the Small Necessities Leave Act, c. 149 § 52D; and the Earned Sick Time Law, G.L. c. 149, § 148C, they are generally not disqualifying for UI purposes as long as

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the claimant made a reasonable effort to preserve employment unless the attempt would have been futile. AH c. 7, § 4B.

- rules that regulate an employee’s conduct outside the workplace
- adherence to rules that could result in injury to the health or safety of an individual
- compliance with rules that would violate federal or state law, public policy, or ethical or professional standards
- inability to comply with the rule due to circumstances resulting from domestic violence. G.L. c. 151A, § 25(e), ¶2; AH c. 6, § 3
- any other objectively verifiable circumstances of an unusual or urgent and compelling nature, with which the claimant could not reasonably be expected to comply.

Where a claimant refused to sign a memo concerning the employer’s time card because she believed there was an error regarding her time worked on her paycheck, the Board of Review ruled the employer discharged the claimant, but the discharge was not for knowing violation of a reasonably and uniformly enforced rule or policy; the policy, though facially benign, was “implemented in an unreasonable way,” making the discharge unreasonable. BR-0013 6849 13 (6/8/15). Other instances where the Board has found a rule unreasonable include where a “no contact” rule was overbroad, BR-0020 9459 20 (12/27/17) (Key); a submission to a Fitness for Duty examination was based solely on the use of an over-the-counter hemp cream to relieve chronic knee pain, BR-0023 4482 89 (9/27/18) (Key); and a highly experienced nurse was ordered not to discuss with coworkers her discipline for objecting to a protocol concerning a highly contagious resident, BR-0015 7381 34 (12/23/15) (Key).

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# 17 Was the Rule Uniformly Enforced?

The employer bears the burden of demonstrating that it has uniformly enforced the work rule or policy—i.e., the employer must show that it treats all similarly situated employees subject to the rule or policy in a similar manner when they

violate a rule or policy. The employee's status within a progressive discipline system must also be considered. AH §§ 1C.b, 1D.

In *New England Wooden Ware Corp. v. Commissioner of the Dep't of Employment & Training*, 61 Mass. App. Ct. 532, 811 N.E.2d 1042 (2004), the Appeals Court provided the first guidance on the question of uniform enforcement of a work rule. The Court found that the claimant who was fired for violating the employer's written policy on unexcused absences, was entitled to UI where the policy included undefined terms and was unevenly applied in practice. The Court considered the employer's failure to apply the policy uniformly to the claimant as evidence of non-uniform enforcement, even if it was to the claimant's benefit. "Failure to enforce a policy uniformly, whether to the employee's benefit or detriment, still influences the employee's belief regarding the consequences of his actions." 61 Mass. App. Ct. at 535. *See also, Gold Medal Bakery, Inc. v. Commissioner of the Div. of Unemployment Assistance*, 74 Mass. App. Ct. 1105, 903 N.E.2d 1145 (2009) (unreported) (holding that where an employer could not demonstrate that its attendance policies were uniformly enforced, an employee discharged for calling in sick in violation of attendance policies was eligible for UI); BR-0002 1180 82 (2/18/04) (Key) (finding that by waiting until the claimant's 5th attendance violation following a final warning of termination, the employer led the claimant to believe that his behavior was condoned, such that the claimant lacked the requisite state of mind to be disqualified).

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## 18 Was the Claimant Incapable of Following the Rule?

A statutory exception to a finding of disqualification under G.L. c. 151A, § 25(e)(2) is that "the violation is not shown to be as a result of the employee's incompetence," a proviso that modifies both prongs (deliberate violation and rule violation) of the discharge provisions. *See* G.L. c. 151A, § 25 (e); *Trustees of Deerfield Academy, v. Director of the Div. of Employment Sec.*, 382 Mass. 26, 33 (1980) (findings of fact that employee was "an unsatisfactory employee" were sufficient for a conclusion that the claimant was not fired for disqualifying misconduct). (Quotations in original).

To the extent that this places the burden of proof on the claimant, it may be inconsistent with the statutory scheme. To establish incompetence, a claimant can show that he was incapable of adhering to the rule due to a lack of ability. If the claimant's work is not satisfactory to the employer but there is no deliberate lack of effort by the claimant, incompetence is similarly established. In some circumstances, a claimant's incompetence may be due to a temporary factor (such as stress attributable to a divorce or a family illness, causing loss of concentration), even though the claimant has the inherent ability to perform the job. AH c. 8, § 1B.3.

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## 19 How Does a Suspension Affect Eligibility?

When an employing unit suspends a claimant from work as discipline for breaking established rules and regulations, the claimant may be disqualified from receiving UI for the period of suspension, but in no case may this suspension period exceed 10 weeks. G.L. c. 151A, § 25(f); 430 CMR 4.04(4). The disqualification occurs only if the employer establishes that the claimant violated a rule or regulation that the employer published or established in its customary manner, the suspension was for a fixed period of time, and the employee has the right to return to the job at the end of the suspension period if work is available.

Public employees who are suspended following indictment are disqualified from receiving UI during the period of the suspension, even if it is for an indefinite period. See G.L. c. 151A, § 22; c. 30, § 59 (applies to officers and employees of the Commonwealth); G.L. c. 268A, § 25 (applies to county, municipal, and district officers).

However under G.L. c. 30, § 59 (the Perry Law), compensation is prohibited for state employees only if the indictment is for work-related misconduct. The Supreme Judicial Court has held that, with the exception of teachers and police officers, G.L. c. 30 § 59 excludes an employee's off-duty conduct. *Brittle v. City of Boston*, 439 Mass. 580, 594 (2003). BR-0029 0310 98 (6/19/19) (holding because a state employee's indictment was for non-work related misconduct, the Perry Law does not prohibit her from collecting unemployment compensation while on indefinite suspension). See also AH c. 8, § 3.

### ***Disciplinary vs. Investigative Suspension***

A “disciplinary suspension” under § 25(f) is distinct from an “investigatory suspension,” which, if followed by termination, should be analyzed under G.L. c. 151A, § 25(e)(2) as discharge attributable to the employee’s actions. See BR-110769 (1/11/2011) (where claimant was placed on indefinite investigatory suspension and then terminated after the employer concluded that the claimant had engaged in the suspected misconduct, this suspension cannot be analyzed as a disciplinary suspension but as a § 25(e)(2) discharge that occurred at the date the employee was put on investigatory suspension pending discharge). As a result of the Board’s decision, DUA took the position that an indefinite suspension is considered to be a discharge as of the date that the suspension began. See UIPP, Indefinite Suspensions, (5/9/2012). However, a subsequent decision of the Board caused DUA to reverse course. See BR-0002 2514 44 (9/11/14) (Key) (claimant who was placed on a disciplinary suspension could not be disqualified under G.L. c. 151A, § 25(f), because the suspension was indefinite; since the claimant remained on suspension at the time he filed an unemployment claim, his separation was properly analyzed under G.L. c. 151A, § 29, i.e., whether or not he was in total unemployment), regardless of the fact that he was subsequently discharged). Accordingly, DUA now finds that if a claimant is under an indefinite suspension, the claimant is eligible for UI. If the claimant is suspended for a workplace rule or regulation violation, the 10 week suspension can be imposed only if the suspension is for a fixed period of time and the claimant has the right to return to work as long as work is available. However, if the claimant is indefinitely suspended, adjudicated under §25(f) and later permanently separated, the entitlement to UI benefits must be investigated under §25(e) and the claim reopened for the week in which the claimant was formally separated. See UIPP # 2014.06, Revision to Policy for Adjudication of Indefinite Suspensions (9/26/14); AH c. 8, § 2.

### ***Other Grounds for Suspensions***

In addition to rules violations, DUA will inquire whether a claimant has been suspended due to conviction; drugs, or alcohol; indictment while in public office; loss of license; safety violation; accident or equipment damage; theft; misappropriation; falsification; unsatisfactory attendance, work performance, or qualifications, or behavioral issues.

## 20 Summary: What Questions Does DUA Ask in Discharge Cases?

DUA typically asks the following questions to ascertain UI eligibility in discharge cases. These represent a small sample of questions posed to claimants in English-only questionnaires. A claimant must respond either through UI Online or by mail. As these questions are often very confusing and the responses could determine initial UI eligibility, advocates should assist claimants in providing the most accurate and clear responses.

1. Why was the employee discharged?
2. Does the employer have a rule or policy regarding this offense?

### **IF RULE VIOLATION:**

3. Did the claimant know of the company's rule or policy?
4. How did the claimant know of the company's rule?
5. Was the rule uniformly enforced? How were incidents like this handled in the past?
6. Was the rule reasonable?
7. Was the application of the rule reasonable?
8. Was the rule violation a result of the claimant's incompetence?

### **IF NO RULE VIOLATION:**

9. Was the conduct deliberate? Was there an intentional act of omission by the claimant?
10. What was the employer's expectation?
11. Did the claimant know of the expectation and, if so, how did the claimant know?
12. Was there any extenuating circumstance that was the cause of the behavior?

**WARNINGS:**

13. Were any warnings issued? If so: When? How many? By whom? What was the content? Was a copy of the warning given in writing, or was the warning verbal?
14. Did the employer provide the warning in a language the claimant could understand?
15. Were the actions previously condoned?
16. Was the conduct so outrageous that no warnings were necessary?

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## **B. VOLUNTARY QUIT: QUESTIONS 21–28**

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### **21 Did the Claimant Quit Voluntarily and Without Good Cause Attributable to the Employer?**

Employees who quits their job voluntarily and “without good cause attributable to the employing unit or its agents” are subject to disqualification pursuant to G.L. c. 151A, § 25(e)(1). Where claimants are determined to have quit or resigned, **the burden of proving eligibility is on the claimant** to establish that they left either involuntarily or for good cause attributable to the employer, such that the claimant is unemployed through no fault of their own. *Sohler v. Director of the Div. of Employment Security*, 377 Mass. 785, 788 n.1, 388 N.E.2d 299, 301 n. 1 (1979).

In most cases, an employee must make all reasonable efforts to maintain the employment relationship before quitting the job, or else the claimant risks that the quit will be treated as voluntary regardless of the underlying reasons. Harassment cases present a notable exception. (See **Questions 26 and 27**). The agency position is not uniform on whether a person who is subjected to other violations of law in the workplace must first attempt to resolve the problem before quitting. Arguably, an employer is charged with knowledge of wage-and-hour laws and so

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should have been aware of the violation. *Lee v. O’Leary, Director of the Div. of Unemployment Assistance*, Quincy District Court, Docket No. 0556 CV 2136 (Coven, J.) (11/1/06) (finding that claimant had good cause for quitting where payroll policy resulting in last payment of wages violated Massachusetts wage laws).

The Board has found that no disqualification shall be imposed if the claimant quit a job with the employer to accept new permanent, full-time employment with another employer, and the claimant later became separated from the new employment for good cause attributable to the new employment unit. BR-0031 0031 53 (7/23/19).

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# 22 Was the Separation Voluntary?

A separation that is not “voluntary” will not subject a claimant to disqualification under G.L. c. 151A § 25(e)(1). A separation is considered voluntary if an employee simply chooses to leave employment. A separation is *not* voluntary if it was:

- coerced or required by the employer;
- caused by circumstances beyond the claimant’s control; or
- of an “urgent, compelling and necessitous” nature.

G.L. c. 151A, § 25(e). These factors are more fully discussed in the following sections.

## 23 Was the Separation Coerced or Required by the Employer?

### *Did the Employee Quit in Reasonable Anticipation of Being Fired or Otherwise Discharged from Employment?*

A separation is not voluntary if the employer imposed it. An employee who is given the choice of being fired or resigning and resigns, should be treated as fired. AH c.6, § 1A.1. An employee who leaves work because of a reasonable belief that a firing is imminent will not be disqualified under G.L. c. 151A, § 25(e)(1).

In both *Malone-Campagna v. Director of the Div. of Employment Security*, 391 Mass. 399, 461 N.E.2d 818 (1984) (employees who had collectively resigned claimed at the hearing that they did so because they believed they were about to be discharged for refusing to conform to employer's new, unlawful policies), and *Scannevin v. Director of the Div. of Employment Security*, 396 Mass. 1010, 487 N.E.2d 203 (1986) (employee believed he was about to be fired and so failed to submit medical document required to preserve his job), remands were required for findings as to whether the claimants' beliefs that they were about to be fired were reasonable.

In *Gabovitch v. Jurczak*, 76 Mass. App. Ct. 1109, 920 N.E.2d 88 (2010) (unpublished), the Appeals Court affirmed a lower court ruling that the employee reasonably believed that her job was coming to an end due to the dissolution of the employing partnership and that she left work for good cause attributable to the employer and was therefore eligible for UI benefits.

If the employer gives the claimant the alternative of quitting or being discharged and the claimant chooses to resign, they will not be disqualified under G.L. c. 151A, § 25(e)(1), but if DUA determines that the intended discharge would have been for misconduct or a rule violation, the claimant may be disqualified under § 25(e)(2).

Although it is not an unemployment case, practitioners should be aware of the SJC's decision in *Upton v. JWP Businessland*, 425 Mass. 756, 682 N.E.2d 1357 (1997), holding that it was not a violation of public policy to terminate an employee at will who, due to her responsibilities as a single parent of a young child, could not work the additional overtime hours that her employer required.

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The court did note, however, that the Legislature has directed that UI benefits should be available where domestic responsibilities limit a person's availability to work. 425 Mass. at 756. Therefore, if the employee were discharged, she should not be disqualified under §25(e)(2), and if she resigned in anticipation of discharge, she should not be disqualified under §25(e)(1).

Where an employer does not allow a quitting claimant to work during the course of the 2-week notice given by the claimant, the claimant is not disqualified from benefits from the date of notice to the date of quitting, even if the separation would have been voluntary and disqualifying after that 2-week notice period. BR-703301 (6/20/14).

A voluntary leaving is not disqualifying under UI law: 1) if the individual leaves her job in good faith to accept a new job on a permanent basis and loses the new job for good cause attributable to the employer; or 2) if the individual leaves because the terms of a pension or retirement program requires the individual's retirement from that job. G.L. c. 151A, §25(e), ¶3.

#### ***Retirement***

In certain cases, an employee who has some control over her date of retirement may still qualify for UI benefits. Thus, in *O'Reilly v. Director of the Div. of Employment Security*, 377 Mass. 840, 388 N.E.2d 1181 (1979), an employee who accepted his employer's proposal to accelerate his retirement by six months was not disqualified from receiving UI since job separation was inevitable. However, an employee will not be deemed eligible if the employee opts for early retirement without reasonable belief that mandatory retirement is inevitable. *Klockson v. Director of the Div. of Employment Security*, 385 Mass. 1007, 432 N.E.2d 704 (1982) (finding claimant's belief that the employer would soon have discharged him unreasonable where the employer had no mandatory retirement policy, several employees older than the 65-year-old claimant worked for the employer, and the claimant had more than 10 years' seniority).

Employees who reasonably believes they will be laid off will not be disqualified for retiring before the layoff is announced. In *White v. Director of the Div. of Employment Security*, 382 Mass. 596, 416 N.E.2d 962 (1981), the claimant accepted a retirement incentive because he had heard rumors of an impending layoff and had limited seniority. He believed that if he did not retire, he would be laid off soon after his retirement date. The Court ruled that, if his belief was reasonable, his leaving was not voluntary. In a subsequent case, the Court held that if the employer created uncertainty about whether the individual would be

laid off as part of a reduction in force, then accepting a voluntary severance package does not disqualify one for UI. *State Street Bank v. Deputy Director of the Div. of Employment & Training, et al.*, 66 Mass. App. Ct. 1, 10–12, 845 N.E.2d 395 (2006); *Charrette v. Commissioner of the Div. of Unemployment Assistance*, 72 Mass. App. Ct. 1114, 892 N.E.2d 837 (2008) (unpublished decision); BR-0014 7739 42 (9/30/15) (concluding as a matter of law that “because the employer substantially hindered the claimant’s ability to determine the likelihood that he would be involuntarily separated from his employment if he did not accept the employer’s separation package, his decision to leave was for good cause”).

### ***Layoffs and Voluntary Severance Packages***

Generally, an employee who is laid off involuntarily is eligible to receive UI. This is true even when an employer’s layoff scheme grants limited discretion to its employees to decide which workers will be laid off. For example, where an employer announces a layoff plan that contains voluntary as well as potentially involuntary components and thereby creates an environment in which an employee is forced to speculate on the likelihood of an involuntary termination, such employee has “good cause attributable to the employer” to leave work and take a voluntary severance package. See *State Street Bank & Trust Co. v. Deputy Director of the Div. of Employment and Training, et al.*, 66 Mass. App. Ct. 1, 845 N.E.2d 395 (2006); *Curtis v. Commissioner of the Div. of Unemployment Assistance*, 68 Mass. App. Ct. 516 (2007); *Charrette v. Commissioner of the Div. of Unemployment Assistance*, 72 Mass. App. Ct. 1114, 892 N.E.2d 837 (2008) (unpublished opinion); *Connolly v. Director of Div. of Unemployment Assistance*, 460 Mass. 24, 948 N.E.2d 1218 (2011).

When given a choice by management of remaining at work or accepting a layoff due to a general reduction in the workforce, a claimant who agrees to be laid off is not subject to disqualification. AH c.6, § 1A. This is because it is the employer who decides to lay off staff, and the employer can accept or reject the claimant’s offer. *Morillo v. Director of the Div. of Employment Security*, 394 Mass. 765, 477 N.E.2d 412 (1985). However, *Morillo* is limited to circumstances in which the employer has announced that layoffs will occur and does not provide a financial incentive for employees to choose in lieu of layoff. *Connolly v. Director of the Div. of Unemployment Assistance*, 460 Mass. 24, 28, 948 N.E.2d 1218 (2011) (claimant who accepted severance package was not eligible for UI where she was not compelled to apply for the termination, did not believe her job was in jeopardy, and left in part for personal reasons). In so holding, the *Connolly* Court found that there was no analytical difference in early retirement and incentive-

based termination packages, and that it was not dispositive that the employer had made the final decision in accepting the claimant's resignation.

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## 24 Was the Separation for Good Cause?

Even if the separation is voluntary, an employee is entitled to UI if the underlying reason is for good cause attributable to the employing unit or its agent. The circumstances leading to the separation need not be company policy or known to policy-level management in order to constitute good cause, as long as the supervisory-management personnel appeared to have authority to act as they did.

In good-cause quit cases, DUA generally requires claimants to bring the issue to their employer's attention and take reasonable steps to try to resolve the problem before quitting. This could include using any available appeal or grievance procedure, formal or informal, to try to resolve it. In some situations, this requirement may be met by something as simple as the employees' bringing a problem to the attention of their supervisor.

On the other hand, DUA will sometimes attempt to impose a requirement that employees pursue a grievance to the highest possible level. Advocates should be aware that the requirement of bringing the problem to the employer's attention is not statutory. They should be prepared to argue that, under the employee's circumstance, it was reasonable to forgo the complaint procedure entirely or to stop after the first level. In cases involving allegations of sexual, racial, or other unreasonable harassment, claimants need only show that the employer knew or should have known of the harassment, and "need not show that [they] took all or even 'reasonable' steps to preserve [their] employment." *Tri-County Youth Programs v. Acting Deputy Director of the Dept. of Employment & Training*, 54 Mass. App. Ct. 405, 413, 765 N.E.2d 810, 817 (2002). G.L. c. 151A, § 25(e), ¶ 5, 430 CMR 4.04(5)(c). (See **Question 26**.)

Reasonable disciplinary action is not good cause for leaving. *Leone v. Director of the Div. of Employment Security*, 397 Mass. 728, 731, 493 N.E.2d 493 (1986) (bank branch manager disqualified for quitting after being warned about inability to get along with supervisor). See also *Fergione v. Director of the Div. of Employment Security*, 396 Mass. 281, 286, 485 N.E.2d 949 (1985). However, the Board of Review held that where the record established that the claimant received

an unreasonable unpaid suspension from work that was inconsistent with the employer's own disciplinary policy, the claimant had good cause for leaving work. BR-118451 (7/15/11).

Good cause is most often found where the employer violates the employee's rights. The AH has listed various workplace rights. AH c. 8, Appendix. Additionally, good cause is found where an employer fails to correct unsafe or unhealthy work conditions, reduces the employee's compensation, subjects the employee to unfair or unduly harsh criticism, or changes the work to something "antithetical" to that for which the employee was hired.

The Court affirmed the Board's ruling that the leaving was for good cause attributable to the employer in a matter "where the claimant left work voluntarily because her supervisor subjected her to unreasonable treatment by threatening to withhold her pay and confining her in a small room where she felt unable to leave." *Workforce Unlimited, Inc. v. Ascencio*, 86 Mass. App. Ct. 1109, 14 N.E.3d 968 (Table) (unpublished decision, August 29, 2014). The Board also found that a claimant left for good cause when he repeatedly complained to his employer about failure to pay overtime in violation of the Massachusetts Minimum Fair Wage law without remedy. BR-0025 4741 79 (3/25/19).

Where a claimant was required to undergo an unpaid drug test in violation of wage and hour laws, the Board found good cause to quit. BR-116407-A (5/20/11) (Key). A claimant has good cause to quit where an employer demands that the claimant violate safety regulations. BR-125248 (5/3/13). Where a claimant believed the employer's policies posed a safety risk to employees, and OSHA cited the employer for several safety violations, the Board found that the claimant had a reasonable basis to believe the employer's working conditions were unreasonably dangerous. BR-119197 (2/13/12) (Key). Further, the Board found that a claimant's refusal to sign a document that she reasonably believed would affect her rights under her union's collective bargaining agreement or cause her to lose her job does not constitute a voluntary quit. *Pulde v. Director of the Div. of Unemployment Assistance*, 84 Mass. App. Ct. 1122, 998 N.E.2d 375 (Table) (unpublished opinion, 2013).

The Board of Review found a claimant entitled to UI where she quit her job because the performance of routine duties became detrimental to her physical health where her preexisting health condition worsened. BR-109817 (12/22/09).

In *Guarino v. Director of the Div. of Employment Security*, 393 Mass. 89, 469 N.E.2d 802, 805 (1984), remand was required for findings on whether the

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claimant, a fish packer, was required to perform additional duties that were not part of her job, and whether there were available remedies she had failed to pursue. Notably, the Court rejected the notion that the claimant must request a transfer to other work or a leave of absence in these circumstances, where such requests would be futile.

Addressing the issue of when unhealthy work conditions constitute good cause for separation, the Board of Review held that a claimant who worked extended hours over her entire 2-month employment period (including 98 hours in 6 days) had good cause to quit, even where the claimant “was aware of what her schedule would be when she accepted the position with the employer.” BR-112118 (3/03/2011) (Key). The Board asserted that it was simply “not reasonable to require an employee to work under those conditions indefinitely until the employer increases its workforce.”

Employers may not defeat the payment of UI by reducing employees’ hours to the point where they must quit, *Manias v. Director of the Div. of Employment Security*, 388 Mass. 201, 445 N.E.2d 1068 (1983) (employer changed claimant’s schedule to eliminate most of her overtime), or laying claimant off and offering to reemploy the employee at substantially reduced wages. *Graves v. Director of the Div. of Employment Security*, 384 Mass. 766, 429 N.E.2d 705 (1981). The Board found a drastic decrease in the number of work hours assigned to a claimant to be good cause to quit. See BR-110763 (5/29/2010) (Key); BR-117158 (5/9/11)(Key). If an employer reduces an employee’s hours with the result that the employee would neither qualify for partial benefits under G.L. c. 151A, § 29(b) nor be able to earn a living wage, the employee may have good cause for leaving work. AH c.7, § 3B.6. The Board held that a claimant had good cause to quit his employment when the employer failed to inform the claimant that its business slowed down during the holiday season. Because the employer had told the claimant upon hire that he would have work for 40 hours per week and did not inform him that the substantial reduction in hours was only intended to be temporary, the claimant had good cause to leave the employer and file for benefits. BR-122769 (10/31/2012). (See **Question 29.**)

In a 2012 Board case, a claimant had resigned because his employer misclassified him as an independent contractor when, as a matter of law, he was an employee. The Board found good cause, attributable to the employer: upon being hired, the claimant had not been told he would be an independent contractor, he did not sign a contract indicating this status, and he learned of the misclassification only upon receiving his first paycheck and asking why no taxes had been deducted from it. The Board relied on *Graves v. Director of the Div. of Employment Security*, 384

Mass. 766, 768, 429 N.E.2d 705 (1981), analogizing the misclassification to significant, detrimental changes in the terms and conditions of employment that render a job unsuitable. BR-122163 (8/27/2012). (See **Question 39**, Misclassification).

A Board of Review decision suggests that *either* an indefinite *or* a permanent reduction in hours qualifies as good cause. In BR-110763 (3/28/2010) (Key), the Board determined that when an employer unilaterally reduced the claimant's hours by half, creating a "drastic change in the conditions of the claimant's employment," the claimant had good cause attributable to her employer to resign. This was so even though the Board specifically determined as a finding of fact that "the employer expected that the reduction in hours would occur *only until the economy improved.*" *Id.* (emphasis added). Thus, the fact that the reduction in hours was time-limited did not mean that the claimant did *not* have good cause to resign based on the reduction in her hours.

Unfulfilled promises concerning pay or benefits can constitute good cause for leaving employment, if the promise was sufficiently definite. A remand was required in *Svoboda v. Director of the Div. of Employment Security*, 386 Mass. 1004, 436 N.E.2d 1218 (1982), for findings on whether the employer had failed to pay the claimant in accordance with the employment agreement, because such failure could have constituted good cause for leaving. See also AH c. 7, § 3B.5. In addition, reliance on a promise is good cause for leaving employment. The Board held there was good cause to leave where an employer's promises (prior to hiring) of biannual raises were unfulfilled, even though claimant spoke with employer every six months about raises and did not receive a raise during claimant's 4 years of employment. BR-124039 (10/31/12). The Board also found good cause for leaving employment where the employee relied upon the promise of a raise that never materialized, and the employee made reasonable efforts to address the problem with the employer. BR-709900 (4/8/14). Finally, where an employer promised an employee a raise and did not follow through with that promise, a Massachusetts District Court has held that the employee had good cause attributable to the employer to quit. *Stowell v. Cicatiello, Director of the Div. of Unemployment Assistance*, Orleans District Court, CA No. 1126 CV 0210 (2010). However, good cause for leaving does not exist where the claimant expected or requested a raise that was not unconditionally promised. See AH c. 7, § 2B.2.

The Court in *Hunt v. Director of the Div. of Employment Security*, 397 Mass. 46, 489 N.E.2d 696 (1986), also remanded for findings on this issue, where the employer hired the claimant as a temporary secretary with representations that the position would probably become permanent after six months, and permanency

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would have entitled the claimant to employee benefits. The claimant left after the employer extended her temporary status indefinitely.

If the employer changes a job so that it becomes significantly different from the job that the employee originally accepted, it may be considered “unsuitable.” If an employee’s job becomes unsuitable, then she has good cause to leave it.

*McDonald v. Director of the Div. of Employment Security*, 396 Mass. 468, 487 N.E.2d 186 (1986); AH c. 7, § 3B.7. The burden of establishing unsuitability is on the claimant. (For a more detailed explanation of the “suitability” requirement, see **Question 8**.)

Where employees have a reasonable belief that the job is hazardous to their health, this makes the job unsuitable and, therefore, constitutes good cause for leaving the job. *Carney Hospital v. Director of the Div. of Employment Security*, 382 Mass. 691, 414 N.E.2d 1007 (1981) (holding that the claimant need only prove she had a reasonable belief and did not have to establish that the work environment in fact harmed her); and a reasonable belief that the job is detrimental to the health of an employee because of pregnancy also makes the job unsuitable and, thus, constitutes good cause for leaving the job. *Director of the Div. of Employment Security v. Fitzgerald*, 382 Mass. 159, 414 N.E.2d 608 (1980).

The Board has ruled that no disqualification shall be imposed if the claimant quit their job with the employer to accept new permanent, full-time employment with another employer, and the claimant later became separated from the new employment for good cause attributable to the new employment unit. See BR-0031 0031 53 (7/23/19).

#### ***Subjective Complaints and Unwarranted Disappointment in the Job Do Not Constitute Good Cause***

A claimant’s “mere” disappointment with pay, working conditions, or management, where there was no justifiable expectation that conditions would be otherwise, is not good cause attributable to the employing unit. In *Fanion v. Director of the Div. of Employment Security*, 391 Mass. 848, 464 N.E.2d 69 (1984), the claimant accepted a change in position with a pay increase to take place after six months. After five months she learned the details of the increase, felt that the pay was not commensurate with the pressures of the job, quit, and was disqualified. See also *LeBlanc v. Director of the Div. of Employment Security*, 398 Mass. 1010, 501 N.E.2d 503 (1986). However, if the pressures of

the job were such as to affect claimants' health, their leaving may be for non-disqualifying urgent, compelling, and necessitous reasons. (See **Questions 29–32.**)

In *Sohler v. Director of the Div. of Employment Security*, 377 Mass. 785, 388 N.E.2d 299 (1979), a hospital employee was disqualified for voluntarily leaving without good cause where she testified to “subjective” complaints regarding mismanagement by the hospital that made her working conditions tense and frustrating, without proving that she was being required to perform work substantially different from that for which she was initially employed or that substandard conditions at the hospital subjected her to professional sanction, criminal or civil liability, or had an adverse effect on her health. See also *Berk v. Director of the Div. of Employment Security*, 387 Mass. 1003, 441 N.E.2d 531 (1982) (alleged mismanagement of a preschool); *Wagstaff v. Director of the Div. of Employment Security*, 322 Mass. 664, 79 N.E.2d 3 (1948) (denial affirmed where Board of Review found claimant left because of general dissatisfaction with the job and failure of employer to grant a pay raise).

Disappointment of a claimant who is a substantial shareholder with the company's financial performance (as with disappointment with pay or working conditions) does not constitute good cause for resignation. *Abramowitz v. Director of the Div. of Employment Security*, 390 Mass. 168, 454 N.E.2d 92 (1983).

Simple dissatisfaction with salary is not good cause for leaving attributable to the employer. *Frazier v. Director of Dept. of Unemployment Assistance*, 86 Mass. App. Ct. 1121 (2014).

However, “general job dissatisfaction” or “mere disappointment” must be distinguished from violations of law. For example, although a claimant's opinion that “wages are too low” may fall under “general job dissatisfaction;” however, if that wage violates minimum wage and/or overtime laws, this constitutes good cause, even if claimants are unaware of their legal rights. Although stated by the SJC in the context of discharge, the principle is applicable here. See *Kinch v. Director of the Div. of Employment Security*, 24 Mass. App. Ct. 79, 506 N.E.2d 169 (1987) (claimant refused to work hours in violation of wage-and-hour laws, and finding that it is immaterial whether the employee is aware of or asserts the legal right, or its source, at the time of the discharge). To aid in the awareness of other legal rights that convert an improper determination of “general dissatisfaction” to a recognition that the separation was for reasons constituting a violation of legal rights, it is important to review other workplace rights. See **Introduction**; AH c. 8, Appendix.

## 25 Was There a Reasonable Concern Regarding Health or Safety?

A claimant who leaves work due to reasonable concerns regarding unsafe working conditions or inadequate lighting, heat, ventilation, or sanitation can have good cause for quitting. AH c. 7, § 3B.4. For example, a claimant leaves work for good cause when working conditions result in exposure to a risk of injury or danger to health beyond the normal hazards of the job. However, the claimant should attempt to resolve the hazardous condition or faulty equipment by making a complaint to the employer prior to leaving work. *Id.* Where the employer does not permit an employee to do so, the claimant has good cause to resign. BR-110509 (9/28/10).

In a District Court decision, the Court reversed the denial of UI, stating that where an employer's smoking policy at the nursing home where the claimant worked as a nurse's aide subjected her to unwanted second-hand smoke, this exposure constituted good cause for her leaving attributable to the employer. *Perez v. Cicatiello*, Boston Municipal Court, CA 2009-01-CV-4076 (Forde, J.) (6/14/11).

The Board of Review held that preliminary OSHA determinations of safety deficiencies in the workplace were sufficient to support the reasonableness of a claimant's belief that she was working in unsafe conditions and therefore constituted good cause attributable to the employer. BR-119197 (2/23/12) (Key).

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## 26 Was the Claimant Being Discriminated Against or Harassed at Work?

Specific language in G.L. c. 151A, § 25(e), ¶6 precludes disqualification if the separation was caused by sexual, racial, or other unreasonable harassment but only where the employer, its supervisory personnel, or its agent knew or should have known about the harassment.

DUA's regulations governing harassment in the workplace as it bears on UI eligibility are helpful to advocacy in these cases. The regulations define what

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constitutes racial, sexual, or other unreasonable harassment. 430 CMR 4.04(5)(a) and (b). Further, the regulations provide that in cases of alleged racial, sexual, or other unreasonable harassment, where the employer, its agents, or other supervisory employees knew or should have known about the harassment, the employee need not take reasonable, or even any, steps to resolve the situation before leaving. 430 CMR 4.04(5)(c)¶¶ 1 and 2. See *Tri-County Youth Programs, Inc. v. Acting Deputy Director of the Div. of Employment & Training*, 54 Mass. App. Ct. 405, 413, 765 N.E.2d 810, 817 (2002).

To determine whether a claimant's reason for leaving work is due to harassment, DUA looks to the totality of the circumstances surrounding the claimant's separation, such as the nature of the harassment and the context in which the alleged harassing incident occurred. 430 CMR 4.04(5)(d).

An employer is not deemed to have knowledge of harassment by a coworker or a customer, and an employee is required to report it unless he can prove that the employer knew or should have known of this harassment.

For harassment cases *other* than racial, sexual, or other unreasonable harassment, the claimant must notify the employer, unless knowledge is imputed, and may leave if the employer fails to take prompt and effective remedial action. 430 CMR 4.04(5)(c), ¶ 3.

In one Board case where failure to bring the matter to the employer's attention did not defeat the claim, the Board found that the sales manager, who had harassed the claimant by belittling her and repeatedly yelling at her, was a longtime friend of the general manager and therefore it would have been futile for the claimant to report the problem. BR-122882-A (8/30/12).

The Board has recognized retaliation (flowing in one matter from a claimant's reporting his legitimate concerns about management's altering his time records) as a form of unreasonable harassment qualifying the claimant for UI benefits. Following the claimant's complaint, management targeted him for truck inspections that were not in accordance with the employer's policy and went to the claimant's home and took photographs of his property while the claimant was on medical leave, and the employer did not present evidence to show that other employees were treated similarly to the claimant. BR-121433-CTRM (10/31/2012).

## 27 Did the Claimant Take Reasonable Steps to Preserve Their Job?

Other than in sexual, racial, or other unreasonable harassment cases, discussed above, or cases where a claimant leaves due to the effects of domestic violence (**Questions 30 and 33**), an employee has a duty to take all reasonable steps to preserve the employment relationship before resigning, unless such efforts would be futile. Where employees have failed to do this, the employees are said to have caused their own unemployment and leaving is not considered involuntary, because there was, or may have been, an alternative. In *Kowalski v. Director of the Div. of Employment Security*, 391 Mass. 1005, 460 N.E.2d 1042 (1984), for example, the employee’s toleration of harassment by the employer and his failure to complain were legal grounds for denying employee UI after employee quit his job. The claimant has the burden of proving further efforts to preserve their employment would have been futile. However, where the claimant fails to notify the employer of their particular personal reason for leaving and where disclosure would not enable the employer to accommodate them, failure to notify does not necessarily defeat a claim. BR-115452-OP (4/4/12) (change in childcare responsibilities).

An employee is expected to take such “reasonable means to preserve her employment” as to show her “desire and willingness to continue her employment.” *Raytheon Co. v. Director of the Div. of Employment Security*, 364 Mass. 593, 597-598, 307 N.E.2d 330 (1974); 430 CMR 4.04(5)(c)(3)(b). However, it is not necessary that a claimant have had no other choice than to resign. *Norfolk County Ret. Sys. v. Director of Dep’t of Labor & Workforce Dev.*, 66 Mass. App. Ct. 759, 766 (2006). In fact, although the general rule requires “reasonable steps” to preserve employment, there are situations in which “the circumstances indicate that such efforts would be futile or result in retaliation.” 430 CMR 4.04(5)(c)(3)(b); *Guarino v. Director of the Div. of Employment Security*, 393 Mass. 89, 94, 469 N.E. 2d 802, 805 (1984) (“We reject the notion that in order to be eligible for benefits an employee must request a transfer to other work or a leave of absence.”) Where a claimant has a reasonable belief that additional efforts to correct a problem would be futile, they have satisfied her burden to make reasonable efforts to preserve employment. See BR-0019 5811 74 (9/13/17) (Key) (finding good cause to resign where an employer repeatedly asked employee to work on Saturdays, even though the employer had granted

Saturdays off as a reasonable accommodation). And where employees make concerns about changes to the terms and conditions of their job known to his immediate supervisor, who responds repeatedly that nothing will be done to address them, these efforts to preserve employment are sufficient. See BR-111647 (9/28/10) (Key).

Additionally, many low-wage workers often feel powerless in their jobs and do not feel they can ask for time off to resolve problems or a leave of absence, out of fear that they will be fired. Advocates need to explore carefully why a claimant did not take any further steps. For example, had the worker's prior experience in raising issues result in being ignored or verbally harangued? Did the experience from observing other coworkers making similar requests lead the employee to fear of making such a request? Any of these, or other, reasons may provide an explanation as to why your client believed such attempts would have been futile.

Review examiners take very seriously claimants' obligation to take steps to preserve their job. Following are some cases on this point.

### ***Requesting Leave of Absence or Transfer to Another Position***

Leaving work without first requesting a potentially available leave of absence or transfer is a frequent reason for denial of benefits. This requirement is more strictly applied in leavings due to urgent and compelling personal reasons, but can also arise in good-cause cases. (See **Question 30**.) In *Dohoney v. Director of the Div. of Employment Security*, 377 Mass. 333, 386 N.E.2d 10 (1979), for example, the claimant was disqualified after she left without applying for maternity leave or discussing with anyone her plans to return after childbirth. (See **Question 32**.)

In *Reissfelder v. Director of the Div. of Employment Security*, 391 Mass. 1003, 460 N.E.2d 604 (1984), the claimant left work after unsuccessfully requesting a day off to go to court on a custody matter. She was disqualified because she failed to provide her supervisor with her reason for needing to go to court, but might have been given the time off, and preserved her job, had she done so.

**Note:** These cases, while not overruled, predate an expansion of employee rights laws as well as new obligations imposed on employers to notify their employees of their rights and responsibilities under these laws. It is illegal for employers to discharge, penalize, or threaten to discharge or penalize employees who have taken time off to testify in a criminal action if the employee is a victim or is subpoenaed to testify, if they have notified their employer prior to the day they are required to be in court. G.L. c. 268, § 14B. Similarly, other workplace laws

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provide protection against retaliation. See, e.g., the Earned Sick Time Law, G.L. c. 149, § 148C and other laws listed in the **Introduction, Note on Related Laws and Benefits**.

In some situations, transfer to another position will cure or diminish the employees' problem with their current position. For example, if the employee is physically unable to do one job, DUA will expect a requested transfer to a less demanding position, if one is available. Again, if no such position is available, or the claimant can show the employer would not have granted the transfer request, no request should be required. And an employee should not be required to request transfer to a position with substantially lower pay or much less favorable conditions.

#### ***Notifying the Employer of Problem with the Employee's Job***

Claimants' leaving may be considered voluntary if they quit without first informing the employer of the problem with the job and giving the employer an opportunity to take steps to resolve it. For example, an employee whose childcare responsibilities change so that they conflict with the individual's hours of work should notify the employer of the problem to give the employer a chance to offer the employee different work hours. An employer might also be able to offer an injured employee a transfer to light duty. Similarly, a multistate employer might be able to offer an employee who must move out of state a transfer to a workplace in the new state. And the Board has held that even where a claimant has a reasonable workplace complaint and believes the employer is violating the law, they must show that he took reasonable efforts to resolve the matter or show that making such efforts would have been futile. See BR-0014 5343 84 (6/29/15) (Key).

Although an employee must provide an opportunity for the employer to correct any problems, the Board of Review has held that it is not necessary for employees to take their complaint to the highest level possible in his employing unit in order to remain eligible for UI upon resigning, if doing so would have been futile. In BR-111647 (9/28/2010) (Key), the Board rejected the employer's contention that the employee should have gone over the manager's head to Human Resources in order to preserve his job, and held instead that the employee made legally sufficient efforts to preserve his job when he made his concerns known to his immediate supervisor, who responded repeatedly that nothing would be done to address them. The Board felt that the manager's statements demonstrated the futility of further efforts by the employee. The Board cited *New York and Mass. Motor Service, Inc. v. Mass. Commission Against Discrimination*, 401 Mass. 566, 517 N.E.2d 1270 (1988), which held that a claimant notifying his supervisor of

the need for a different work schedule constituted adequate effort to preserve employment. In addition, the Board of Review held that a claimant who quit her job due to her employer's withholding earned pay had good cause attributable to the employer to resign, and she was under no obligation to bring the violation to her employer's attention prior to her resignation. BR-124223-A (1/30/13).

Furthermore, a request for a leave of absence may also be futile because a leave would not ameliorate the situation. AH c. 7, § 1C.5. *See also* BR-108494-CTRM (5/8/2009) (holding that a pregnant employee took adequate steps to preserve her employment before resigning despite not having specifically requested Massachusetts Maternity Leave Act (MMLA) leave, relying in part on the fact the MMLA, which allows only 8 weeks of maternity leave, could not have remedied her need for 17 weeks of leave) (The MMLA has been replaced in 2015 by the Massachusetts Parental Leave Act).

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## 28 Summary: What Questions Does DUA Ask in Voluntary Quit Cases?

DUA typically asks the following questions to ascertain UI eligibility in voluntary quit cases. These questions are a small sample of questions posed to claimants in English-only questionnaires. A claimant must respond either through UI Online or by answering these questions in the mail. As these questions are often very confusing and the responses could determine initial UI eligibility, advocates should assist claimants in providing the most accurate and clear responses.

1. Why did you leave your job?
2. What were the events leading up to your leaving the job?
3. What were the terms of your employment?
4. What was your regular work?
5. What could the employer have done to remedy any problems you had?
6. What did you do to try and work out a solution before leaving? Do you have any proof of what you did?

7. Did you talk to anyone at work about the problem?
8. If you didn't talk to anyone before leaving, why not?
9. Did you have a union, and if so, did you exhaust the union grievance procedure?
10. Did you know about the employer's policies regarding leave of absence?
11. What did you tell the employer was the reason for your leaving your job?
12. Did you have to leave your job because of union or retirement rules?

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## **C. URGENT, COMPELLING REASONS REQUIRING WORK SEPARATION: QUESTIONS 29–32**

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### **29 Were There Urgent and Compelling Personal Reasons Causing the Claimant to Leave Work?**

Claimants who leave work due to “urgent, compelling and necessitous circumstances” leave involuntarily and are eligible to receive UI benefits under G.L. c. 151A § 25(e), ¶3; AH c. 7, § 4. There are no hard-and-fast rules regarding what constitutes urgent, compelling and necessitous circumstances for leaving a job; such determinations are largely driven by the facts of the individual case. AH c. 7, § 1C.4. “The nature of the circumstances in each case, the strength and the effect of the compulsive pressure of external and objective forces must be evaluated, and if they are sufficiently potent, they become relevant and controlling factors.” *Reep v. Commissioner of the Dept. of Employment & Training*, 412 Mass. 845, 848, 593 N.E. 2d 1297 (1992). However, a review examiner would typically find that certain general categories meet the definition and the courts have held that a wide variety of personal circumstances have been recognized as constituting “urgent, compelling and necessitous” reasons.

For example, an employee who must leave work due to illness or the need for treatment (including treatment for alcoholism), to escape domestic violence, or due to family responsibilities, such as to care for an ill family member or because childcare arrangements unexpectedly collapse, may do so for compelling personal reasons and, if so, should not be disqualified. See *Norfolk County Retirement System v. Director of the Dept. of Labor & Workforce Development*, 66 Mass. App. Ct. 759, 765, 850 N.E. 2d 1079 (2006)(collecting cases); *Raytheon Co. v. Director of the Div. of Employment Security*, 364 Mass. 593, 307 N.E.2d 330 (1974); BR-0027 2835 41 (1/14/19); BR-1576384 (5/15/14). In another case, an employer-imposed schedule change interfered with the claimant's childcare responsibilities, and the court remanded the case to consider whether the claimant's domestic responsibilities meant that his leaving work was involuntary. *Zukoski v. Director of the Div. of Employment Security*, 390 Mass. 1009, 459 N.E.2d 467 (1984). In such situations, however, the employee will be expected to explore other, less drastic, alternatives before quitting. The most common expectation is that the claimant will request a leave of absence, unless it would be futile to do so. (See **Question 30**). The Board held that the claimant's decision to leave work in order to care for her ailing grandmother, who lived in New Jersey, was involuntary. It made no difference that her grandmother later moved to Massachusetts or that her health eventually improved because the standard is whether claimant acted reasonably at the time of her resignation. The claimant also tried without success to preserve her job before quitting, including requesting a leave of absence in lieu of resigning. BR- 0002 4578 04 (12/31/2013). The Board held that a claimant who was pregnant who could not perform heavy lifting had an urgent, compelling, and necessitous reason for quitting when her employer's only offer to accommodate her medical necessity was to reduce her hours, without providing any relief from lifting heavy items. BR-0014 5404 50 (8/17/15).

Childcare needs and domestic responsibilities also can render a separation involuntary. *Manias v. Director of the Div. of Employment Security*, 388 Mass. 201, 204, 445 N.E. 2d 1068 (1983). In a case where a claimant left her job after learning that she would not be able to change her hours to make them compatible with her childcare needs, the Board held that her separation was involuntary. BR-0002 4383 77 (12/3/13).

Not being able to afford childcare can also make leave involuntary. The Board also held that a claimant's need to leave work just before her scheduled return from maternity leave was involuntary because she could not afford childcare services as a working, single parent. BR-0002 1624 00 (6/19/14). And the Adjudication Handbook recognizes that continued employment may be impossible where severe documented financial hardship (e.g., rent past due

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notices, eviction notices, bank statements, medical bills) causes a claimant to move to a new location beyond commuting distance, making continued employment impossible. AH c. 7, § 4B.8.

The Board of Review has held that a claimant's leaving was involuntary where the claimant's mental health condition rendered him unable not only to perform his job but also to make any efforts to preserve his job. BR-110773 (1/27/2010) (Key). A claimant who resigned because he reasonably believed that his job had a negative impact on his health and he had already taken a leave of absence, left for urgent, compelling reasons. BR-95712-FE (3/16/2005). The Board of Review held that a claimant suffering from severe mental disorders who believed his mental condition would lead to discharge left involuntarily and his illness prevented compliance with the obligation to preserve employment. BR-0014 6325 82 (1/7/15).

Similarly, the Board has held that a claimant's separation was involuntary where the claimant's mental state was impaired at the time of resignation because her pain medication rendered her unable to think rationally about quitting. BR-671940 (2/13/2014). The Board noted that even if claimant was aware of the obligation to try and preserve employment, she was not able to do so at the time due to significant impairment. *Id.* The Board of Review held that a claimant with mental disorders had urgent reasons to quit mid-shift when she experienced a severe panic attack and she lacked the capacity to make efforts to preserve her job at the time she walked out. BR-0015 9657 00 (5/17/16).

Additionally, the Board held that a claimant's leaving was involuntary where the claimant was vomiting blood from an ulcer and the doctor advised a less stressful job, so long as claimant reasonably believed the condition was caused by work. The Board noted that verification from the doctor was not necessary. BR-1233626 (12/27/12). The Board of Review also held that a claimant's stress about her husband's major illness was sufficient to establish that the claimant left work at a funeral home for urgent, compelling, and necessitous reasons. BR- 0015 8288 32 (12/23/15).

**Note 1:** Leaving for urgent, compelling, necessitous reasons may prompt an inquiry as to whether the claimant is able to work and available for work. (See **Question 8.**)

**Note 2:** If the employee's reason for leaving was an urgent, compelling, and necessitous one, the employer's experience rating is not charged and the UI payments are made from the UI Solvency Fund, unless the employer is self-insured. G.L. c. 151A, § 14(d)(3).

**Note 3:** Advocates should review AH, c. 7, § 4B for other examples of involuntary leaving that are not disqualifying, such as moving with a family member to escape the threat of domestic or gang violence or to avoid homelessness, or where a claimant under the age of 18 moves with their parents. Although a longstanding exception has included moving with a spouse serving in the armed services, an Appeals Court decision erroneously noted (based on a mistaken fact submitted by DUA Counsel) that this provision has been repealed. *DiGiulio v. Director of Dep't of Unemployment Assistance*, 94 Mass. App. Ct. 292, n. 4, 113 N.E. 3d 850 (2018). The DUA Legal Department has confirmed that this provision has not been repealed and legislation is pending to codify this requirement. See AH c. 7, §4B.6.

Other common reasons of an “urgent, compelling, and necessitous” nature are described in the following sections.

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## 30 Did the Claimant Try Requesting a Leave of Absence First?

To establish that the claimant left work for “urgent, compelling and necessitous circumstances,” the employee must have first made reasonable attempts to find a way to maintain the employment relationship (see **Question 27**), generally by requesting a leave of absence. This requirement will be excused if employees can establish that:

- they reasonably believed leaves of absence were not available or that their request for a leave of absence would have been denied; or
- a leave of absence would not have resolved the underlying problem.

Review examiners treat this requirement very seriously and do not lightly excuse a failure to request a leave. It should be noted that this leave of absence requirement is not statutory.

Claimants are not required to request a leave if they did not know a leave might be available, or if the employer would not grant a leave. See AH c. 7, § 1C.5. The Board of Review held that while a claimant may have inaccurately concluded that she had already exhausted her available leave, this belief was reasonable given

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her severe mental and physical conditions at the time. BR-0014 5696 18 (7/16/15). The Board of Review held that a claimant acted reasonably when she did not request leave to deal with childcare issues because management inaccurately told her that her leave under a collective bargaining agreement had been exhausted. BR-0014 3119 43 (12/9/15).

The Board held that claimant's need to stop working to allow a doctor to adjust depression medication (after being denied FMLA leave due to ineligibility and without employer's providing an option for non-FMLA leave) was involuntary as a matter of law, citing *Reep v. Comm'r of Department of Employment & Training*, 412 Mass. 845, 593 N.E.2d 1297 (1991); *Guarino v. Director of the Div. of Employment Security*, 393 Mass. 89, 469 N.E.2d 802 (1984). BR-0002 1459 34 (1/10/2014). The Board of Review held that a claimant who informed her employer that her work was physically overwhelming and who had a mental breakdown because of her inability to adequately perform the work, separated involuntarily under G.L. c. 151A, § 25(e). BR-0016 3569 76 (10/19/15).

The Board also held that a claimant's decision not to request further unpaid leave after his FMLA leave expired was reasonable on the basis of futility (if granted—which was unlikely—he still would not have recovered sufficiently to do the work he had been doing prior to injury and the employer would not have any light-duty positions available), which rendered his separation involuntary as a matter of law. BR-0002 2340 17 (6/25/2014).

When an employee returns from an approved leave of absence only to be notified by their employer that they have already been replaced, the reason for separation from employment for UI purposes is “discharge.” See BR- 0002 1899 64 (1/15/2014).

**Note:** Ensure that the claimant would actually have been eligible for a leave under the applicable federal or state law and that the employer followed the requisite posting and notification requirements. Claimants who are on a leave of absence granted at their request will be considered “not in unemployment” and therefore ineligible for UI benefits during the period of their leave.

In *Lebeau v. Commissioner of the Dep't of Employment & Training*, 422 Mass. 533, 664 N.E.2d 21 (1996), the claimant requested a leave of absence and then sought to rescind the leave, and the employer exercised its discretion (under a contract) not to rescind. The court held that the claimant was not involuntarily unemployed during the period of the leave and therefore was not entitled to benefits.

### *Domestic Violence and Sexual Harassment Exceptions*

The requirement that a claimant take reasonable steps to resolve problems with the employer prior to leaving does not apply when the claimant leaves work due to domestic violence, G.L. c. 151A, § 25(e), or where there are allegations of work-related sexual harassment. See *Tri-County Youth Programs, Inc. v. Acting Deputy Director of the Div. of Employment & Training*, 54 Mass. App. Ct. 405, 765 N.E.2d 810 (2002).

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## **31** Was There a Transportation Problem?

A lack of transportation may be a compelling reason if caused by circumstances beyond employees' control and they have no other means of getting to work. See *Raytheon Co. v. Director of the Div. of Employment Security*, 364 Mass. 593, 598, 307 N.E.2d 330 (1974). However, claimants may be disqualified if they fail to take reasonable steps to mitigate the transportation issue. For example, a disqualification was upheld where an employee's car broke down but he declined to make temporary use of available public transportation or to ride with coworkers. *Navarra v. Director of the Div. of Employment Security*, 382 Mass. 684, 409 N.E.2d 1306 (1980). Had the employee claimed at the hearing that he had quit because his employer's relocation increased his transportation burden, this might have constituted good cause.

The Board held that it was reasonable for a claimant to leave work when the claimant suffered from seizures, making travel to and from work dangerous, and the employer could not accommodate a closer work location. BR-124352 (11/26/12).

An employee who leaves work due to a move outside of a reasonable commuting distance is generally ineligible to receive UI benefits. However, if an employee moves outside of a reasonable commuting distance for "urgent, compelling and necessitous reasons" (i.e., domestic violence, medical reasons of self or spouse, loss of residence, accepting permanent housing, inability to find suitable housing following foreclosure, etc.), then the claimant is not disqualified for leaving work. *Id.*; *Brightwell v. King, Deputy Director of the Div. of Employment & Training*, Greenfield District Court, CA No. 9741 CV 539 (Hodos, J.) (3/2/98). If the

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employee leaves work because the employer moves beyond commuting distance from the employee's home, then the leaving is involuntary. *Id.*

If an employee moves outside of a reasonable commuting distance to care for an ailing ex-spouse, this can also render a separation involuntary. The Board held that a claimant's decision to move outside of commuting distance in order to care for his ill ex-wife made his separation involuntary. BR- 0002 2245 10 (2/21/14).

An employee's separation is involuntary where it is proximately caused by incarceration (technically rendering employee unable to commute to work) on false allegations; this is because it cannot be said that the employee is at fault for bringing about incarceration where the charges are false. Proof that charges are false is necessary. BR-2033616 (2/4/2014). Note that *conviction*, as opposed to being held on *charges*, is a separate issue. G.L. c. 151A, § 25(e)(3). (See **Question 36.**)

When an employee moved outside of a reasonable commuting distance in order to accept permanent housing after being approved for federal subsidized "Section 8" housing, the Board found she left for urgent, compelling, and necessitous reasons—she had been living in a homeless shelter with her two children prior to being approved for Section 8 housing. BR-123742 (10/31/2012).

Where a claimant's home was foreclosed upon because, after her husband's death, she was unable to pay the mortgage and the claimant could not find affordable housing close to her job that accommodated her large and elderly family dog, the Board concluded that the claimant's decision to move out of state to live near her family, where she had been offered free trailer-home accommodations that would allow her to keep her dog, constituted an urgent, compelling, and necessitous reason for leaving her job. BR-116429 (9/9/2011).

#### ***Loss of License Required for Work***

Where individuals cannot work, or get to and from work, because of the loss of a professional license or driver's license and it is established that the loss is their fault, the employees are considered to have brought about their own separation and to have left work voluntarily. *Olmeda v. Director of the Div. of Employment Security*, 394 Mass. 1002, 475 N.E.2d 1216 (1985) (conviction of driving while intoxicated); *Rivard v. Director of the Div. of Employment Security*, 387 Mass. 528, 441 N.E.2d 257 (1982). The same reasoning has been applied to the dismissal of a teacher who allowed her provisional educator's certificate to expire. *Burroni v. Director of the Div. of Employment Security*, 85 Mass. App. Ct. 1127,

10 N.E.3d 671 (2014) (unpublished). But where the license loss is not the employee's fault, the leaving is deemed involuntary. *Carey v. Deputy Director of the Div. of Employment Security*, Greenfield District Court, CA 0041-CV-0251 (6/4/01) (claimant, who was an admitted alcoholic, qualified for UI — notwithstanding his loss of license for failure to take a breathalyzer test — because any conduct arising out of his irresistible compulsion to drink was not “voluntary”). For a Board decision affirming that a person who loses their license for drunk driving, and who was a diagnosed and active alcoholic whose uncontrollable impulse to drink caused the arrest for drunk driving, is nonetheless eligible for UI benefits, see **Question 34**.

## 32 Was There a Pregnancy/Parental or Illness Issue?

### *Pregnancy and Parental Leave*

Pregnancy or childbirth can be a compelling personal reason, but the claimant's decision to leave employment must be reasonable, and the employee must exhaust all reasonable means to preserve her employment. *Director of the Div. of Employment Sec. v. Fitzgerald*, 382 Mass. 159, 414 N.E.2d 608 (1988). In *Fitzgerald*, the claimant, who prevailed in obtaining UI benefits, was a welder whose obstetrician advised her in mid-pregnancy to discontinue her employment. She sought a transfer to clerical work, but the company physician did not support her request for transfer. After obtaining outside opinions, she declined to continue welding and was put on maternity leave. While on maternity leave, she continued to seek clerical work and was considered involuntarily “unemployed” despite her ongoing relationship with the employer.

In *Dohoney v. Director of the Div. of Employment Security*, 377 Mass. 333, 386 N.E.2d 10 (1979), the claimant was disqualified after she left without applying for maternity leave or discussing with anyone her plans to return after childbirth.

According to AH c. 7 § 1.C.5, claimants' statements that they did not know that a leave was available or that attempts to request a leave would be futile is a valid reason for not requesting a leave of absence. And, despite the decision in *Dohoney*, it is not absolutely necessary for a claimant leaving employment due to pregnancy to specifically apply for maternity leave (under federal or state laws governing leave due to pregnancy or the employer's policy) in order to remain

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eligible for UI. In BR-108494-CTRM (5/8/2009), the Board found the claimant took sufficient steps to preserve her employment before leaving her position due to her pregnancy. Although the claimant did not apply for FMLA or parental leave, she did generally inquire about a leave for pregnancy, and the director did not offer her parental leave or any other options for maintaining her employment; thus, the Board concluded it was reasonable for the claimant to believe that further efforts to preserve her employment would have been futile.

An employee who has properly applied for parental leave and whom the employer does not reinstate at the end of the leave is eligible for UI benefits; the employer-employee relationship is deemed to continue during the leave. *Western Electric Co. v. Director of the Div. of Employment Security*, 340 Mass. 190, 163 N.E.2d 154 (1960). However, arguably, if the claimant can show that the termination occurred when the leave began, that date would be the start of the claimant's benefit year and eligibility for UI would start as soon as the claimant was available for work. An extended unpaid leave may affect claimants' benefit credit, and thus their monetary eligibility and benefit rate. G.L. c. 151A, § 24(a).

The Board held a claimant's separation to be involuntary when her employer required her to decide, months before giving birth, that she would need to quit because she believed that she would not be able to afford childcare after giving birth. Though circumstances changed following her prospective notice of resignation such that affording childcare became feasible, these circumstances were neither planned nor were they reasonably foreseeable when she was forced to make the decision. BR-0002 1442 38 (12/30/2013) (Key).

#### ***Pregnancy Discrimination, the Massachusetts Parental Leave Act, the Massachusetts Pregnant Workers Fairness Act, and the Paid Family and Medical Leave Law.***

Under the Massachusetts Parental Leave Act, G.L. c. 149 §105(d), employees who have completed their probationary period or who have worked full-time for the employer for 3 months is entitled to 8 weeks of parental leave for the purpose of the birth or adoption of a child. This leave is generally unpaid although the employer may elect to pay the employee during the leave. It also applies regardless of the gender identity of the employee.

EEOC guidelines do not allow for disparate treatment of pregnant employees and the leave policy must be uniformly applied. See EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, Rev. June 25, 2015, available at [https://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm). Employers are

also not allowed to terminate an employee for requesting restricted or light duties if the reason is due to pregnancy and this denial does not match similar situations in cases of injury or disability. See *Young v. UPS*, 135 S. Ct. 1338 (2015) (holding that evidence of an employer policy or practice of providing light duty to a large percentage of non-pregnant employees while failing to provide light duty to a large percentage of pregnant workers, although not facially discriminatory, might establish that the policy or practice significantly burdens pregnant employees). Similarly, employers may not adopt policies that limit or preclude pregnant employees from performing specific jobs or tasks. See *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); See also *Spees v. James Marine, Inc.*, 617 F.3d 380, 392-94 (6th Cir. 2010) (finding genuine issue of material fact as to whether employer unlawfully transferred pregnant welder to tool room because of perceived risks of welding while pregnant).

Under the Massachusetts Pregnant Workers Fairness Act, St. 2017, c. 54, amending G.L. c. 151B, § 4, employers may not deny reasonable accommodation for an employee's pregnancy or any condition relating to pregnancy including lactation or the need to express milk for a nursing child. Unlawful activities under this act include taking adverse employment actions including the denial of employment opportunities and requiring an employee to take a leave if another reasonable accommodation can be provided.

Under An Act Relative to Minimum Wage, Paid Family Medical Leave and the Sales Tax Holiday, St. 2018, c. 121, adding G.L. c. 175M, all family and medical leaves are job protected and employees are protected against retaliation starting January 1, 2021, for family leave for the birth or adoption or foster care placement of a child, for needs arising out of a covered individual's family member's active duty service, and for care of a family member of a covered service member. Benefits and protections for other covered individuals for care of a family member with a serious illness begin on July 1, 2021.

### ***Illness or Injury of the Employee, Employee's Spouse or Family Member***

The health condition of an employee can constitute a compelling reason for leaving. Where an employee leaves work out of necessity due to a health problem, such a leaving constitutes "urgent, compelling and necessitous" circumstances under § 25(e)(1) of the law and the claimant should not be disqualified. For example, in *Carney Hospital v. Director of the Div. of Employment Security*, 382 Mass. 691, 414 N.E.2d 1007 (1981), the court found that the claimant was not disqualified where the claimant had a reasonable belief that a recurrent severe

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skin infection was caused by the work environment. In another case, a remand was required to enable the claimant (who was without representation at her initial hearing) to procure medical evidence of her elevated blood pressure and recurrent headaches, which she had referred to in her letter of resignation. *Hunt v. Director of the Div. of Employment Security*, 397 Mass. 46, 489 N.E.2d 696 (1986). A claimant need not prove that the employment caused the ailment; they need only prove that it was reasonable to believe that a causal connection existed between the employment and the ailment. See *Carney Hospital*, 382 Mass. at 691.

According to AH c.7, §4.B.1, “[a] claimant who leaves work as the result of a medical issue after having made a good-faith effort to preserve employment, for example, by requesting a job re-assignment or time off, or exploring other alternatives to leaving, should not be disqualified under §25(e)(1). Alternatively, the claimant may establish that such efforts would have been futile.”

For example, the Board of Review has held that where a claimant injured her arm at home and was unable to return to her job as a bartender (because she was unable to afford the surgery necessary for her recovery) but was capable of doing other forms of work, her leaving was involuntary. BR-112431-EB-OP (2/23/11) (Key). The Board held that a claimant’s leaving was involuntary where the claimant was experiencing respiratory issues while at work. Her belief that the presence of mold in the workplace was causing these issues was reasonable because the employer’s attempts to repair the leaking roof only marginally improved her issues and because she only felt complete relief when she left work. She took steps to preserve her employment when she complained to the employer about her health concerns and the employer refused to acknowledge them. BR-0002 3797 42 (5/6/2014).

**Note:** Job-related emotional stress is a particularly common reason for claimants to leave work, but frequently they will not reveal that they suffer from symptoms of stress or anxiety until directly asked. Job-related stress can be caused by a number of factors, including difficulty meeting the employer’s production demands, frequent dealings with hostile customers, repeated harsh criticism by the employee’s supervisor, etc. Adjudicators and review examiners may be skeptical of such cases, but a claimant will have a decent chance of proving the leaving was involuntary if the claimant has sought professional counseling or medical attention, has been prescribed medication for emotional problems caused by the stress, and/or can testify, and have friends or relatives testify, as to physical symptoms, such as trembling, panic attacks, difficulty sleeping, and appetite and weight changes. So, for example, the Board found that a combination of a claimant’s medical condition of stress and anxiety, recent discipline for poor work

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performance and an inability to transfer to get more help with her job duties created urgent, compelling and necessitous circumstances for resigning. The Board noted that the claimant's 2-week notice to provide the employer an opportunity to find a replacement and to leave on good terms did not make the claimant's reasons for leaving any less urgent. BR-0017 4854 67 (11/22/16) (Key).

As with any other claim that leaving was involuntary, an employee who leaves because the job is a threat to the employee's health will be required to show that reasonable steps were taken to preserve the employment by, for example, bringing the problem to the employer's attention so the employer has an opportunity to correct it, or requesting a leave of absence (if a leave would not be futile; i.e., if there is some reason to think that, at the conclusion of the leave, the job would be less harmful or the employee more able to tolerate the job). (See **Question 30**.)

Leaving work due to illness or a medical condition can also constitute "urgent, compelling and necessitous circumstances" even if the illness is not caused by the job, where the illness permanently disables the employee from performing the job (but not other kinds of work) or when the illness is temporary and the employer refuses to grant a leave of absence. See AH c. 7, § 4B.3; BR-114436-A (10/12/10) (claimant's need for medical treatment in Morocco preventing his timely return was for urgent, compelling reasons).

The Board held that a claimant's decision to retire was involuntary when his employer gave him the option between forced retirement and voluntary retirement because his severe medical condition (loss of hearing) made it dangerous for him to continue working. BR-0011 5387 80 (6/12/2014).

Where the illness is temporary, in addition to requesting a leave DUA will expect the claimant to have brought the problem to the employer's attention and to have given the employer a chance to offer a transfer to another position or to modify the job so that it is within the employee's capabilities.

A claimant's need to leave employment to temporarily move to Nevada to care for her mother when her employer denied her requests for leave of absence or part-time work made her separation involuntary. The Board found no distinction between an employee caring for an ailing parent and an employee caring for an ailing child. BR-0002 4255 53 (5/23/14).

In any case where claimants leave work because of a health condition, they will probably be questioned about whether they are able and available to accept future work, pursuant to G.L. c. 151A, § 24(b).

Although a claimant is subject to disqualification under G.L. c. 151A, 25(e)(1) for leaving work to accompany or join a spouse or other person to a new location, exceptions to this rule occur when the move is necessary to protect the health of the spouse or other person. AH c. 7, § 4B.5.

**Note:** Advocates should ensure that DUA does not erroneously interpret §24(b) (the able-and-available requirement) to disqualify claimants available only for part-time work. (See **Question 8.**)

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## D. OTHER SEPARATION ISSUES: QUESTIONS 33–36

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### 33 Did the Claimant Need to Leave Work or Was the Claimant Fired Due to Domestic Violence?

Domestic violence frequently spills into the workplace; 96% of employed victims of domestic violence experience some kind of work-related problem due to that violence. Victims may need to take time off from work to participate in criminal and civil legal proceedings and to address such effects of domestic violence as relocating their family or obtaining medical care. Victims may also need to leave their jobs for safety reasons where their abusers know where they work or know their commuting patterns to and from work.

Chapter 69 of the Acts of 2001, An Act Relative to the Eligibility for Unemployment Benefits for Victims of Domestic Violence, made numerous important changes to G.L. c. 151A, resulting in the payment of benefits to individuals whose separation from work is attributable to domestic violence *or* to the need to deal with the physical, psychological, or legal effects of domestic violence on the worker and her family. ***It is not necessary to prove that employees divulged the domestic violence to their employer prior to leaving their job.*** See BR-117242 (10/28/11).

The statute extends special considerations and eligibility for victims of domestic violence, which are found in provisions relating to: voluntary quit; leaving work

for “urgent and compelling” personal reasons; discharge analysis; able-and-available and suitability requirements; and access to training. For example, **voluntary quit** provisions clearly provide for eligibility if an individual leaves a job because: (1) the individual fears future domestic violence at, or on route to and from, the individual’s place of employment; (2) the individual needs to relocate to another geographical area in order to avoid domestic violence; (3) the individual needs to address the physical, psychological, and legal effects of domestic violence; (4) the individual needs to leave employment as a condition of receiving services or shelter from an agency that provides support or shelter to victims of domestic violence; or (5) the individual’s leaving is due in any other respect to a reasonable belief that terminating employment is necessary to ensure their safety or the safety of their family. G.L. c. 151A, § 25(e), ¶ 7.

Individuals who are **fired** are also eligible for benefits if they can show that the firing was due to circumstances resulting from domestic violence, including the individual’s need to address the physical, psychological, or legal effects of domestic violence. G.L. c. 151A, § 25(e), ¶ 2.

The Board has held that because a claimant’s unreported absences were due to domestic violence, she was eligible for UI benefits. BR-0022 2055 38 (8/31/18) (Key). The Board noted that even though the claimant did not present hospital records of treatment for injuries inflicted by her abusive boyfriend, that the combination of police reports, restraining orders and the claimant’s undisputed testimony were sufficient. *Id.* Advocates should note, too, that under the statute, although police reports and restraining orders constitute alternate sources of proof of domestic violence, “a sworn statement from the individual attesting to the abuse” is sufficient proof. G.L. c. 151A, § 1 (g1/2).

Additionally, the law addresses individuals’ need to show they are “able and available” for **suitable work**. The law modifies the requirement by limiting “suitability” requirements for domestic violence survivors to work that is determined suitable only if the employer reasonably accommodates the individual’s need to address the physical, psychological, and legal effects of domestic violence. G.L. c. 151A, § 25(c), ¶ 2. The AH also provides that a claimant who is restricting availability to comply with the requirements of a shelter provider in order to receive or continue to receive shelter is still considered to be available for work. AH c. 4, § 3B.4; BR-111513 (9/17/10) (upholding DUA’s policy analysis that a claimant does not need to make oneself available where the claimant is complying with the requirements of a shelter for those escaping domestic violence).

DUA has expanded access to **training opportunities** for domestic violence survivors by tolling the requirement that an individual must apply for approved training within the first 20 weeks of the UI claim if the delay is related to addressing the effects of domestic violence. G.L. c. 151A, § 30(c).

**Note:** The AH includes important sections on how domestic violence issues should be handled, emphasizing the need for sensitivity and ensuring a claimant’s privacy. AH c. 6, § 3D and c. 7, § 6. If a client reveals domestic violence, and this issue has not previously come to the attention of DUA, contact the Constituent Services at 1-877-626-6800 (toll free for area codes 351, 413, 508, 774, 908) or 617/626-6800 or email at [Constituentservices@detma.org](mailto:Constituentservices@detma.org). Cases identified as involving domestic violence are sent to a “confidential queue” on UI Online and handled by DUA’s UI Policy and Performance Department. AH, c. 6, § 3.

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## 34 Did the Claimant Leave Work Due to Alcoholism or Substance Abuse?

Employee substance abuse, or conduct that derives from substance abuse, is often a factor in determining employee eligibility for UI benefits. It may arise in both quit and discharge cases discussed above—a UI claimant with a drinking problem may be disqualified for having voluntarily quit a job without good cause, or for engaging in alcohol-related misconduct or rule violations. Generally, if the employer can demonstrate that the claimant violated a company policy regulating the effect drugs or alcohol has on job performance at work, the claimant will be disqualified. On the other hand, in a Key Decision, the Board held that a claimant discharged for failing a breathalyzer test, could not be disqualified where he had consumed alcohol 10 hours before his shift and was not intoxicated or under the influence at work. BR-0031 2558 84 (10/30/19) (Key).

Drug or alcohol testing to determine compliance with the employer’s policy must meet relevant standards; the Board of Review, for example, has held that UI benefits could not be denied to a claimant where the only evidence of his drug use in violation of the employer’s policy was a positive drug test that did not follow the standards for drug testing set forth by the federal government, which required a “split urine specimen.” BR-109252-A (02/24/2011) (Key); see also BR-110354 (7/5/11) (Key) (where employer used a procedurally flawed drug test for marijuana and, even if the test were reliable, the level of marijuana present in the

sample would not cause impairment at work, the claimant cannot be disqualified for violation of the employer's drug policy or for deliberate misconduct).

The Board held that a claimant was not disqualified from receiving UI benefits after being fired for refusing to take a drug test, where the claimant asserted his own privacy interest, and where the employer's reasons (that the claimant's driving duties were about to increase and another driver had just failed a drug test) were not included in its drug test policy. BR-0019 4525 76 (3/20/17) (Key). The Board also held that a claimant was not disqualified for quitting when he reasonably believed he would be fired for refusing to take a random drug test. BR-114832-A (date missing from signature page) at p. 5. This case also suggests that employees who are unaware of an employer policy subjecting an employee to random drug tests and who are fired for failing such test may not be disqualified under § 25(e)(2) for a “*knowing* violation of a reasonable and uniformly enforced rule or policy of the employer” (emphasis added). *Id.*

If claimants leave work due to an alcohol-related incident, either on or off the job, they will not be disqualified under § 25(e) as long as they admit to being an alcoholic and are making a sincere effort to overcome the alcoholism. AH c.7, § 4B.1, and AH c. 8, § 1F.14. DUA's policy statements and state court cases have long recognized that a person addicted to alcohol is subject to an irresistible compulsion to drink. This negates the intentionality required for the claimant to be disqualified under either the deliberate misconduct or the knowing-rule-violation standard. *Shepherd v. Director of the Div. of Employment Security*, 399 Mass. 737, 506 N.E.2d 874 (1987). Any conduct that is the product of an irresistible compulsion to drink (alcoholism) cannot be considered to be deliberate or willful and should not incur a disqualification for misconduct. AH c. 8, § 4.B.14.a. Alternatively, if claimants admit to being an alcoholic, they were temporarily incapable of adhering to the rule, due to alcohol-caused incompetence. This reasoning extends to a claimant who tested positive for alcohol in violation of a “last chance” agreement. The Board reasoned that where a claimant had been making a sincere effort to control her alcoholism, her inability to maintain her sobriety was not willful under the reasoning of the *Shepherd* decision. BR-0011 0254 86 (9/29/14) (Key). However, where a claimant refused to accept any help in controlling his alcoholism, the Board found that the violation of a last chance agreement through unexcused absences, binge drinking and involuntary commitment to a detox facility by a court order constituted disqualifying behavior. BR-122588 (3/29/13) (Key).

The Board of Review has concurred with the reasoning in *Shepherd* and reviewed its policies on alcoholism to take into account changes in cases and precedent,

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including the Americans with Disabilities Act. BR-109710 (3/18/2010). In another decision, the Board ruled that although it does not read *Shepherd* to hold that alcoholism is an absolute defense to disqualification under § 25(e)(2), a claimant may prevail if she demonstrates that, at the time of the misconduct, she “suffered from the disease of alcoholism, was unable to control the addiction, and that these two factors caused the wrongful behavior and discharge.” BR-110099 (2/25/11), at p. 6. Notably, the Board found the claimant eligible even though, as a result of the claimant’s alcoholism, the claimant lost her driver’s license, which she needed for her job.

The Board has held that a claimant, who due to his substance abuse problems, abruptly and involuntarily committed to a treatment facility and therefore, failed to appear for work is entitled to receive benefits because the claimant separated due to urgent, compelling, and necessitous reasons. BR-0027 2835 41 (1/14/19).

DUA maintains that individuals who lose their job due to loss of license have voluntarily caused their own separation. *Olmeda v. Director of the Div. of Employment Security*, 394 Mass. 1002, 475 N.E.2d 1216 (1985) (claimant whose separation was caused by loss of license deemed to have voluntarily quit his job). However, *Olmeda* did not raise the question of alcoholism. If the loss of license resulted from admitted alcoholism, a claimant should still qualify for UI. See *Carey v. King, Deputy Director of the Div. of Employment & Training*, Greenfield District Court, CA No. 0041-CV-0251, (6/4/01) (claimant, who was an admitted alcoholic, qualified for UI notwithstanding his loss of license for failure to take a breathalyzer test, because any conduct arising out of his irresistible compulsion to drink was not “voluntary”). See also BR-110099 above, where the Board of Review specifically determined that if a loss of license leading to separation from employment resulted from admitted alcoholism, a claimant should still qualify for UI. The claimant’s refusal to take a blood-alcohol test after a car accident caused her to lose her license for 30 days, during which time she could not return to work. Determining that there was sufficient evidence showing the claimant suffered from alcoholism, the Board found that the claimant’s judgment was impaired when she refused to take the blood test, and thus her refusal to do so did not constitute “willful misconduct” under § 25(e)(2).

A claimant’s need to seek alcohol-related treatment may constitute an urgent, compelling, and necessitous personal reason for leaving work, rendering the separation involuntary. However, the employee should request a leave of absence first, unless such a request is futile. See *City of Woburn v. Commissioner of the Dep’t of Employment & Training*, 65 Mass. App. Ct. 1106, 837 N.E.2d 729 (2005); **Note:** AH c. 7, § 4B.1 (individuals in an intensive and/or inpatient

treatment program may not be “able and available” for UI purposes until they complete their treatment program).

DUA policies and administrative decisions suggest that the agency is ambivalent about whether to apply this same “illness model” to workers’ addiction to illegal or prescription drugs. The agency does provide, however, that an employee who seeks drug or alcohol treatment and who cannot obtain a leave of absence from the employer is considered to have left involuntarily, for urgent, compelling, and necessitous reasons. AH c. 7, § 3B.3.

The marijuana decriminalization law (G.L. c. 94C, § 32L), passed as a voter initiative in 2008, specifically provides that “possession of one ounce or less of marijuana shall not provide a basis to deny an offender student financial aid, public housing or any form of public financial assistance including unemployment benefits.” In August 2014, the Board issued a decision holding that a positive marijuana test alone does not render a claimant ineligible for UI. BR-0012004801; see also, BR-0018 3168 60 (7/29/16) (Key) (holding that a positive test alone is not disqualifying where a claimant was not under the influence while working, injured accidentally while performing her job duties and not subject to federal Department of Transportation rules). For a full description of how DUA treats the adjudication of separations caused by possession of less than one ounce of marijuana, see AH c. 8, § 1F.14.b.

The Board has also held that an employer’s policy of discharging employees for “any amount” of drug use does not constitute grounds for disqualification where the claimant’s off-duty use does not carry over to impairment at work. BR-113575 (12/23/10). In addition, the Board held that absent a regulatory requirement prohibiting employees from working who test positive, a claimant is not disqualified for a positive drug test standing alone. BR-118149 (5/9/2012) (Key).

Advocates may prevail if drug use was during non-work hours and not on work premises, or was prior to the start of employment. *Thomas O’Connor & Co., Inc. v. Commissioner of Employment & Training*, 422 Mass. 1007, 664 N.E.2d 441 (1996) (rescript). Additionally, where a client denies drug use, advocates should challenge the accuracy and reliability of the drug test. See BR-110354 (6/3/11) (Key) (finding that an employer did not meet its burden of proving that the claimant, who denied using marijuana, was working under the influence where it failed to provide evidence that the collection facility was certified or qualified to administer drug tests, that the urine sample was appropriately shipped from the collection facility to the lab, or that it was the claimant’s urine that had been tested).

## 35 When Does DUA Treat a Discharge As a Quit?

There are several situations that DUA and the case law treat a discharge as a “voluntary quit” under G.L. c. 151A, § 25(e)(1), even though it is the employer who takes action to end the employment. For example, in *Barksdale v. Director of the Div. of Employment Security*, 397 Mass. 49, 489 N.E.2d 994 (1986), the claimant was disqualified under § 25(e)(1) on grounds that he “brought about his own unemployment” when he was fired for refusing to pay an agency fee that was the alternative to paying union dues under a state collective bargaining agreement. The logic behind the decision, which is sometimes referred to as a “constructive quit” analysis, is that the claimant voluntarily chose to refrain from paying the fee and thereby left work voluntarily.

A similar analysis was applied in *Rivard v. Director of the Div. of Employment Security*, 387 Mass. 528, 441 N.E.2d 257 (1982), where the claimant was fired from a city job when his employer realized that the claimant had failed to take steps to remove a statutory impediment to his ability to hold the position. See also *Olmeda v. Director of the Div. of Employment Security*, 394 Mass. 1002, 475 N.E.2d 1216 (1985); *Harvard Student Agencies v. Director of the Div. of Employment Security*, 12 Mass. App. Ct. 871, 421 N.E.2d 470 (1981); AH c. 6, § 1A.9.

A frequent example is where the employer has a policy requiring an employee who is going to be absent to “call in.” The employer treats the failure to call in as job abandonment, and DUA will initially characterize this as a voluntary quit case, even where the employee re-contacted the employer and was told that the job was no longer available.

The same logic, if applied to other cases of deliberate misconduct, would lead to unfair results in many cases. An employee fired for drinking on the job, or embezzling the employer’s money, or refusing to follow orders could be described as voluntarily acting in a manner that would bring about his own unemployment, which could give rise to a § 25(e)(1) disqualification. This argument was rejected in *Orellana v. Director of the Div. of Unemployment Assistance*, Gloucester District Court, CA No. 1139 CV 0101 (2010) (holding that an employee who was told to ‘find work elsewhere’ after showing up to work smelling of alcohol was effectively discharged, and that a decision to deny him UI on the grounds that he had quit was precluded by the manner of his discharge).

**Note 1:** The flaw in this analysis is that it switches the burden of proof from the employer, who bears it under § 25(e)(2), to the employee, who has the burden under § 25(e)(1), and may circumvent some of the careful “state of mind” assessment required under § 25(e)(2).

**Note 2:** DUA sometimes overuses the “constructive quit” analysis. Advocates should be on guard and insist that the principles of cases like *Rivard* and *Olmeda* be limited strictly to their facts and to situations where a claimant’s actions and expressions *show a clear intent* to end her employment relationship. The Appeals Court has addressed this issue in an unpublished opinion, *Saunders Enterprise Payroll Corp. v. Commissioner of the Dep’t of Employment & Training*, 61 Mass. App. Ct. 1123, 814 N.E.2d 36 (2004); See also Annotation, *Unemployment Compensation: Eligibility Where Claimant Leaves Employment under Circumstances Interpreted as a Firing by the Claimant but As a Voluntary Quit by the Employer*, 80 ALR 4th 7 (1990), and *Sacco v. Nordberg*, Malden District Court, CA No. 9550 CV 1753 (1997) (holding that in response to Court’s Remand Order, the Board could not reverse its prior decision that claimant had been discharged and decide that claimant had quit).

On the other hand, a discharge may not convert into a constructive quit where the employer sought to execute a new contract with the employee, and the employee was terminated for refusing to do so. In *Pulde v. Director of the Div. of Unemployment Assistance*, 84 Mass. App. Ct. 1122, 998 N.E. 2d 375 (Mass. App. Ct. 2013) (unpublished), the Appeals Court vacated and remanded the review examiner’s decision, holding that the DUA should have reviewed the case under § 25(e)(2)(discharge), not § 25(e)(1)(quit). The employer had presented the employee with a conditional reinstatement agreement coupled with a “sign this or else” ultimatum. The employee refused to sign the agreement because she believed that it may have terminated her rights as a union member. The employer then terminated the employee. The Court reasoned that the claimant’s refusal to alter the contractual terms of a collective bargaining agreement did not mean that she left her job voluntarily, therefore the DUA should not have applied § 25(e)(1).

The Board, in at least 2 instances, has held that “last chance agreements” that a claimant refuses to sign constitute a discharge rather than a quit. BR-0002 1377 85 (10/6/14) (Key) (same as *Pulde*); BR-0008 9856 93 (1/9/14) (Key) (finding that a last chance agreement was a firing not a quit, and the claimant was not disqualified as underlying conduct was poor work performance).

In determining whether separation from employment was due to quit or discharge, the Board noted that the examiner should take into consideration whether the

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employee made attempts to contact the employer in the days following being sent home to indicate that he wished to remain employed. BR-10232330 (11/21/2014). In the same case, the Board stated that the examiner should also consider whether the employee contested a company document indicating that the employee “quit” his job shortly after receiving this document.

The Board has held that where an employer did not accept the terms of a claimant’s proposed consulting agreement in lieu of continued employment, the proposal did not amount to a notice of resignation. Therefore, the claimant could not be disqualified after discharge where there was no misconduct. BR-0018 7766 38 (11/14/16) (Key). And where a claimant failed his probationary period as a newly promoted supervisor and refused to reapply for a cashier position, the Board determined that he was effectively discharged. BR-0008 9910 74 (6/9/14) (Key).

**Note 3:** When it is unclear if separation from employment was due to quit or discharge, an advocate arguing that separation was due to discharge should also present arguments that even if the separation was due to quit, the employee was entitled to benefits because such quit was the result of “urgent, compelling, and necessitous reason” or “good cause attributable to the employer.” Failure to present facts that support such arguments during the hearing could result in disqualification for UI benefits if the review examiner determines that separation was, in fact, due to “quit.” See BR-1498659 (11/21/14).

The Board ruled that where employees leave their employment under the “reasonable belief” that they are “about to be fired,” the reason for separation from employment for UI purposes is “discharge.” BR-10232330 (11/21/2014); BR-0002 4910 00 (3/27/2014). In such cases, “[their] separation is not disqualifying if the impending discharge itself would not have been for disqualifying reasons.” BR-0002 4910 00 (3/27/2014); see BR- 0008 9799 73 (2/7/2014).

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# 36 Did the Claimant Leave Work Due to a Felony or Misdemeanor Conviction?

Leaving work because of a conviction of a felony or misdemeanor is disqualifying under a separate clause of G.L. c. 151A, § 25(e)(3). A disqualifying separation

must result directly from the conviction, either because the employer fired the claimant or because the claimant was incarcerated. *Glasser v. Director of the Div. of Employment Security*, 393 Mass. 574, 471 N.E.2d 1338 (1984) (claimant failed to prove he would have been reinstated but for unlawfully excessive sentence).

A discharge due to being charged with a crime or due to incarceration before trial is not disqualifying under §25(e)(3); nor is a discharge because of admission to sufficient facts to warrant a finding of guilty. *Wardell v. Director of the Div. of Employment Security*, 397 Mass. 433, 491 N.E.2d 1057 (1986); *Santos v. Director of the Div. of Employment Security*, 398 Mass. 471, 498 N.E.2d 118 (1986).

Individuals who notify their employer of an inability to continue work because of incarceration and who subsequently are not convicted of the offense charged are not subject to disqualification under §25(e)(3). AH c. 8, § 4; BR-110511 (12/2/2009) (Key) (reversing disqualification on the grounds of unauthorized leave, where claimant who was incarcerated was not convicted). Similarly, the Board has held that a claimant who missed work because he was incarcerated on felony charges was involuntarily separated for urgent, compelling and necessitous reasons where the claimant denied any wrongdoing and all the charges were eventually dismissed. The Board found that where a claimant's mother informed the employer about the incarceration, the claimant took reasonable steps to preserve his employment. The Board noted that where the separation arises solely from an arrest and/or incarceration, the ultimate disposition of the criminal charge is "a probative but not necessarily determinative factor." BR-0015 9093 69 (9/2/16) (Key).

DUA draft AH (10/19) takes the position that a disqualification may be imposed even if the employer discharged the claimant not because of the conviction, but because the employer "needed the work to be done." AH c. 8, § 4C. However, see BR-2033616 (2/4/2014) (holding that an employee's separation is involuntary where it is proximately caused by incarceration --- technically rendering employee unable to commute to work--- on false allegations; this is because it cannot be said that the employee is at fault for bringing about incarceration where the charges are false). Moreover, wrongful arrests and/or convictions where the claimant cannot afford to make bail is another example of a non-disqualifying event. The presumption of innocence should protect the claimant from disqualification prior to conviction.

Claimants terminated for a DUI conviction resulting in loss of their driver's license that interferes with commuting to work do not leave work either voluntarily or by constructive quit. The board held that where driving is not

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directly within the scope of the employee's job, but the employer terminated the employee nonetheless, the claimant cannot be viewed as having created a "bar" to continued employment simply by losing an unrestricted driver's license. Moreover, the separation is not a voluntary quit; rather, claimant was discharged under § 25(e)(2). See BR-2028524 (3/10/14).

# Part 4

## Special Situations

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### 37 Employees of Educational Institutions

A special provision in the UI statute limits the UI eligibility of all employees of schools and other educational institutions (not just teachers but also custodians, bus drivers, and aides) when they are out of work between academic years or terms, even if they receive no pay over the break. If the worker has a contract of employment or a “reasonable assurance” of employment that is substantially the same or better in the next term or year, then the worker will not qualify for UI benefits. G.L. c. 151A, § 28A. The burden of proof for proving that a claimant has reasonable assurance of re-employment falls on the employer. BR-0016 2670 84 (1/29/16) (Key). According to G.L. c. 151A, § 28A, the offer of re-employment for the following academic year or term must be made under economic terms that are not considerably less than the current year, meaning that the employee must be offered no less than 90% the amount that they earned in the current academic year. For example, a school district’s offer of re-employment for a 10-month position to a 12-month bus driver was not reasonable assurance because if the bus driver accepted the 10-month position, he would have earned only 83%, not the threshold 90%, of the amount he had earned in the previous academic period. BR-0026 5187 26 (2/27/19).

In order for this disqualification to apply, DUA should determine:

- If the employer is an educational institution. If the employer is a private bus company that contracts with a school, this provision does not apply; nor does the provision apply if the employer’s mission is not educational. BR-107631-A (9/18/2009) (Key) (institution whose mission was to make art accessible to the public did not fall under § 28A); BR-0021 7731 88 (3/29/18) (Key) (holding that an employer’s 11-week summer sailing program does not make it an educational employer within the meaning of § 28A);

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- If the claim is being filed between two successive academic years or terms;
- If the claimant has an employment contract or received a “reasonable assurance” of reemployment that is substantially the same or better for the next academic year or term. A reasonable assurance is more than the mere possibility of reemployment, and must be submitted in writing to DUA. See BR-0010 7230 82 (9/16/14) (Key).

As professional public school employees earn professional teacher status after three years under G.L. c. 71, §41 (Tenure of Teachers and Superintendents; Persons Entitled to Professional Teacher Status), they are automatically considered to have reasonable assurance of reemployment in the following academic year unless they are officially notified by June 15th of the academic year that they will not be returning to their position the following September.

For employees of educational institutions who do not perform services in an instructional, research, or administrative capacity, if the worker is then not given an opportunity to perform work in that next academic term, the worker is entitled to retroactive UI benefits. G.L. c. 151A, § 28A (b); 430 CMR 4.91–4.98. Likewise, where the assurance given is for work of substantially less favorable economic terms and conditions, the assurance is not reasonable under G.L. c. 151A, § 28A, and the worker is entitled to UI. BR-6931108 (5/12/14).

Under G.L. c. 151A, § 28A(c), for both professional and non-professional employees UI benefits are not available during a customary vacation period or holiday recess where there is reasonable assurance of work after the break. This provision was narrowly construed to allow an award of partial UI benefits to a school bus driver who had no work and was not paid during the Thanksgiving break. *Cape Cod Collaborative v. Director of Dep’t of Unemployment Assistance*, 91 Mass. App. Ct. 436, 76 N.E. 3d 265 (2017). The Court reasoned that where the statute precludes UI for “any week *commencing* during an established and customary vacation period or holiday recess” (emphasis in decision), as the week did not commence during a holiday recess where it started on a Wednesday, the exclusion in § 28A(c) did not apply. 91 Mass. App. Ct. at 441, 76 N.E. 2d at 269. See also BR-0022 1445 55 (4/27/18) (holding that a full-time, 12-month, ABA technician who was required to work part-time for six weeks over the summer, G.L. c. 151A, § 28A (b) is not precluded from receiving partial UI during that time. However, the claimant could not collect UI in the weeks immediately before and after the six-week summer program due to G.L. c. 151A, § 28A(c). Such weeks were a customary vacation period where the

claimant worked immediately before and had reasonable assurance that she would work immediately after such period).

Advocates should note that where an instructional employee is employed in one academic term *but not* in the academic term immediately following that term, the employee remains entitled to UI benefits despite a reasonable assurance of reemployment the following academic year. BR-114638 (9/13/2011) (Key). The Board noted in its decision that the manifest legislative intent behind section 28A(c) was to “withhold benefits to school employees during holiday and vacation periods *only* when they worked immediately before and after such recesses,” and that it approved of the decision in a UI case from Pennsylvania that the nearly identical provision in that state’s statute did not apply to coaches hired only for fall terms of each year because the intervening spring semester was not a period between academic terms, but an academic term proper, and therefore the employee did not have a reasonable assurance of reemployment in the *next* academic term. *Id.* (both emphases added).

Primary and subsidiary jobs are distinguished for eligibility purposes. (For the distinction between a primary and a subsidiary job, see **Question 45**.) If the claimant has had different types of educational employment during the base period preceding a new academic term, the examiner will look to the claimant’s primary base-period employment in determining whether there was “reasonable assurance of reemployment.” If there is no reasonable assurance of reemployment in the claimant’s primary job, then the claimant is eligible for benefits. If there is reasonable assurance of reemployment in the claimant’s subsidiary job, then the wages from the subsidiary job will be excluded in determining the amount of the claimant’s benefit rate and credit. BR-109037-OP (8/4/2009) (Key); BR-121760 (4/20/12).

Additionally, if a claimant was engaged in different types of educational services—e.g., both full-time teaching and substitute teaching—and received reasonable assurance only for the latter, the wages from the full-time teaching could be used to establish the claim. See BR-121272 (4/27/12).

### ***Adjunct Faculty***

In 2014, DUA changed its policy regarding UI eligibility for adjunct college professors, making it more difficult for adjuncts to collect UI. Under DUA’s prior policy, an adjunct whose employment was contingent upon “enrollment” or “funding” did not have reasonable assurance of reemployment and was therefore eligible. DUA has changed this policy, relying upon a federal Department of

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Labor Unemployment Insurance Program Letter issued 27 years earlier on December 24, 1987), UIPL No. 4-87 (12/24/86), [http://ows.doleta.gov/dmstree/uipl/uipl87/uipl\\_0487.htm](http://ows.doleta.gov/dmstree/uipl/uipl87/uipl_0487.htm).

Under DUA's revised policy, an adjunct professor has reasonable assurance of reemployment—despite enrollment or funding contingencies—if the employer can show a history of reemployment on similar terms and conditions and the offered employment is not substantially less than the prior employment. This runs counter to reasonable assurance jurisprudence that an offer of employment is not considered *bona fide* if only the possibility of work exists.

However, the employer shoulders the burden to prove that the adjunct had reasonable assurance. AH c. 11, § 2F.6; BR-0015 4196 77 (12/30/15). If the adjunct professor is being offered work that is “substantially less” than previously offered, there is no reasonable assurance and the worker is UI-eligible. BR-0016 5329 77 (1/20/16). DUA's policy considers “substantially less” to be a reduction of 10 % or more, i.e., the claimant will not earn at least 90 % of the amount earned in the first academic year or term. AH, c. 11, § 2C.4. Consequently, a contractual requirement by the employer to offer at least one course per term is not sufficient to establish reasonable assurance if that is “substantially less” than the worker's prior employment. See BR- 0002 1339 07 (5/12/14).

The Board looks at the course schedule history for the adjunct. BR- 0013 6586 83 (10/21/15) (finding that even with a history of teaching a certain number of courses, a drop from three classes to two in a semester was enough to allow for UI benefits). If the adjunct is relatively new or if there have been changes to the workload in past semesters, the Board presumes that there was no “reasonable assurance”. BR-0016 2670 84 (01/29/16) (Key) (finding that an adjunct who had only worked one year with a workload in the spring semester that was half as much as the fall semester meant that there was insufficient history to show the adjunct had reasonable assurance); BR-0017 6915 85 (10/19/16) (Key) (holding that the appropriate comparison for adjuncts paid by the course and hired one semester at a time is to compare an offer with the economic terms of the most recent academic semester); BR-0016 6123 65 (04/27/16) (finding that an adjunct who had had 4 classes canceled in the last 8 years did not have reasonable assurance that his classes would not be canceled again). Employers must also be timely in providing reasonable assurance to the adjunct employee. BR-0016 2822 60 (11/25/15) (finding that reasonable assurance did not exist until the receipt of a letter offering a new schedule). If the school announces a reduction in courses taught by adjuncts generally or in the adjunct's particular program, this can be sufficient grounds to show there was no reasonable assurance for the employee.

BR-0016 3028 44 (5/18/16) (finding that a new labor agreement on the number of classes that could be taught by adjunct faculty meant that there was no reasonable assurance for adjuncts); BR-0016 2085 38 (03/24/16) (holding that the announced future closing of an academic program meant there was no reasonable assurance).

An adjunct professor who has reasonable assurance from one employer but not from another may also be eligible for UI. An adjunct professor who also held a full-time teaching position without reasonable assurance of reemployment but was given reasonable reassurance of reemployment of the adjunct position is not barred from UI for the benefit year of the full-time position. BR-121760 (4/20/12).

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## 38 Employees of Temporary Help Agencies

Increasing numbers of workers, especially low-wage workers, are forced to accept jobs with temporary agencies in order to support themselves and their families. Many of these workers are “temps” not out of choice but because they are unable to secure permanent jobs. UI claimants who have lost their permanent jobs often accept temporary work to bridge the gap until they can locate a new permanent position. Doing so, unfortunately, may create problems for both initial and continuing UI eligibility.

Temp agencies act as labor intermediaries, hiring employees and then sending them out to work for other firms. As such, the claimant’s eligibility for UI is based on her separation from the temp agency, not from the client employer. BR-0020 4771 70 (5/16/17) (holding that where claimant had established mitigating circumstances for failure to meet client employer’s expectations, this was nonetheless not relevant for purposes of qualifying for UI.) Since the temp agency is the employer for UI purposes, temp agencies have a financial interest in lowering their UI costs by preventing employees from collecting UI while they are between assignments. Nationally, the temp industry has made a concerted effort to change state unemployment laws to make it more difficult for its employees to collect UI.

Under a Massachusetts law passed in 2003, a temporary worker may be deemed to have voluntarily quit his job if, after the completion of an assignment, the worker files for UI benefits without first contacting the temp agency for reassignment. G.L. c. 151A, § 25(e), *as amended by* St. 2003, c. 142, § 8. Under

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the statute, a “temporary help firm” is defined as “a firm that hires its own employees and assigns them to clients to support or supplement the client’s workforce in work situations such as employee absences, temporary skill shortages, seasonal workloads and special assignments and projects;” and “temporary employee” as “an employee assigned to work for the clients of a temporary help firm.”

The legislation and implementing regulations further provide, however, that this failure to contact the temp agency for reassignment will *not* be deemed a voluntary quit “unless the claimant has been advised of the obligation *in writing* to contact the temporary help firm upon completion of an assignment.” *Id.*, 430 CMR 4.04 (8)(b)(2) (emphasis added) or had good cause for failing to request another assignment. 430 CMR 4.04(8)(c). Therefore, the Board held that the claimant took sufficient steps to satisfy the law where the actual practices of a temporary help firm and its employer-clients misled the claimant to believe that she was employed by the client companies, that the temporary help firm was simply the payroll company and, as a result, the claimant had contacted the client company not the temporary help firm for more work at the end of her assignment. BR-0024 4369 85 (8/24/18) (Key).

Further, the employer’s notice of this obligation also must specify: (1) the method for requesting a new assignment in a manner that is consistent with the normal method and manner of communication between the employee and the temporary employment firm, and (2) that failure to request a new assignment may affect eligibility for UI benefits. 430 CMR 4.04 (8)(e). If the temp agency is unable to provide proof that it provided proper notice to the claimant, that employee will be deemed to have been laid off and therefore entitled to UI, if otherwise eligible.

The Board of Review has affirmed that 430 CMR 4.04(8)(e) requires notice of the need to request a new assignment (including the procedure for making that request). The procedure is deficient where the written notice does not include a contact phone number for the employer’s office. See BR-0025 3033 83 (12/05/18) (where the claimant had not worked for the employer temporary-staffing agency for over two years and was not provided with a new written notice or reminded of the requirement to request re-assignment during his latter period of employment with the employer, the claimant had good cause for his failure to request re-assignment at the conclusion of his temporary assignment); BR-0014 5562 05 (10/1/15) (the absence of contact information on the form given to employee eliminated the requirement that employee call at the end of an assignment); BR-106729 (9/11/08) (claimant entitled to UI where neither advised in writing of contact requirement nor told of means by which to contact employer).

The notice must also specify that failure to request a new assignment may affect eligibility for UI benefits. BR-120231 (01/20/2012) (Key). In that case, the Board held that a laid-off temporary service employee was not disqualified for failing to request reassignment because the temporary agency's notice did not inform the employee that a failure to request reassignment may affect eligibility for UI benefits, even though the notice form did state that failure to request reassignment would result in the employee's being deemed to have voluntarily quit. *Id.*

The burden is on employees to establish that they did request another assignment and, thus, was discharged rather than voluntarily quit. BR- 0002 1746 84 (8/29/13); see also G.L. c. 151A, § 25(e)(1). The Board looks to see if the spirit of the law was met, namely that the employee and employer communicated and therefore, the employer received actual notice of the employee's availability for a new suitable assignment. BR-468131 (3/26/15). Thus, despite the language of 430 CMR 4.04(8)(b), a claimant need not expressly "request another work assignment" from the temporary staffing agency to qualify for UI benefits. BR-113223 (10/8/14).

If an employee has contacted the temp agency and is asked to call back for a new assignment after an upcoming holiday, the employee is deemed to have fulfilled his duty to contact. When the communication between the employee and the employer includes, in substance, a request for a new assignment, the Board has ruled that the employee's obligation to request additional work is satisfied: the Board is "unwilling to bootstrap this request [that the employee call back again after the holidays] for what was really a *second* contact into a requirement, under G.L. c. 151A, § 25(e)" (Board's emphasis). BR-118830 (11/8/2011). Likewise, where the temp firm sent a claimant an email stating that her assignment had ended and adding that "we will be in touch as soon as possible regarding another opportunity," thus failing to offer the claimant a new position, the Board held that the claimant did not need to contact the temp firm and overruled the decision of the review examiner as based on an unduly formulaic interpretation of the statute. BR-0021 9932 58 (3/16/18). Similarly, although the temp firm instructed its employees to request a new assignment by calling an 800 number, the claimant satisfied the statutory requirement to request a new assignment before filing a UI claim by asking the employer's human resource representative about a new assignment. BR-0021 5297 05 (19/24/17). The Board has also held that when a claimant can establish facts sufficient to show that he attempted to speak to a supervisor about a new assignment after a job has concluded but the supervisor was too busy to speak to him, the claimant's separation is not a disqualifying voluntary resignation. BR-125041 (4/29/13). The Board held in that case that a claimant is entitled to UI benefits when he attempted to request reassignment and

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the temp agency did not offer the claimant a new assignment. See also BR-124418 (3/22/13) (holding that temp service employee told that his current assignment was about to end and that nothing in the way of a new assignment would be forthcoming meets the “call-in” requirements under G.L. c. 151A, § 25(e) and claimant is entitled to UI benefits); BR-122974 (10/26/12) (holding that when the claimant and employer spoke three times during the claimant’s last day of work without offer of another position, the claimant met his statutory duty even where the employer told the claimant to contact the employer in the future and the claimant did not do so).

If the temp agency contacts the employee to let him know that his assignment is finished or that he has been terminated by the client organization, this communication is sufficient to fulfill the obligation for the employee to contact the agency. BR-0016 0869 84 (3/24/16) (Key); BR- 0016 9906 45 (4/20/16); BR-0016 3525 25 (9/28/15) (holding that an employee who was told that his assignment was over in December and who did not file for months afterwards was still eligible since the agency had contacted him initially). If the temporary employee has only met his recruiter with the temporary agency, the employee may be eligible if he spoke with that recruiter about the end of his assignment even if he did not explicitly request a new assignment and even if that recruiter was not the normal person to tell about the end of an assignment. BR-0014 4820 58 (8/24/15).

A temporary employee also does not have to take an assignment that is offered if the employee refuses for good cause and this singular contact is all that is necessary to meet the requirements of the statute. BR-0015 1070 15 (01/14/16). If an employee learns of the end of his assignment before the actual end date and discusses this with the temporary agency, that contact is sufficient to meet the required request for a new assignment, even though it occurred prior to the end of the original assignment. BR-0015 2809 79 (11/ 23/15). It is also possible to be fired for cause by the contracting agency but kept on as an employee by the temp agency – this is established if the temp agency offers the employee a new assignment after the end of his assignment, and once this offer is made, the employee is allowed to claim UI if that assignment was not suitable. BR-0014 4271 40 (10/19/15).

The Board of Review has held that an employee of a temporary staffing agency who “notified the employer that his assignment was ending [or had become unsuitable] and expressed his intent to remain employed with the employer” was eligible for UI benefits when his employer failed to offer him any new assignment. See BR-0017 8311 63 (8/29/16); BR-0017 1846 77 (8/24/16) (email

at end of work assignment is sufficient); BR-113223 (10/8/14); BR-1883959 (2/27/15); BR-124418 (4/22/13).

A claimant who worked for a temporary help agency satisfied her duty to contact the agency for reassignment when the employer's senior branch manager, after informing the claimant that her assignment had ended, also informed the claimant that she would inform other representatives of the employer that claimant was still looking for work. This exchange between the claimant and the senior branch manager indicated to the Board's satisfaction that the claimant, indeed, informed the employer that she would like to have another assignment. Thus, the Board concluded that the claimant's separation from employment was due to lack of work and therefore not voluntary. BR-120299 (1/26/2012).

When a temporary staffing agency refused to offer an employee additional assignments after the employee quit his current assignment without prior notice, the employee's separation from his employment with the temporary staffing agency is considered due to "discharge" not "quit." BR-1786345 (1/26/15).

Where a claimant resigned to accept full-time employment with a temporary staffing agency, the claimant left in good faith for employment on a permanent, full-time basis. Although the nature of the work was temporary, the claimant's relationship to the agency was permanent with the meaning of G.L. c. 151A, § 25(e). "In the instant case, the claimant's new job carried higher wages and a much better commute. He had no reason to anticipate that the employment would end after only a few weeks. We can think of no reason to exclude him from unemployment benefits simply because his employer was in the business of supplying contingent services to client companies." BR- 0010 6162 10 (9/19/14); BR-0020 5537 93 (8/21/18) (reaffirming Board precedent).

Where an employer informed a non-English speaking employee that the employee needed to contact the employer's Milford office (and not the Marlborough office from where he usually worked) for his next assignment, and the employee misunderstood due to the language barrier and repeatedly tried to receive his next assignment at the Marlborough office, which would not give him any assignments, the Board awarded him benefits. See BR- 0013 2758 (2/21/15).

**Note 1:** Advocates should determine whether the particular assignment should even fall under the temporary employment rules; i.e., whether the assignment meets the statutory definition that the claimant has, rather, been hired in "work situations such as employee absences, temporary skill shortages, seasonal workloads and special assignments and projects," G.L. c. 151A, § 25(e), ¶9; or whether the employer is a true temporary agency. BR-0017 4026 19 (7/28/16).

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**Note 2:** If the temp agency provided proper notice and the employee is unable to prove to DUA that he contacted the temp agency at the end of the previous assignment to request a new assignment, he will be deemed to have “voluntarily quit” his job. Often, a worker’s cell phone or email records are helpful to document contact with the temp agency. Where the worker returns to the temp agency at the time of receiving his final paycheck, any conversation that occurs at that time regarding future work should satisfy the “seeking reassignment” requirement.

**Note 3:** Although the statute and DUA’s regulations are silent on these matters, UI advocates should explore possible due process claims. For example, if the employer provided the claimant notice but in a language she cannot read, arguably the temp agency has not met its burden to provide proper notice. (See **Question 52**). Likewise, it often happens that employees work for a temp agency on long-term assignments or have breaks between assignments. If employees are provided notice about the requirement to seek reassignment only at the time of their initial hire, it is reasonable to argue that temp agencies have a duty to provide new notice when the temp workers are rehired or at the time the most recent assignment ends. 430 CMR 4.04 *et seq.*

### ***Temp Agencies and “Suitable Work”***

The requirement that an employee at a temporary agency must seek reassignment does not mean that the new position must be *accepted* in every case. The suitable work provisions still apply, and they include the “prevailing conditions of work” test. (See **Question 8, Suitability, Prevailing Conditions of Work**). AH c. 7, § 10D.2 (requiring an inquiry into whether the work is suitable where a claimant declines another assignment from the temp agency); BR-1586240 (8/26/14) (the Board ruled that claimant and employer merely engaged in a discussion of job possibilities and no direct job offer was made to claimant; “[f]urthermore, even if we were to conclude that a job offer was made, the job may not have been suitable employment for the claimant . . . where her income would have been reduced and her commute increased”). If a claimant finished an assignment as a secretary and is offered an assignment as a cleaner, this would not constitute “suitable work” and a refusal should not result in disqualification. A claimant has no obligation to accept a work assignment for which she is not properly trained. BR-12531 (7/21/14). The Board has held that a claimant who had a temporary placement with a client for 1.5 years and was offered a 6-week assignment with another client doing similar work at a lower rate of pay had good cause for declining the offer, as the substantially shortened job duration meant that the job was not suitable. BR-111185 (3/3/10). Similarly, a client company’s offer of the possibility of work with

reduced hours was neither suitable nor a cognizable offer of continued employment. BR-0018 5427 37 (10/31/16), nor did a claimant refuse an offer of suitable work where a one-year assignment of full-time work ended, and at the end of that assignment, the temp agency offered the claimant a job of roughly 16 hours a month. BR-0016 2073 23 (12/24/15) (Key). And where a claimant contacted her temporary-agency employer prior to filing a claim but turned down an assignment that was unsuitable due to its commuting distance, the claimant had satisfied the notice requirement. The Board reasoned that the communication provided the temporary employer with actual notice of the employee's availability for reassignment to suitable work. BR-0002 2757 85 (9/20/13) (Key).

Additionally, where a claimant who previously held a full-time employment position with benefits at a company takes a job at a temp agency in hopes of gaining another permanent full-time position with benefits and is unable to do so after several months of working for the agency, his work with the agency is considered "unsuitable" and quitting such work will not disqualify him for benefits. See BR-0017-4217-90 (9/30/16); BR-998249 (10/31/14); see also *Hunt v. Director of the Div. of Employment Security*, 397 Mass. 46, 48, 489 N.E.2d 696, 697 (1986). (See **Question 8, Suitability.**)

### ***Urgent, Compelling and Necessitous Reasons for Leaving a Temp Job***

Even when an employee is determined to have quit his position with a temp agency, he will still qualify for UI benefits if he quit for an "urgent, compelling and necessitous" reason. G.L. c. 151A, § 25(e); see BR-10289560 (4/27/15). As with other kinds of employment, "[l]oss of transportation has been recognized as an urgent, compelling, and necessitous reason for leaving employment, where no reasonable transportation alternative is available." BR-10289560 (4/27/15). When an employee's vehicle breaks down, this is also an "urgent, compelling, and necessitous" reason for declining assignments outside of the employee's local area. BR-10289560 (4/27/15). (See **Question 29.**)

### ***Is a Temp Job a "Permanent Job"?***

A position at a temporary staffing agency is considered "permanent" for the purposes of eligibility for leaving a job for a good faith new offer under G.L. c. 151A, § 25(e) if it has "a reasonable probability of continuing for a[n]... indefinite period of time." BR-10181653 (11/3/14); see also BR-0010 6162 10 (9/29/2014) (employment is permanent when there is no evidence that the position was "intended by both parties to be of finite, short-term duration.")

## 39 Worker Misclassification Issues

The UI law carries a strong presumption that services performed are “employment.” Sometimes employers wish to have their employees characterized as “independent contractors” in order to reduce payouts for unemployment, workers’ compensation, and other employee costs. The UI law uses a three-prong “ABC test” under which any individual performing services will be presumed to be an employee unless the alleged employer can prove *all three* of the following prongs:

- (A) The worker has been and continues to be free from control and direction in performance of the service;
- (B) The work is performed either outside the usual course of business or outside all of the enterprise’s places of business; and
- (C) The worker is customarily engaged in an independently established business of the same nature as the service performed. G.L. c. 151A, § 2.

The employer bears the burden of proof on all 3 prongs. If a contract exists that gives the employer the right to control and direct the employee’s performance, the employer fails prong A, even if the employer does not exercise this right. AH c. 3, § 4A.2. The employer’s failure to withhold federal and state income taxes or pay workers compensation premiums does not affect status determination. G.L. 151A, § 2.

### ***Cases and Board Decisions on Independent Contractor vs. Employee Issue***

- *Subcontracting Concepts, Inc. v. Commissioner of the Div. of Unemployment Assistance*, 86 Mass. App. Ct. 644, 19 N.E.3d 464 (2014) (courier who drove his own vehicle, but was not allowed to have nonessential passengers and was required to report accidents, was an employee, even though claimant’s agreement with the employer stated that “no employer/employee relationship is created under this agreement or otherwise,” no taxes were deducted from claimant’s pay, and he received no benefits from the employer).

- *Depianti v. Jan-Pro Franchising Intern., Inc.*, 465 Mass. 607 (2013) (franchisor is vicariously liable for the conduct of its franchisee only where the franchisor controls or has a right to control the specific policy or practice resulting in harm to the plaintiff - and in this case, despite there being no contract between the franchisor and the employee, the franchisor controlled the franchisee sufficiently to be held liable for misclassification).
- *De Giovanni v. Jani-King International, Inc.*, 262 F.R.D. 71, 84-85 (D. Mass. 2009) (finding that a class could be certified challenging the independent contractor classification for workers because the franchisor exerted so much control over the supposed franchisee and its workers).
- *Driscoll v. Worcester Telegram & Gazette*, 72 Mass. App. Ct. 709, 893 N.E.2d 1239 (2008) (news carriers were employees where newspaper retained control over order in which newspapers were delivered and retained authority to discharge carriers because of customer complaints).
- *Commissioner of the Div. of Unemployment Assistance v. Town Taxi of Cape Cod*, 68 Mass. App. Ct. 426, 862 N.E.2d 430 (2007) (taxi drivers who had discretion to choose which shifts they worked and which customers to accept from company dispatch were independent contractors); however, delivery drivers for a bakery were not independent contractors because they were not permitted to carry competitors' products without the employer's prior approval. BR-108261-XA (3/10/10) (Key). And pedicab drivers who were contractually prohibited from using their pedicabs for other purposes and from operating a similar business within the employer's area of business and for 12 months following their lease were employees. BR-117473-XA (1/24/12) (Key). Similarly, an employee of a delivery company under a 3-year non-compete clause was an employee. BR-120513-XA (4/13/12) (Key); And owner-operator truck drivers who determined their own routes, hours, truck-repair/service providers, and insurance providers were not independent contractors because: (1) the truckers could not sublease or hire others to drive their vehicle without the employer's approval; (2) the truckers could not refuse an assignment unless another trucker was available to take it; and (3) the truckers could not use their trucks to transport goods for other carriers without cancelling their lease agreement with the employer. BR-112274-XA (2/09/12).
- *Coverall North America, Inc. v. Commissioner of the Div. of Unemployment Assistance*, 447 Mass. 852, 857 N.E.2d 1083 (2006) (although employer claimed individual was a franchisee and not an employee, the court held the employer did not meet the third prong of the test where claimant performed

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janitorial services as an employee and where the nature of the business effectively compelled her to accept work solely from the employer); *cf* BR-0021 5645 27 (7/19/18) (holding that a managing editor for an advertising company who worked at home was nonetheless an employee where the employing unit failed to show that it had not “directed [the claimant] in how he performed his services.”)

- BR-SEC2-19-001 (4/24/19) (holding that the employing unit failed to show that golf lesson services performed at the employing unit’s driving range/ golf course were not employment where the services were done at the employing unit’s place of business, and the services were similar to those already provided by another employee).
- BR-SEC2-18-002 (2/7/19) (Key) (Personal trainers and group exercise class instructors were held to be employees of the employer fitness club. Employer failed to sustain its burden that these services were outside the usual course of the business for which the services are performed where the services at issue were offered on a regular and continuing basis, and the employer scheduled exercise class for the instructors, provided equipment for trainers and exercise classes, and advertised for the services and portrayed many of its trainers and instructors as members of the staff).
- BR-0019 6946 15 (9/25/17) (Key & affirmed by D. Ct.) (holding that employer failed to show that internet video production services were not employment where claimant spent time every day working at premises leased or owned by employer, services were not performed outside of the places of the employing unit’s enterprise, and requiring the claimant to produce hundreds of videos took so much time that claimant was incapable of offering his services to other clients).
- BR-1919023 (1/14/15) (A person in a “talent” position was an employee where she was not “free from the direction and control of the employing unit when she performed her services.” The claimant relied on the employing unit’s instructions on where and how to perform the assigned marketing services; the employing unit, not the client, directly paid the claimant, and claimant had to accept the rate of pay that the employing unit offered to her).
- BR-0002 4356 65 (6/20/14) (holding a worker who worked at a law firm that exercised a reasonable degree of control over her work was an employee, not an independent contractor); BR-106002-XA (6/23/08) (Key); similarly, mortgage originators who work under a broker’s license are employees. BR-102711-XA (11/21/07) (Key).

- BR-121929-XA (6/26/12) (Key & affirmed by D. Ct.) (tutors, who were required to meet extensive reporting and performance requirements, were subject to so much direction and control by the employing unit within the meaning of G.L. c. 151A, § 2(a), as to be employees, notwithstanding the tutors' high level of skill and the fact that several tutors held themselves out as independent contractors).
- BR-110709-XA (1/13/11) (Key) (where a carpenter performing services in customers' homes for the employer's remodeling company was not a registered home improvement contractor under G.L. c. 152, § 14, he was incapable of performing services as an independent contractor as a matter of law).

Employers are required to “keep true and accurate records of all individuals employed” G.L. c. 151A, § 45, and to pay contributions based on the wages of those employees. 430 CMR 5.03(3). If the alleged employer raises a question about employee status, the case is sent to the Status Department, where the DUA Adjuster conducts a “status determination,” asking a series of questions of both parties to get at the facts relevant to the three-prong test. An advocate may intervene and provide the Status Department with information. Both the alleged employer and the claimant are interested parties to this determination and may appeal an adverse determination.

In 2008, Governor Patrick signed Executive Order #499 establishing the Joint Employment Task Force on the Underground Economy and Employee Misclassification, later codified in the General Laws. St. 2014, c. 144, §§ 23, 24, *adding* § 25 to G.L. c. 23 and *amending* G.L. c. 62, § 21. The Task Force has since been replaced by a permanent Council on the Underground Economy (CUE). More than 17 state agencies participate in CUE, whose mission is to ensure business compliance with applicable state labor, licensing, and tax laws. A toll-free referral line (1-877-96-LABOR) and online referral, <http://www.mass.gov/lwd/eolwd/jtf/>, are available to provide information and to receive complaints about suspected cases of misclassification. In 2017, (the most recent year that information is publically reported on the web), DUA identified 50 misclassified workers (down from 1,100 in 2015) and \$111,225 in unreported wages (down from \$22.7 million 2015). See <https://www.mass.gov/files/2017-07/cue-annual-report-2017.pdf>.

## 40 On-Call Workers

Workers who have a history of working on an “on-call” basis, in which they accepted a verbal or written contract to work variable hours as needed, are considered in unemployment and therefore eligible for UI benefits *only* in a week in which there is *no* work available—i.e., a week of total unemployment. There is no eligibility for partial unemployment benefits. *Mattapoissett v. Director of the Div. of Employment Security*, 392 Mass. 546, 466 N.E.2d 125 (1984) (police officer hired to work irregular, part-time hours ineligible for UI in any week in which employer offered any work at all, as the town was the claimant’s only base-period employer); *Bourne v. Director of the Div. of Employment Security*, 25 Mass. App. Ct. 916, 515 N.E.2d 1205 (1987) (part-time, on-call, fill-in teacher was ineligible for UI while so employed because, even though the teacher had been employed full time as a teacher in another town, the teacher had made no claim against the other town nor proved that eligibility for UI resulted from the separation from that job).

However, a worker treated as a full-time employee cannot be considered an on-call worker even though the work is variable hours. BR-109764 (1/21/10) (Key). Similarly, an employee hired for full-time work and whose employer reduces hours to part-time on call, is in partial unemployment and the “Mattapoissett doctrine” does not apply. BR-113830 (3/16/11) (Key). Additionally, where a worker has been laid off from a full-time job in the base period, the worker’s *on-call part-time benefit year job* did not prevent the receipt of partial UI benefits. BR-111378 (5/21/10) (Key); AH c. 9, § 2C.4.b. Similarly, on-call employment established during the lag period (the period between the end of the last completed calendar quarter and the beginning of the benefit year) and that period is not used as part of the claimant’s base period, the claimant is not subject to disqualification as an “on call” employee. AH c. 9, § 2C.4. A full- or part-time schedule where the person works approximately the same number of hours per week in accordance with a posted or advance schedule is not an on-call situation, and a reduction of hours could qualify the worker for partial UI benefits. BR-110067 (3/22/2010)(holding that “accustomed remuneration” must be considered in determining suitability and a per diem worker who had an abrupt reduction in hours after 8 months of significant hours had good cause to quit.) Moreover, “on-call” should not be confused with a variable schedule where the employer changes the hours and shifts week by week. AH c. 9, § 2C.4.

A home health aide in partial unemployment whose hours were fairly consistent is not an on-call worker for the purposes of determining eligibility for UI. BR- 0014 0062 59 (03/09/2015).

A worker in an approved training program (under § 30 of G.L. c. 151A) who accepts on-call work is not required to work; therefore, refusal of on-call shifts is not disqualifying. BR- 0011 6741 52 (7/24/14).

**Note:** Both *Mattapoissett* and *Bourne* involved an on-call relationship that continued during the benefit year; neither decision addressed on-call employees who established the on-call relationship during the base period as subsidiary employment; i.e., contemporaneously with, and subsidiary to, full-time employment. If on-call work is subsidiary to full-time work (established by a finding that the hours of work are less), even if the on-call work was performed contemporaneously with the full-time work, the on-call work will still be considered subsidiary and approvable. If on-call work occurs during the benefit year, partial UI benefits are allowed because the individual's UI is based on another employer. See AH c. 9, § 2C.4.b.

For an excellent article chronicling the problems of non-standard work, see National Employment Law Project, *Out of Sync: How Unemployment Insurance Rules Fail Workers with Volatile Work Schedules*, 2015, <http://www.nelp.org/content/uploads/Out-of-Sync-Report.pdf>.

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## 41 UI Eligibility during a Labor Dispute

An individual may be disqualified from receiving UI benefits if unemployment is due to a “stoppage of work” because of a labor dispute. G.L. c. 151A, § 25(b). In order for there to be a stoppage of work, operations must be “substantially curtailed.” How much disruption is required to constitute a substantial curtailment is a fact-specific inquiry; there is no percentage threshold or numerical formula. *Boguszewski v. Commissioner of the Dep’t of Employment & Training*, 410 Mass. 337, 338, 572 N.E.2d 554, 555 (1991) (“stoppage of work” occurred where two thirds of employees of a public electric utility ceased to work during a 4-week strike); *Hertz Corp. v. Acting Director of the Div. of Employment & Training*, 437 Mass. 295, 297, 771 N.E.2d 153, 155-56 (2002) (no decrease in rentals or revenue); *Reed Nat. Corp. v. Director of the Div. of Employment Security*, 393

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Mass. 721, 473 N.E.2d 190 (1985) (25% drop in operations at only one plant did not constitute substantial curtailment); *Westinghouse Broadcasting Co., Inc. v. Director of the Div. of Employment Security*, 378 Mass. 51, 389 N.E.2d 410 (1979); *Adomaitis v. Director of the Div. of Employment Security*, 334 Mass. 520, 136 N.E.2d 259 (1956).

The employer has the burden of proving that its operations have been substantially curtailed. *Verizon New England, Inc. v. Massachusetts Executive Office of Labor and Workforce Development*, 87 Mass. App. Ct. 1126, 31 N.E.3d 1192, 2 (Table), further review denied, 472 Mass. 1110 (2015). In *Verizon New England*, the Court upheld the DUA's ruling that striking Verizon workers were entitled to UI benefits because the strike had not caused a substantial curtailment in Verizon's operations. The Court rejected Verizon's contention that the DUA erred by requiring Verizon to prove a substantial curtailment of its operations since all the information relevant to that inquiry was in Verizon's possession, and since the finding of a "stoppage of work" is an exception to the usual rule of awarding UI. The Court affirmed the Board of Review's decision. M-63772 – M-69116 (4/24/13) (Key). The Board found that the burden of proving a work stoppage also lies with the employer. The employer failed to establish a work stoppage where revenue declined less than two percent and then employer managed to perform between 80 and 98 percent of its business. *Id.*

However, the burden is on claimants to prove that they fall within the exceptions to the provisions of the statute denying UI eligibility when unemployment results from a stoppage of work due to a labor dispute. *General Electric Co. v. Director of the Div. of Employment Security*, 349 Mass. 358, 208 N.E.2d 234 (1965). This bar does not apply if the claimant did not, as an individual or as a member of a group, participate in, finance, or have a direct interest in the labor dispute (notwithstanding the payment of union dues). G.L. c. 151A, § 25(b)(1), (2). However, even if an individual is not a member of a union participating in the strike, the requirement of "direct interest" is met if the outcome will either favorably or adversely affect the individual's wages, hours, or conditions of work. *Wheeler v. Director of the Div. of Employment Security*, 347 Mass. 730, 200 N.E.2d 272 (1964). If the "direct interest" test is met, the bar to UI benefits does not apply before the strike begins if the individual is involuntarily unemployed during contract negotiations, nor does it apply after the strike has ended if the individual is not recalled within 1 week of the end of the strike. G.L. c. 151A, § 25(b).

If there has been a "lockout"—i.e., either a physical shut-down of a plant or a communication by the employer to its employees that there will be no more work

until the end of the labor dispute—individuals are eligible for UI benefits whether or not there has been a stoppage of work, as long as they are willing to work under the terms of the existing or expired contract pending the negotiation of a new contract. The employer can prevent payment of UI under these circumstances only if it demonstrates by a preponderance of the evidence that the lockout is in response to damage or threats of damage by bargaining-unit members with express or implied approval of the union’s officers, that the employer has taken reasonable measures to prevent such damage, and that such efforts have been unsuccessful. G.L. c. 151A, § 25 (b)(4), ¶ 2.

Normally, G.L. c. 151A, § 24(b) requires that the claimant actively search for work in order to qualify. In terms of a lockout, this means that a claimant must contact a variety of employers if their union allows them to seek work through non-union avenues, and ordinarily, work search logs showing that a claimant only contacted their union for work 3 times a week would not satisfy § 24(b). However, where DCS agents led the claimant to believe that such a work search was acceptable, the Board held it would be unfair to penalize the claimant for the agency’s error. BR-0027 1108 94 (3/28/19).

Legislation enacted at the end of 2018 provides that employees who are locked out and who have exhausted all other state or federal UI benefits are eligible for up to 26 times their weekly benefit amount or until the lockout has ended, whichever period of time is shorter. St. 2018, c. 338, amending G.L. c. 151A, § 25 (b)(4) and adding G.L. c. 151A, § 30(d).

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## 42 Persons Receiving Workers’ Compensation

Under appropriate circumstances, a worker may be eligible for workers’ compensation benefits under G.L. c. 152 and UI benefits under G.L. c. 151A. The intersection of these two areas of Massachusetts employment law can have surprising results, so practitioners are wise to keep abreast of both. In simplest terms, “worker’s compensation applies to wage loss attributable to physical disability, not to economic conditions [while] unemployment compensation applies to wage loss caused by economic conditions, not physical disability.” See In re Mike’s Case, 73 Mass. App. Ct. 44, 48 n. 10, 895 N.E.2d 512 (2008) (internal quotation marks and citations omitted). G.L. c. 151A, § 25 (disqualification for

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benefits) and G.L. c. 152, § 36B (UI benefits; eligibility) lay out the basic rules that apply when a worker might be eligible for both kinds of benefits.

Receipt of workers' compensation *total* disability benefits renders a worker ineligible for UI under G.L. c. 151A, § 25(d) because someone who is completely disabled does not meet the "able and available for work" test required by G.L. c. 151A, § 24(d). However, the Board has held that a review examiner erred in concluding that by accepting a Workers' Compensation lump sum settlement, a claimant was precluded from continuing to work for the employer as a matter of law or that by signing the agreement, the claimant voluntarily ended the employment relationship. BR-0013 5701 21 (4/27/15) (Key) (where claimant was terminated for failing to provide medical documentation to support a medical leave even though the claimant had provided the documentation, the claimant was discharged for a non-disqualifying reason, and as the presumption that a claimant cannot return to work is rebuttable, it did not constitute a bar to continued employment or render his leaving voluntary). For a discussion of the impact of lump sums under the Workers Compensation law on UI receipt, see AH c. 11, § 5D.

A worker who receives workers' compensation benefits for specific injuries causing disfigurement or loss of function under G.L. c. 152, § 36, may still be able to work in some capacity. Such a worker could collect UI if able to work on a part-time basis, with a reasonable accommodation if necessary. AH c. 11, § 5D.3. Similarly, a worker who suffers only a partial disability for workers compensation purposes may be eligible to collect UI.

Under G.L. c. 152, § 36B of the Workers Compensation Act, "[a]ny unemployment compensation benefits received are to be credited against partial disability benefits payable for the same time period." See Nason et al., *Workers' Compensation*, 29A Mass. Practice Series § 18.27 (3d ed. Nov. 2018). "Section 36B calls for a dollar-for-dollar reduction in partial [workers compensation] disability benefits, even though unemployment benefits may be taxable, [thus] reducing the employee's protection." *Id.* at 100. Further, "[a]ny employee claiming or receiving [partial incapacity workers' compensation benefits under G.L. c. 152], §35 who may be entitled to UI shall upon written request from the insurer apply for such benefits. Failure to do so within sixty days after written request shall constitute grounds for suspension of benefits under section thirty-five." See G.L. c. 152, § 36B (2).

In contrast to the arguably harsh limitation of UI for workers suffering partial incapacity under G.L. c. 152, § 35, the law provides that a worker who has been on workers' compensation *total* disability (i.e., received G.L. c. 152, § 34

benefits) for more than 7 weeks may have her base period for calculating her UI extended by the number of weeks she received total disability benefits, up to a maximum of 52 weeks. See G.L. c. 151A, § 1(a). This allows: (1) calculation of the worker's monetary eligibility for UI to reach back to the period of employment that occurred before the injury and receipt of workers compensation, as workers' compensation benefits are not counted as wages; and (2) the worker who has recovered enough to engage in a work search to go back to work to collect UI benefits.

**Note:** Claimants who are totally disabled, laid off and who receive workers compensation total disability benefits for at least 7 weeks should consider not applying for UI until they are looking for work and a doctor certifies that they are able and available for at least part-time work of 15 hours a week (with or without reasonable accommodation). Otherwise, the time for claiming UI will run but the claimants will not be able to receive UI while they are totally disabled.

Unfortunately, DUA takes the position that claimants who mistakenly apply for UI in this situation cannot withdraw their claims. Because the base period is extended to include earnings up to a year prior to the receipt of workers' compensation benefits, this is one situation where the rule about applying for UI as soon as possible after leaving work may not be to the claimant's advantage.

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## 43 Persons Receiving Social Security Disability or Retirement Benefits, or a Pension.

In order to qualify for UI benefits, an individual must be "capable of, available and actively seeking work." G.L. c. 151A, § 24(b). (See **Question 8**).

### *Social Security Disability Payments*

The Social Security Administration has made clear that the mere fact that a person is receiving Social Security Disability benefits (as distinguished from Retirement benefits) does not automatically result in disqualification for UI benefits. Social Security Forum, V. 20, No. 11, Memorandum to Regional Chief Justices from Chief Judge F. Cristaudo, *Receipt of Unemployment Insurance Benefits by Claimant Applying for Disability Benefits*, 11/15/2006. This memorandum is available at <http://www.masslegalservices.org/node/37847>. A DUA memorandum

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implementing this SSA guidance is available at <http://www.masslegalservices.org/node/30888>.

A claimant receiving SSI and SSDI who provides medical documentation that the claimant can work, will not be disqualified. AH c. 4, 2C.5&6. (See **Appendix Q** for the information DUA requests in order to make this determination). Only if the documentation indicates that the claimant is unable to work on even a part-time basis with a reasonable accommodation should DUA issue the Notice of Disqualification.

Claimants receiving SSI or SSDI while working part time must document the number of hours worked and the number of hours that they are capable of working. A claimant who works at least 15 hours per week would not be considered unemployed and would be subject to disqualification under §§ 1(r) and 29(b) of G.L. c. 151A.

In all instances, no presumption should be made that a claimant is disqualified without determining whether or not she can work full-time or part-time, with or without reasonable accommodation, or without giving the claimant a reasonable opportunity to provide medical documentation.

### ***Social Security Retirement Benefits***

Receipt of Social Security Retirement benefits does not cause any financial offset in UI benefits. (St. 2006, c. 123, §§ 67, 68, amending G.L. c. 151A, § 29(d)(6) to eliminate financial offset). Other nondeductible benefits include those from IRA Plans, Keough Plans, Railroad Retirement, and any withdrawal of Pension Contributions.

### ***Pension and Other Retirement Benefits***

Receipt of pension or other retirement benefits from a base-period employer may affect the amount of UI benefits but does not affect UI eligibility as long as the individual is able, available, and actively seeking work. A claimant who receives a pension or retirement benefit that is financed wholly by a base-period employer will have her weekly UI benefits reduced by 100 percent; whereas, if the employee makes any contribution, the UI benefits are reduced by 50 percent of the weekly retirement benefit. *Lynch v. Director of the Div. of Employment Security*, 372 Mass. 864 (1977); BR-2015465 (5/19/14). No deduction is made if the pension is from a source other than the base-period employer, the lump-sum payment was made prior to the base period, or the pension is solely funded by the employee. G.L. c. 151A, § 29(d).

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## 44 Persons Receiving Severance Pay or Other Lump-Sum Payments upon Separation from Employment

An employee who receives any remuneration from their base-period employer is not considered to be in unemployment. “Remuneration” is defined to include “severance, termination or dismissal pay.” G.L. c. 151A, § 1(r)(3). Severance pay that is granted unconditionally (that is, without requiring the employee to release claims against the employer) will disqualify the employee for the period it covers—for example, if an employee is given 6 weeks of pay at the time of termination, she will be ineligible for UI until this payment period runs out. When she then applies for UI, this severance pay is included as base-period earnings for purposes of establishing her monetary eligibility. *Ruzicka v. Commissioner of the Dep’t of Employment & Training*, 36 Mass. App. Ct. 215, 629 N.E.2d 1012 (1994). The benefit year is extended by the number of weeks in which the employee’s severance pay was disqualifying.

In contrast, an agreement by an employee to take a lump-sum payment upon separation in return for the employee’s release of claims against the employer will not constitute the kind of payment that disqualifies the employee from receiving UI concurrently with the severance payment. *White v. Commissioner of the Dep’t of Employment & Training*, 40 Mass. App. Ct. 249, 662 N.E.2d 1048 (1996); *Dicerbo v. Commissioner of the Dep’t of Employment & Training*, 54 Mass. App. Ct. 128, 763 N.E.2d 566 (2002) (holding employees’ receipt of a lump-sum separation package, paid regardless of whether employees had found new employment and that constituted an agreement by employees not to bring any future claims against the employer, was not “severance pay” and thus did not disqualify employee from receiving unemployment benefits).

In these circumstances, where a claimant agrees to take a lump-sum payment in return for a release of claims, it is important that the employer not contest the claimant’s UI eligibility. Helpful language to be included in a release of claims to secure this outcome will specify that, if contacted by DUA, the employer will accurately state that the claimant was terminated [for reasons adequately consistent with the facts and consistent with eligibility], that there was no misconduct or rule violation, and the employer does not dispute that the claimant is eligible for UI as of [specified date].

Lump sum payments where there has been a plant closing at a business of 50 or more employees, or where at least 50 percent of employees have lost their jobs, are not disqualifying. G.L. c. 151A, §1(r)(3).

For information concerning the effect of early-retirement incentive packages and voluntary severance packages on UI eligibility, see **Question 23**.

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## 45 Working and Leaving Multiple Jobs

When a claimant applies for UI, DUA reviews the information from all employers who have reported wages during the base period in order to calculate the weekly benefit amount and the duration of UI. Charges are made to “the accounts of the most recent and the next most recent employers in the inverse chronological order of the base period employment of the claimant.” G.L. c. 151A, § 14(d)(3).

### *Workers Who Work Concurrent Full-Time and Part-Time Jobs during the Base Period*

When a worker works more than one job concurrently during the base period, DUA establishes which is the primary job and which is the subsidiary job based on a comparison of a number of factors, including hours, wages, employment history, and whether the work is in other than the individual’s primary occupation. 430 CMR 4.74, 4.75. This determination becomes relevant because, although wages from all jobs during the base period are used to calculate monetary eligibility and the weekly benefit rate, an individual is unemployed (and hence eligible for UI) only upon the loss of a primary job. BR- 0017 2245 57 (03/09/16) (finding that while both jobs required about the same amount of hours, the job that paid more was the primary job).

### *Leaving Subsidiary Part-Time Work in the Base Period*

A claimant who leaves subsidiary part-time work for disqualifying reasons within **4 weeks** prior to the establishment of an eligible claim for UI, i.e., during the claimant’s base period, is subject to a “constructive deduction.” 430 CMR 4.76 – 4.78; AH c. 6, § 2 (**note**: this is a change from past practice that looked back 8 weeks, and it now conforms to the regulation). This means that DUA reduces a claimant’s UI amount by assuming that the claimant still holds the subsidiary

part-time job; and DUA calculates the claimant's UI benefit assuming those earnings. Although the unemployment statute is silent on this issue, DUA promulgated these regulations to implement the court's decision in *Emerson v. Director of the Div. of Employment Security*, 393 Mass. 351, 471 N.E.2d 97 (1984). However, *Emerson* dealt with a claimant who left a part-time job during her *benefit year*, and therefore provides no authority for the constructive-deduction regulations as applied in the *base period*. The Board has clarified this issue in a key decision. BR-0011 4858 86 (6/19/14) (Key) (holding that under 430 CMR 4.76, a claimant may not be disqualified from UI benefits or subject to a constructive deduction if he quits a part-time job without knowledge of an impending separation from his full-time job).

**Example of Constructive Deduction:** *Sue works full time at Job A for 3 years and, at the same time, she works part-time at Job B. At some point in the 4-week period before she leaves Job A, she quits her part-time job with B without good cause. She is then laid off from Job A and is found eligible for UI benefits. The wages from Job B will be ("constructively") deducted from her UI unless Sue can show that when she quit her part-time job she did not know that she would be laid off from her full-time job. If her wages from Job B are less than or equal to one third of her weekly UI benefit rate, her UI will not be reduced. The amount of her Job B gross wages that exceed one third of her benefit rate will cause a dollar-for-dollar reduction in her UI.*

The Board of Review held a claimant separated from a part time job for disqualifying reasons was nevertheless not subject to a constructive deduction because he did not know of his impending separation from his full time job. BR-0017 2245 57 (3/9/2016); BR-0011 4858 86 (6/19/14) (Key) (same). This holding has been restated in several cases. See BR-0028 2066 52 (6/24/19) (where a claimant separated from a subsidiary base period employer, and did not know that his hours from his primary employer would be cut or reduced when he quit the subsidiary job, he is not subject to constructive deduction or any disqualification); BR-0024 9313 31 (9/27/18) (Key) (where disqualifying discharge was part-time, subsidiary, base period employment and, at the time of her separation from the employer, the claimant did not know of an impending qualifying separation from her full-time job, under DUA's regulations, the claimant was entitled to full benefits and not subject to a constructive deduction due to her discharge from the employer); BR- 0015 6369 62 (9/30/2015) (holding a claimant who voluntarily quit a subsidiary job for a higher paying job was not subject to a constructive deduction when she was laid off from her primary job).

## Part 4 ■ Special Situations

The Board has also held that federal extended benefits are subject to a constructive deduction—resulting from a disqualifying separation from part-time work in the benefit year—to the same extent as a constructive deduction from regular benefits. BR-112903 (6/9/2010) (Key). **Note:** An individual who quits a part-time job with an employer other than the most recent base period employer in order to participate in DUA-approved training is not disqualified under this provision. G.L. c. 151A, § 25(e), ¶10.

### ***Constructive-Deduction Regulations and Amended Statutory Provision***

DUA’s regulations, at 430 CMR 4.76 (2013), mitigate the harshness of some of prior regulations:

- If a claimant has no knowledge of impending separation from her primary work when she leaves her subsidiary part-time work during the base period, then there is no constructive deduction. § 4.76(1)(a); BR-0028 2066 52 (6/24/19); BR- 0015 4493 28 (11/25/15); BR-0013 9350 99 (10/19/15).
- If a claimant leaves her subsidiary part-time work for a disqualifying reason after she leaves her primary work and applies for UI benefits based on non-disqualifying reasons from her primary work, then a constructive deduction will apply. § 4.76(1)(b).
- If a claimant leaves subsidiary part-time work that is for a fixed period of time, the constructive deduction will apply only through the last week of the fixed period. § 4.76(2) (See *Freeman v. Director of the Div. of Unemployment Assistance*, Suffolk Sup. Ct. CA 10-824 (2013) (settlement requiring revised regulations).
- If a claimant left part-time work for disqualifying reasons but then obtains new part-time work or returns to the former part-time job, a constructive deduction will no longer be imposed. § 4.76(3).

**Note:** For information on how DUA conducts its fact-finding in these cases, see UIPP # 2014.05, *Revision to 430 Code of Mass. Regs. §4.76 – Reduction of Benefits for Constructive Deductions*, (5/29/14).

Claimants may leave their subsidiary job without being subject to a constructive deduction if the job does not fall under “covered employment” under the Unemployment Law, G.L. c. 151A, §6. AH c. 6, § 2B; *McCormick v. Director of the Dep’t of Unemployment Assistance & the Episcopal Diocese of Western MA*,

Southern Berkshire Division, CA No. 1629CV018 (2016) (agreement for judgment by all parties reversing Board's decision imposing a constructive deduction where claimant worked for a church, which is excluded from employment under G.L. c. 151A, § 6(r)).

An individual need not be actively working in the worker's primary job to be rendered only partially unemployed – if the individual is on disability leave or a leave of absence and leaves the subsidiary job for disqualifying reasons, the result should be a constructive deduction rather than full ineligibility. BR-0012 9792 63 (09/18/15).

In cases involving separations from multiple employers during the base period, DUA has all too often terminated claimants' entire UI benefits rather than applying a constructive deduction. The Legislature has made clear that there shall be no "full denial of benefits solely because an individual left a part-time job, which supplemented a primary full-time employment, during the individual's base period prior to being deemed in partial employment." St. 2014, c. 144, § 65 *amending* G.L. 151A, § 29(d). This language protects claimants' right to receive at least partial benefits.

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## 46 Combined Wage Claims (Interstate Claims)

The UI system has a set of rules for workers who have worked in more than one state, have worked in another state for an out-of-state employer, or have moved to another state since they began collecting UI benefits. Under federal law, states are required to set up an Interstate Benefit Plan, which allows a worker who lost his job in one state to collect UI benefits in another state in which he resides. 26 U.S.C. § 3304 (a)(9)(B). The Massachusetts law governing combined wage claims appears at G.L. c. 151A § 66; 430 CMR 4.05 and 4.09.

As a result of a 2009 change in federal regulations, interstate UI benefit claimants may choose to file a UI claim in any state in which they had wages during the base period *and* in which they qualify for UI under that state's laws. 20 CFR 616. (Under a prior regulation, claimants could file a claim in any state in which they had base-period wages *or* in which they resided.)

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The UI law of the state in which the UI claim is filed (i.e., the paying state) controls in interstate claims. 20 C.F.R. 616.8 (a). That state investigates the claim and, unless an issue has already been determined by the transferring state (any other state in which the claimant had covered employment and base-period wages and that transfers those wages to the paying state), determines eligibility and conducts redeterminations or appeals. If a state denies a combined-wage claim, it must inform the claimant of the option to file in another state in which the claimant also had covered employment and base-period wages. 20 CFR 616.7(f); 430 CMR 4.09(7). See UIPL No. 12-17, 2/28/17, *Adjudication of Unemployment Insurance Combined Wage Claims Issues*, available at [https://wdr.doleta.gov/directives/corr\\_doc.cfm?docn=7712](https://wdr.doleta.gov/directives/corr_doc.cfm?docn=7712).

Where the claimant had collected regular UI from two states, the Board ruled that if the original determination of such eligibility was issued more than 1 year before DUA caught and corrected the error, the claimant cannot be required to repay DUA for those benefits, if there is no intentional misrepresentation by the claimant. BR-0002 4648 63 (4/22/14).

# Part 5

## Receiving Benefits

A person who is monetarily eligible for payment of UI benefits will receive a weekly benefit amount calculated in accordance with the description in **Question 4**. For a discussion of how part-time earnings affect weekly UI, see **Question 49**. For a description of how working and leaving multiple jobs may affect weekly UI, see **Question 45**.

When UI benefits commence, claimants will receive them through a debit card or direct deposit every other week, so long as they continue to certify their continuing eligibility. (See **Questions 6 and 8**.)

**Note:** The default payment is through a debit card. A claimant must affirmatively choose direct deposit. Paper checks are no longer issued.

Below is a list of some of the obligations, benefits, and services for claimants who are receiving UI benefits.

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### **47** Are Claimants Entitled to Additional Benefits For Their Children?

A claimant who is the natural, adoptive, step-parent, or legal guardian of a child or is under a court order to provide support to a child and who provides more than 50 percent of the support for the child is entitled to a dependency allowance of \$25 per week for each dependent child up to age 18, not to exceed 50 percent of the claimant's weekly benefit rate. The allowance is also available for a dependent child over age 18 who is unable to work because of a physical or mental disability and for a dependent child between ages 18 and 24 who is a full-time student at an educational institution. G.L. c. 151A, § 29(c). Once the dependency allowance is established, it does not change during the benefit year, except that one spouse can transfer the allowance to their spouse; only one spouse at a time may receive a dependency allowance during the same week of UI.

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Claimants whose child does not live with them is still eligible for the dependency benefit, so long as they provide more than 50 percent of the child's financial support and as long as the child resides in the US or its territories or possessions. AH c. 3, § 7B.2. Similarly, a claimant who is under a court order to pay child support, *and* the other parent has not already claimed the child for purposes of UI dependency benefits, is eligible for the dependency benefit. AH c. 3, § 7B.4. The Board also has determined that a grandmother taking care of a grandchild under a court-ordered temporary guardianship is also entitled to a dependency allowance. BR-0021 4726 92 & 0021 4726 98 (10/23/17) (finding that the fact the order was temporary not dispositive as the relevant time-period is during the base period of the claim).

Where a claimant received government support in the form of food stamps, the Board found that the amount should be equally attributed to both parents such that the father was able to receive dependency allowance where his income plus have the food stamp allotment constituted more than 50% of the support of 2 children. BR-0023 9238 50 (5/21/18) (Key). The Board reversed a review examiner's decision that held that because a claimant received more in public assistance benefits than she had earned from employment, she was ineligible for a dependency allowance because the government, not she, had paid more than 50 percent of the support for the claimant's child. The Board based its reversal on G.L. c. 151A, § 29(c) (defining dependents) and prior SRH § 1652(C), that requires the claimant to establish that they were the child's main financial support during the base period of the claim rather than considering income during the benefit year. BR-0012 6566 49 (03/16/2015); BR-0029 0738 15 (6/11/19)(same); BR-0029 0736 96 (6/10/19) (same); AH c. 3, § 7B.2.

The Board of Review held a mother could claim the dependency allowance for her 19 year-old daughter who was attending college in another town. BR-0011915371 (9/8/2015). In addition, the Board of Review held a stepfather could claim his minor stepson for a dependency allowance. BR-0011 8516 99 (8/15/2015).

Finally, where the claimant, who had not supplied the information for the receipt of the dependency allowance, had done so after the hearing, the Board found that the claimant was entitled to the dependency allowance and reversed the Review Examiner's denial. BR-0017 5957 87 (1/20/17).

## 48 For How Long Can a Claimant Receive Unemployment Benefits?

The number of weeks during which a claimant receives UI benefits during the benefit year depends on the total benefit credit for that year. That amount is calculated by first determining which amount is less – 30 times the weekly benefit amount or 36 percent of the claimant’s base period earnings. If the former, the claimant receives benefits for 26 weeks, if the latter, the total benefit credit is divided by the weekly benefit amount to determine the number of weeks of UI benefits. Therefore, the number of weeks of UI benefits an individual claimant receives may be far fewer than 26, depending on the number of weeks of earnings, the total earnings, and whether earnings fluctuated between different quarters of the base period. For an explanation about how the weekly benefit amount is calculated, see **Question 4**.

An additional period of UI eligibility may be available to employees who are locked out of work during a labor dispute. See **Question 41**.

### *Federal Extended UI Benefits*

The federal extended UI benefits program is triggered during periods of high unemployment through Congressional enactments and also through a permanent federal-state extended benefits program. G.L. c. 151A, § 30A. During a period when DUA is paying federal extended benefits, if the regular UI payment period 30 times the weekly benefit amount, it is reduced to 26 times the weekly benefit amount.

Monetary eligibility for federal extended benefits is established 3 ways: 1) the claimant has wages in the base period that exceed 40 times the weekly benefit amount (whereas regular UI requires wages in the base period to exceed 30 times the weekly benefit amount); or 2) the claimant’s base period wages exceed 1 1/2 times the claimant’s high quarter earnings; or 3) the claimant had 20 weeks of full-time insured earnings. AH c. 3, § 8B. Prong #3 was added to the regulations, 430 CMR 4.01(7)(Rev. 1/12/18) as a result of the settlement of *Stone v. DUA & EOLWD*, Suffolk Superior Court, C.A. No. SUCV2012-04456-F (2018). Because DUA calculates monetary eligibility based on quarterly income, an individual denied federal extended UI benefits under prongs (1) and (2) will be asked to produce evidence of 20 weeks of full time work to prove eligibility under prong (3).

***Training Opportunity Program (TOP) Benefits under Section 30 of the UI Law***

Under G.L. c. 151A § 30, unemployed workers who are eligible for UI may be entitled to an additional 26 times their weekly benefit rate if they are participating in a DUA-approved training program. An individual participating in an approved training program is deemed to be meeting both the work-search and availability requirements during the period of training. Note also that claimants participating in a DUA-approved Section 30 training program are also exempted from federal reemployment seminar participation requirements. 26 U.S.C. § 3304(a)(8); T.E.G.L. 20-11 § 3 (March 16, 2012). (For further information about Section 30 extended benefits, see **Question 53**).

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## **49 How do Part-Time Earnings Affect UI Benefits during the Benefit Year?**

***The Partial-Earnings Disregard***

Claimants who are collecting UI and find some new employment have a duty to report these earnings in their weekly certification. Claimants are entitled to a disregard of a portion of their gross earnings (or net earnings from self-employment), such that that portion is not deducted from their weekly UI benefit. The disregard is equal to one-third of their weekly benefit rate (excluding any dependency allowance). Any weekly earnings above that one-third disregard cause a dollar-for-dollar reduction in the weekly UI benefit. The disregarded earnings plus the individual's weekly benefit may not exceed 133% of the weekly benefit amount. G.L. c. 151A, § 29(b).

***Leaving Newly Obtained Part-Time Work in the Benefit Year***

A constructive deduction is applied when a claimant is separated, under disqualifying circumstances, from part-time employment newly obtained during the benefit year. 430 CMR 4.76(1)(a)(ii); BR-1989041 (5/16/14). (See **Question 45 Constructive-Deduction Regulations and Amended Statutory Provisions**). In addition to the standard arguments about why the leaving should not be disqualifying, also consider whether the work was suitable under G.L. c. 151A,

§ 25(c)(2) (work is not suitable where remuneration, hours, or other conditions of work offered are substantially less favorable to the individual than those prevailing for similar work in the locality), or whether the job was “trial work.” (See **Question 8**.)

A constructive deduction is often inappropriate when the claimant has accepted part-time work during the benefit year. For example, the Board has found that if claimants immediately accept part-time work during their benefit year, even after voluntarily separating from their former full-time employer, 430 CMR 4.76 requires that the claimants are not subjected to disqualification nor constructive deduction. Rather, the penalty is limited to the usual earnings disregard. BR-0027 2059 15 (4/24/19) Key).

### ***Requalifying on a Constructive Deduction, and Effect on Benefit Credit***

In order to requalify for benefits after a constructive deduction, the requalification rule applies: i.e., claimants must have had 8 weeks of earnings and have earned an amount equivalent to, or in excess of, 8 times their weekly benefit amount. G.L. c. 151A, § 25(e) (see **Question 10**). Under constructive-deduction regulations promulgated in 2013, claimants subject to a constructive deduction who obtain new part-time work, or return to their former part-time work, will have the earnings disregard applied but will no longer be subject to the constructive deduction while employed. 430 CMR 4.76 (3). The benefit-credit balance (the total amount of UI benefits payable on that particular claim) is reduced only by the amount of benefits actually paid. This allows claimants to collect their entire benefit credit balance if they remain unemployed long enough and can exhaust all the benefits available on their claim. AH c. 6, § 2; c. 9, § 2B.1.

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## **50 What Is the Worker Profiling Program and RESEA?**

Federal law requires states to have a **worker profiling program**. 42 U.S.C. §§ 503(a)(10), (j). The purpose of this law is to identify and target claimants likely to exhaust their UI because they are permanently laid off and unlikely to return to the same industry or occupation.

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The federal government provides grants to the states to address the individual reemployment needs of UI claimants through the **Reemployment Services and Eligibility Assessment (RESEA) program**. The FY 2019 spending bill increased appropriations for the program, Dep't of Defense, Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. 115-245, Division B, Title I, amending sections 303(j) and 306 of the Social Security Act. Additionally, the Bipartisan Budget Act of 2018, PL 115-123, provided RESEA with permanent authorization under section 306 of the SSA and included new requirements to be phased in over several years. States have more flexibility in program design and targeting UI claimants for participation including the ability to require subsequent RESEA appointments (and at each appointment, work search activities are assessed). Even though training is not an allowable activity for program funding, states must report on the number of RESEA participants who begin training. UIPL 08-20 (1/30/20, available at [https://wdr.doleta.gov/directives/attach/UIPL/UIPL\\_8-20\\_acc.pdf](https://wdr.doleta.gov/directives/attach/UIPL/UIPL_8-20_acc.pdf); TEGL 09-19 (1/30/20) available at [https://wdr.doleta.gov/directives/corr\\_doc.cfm?docn=3714](https://wdr.doleta.gov/directives/corr_doc.cfm?docn=3714)). The 4-year plans that states must submit are due on March 16, 2020. *Id.* For detailed information about how the MassHIRE Department of Career Services implements RESEA, see <https://www.mass.gov/doc/resea-policy-and-procedures-manual-1/download>.

Massachusetts has expanded worker profiling to include all UI claimants. However, DUA's regulation on worker profiling does not authorize DUA subjecting all UI applicants to "worker profiling." 430 CMR 401(8). All UI claimants receive a notice informing them that they must attend a career services seminar to participate in RESEA at a MassHIRE Career Center, or in DUA offices in areas where there is no MassHIRE Center. (A list of the addresses and telephone numbers of existing MassHIRE Career Centers is provided in **Appendix A**.) The seminar is intended to assist claimants with job searches, and although claimants should also be informed at these sessions about training opportunities/extended benefits such as the TOP benefits under Section 30 (see **Question 48 and Question 53**), they are often not told of these opportunities, or they are not provided with adequate or timely assistance to seek approval for the training program and the extended training benefits that are available while one participates in training. Greater coordination between DUA and the MassHIRE Career Center is required under the Workforce Innovation and Opportunity Act (WIOA), 29 U.S.C. §3101 *et seq.* (Pub. L. No. 113-128). For a full description of the services and allowable types of training available under WIOA, see TEGL No. 8-19(1/02/20) available at [https://wdr.doleta.gov/directives/corr\\_doc.cfm?DOCN=5389](https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5389). **Note:** The Guidance provides that individual training accounts are the only funding

mechanism that requires that a training provider be on an eligible training provider list. Therefore, as in the selection of training providers under Section 30, if a training provider is not listed, this should not end the inquiry as to whether or not the training is approvable.

A claimant who fails to attend a career services seminar by the due date (the 3<sup>rd</sup> paid week of the claim or if rescheduled for good cause, the 4<sup>th</sup> paid week) may have UI benefits suspended for a week. If a claimant has not attended a RESEA review or fails to comply with required activities by that date, the claimant is then indefinitely disqualified. The disqualification ends when the claimant has satisfied the RESEA requirements. AH c. 2, § 1F. Claimants should not have their UI benefits suspended if they had good cause for not attending. The circumstances that constitute “good cause” are set out in DUA regulations at 430 CMR 4.01(8)(b).

**Note:** Advocates should be vigilant that the good cause provisions are applied to claimants, because the UI Online system does not appear to accommodate claimants even where good cause clearly exists. DUA’s policy provides that an LEP claimant has good cause for not attending a Career Center Seminar that is offered only in English. AH c. 2, §1G2. DUA is increasingly denying claimants UI benefits related to RESEA requirements. These denials occur even though the claimant had good cause, had received misinformation from the career center or had completed the RESEA requirements. Although these denials are reversed with advocate intervention, the increase in denials is troubling and indicative of systemic errors. Moreover, a public record request for denials occurring in 2018 showed that only 20% of denied claimants were reinstated.

The Board has repeatedly reversed denials of UI benefits on a finding of good cause (not considered by adjudicators or by the Hearings Department). Examples include reversals of UI denials where: a claimant received an offer to start a full-time job within a couple of weeks of a scheduled RESEA review, the claimant had good cause for failure to attend RESEA, BR-0030 9537 40 (9/23/19)(Key); a claimant had good cause for failing to meet his initial RESEA deadlines because he was caring for sick relatives and completed the rescheduled initial and final RESEA reviews at a later date, BR-0028 4636 06 (6/19/19); a claimant had good cause for failing to complete RESEA review after gaining and losing a job within 10 days, as the email from a career center employee did not indicate the RESEA program would re-open when claimant began collecting UI again, BR 0025 1624 89 (9/24/2018); a claimant did not receive her first RESEA letter, did not receive a subsequent notice of disqualification for failing to attend the RESEA Review because she was not collecting UI at the time, showed sincere efforts to complete

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eligibility requirements, and was further delayed in attending the RESEA Review due to career center technical issues, BR0024 2365 09 (12/21/18); the failure to provide work logs was for weeks that the claimant had not requested UI benefits, BR-0023 7404 95 (5/30/18); the claimant's inability to open the RESEA letter electronically where the claimant was found to have made additional "diligent but unsuccessful" efforts, BR-0023 4912 20 (4/30/18); the career center was closed due to inclement weather followed by career counsellor's erroneous advice that it was "too late" when the claimant returned, BR-0024 0783 47 (4/27/18); the claimant was given the run-around after moving to Maryland, including misinformation provided by both Massachusetts and Maryland staff, BR-0020 4435 04 (6/30/17); the claimant was unable to schedule an orientation coupled with career center's representative's inability to access the claimant's account in Job Quest and failure to fix the technical problem or find a manual solution, BR-0018 9757 07 (12/29/16); the claimant relied on DUA's statement that as a union member, claimant did not need to complete RESEA requirements, BR-0019 1437 36 (12/16/16); the record stated that claimant had failed to complete RESEA requirements but where, on remand (as a result of Board's suspicion that good cause probably existed), the problem was "human error" in not entering this information, BR-0019 3708 99 (12/9/16); the claimant who started RESEA in Massachusetts and completed it in California that had different requirements, BR-0018 9754 68 (11/30/16); the claimant was advised by a career counsellor that he was not required to attend a subsequent review meeting and therefore the claimant ignored a reminder notice, BR-0018 2403 84 (9/30/16); the claimant, notified to enroll in RESEA after he had already started working at a new job and was not collecting UI benefits, attended a REA orientation after reopening his claim but received no further notices, BR-0014 2904 43 (4/19/16).

In addition to failing to apply "good cause" principles as shown in the Board's decisions cited above, the decisions of both adjudicators and review examiners reversed by the Board demonstrate ignorance of the law. For example, in one case the review examiner erroneously concluded that there "are no exceptions for profiled claimants who fail to meet the [RESEA] requirements by the deadline date." BR-0019 5198 91 (1/23/17) (Board finding good cause where the claimant could not attend RESEA review due to a sick child). In another case, the claimant was disqualified from UI benefits during a period that she had been approved to participate in training. BR-0015 7819 25 (11/5/15) (Key). Finally, the Board has reversed a denial of benefits during the week in which a claimant completed the RESEA requirements. BR-0017 1880 42 (5/16/16).

Further information about worker profiling is available in Department of Labor Unemployment Insurance Program Letters published in the Federal Register,

59 Fed. Reg. 11804 (March 14, 1994); 20 C.F.R., Part 662. For advocacy handles, see the General Accounting Office Report, GAO-18-633 (Sept. 2018), Reemployment Servicers, DOL Could Better Support States in Targeting Unemployment Insurance Claimants for Services.

For advocacy on behalf of claimants with limited English proficiency, see **Question 52**.

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## 51 What Are the Requirements for Non-Citizens?

The Federal Unemployment Tax Act (FUTA) requires that states' UI laws provide that compensation shall not be payable on the basis of services performed by a non-citizen unless such non-citizen is an individual who (1) was lawfully admitted for permanent residence at the time such services were performed, *or* (2) was lawfully present for purposes of performing such services, *or* (3) was permanently residing in the United States under color of law (PRUCOL) at the time such services were performed (including a non-citizen who was lawfully present in the United States as a result of the application of the provisions of § 212(d)(5) of the Immigration and Nationality Act). 26 U.S.C. § 3304(a)(14)(A)). These requirements are incorporated in Massachusetts UI law at G.L. c. 151A, § 25(h). The receipt of UI benefits does not pose a problem or potential public-charge issue for an immigrant who later applies for permanent status or citizenship.

For a full description of DUA's policy with respect to non-citizen eligibility, see AH c. 10, § 1.

In addition to proving their satisfactory immigration status (by meeting one of the 3 tests listed above) for purposes of determining financial eligibility during the base period, non-citizens must also prove that they are available for work during their benefit year while collecting UI benefits under G.L. c. 151A, § 24(b). DUA determines non-citizens' availability for work using the Employment Eligibility Verification, or the Form I-9, process required of employers.

<http://www.uscis.gov/files/form/i-9.pdf>.) The request for more documents than are required by law or the refusal to honor facially genuine documents is an unfair immigration-related employment practice. Immigration Act of 1990, 8 U.S.C. § 1324b (a)(6). U.S. Department of Justice, Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), *Unfair documentary*

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*practices related to verifying the employment eligibility of employees, available at [www.justice.gov/crt/about/osc/](http://www.justice.gov/crt/about/osc/).* Accordingly, where a review examiner denied UI benefits to a claimant who had provided DUA with an expired permanent resident card, a social security card and a current Massachusetts driver's license, the Board reversed the denial because the claimant's social security card and driver's license were sufficient. BR-0019 4545 15 (12/2/16) (Key).

The Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS) finalized a rule, effective May 16, 2011, altering the list of acceptable identity documents for the I-9 employment eligibility verification process. The rule amends 8 CFR 274a.12. The 2011 rule, which finalized without change a 2008 interim final rule, requires *only unexpired documents* to be presented during the verification process, with certain exceptions. The rule also eliminates from the list of acceptable documents several that USCIS no longer issues, such as forms I-688, I-688A, and I-688B, which are temporary resident cards and older versions of the employment authorization card.

An important exception to the "unexpired document" rule applies to "green card" holders, i.e., lawful permanent residents who have permanent work authorization in the US even *after* their green cards expire. Accordingly, the Board overturned its prior denial of UI benefits where a claimant had been fired for not providing proof that he had requested a new green card where the employer had a copy of his old expired document. BR-0024 3279 66 (8/20/19), (reversing its prior decision, same docket number, issued on 7/30/18).

The USCIS rule includes arrival/departure record Form I-94, Employment Authorization Card Form I-766, other work authorization documents and adds to the list of acceptable documents: a revised U.S. passport card; the temporary Form I-551, or permanent resident card that includes a machine-readable immigrant visa; and documentation for certain citizens for the Federated States of Micronesia and the Republic of the Marshall Islands. For a full description of what DUA accepts as documents relating to immigration status and work authorization, see AH c. 10, § 1D.

The USCIS rule also preserves the "receipt rule," which allows employees to present alternative documents under certain circumstances. 8 CFR 274a.2 (b)(1)(vi). In addition, minors under the age of 18 and certain individuals with disabilities may use alternative procedures if they cannot provide a document establishing identity. 8 CFR 274a.2 (b)(1)(v)(B).

As of January 17, 2017, USCIS automatically extends certain expiring employment authorization documents for up to 180 days. This extension also applies to individuals with TPS. For a list of the categories of immigration status eligible for automatic extensions, go to <https://www.uscis.gov/working-united-states/automatic-employment-authorization-document-ead-extension>. The notice USCIS provides to the individual includes that individual's immigration category. **Note:** this change may cause problems for immigrant workers in 2 ways: 1) it relieves USCIS from the responsibility of timely adjudicating work authorization applications within 90 days; and 2) employers may not be aware of this change.

Similarly, DUA may not impose requirements that would constitute "document abuse." For example as outlined above, an employer who discharges a claimant for failure to acquire a new green card for continued employment after the card on file had expired, may violate federal law in committing an unfair immigration-related practice under 8 USC 1324(b).

**Note 1:** A person who is a U.S. citizen may not be disqualified from receiving UI even after failing to produce documentation proving their citizenship status upon an initial request or at a DUA hearing. Citizens able to produce appropriate documentation that demonstrates their citizenship status are to be deemed able to work within the meaning of G.L. c. 151A, § 24(b) and eligible for retroactive UI if otherwise eligible. BR-0008 9668 79 (10/14/14).

**Note 2:** The same is true for non-citizens authorized to work in the United States, but who do not produce appropriate documentation that demonstrates such authorization either when their employer asks for such or when they are asked for such at a DUA hearing. Once the non-citizen produces appropriate documentation that demonstrates work authorization, the individual is considered available to work within the meaning of G.L. c. 151A, § 24(b). BR-0011 5392 01 (7/24/14). (Here, the documentation was provided to the Board and sent back to the Review Examiner to consider at a remand hearing).

### ***Verification of Status***

Claimants who are non-citizens must have their immigration status verified through Systematic Alien Verification for Entitlements (SAVE). 42 U.S.C. § 1320b-7. DUA has access to an automated information system that includes the non-citizen's first and last names, "A-number" (alien admission or file number), date and country of birth, date of entry into the United States, Social Security number (when available), and immigration status. Verification through this system is called "primary verification."

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If the non-citizen does not have an A-number, or if primary verification does not establish satisfactory immigration status, “secondary verification” is instituted by sending photocopies of the claimant’s documentation to the local immigration office. DUA should not deny UI benefits before DUA has received a response from USCIS on its request for secondary verification. Under both federal and Massachusetts law, a determination that UI cannot be paid to a claimant due to immigration status shall not be made *except* upon a preponderance of the evidence. 26 U.S.C. § 3304(a)(14)(C); G.L. c. 151A, § 25(h).

Claimants who are undergoing primary or secondary verification are to be paid benefits in the interim. If documentation is not verified following primary or secondary verification, the claimant must be allowed a reasonable period to present other evidence of satisfactory immigration status. 42 U.S.C. § 1320b-7(d)(4). Therefore, if DUA denies a non-citizen UI benefits because she could not provide documents that could be verified using SAVE, advocates may argue that claimant should be provided a reasonable opportunity to submit other evidence of satisfactory immigration status. 42 U.S.C. § 1320b-7(d)(2)(B) (allowing states to accept documents without an A-number as evidence of satisfactory immigration status). This interpretation of the federal statute is supported by the purpose of the Massachusetts UI law, which is “to lighten the burden which now falls on the unemployed worker and his family.” G.L. c. 151A, § 74. Moreover, it is the responsibility of DUA, not CIS, to determine satisfactory immigration status for purposes of UI eligibility. 42 U.S.C. §§ 1320b-7(d)(1)(B)(iii), (d)(2)(B), (d)(5).

### ***Permanently Residing under Color of Law***

If an individual has the necessary documents to demonstrate “availability for work” during the benefit year but did not have work authorization while employed, he may still be eligible for UI benefits if he met the third test of the unemployment law (“PRUCOL”) during the base period. 26 U.S.C. § 3304(a)(14)(A); G.L. c. 151A, § 25(h); AH c. 10, § 1C.4. The term “permanently residing under color of law” (PRUCOL) does not exist in immigration law but has been created under common law and is included in numerous benefit statutes, including the unemployment insurance law. The majority of court decisions construing PRUCOL—and the legislative histories of statutes that include PRUCOL—have interpreted the phrase expansively.

Claimants demonstrate they are “permanently” residing in the US simply by showing *continuing* presence, even if their status is subject to renewal or revocation by USCIS. While Massachusetts case law has not specifically

addressed the question of PRUCOL as it relates to UI benefits, the SJC has adopted the well-established definition of PRUCOL, holding that an individual is “residing under color of law” and eligible for a variety of benefits if the INS (now CIS) knows about, and thereby acquiesces in, the individual’s continued presence in the country. *Cruz v. Commissioner of Public Welfare*, 395 Mass. 107, 115, 478 N.E.2d 1262, 1266 (1985) (finding claimant PRUCOL and, therefore, eligible for Medicaid, because “INS . . . acquiesced in the [claimant’s] continued presence in this country” by failing to take action to deport claimant); AH c. 10, § 1C.4 (see types of documentation required).

The Board of Review has addressed this issue on several occasions. BR-115462 (1/14/2011) (Key) (although the claimant, a Liberian national, did not have a formal Employment Authorization Document during the base period, the automatic government extensions of her work authorization documents and her formal applications to the USCIS constituted sufficient evidence that claimant was PRUCOL and thus eligible for UI benefits); BR-110292 (12/6/2010) (Key) (claimant, a citizen of Cape Verde, who entered the country legally, held conditional residency status, was granted employment authorization and extensions of such authorization, was in regular contact with USCIS, and was ultimately granted lawful permanent resident status retroactively, satisfied the PRUCOL eligibility requirement of § 25(h) and was able and available for work during the benefit year under § 24(b)); BR-110292 (6/12/10) (claimant who did not have a work authorization document during his base period or his benefit year was nonetheless *deemed to be work authorized* where he was PRUCOL during his base period and obtained a Removal of Conditions of Residence during his benefit year)(emphasis added); AH c. 10, § 1C.4, ¶2Note.

### ***Work Authorization***

A non-citizen’s work authorization may be relevant in a UI case for three distinct reasons: (1) the non-citizen must establish availability for work during the benefit year; (2) the non-citizen may be financially eligible during the base period by meeting the second test of the unemployment law, “lawfully present for purposes of performing such services” (however, as described in the description of PRUCOL above, this test is a sufficient but not necessary condition of eligibility with respect to work during the base period); or (3) the non-citizen’s separation from work may be related to the individual’s work authorization.

This is a complicated area of the law, and advocates should consult an immigration expert to ensure that a claimant is not wrongly denied UI benefits. CIS’s practices often cause individuals to have expired documents that do not

correspond to their actual work authorization—this is especially the case with Temporary Protected Status (TPS) and Deferred Enforcement of Departure (DED) designations and extensions. There is often a last-minute extension of TPS or DED and an automatic extension of expired Employment Authorization Documents for six months or some other time period. Before assuming that a client does not have the requisite work authorization, particularly a client with TPS or DED status, be sure to check the USCIS at <http://www.uscis.gov>.

Where an employee's work authorization is automatically renewed but an employer terminates him because he has not received an updated authorization card, the Board has held that a claimant is involuntarily terminated through no fault of his own. BR-0015 5236 84 (2015); similarly, where a claimant was discharged from failing to renew his work authorization and the claimant had applied for renewal four months prior to its expiration and the way in which USCIS handled his petitions (including an immigrant visa petition and an application to adjust status) was beyond the claimant's control, the Board determined that his leaving was for involuntary and due to urgent, compelling and necessitous reasons. BR-0021 8150 72 (12/22/17) (Key).

Where claimants' UI benefits have been stopped or delayed due to their immigration status, even though the claimants have current work authorization, please contact Greater Boston Legal Services at 617-371-1234 for assistance.

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## **52 What Is DUA's Obligation to Claimants Who Don't Speak English?**

DUA and the Career Centers have a legal obligation to provide equal services to claimants who have limited English proficiency (LEP). 68 Fed. Reg. 32290 (May 29, 2003) codified at 28 C.F.R. 42.101–42.412 (Department of Labor regulations implementing the Title VI prohibition against National Origin Discrimination Affecting Limited English Proficient Persons). To achieve this goal, DUA should communicate with LEP claimants in their primary language whenever possible (and always when required by law). However, the reality is that outside of the DUA hearing process, discussed below, the agencies have not sufficiently addressed services to LEP clients. *We strongly encourage advocates to monitor the treatment of LEP clients throughout the entire UI process.*

Moreover, the Executive Office of Labor and Workforce Development Language Access Plan—revised in December 2012 and promulgated under Governor Patrick’s Executive Order 526, “Improving Access to Services for Persons with Limited English Proficiency”—governs all EOLWD departments, including the Department of Career Services and requires a plan that ensures “meaningful access” to all programs, services and activities. This plan can be found online at [www.mass.gov/governor/docs/oao/eolwd-lap-6-2013-final.pdf](http://www.mass.gov/governor/docs/oao/eolwd-lap-6-2013-final.pdf) (last revised in 2012).

DUA modified its regulations concerning interpreters, 430 CMR 4.16–4.20, deleting the regulation that required individuals to bring their own interpreters to the Career Centers, § 4.19. Sections 4.16–4.20 are now silent on the use of interpreters at interviews and Career Centers, but make clear that DUA continues to bear the burdens of (1) providing an interpreter at hearings, and (2) explaining a claimant’s right to a stay of the hearing if the claimant needs an interpreter but does not have one.

Although DUA regulations do not address the use of interpreters at Career Centers or at any stage of the UI process other than hearings, federal law may still require that claimants have access to interpreters. 29 C.F.R. 31.1, *et seq.*; 68 Fed. Reg. 32290 (May 29, 2003) (Department of Labor policy guidance regarding federal financial assistance recipients’ obligations to persons with limited English proficiency.)

### ***Identification of a Claimant’s Primary Language***

Under both federal and state guidelines, “limited English proficiency” (LEP) refers to an individual’s limitations in reading, writing, or oral communication in English. The question to be asked is, “What is the person’s primary language?”—not whether the person has some English skills. The Secretary of Administration and Finance (ANF) addresses this issue when discussing ANF Administrative Bulletin #16: A limited-English-proficient person is someone who is not able to speak, read, write, or understand the English language at a level that allows effective interaction with agency staff. OFFICE OF ACCESS AND OPPORTUNITY, ADMIN. BULL. NO. 16, LANGUAGE ACCESS POLICY AND IMPLEMENTATION GUIDELINES (2015) *available at* <https://www.mass.gov/administrative-bulletin/language-access-policy-and-guidelines-af-16>. Most often, an LEP claimant first contacts DUA when filing a claim for UI benefits. The claims-taker must enter into the UI system whatever language the claimant names as primary, even where the claimant may be able to communicate effectively in English. Advocates with LEP clients should inform DUA of their client’s primary

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language. DUA has created an email address – [LanguageChange@detma.org](mailto:LanguageChange@detma.org) – for advocates to inform DUA of their claimant’s primary language. Advocates should include a release when emailing.

### ***Oral Communications with the Claimants***

*All oral communication should be in a claimant’s primary language unless the claimant has specifically directed otherwise.* When the claimant has identified a primary language other than English, DUA staff may not decide on their own that the claimant’s English-speaking ability justifies communicating in English.

A DUA employee who speaks the claimant’s primary language should be used whenever possible to communicate with the claimant. When such a staff member is not available, DUA staff should use the telephonic interpretation service at 1-888-898-7621.

*DUA should not allow a claimant’s child to interpret for the claimant.* Children generally are not trained interpreters. Also, the issue about which the claimant is in contact with the agency may involve sensitive and explicit subject matter, such as domestic violence, separation from work due to sexual harassment, etc. It is particularly inappropriate to engage in these types of conversations with minors. Moreover, Administrative Bulletin #16, “Languages Access Policy and Implementation Guidelines, 2015,” specifically prohibits the use of minor children as interpreters. OFFICE OF ACCESS AND OPPORTUNITY, ADMIN. BULL. NO. 16, LANGUAGE ACCESS POLICY AND IMPLEMENTATION GUIDELINES (2015), <https://www.mass.gov/administrative-bulletin/language-access-policy-and-guidelines-af-16>. The relevant section of the Bulletin states, “Agencies should refrain from using family members or friends to provide interpreter services; and, in no event shall an agency allow a minor to provide interpreter services.” *Id.* at 6.

### ***Translated Materials and Good-Cause Protections***

The UI statute specifically requires that DUA “issue all notices and materials in English, Spanish, Chinese, Haitian Creole, Italian, Portuguese, Vietnamese, Laotian, Khmer, Russian and any other language that is the primary language of at least 10,000 or one half of 1% of all residents of the commonwealth. G.L. c. 151A, § 62A (d)(iii). DUA has agreed to an expanded interpretation of the statute and maintains that “Although DUA is not obligated to translate notices into languages not specified in § 62A (d)(iii), DUA will apply this good cause policy to all LEP claimants.” AH c. 1, § 4E (emphasis in original). Whenever DUA fails to issue a bilingual notice in the claimant’s primary language and the claimant

credibly represents to DUA that DUA’s failure resulted in the claimant’s failure to meet a deadline or requirement, the division’s omission shall constitute good cause for the claimant’s failure.” 430 CMR 4.13(4); see also **Note 2**, below.

*Luciano v. Malmborg, Director of the Div. of Unemployment Assistance*, Suffolk Superior Court, CA No. 07-4285C, 2008, a lawsuit challenging DUA’s failure to provide LEP claimants with notices in their primary language, was settled by agreement in December 2014, available at <https://www.masslegalservices.org/system/files/library/Luciano2014.pdf>. Under the agreement, DUA created a separate Multilingual Services Unit that trains staff in LEP issues; translates all DUA notices into the nine languages mandated under the statute; and periodically reviews the percentage of people who speak or read a language, and translates all notices into any language spoken by at least 10,000 residents in the state.

Under UI Online, claimants are required to submit numerous questionnaires. These questionnaires are all in English but as part of the *Luciano* settlement DUA issued a translated cover sheet in all covered languages. The translated cover sheet informs claimants that they can receive assistance completing the questionnaires in two ways. Each cover sheet has a separate DUA phone number for the specific language the claimant speaks to call DUA to have the questionnaire completed over the phone. When an LEP claimant calls, DUA is required to complete all outstanding questionnaires. Claimants can also send in the cover letter asking for DUA to call them to complete the questionnaire.

The telephone system has separate designated language lines. The toll-free telephone numbers for 11 languages are as follows:

Cantonese	855-697-3052
Spanish	855-697-3053
Portuguese	855-697-3054
Vietnamese	855-697-3044
Khmer	855-697-3045
Haitian Creole	855-697-3046
French	855-697-3047
Italian	855-697-3048

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Korean	855-697-3049
Laotian	855-697-3050
Russian	855-697-3051

**These numbers may change**, so the most reliable number is the number provided by DUA on the questionnaire after a claimant has identified their primary language.

It is very important for advocates to monitor the effectiveness of this system. LEP claimants should not have unduly long wait times and all outstanding UI questionnaires should be completed at the time of the call. If you have LEP clients who experience problems with this system, please contact Greater Boston Legal Services at 617-371-1234.

A DUA regulation at 430 CMR 4.13(4) (2/19/10), extends the appeal period in certain instances involving LEP claimants. The regulation provides that a claimant whose preferred language is among those listed in G.L. c. 151A, § 62A(d)(iii), who did not receive a determination in that language, and whose reason for not filing a timely appeal was that the determination was not written in the claimant's preferred language has an indefinite time to appeal.

The language rights provisions at G.L. c. 151A, § 62A (d)(iii) include not only the ten listed languages (English, Spanish, Chinese, Haitian Creole, Italian, Portuguese, Vietnamese, Laotian, Khmer, Russian) but also "any other language that is the primary language of at least 10,000 or ½ of 1% of all residents in the commonwealth." DUA has recently added Korean to this list. Additionally, DUA provides assistance to LEP callers in any language by utilizing a multilingual AT&T language line. However, as that is accessed through 617-626-6800, a line that starts with an English introduction that goes on for half a minute followed by prompts in Spanish and Portuguese only, assistance is often required to access multilingual assistance.

As part of the compliance with the *Luciano* settlement agreement, the DUA issued a good-cause policy for LEP claimants. The good-cause policy (available here: <https://www.masslegalservices.org/content/uipp-201306-good-cause-policy-limited-english-proficiency-lep-claimants>) made improvements over prior practice, as follows:

- It clarifies that good cause is applicable to all LEP claimants, regardless of whether the claimant's primary language is listed or provided for under the unemployment statute;

- It clarifies that good cause is not limited only to late-filed appeals, but to other issues as well;
- It clarifies that LEP status is established by self-identifying as such and is not subject to second-guessing by DUA staff;
- It clarifies that under 430 C.M.R. § 4.13(4) in the *Luciano* settlement, if an LEP claimant does not receive a notice in her primary language and she files a late appeal within 60 days, the appeal is accepted unconditionally. However, appeals filed after 60 days should be accepted unless DUA has information that the claimant knew about the deadline but filed late for a reason unrelated to LEP status; and
- If good cause is denied, DUA must put the reason in writing; if it fails to do so, the denial will be overturned. DUA must state the reason for denial in the notice of denial provided to the claimant. Although not part of the official policy, DUA has agreed to review any good-cause denials brought to their attention that advocates believe do not conform to the policy.

“Good cause” includes, but is not limited to, the following situations:

- Allegations of fraud based upon unreported earnings; and
  - All UI recipients, including LEP claimants, are required to report their earnings. Although ignorance of this obligation does not excuse noncompliance, before an “at-fault” finding for not reporting earnings may be made, an inquiry is needed to determine whether the claimant’s inability to understand or communicate in English led to the failure to report earnings. If it did, then an at-fault finding should not be made. In accordance with G.L. c. 151A, §25(j), a compensable week penalty can never be imposed upon a claimant who did not have actual notice of the reporting requirement that complied with G.L. c. 151A, §62A (d)(iii). See AH c. 9, § 5D; c. 1, § 4F.AH
- Predating a UI claim.
  - Good cause for predating a UI claim shall be found when a claimant credibly states that the late filing resulted from the claimant’s limited English proficiency. However, the claimant must demonstrate having taken reasonable actions to find out how to file a claim. AH, c. 2, § 2C.

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Despite requirements that interpreters be provided at all stages of the UI process, currently, DUA provides interpreters for claimants at no charge only at hearings, including hearings before the Board of Review. For hearings outside of the Boston area, DUA sometimes uses telephonic interpreters.

### *The DUA Hearing*

DUA's Hearings Department automatically arranges for an interpreter when the local office has indicated that the individual has a language barrier or when the individual or her advocate requests an interpreter; however, double-check with the Hearings Department at 617-626-5200. An interpreter-assisted hearing is automatically scheduled for 1.5 hours. A review examiner is required to ask, during the hearing, whether the claimant is able to understand the interpreter. The review examiner's obligations are set out in DUA regulations at 430 CMR 4.20 (3), (5), (6). Advocates should direct any problems with the qualifications of the interpreter to: Marisa de la Paz, Director of DUA's Office of Multilingual Services, at 617-626-5471.

If the review examiner observes during a hearing without an interpreter that an individual cannot effectively communicate in English, the claimant has a right to a stay of the hearing for the purpose of securing an interpreter. 430 CMR 4.20(3).

### *LEP Rights Outside of the Hearing*

In addition to the hearing process, claimants must be informed of their right to have interpreter assistance:

- at the claims level, *and*
- at the MassHIRE Career Centers (430 CMR 4.16–4.20).

To improve services to LEP claimants, DUA has agreed to the following:

1. To provide interpreters at the initial claim determination;
2. To provide seminar information in the nine statutory languages under G.L. c. 151A, § 62A;
3. To approve ESOL (and Basic Skills) to facilitate training. AH c. 11, § 6B.1.

### *UI Online Services and LEP Claimants*

Currently, UI Online is an English-only system, which makes accessing UI benefits more difficult both for LEP claimants and for claimants who are not computer-literate or have limited access to computers. DUA is statutorily mandated to provide some level of in-person access in various locations across the state. G.L. c. 151A, §§ 62A (a)–(c). Currently, only Boston has a walk-in UI dedicated office. Around the state, UI advice is provided by UI Navigators through MassHIRE Career Centers. (See **Appendix A**).

For LEP claimants who walk in to apply for UI Online, DUA must provide either in-person interpretation or direct them to telephone interpreters. For ongoing weekly certification of eligibility, English-speaking claimants may use UI Online or certify by telephone. Additionally, TeleCert is available in Spanish and Portuguese. Claimants who speak languages other than these three must wait until the system connects them with an adjudicator, who then uses the multilingual AT&T language line. For more information on TeleCert, including the questions most frequently asked, and for translations of these questions in nine languages, see: <https://www.mass.gov/how-to/request-weekly-unemployment-benefits> (and see language selection prompt on top of page).

**Note:** We urge advocates to make certain that DUA has implemented these above changes for their LEP clients and to review the Department of Labor regulations for additional advocacy handles. To ensure that claimants are protected under the changes brought about through the *Luciano* case, your client should be designated as LEP. Contact DUA at [languagechange@detma.org](mailto:languagechange@detma.org) or the Multilingual Services Unit at 1-888-822-3422. For further information about the rights of LEP claimants, contact GBLs at 617-371-1234.

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## **53** Is the Claimant Eligible for Training (“TOP,” “Section 30,” or “RED”) Extended UI Benefits?

Unemployed workers who are eligible for UI are also eligible for up to 26 weeks of additional extended UI benefits under DUA’s Training Opportunities Program (TOP), under Section 30 of the UI Law, if they can show that they are in need of training to find new employment. G.L. c. 151A, § 30(c); 430 CMR 9.01 *et seq.*

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DUA also refers to these extended benefits as “retraining extended duration” or “RED.” See generally, AH c. 11, § 6.

The link on the website of the Department of Career Services (DCS) to access a list of approved Section 30 training programs is: <http://jobquest.detma.org/JobQuest>. Click on “Locate Training” in the tool bar on top and then select “Section 30” in the “Approved Course Type” box. (Selecting “ITA” indicates which programs are federally funded). The selection of Section 30 provides 25 pages of approved training programs that can be organized by course or by provider. If a training program does not appear on the list of approved training programs, DUA may approve the program as long as it meets the criteria for approval set out in 430 CMR 9.04, see, e.g., BR-0016 3650 39 (5/11/16) (claimant was eligible for training benefits while participating in an out of state training program as the program met DUA’s requirements.); however, the TOP Unit may take a longer time to approve the application due to the need for investigation.

Many unemployed workers fail to take advantage of this valuable training opportunity, since they frequently are unaware of the program or are discouraged by procedural hurdles involved in getting approval for their program. All too often, claimants must go through adjudication, a hearing and then to the Board of Review before they obtain approval of participation in and an award of extended benefits for a training program. See, e.g., BR-0026 3026 22 (10/30/2018) (claimant’s approved training program did not appear in the Massachusetts One-Stop Employment System (“MOSES”) due to a clerical error on the part of the training program, so it took approximately 17 weeks of review and appeal before benefits were retroactively awarded); BR-0024 6739 83 (9/28/2018) (claimant who enrolled in a Section 30 training program was not required to accept an offer of reinstatement for suitable work with her previous employer).

Eligible applicants, once approved for Section 30, continue to receive unemployment payments under §24(b) for up to the maximum allowed 26 (or 30 weeks during periods of higher unemployment) weeks. After the claimant has used up or, in UI lingo, “exhausted” all rights to regular UI benefits, the claimant can then receive up to an additional 26 weeks of extended UI or “Section 30” benefits if the claimant is still in school. This may lead to an applicant receiving a total of up to 52 weeks of benefits.

While in training, claimants are “deemed” to be able and available and actively seeking work and therefore, excused from doing work search. G.L. c. 151A, §24. This includes any week of an approved break in training. 430 CMR 9.06(2); 9.07.

Moreover, the Board of Review has held that work search requirements are waived retroactively where the claimant's section 30 application was initially denied but then approved as a result of the appeal process. BR-0014 7197 91 (12/17/15) (Key). Additionally, a claimant does not have to comply with the Reemployment Assistance (REA) seminar requirements while she is in a section 30 approved training program. BR-0015 7819 25 (11/5/15) (Key). (See **Question 50, What is the Worker Profiling Program**)

As a result of 2009 changes in federal and state law and state regulations, and 2016 changes in state law resulting in 2019 regulations, extended UI benefits under this program have increased and many barriers to participation have been removed. T. II of Div. B, Emergency Unemployment Compensation Program Extension and ... American Recovery and Reinvestment Act (ARRA) made by the Assistance for Unemployed Workers and Struggling Families Act, 05/04/2009(providing incentive payments to states that choose two out of four options, one of which is the provision of up to 26 weeks of extended benefits for participation in training); An Act Mobilizing Economic Recovery in the Commonwealth, St. 2009, c. 30, §§ 1–3 (adopting the training option); 430 CMR 9.00 *et seq.*(10/02/09) (implementing changes in federal and state law); An Act Relative to Job Creation and Workforce Development, St. 2016, c. 219, §§ 107 – 110 (extending application period from 15 to 20 weeks, allowing claimants whose benefit year expired due to an erroneous denial of regular UI to commence training after the benefit year expiration, requiring new regulations setting out “good cause” reasons for the waiver of the 20 week application deadline, and requiring LEP claimants to receive information about the program including the grounds for tolling and the good cause waivers of the 20 week application deadline in their own language). DUA's current regulations at 430 CMR 9.00 *et seq.* (9/20/2019) now incorporate the 2009 and the 2016 statutory changes.

Effective August 10, 2016, claimants can apply for training program up to **the 20th week** of a new or approved claim. St. 2016, c. 219, § 107. This means that the 20-week clock starts running when there is a compensable claim, i.e., when DUA starts paying UI benefits, not when the claimant first applied and continues only during each week of actual payment. 430 CMR 9.02 (Definition of Application Period); BR-022 2673 94 (1/31/18) (Key); BR-0027 1858 66 (3/20/19) (Key); BR-0031 2855 97 (11/12/19; BR-0031 5503 95 (12/17/19)(same plus noting that a claimant improperly denied section 30 has 2 weeks to reapply); AH c. 11, § 6C.1 (“Only weeks where the claimant is eligible, has certified, and has received a payment counts toward the 20-week period.”).

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Claimants need to have first used up or “exhausted” other rights to state or federal unemployment benefits before receiving extended UI benefits to participate in training. G.L. c. 151A, § 30(c).

**Note:** Extended benefits that an individual receives under Section 30 are not charged to a contributory employer’s account but are drawn from the Solvency Account (unless the employer is self-insured). G.L. c. 151A, § 30(c).

Claimants are eligible for Section 30 extended UI benefits if:

- 1) They are permanently separated from work; and
- 2) They are unlikely to obtain “suitable work” based on their most recently used skills; and
- 3) They are in need of training to become reemployed. 430 CMR 9.04 (1).

The statute, G.L. c. 151A, § 30(c), provides eligibility for extended UI benefits for those individuals unable to obtain “**appropriate**” rather than “suitable” work; however, this term is not replicated in DUA’s regulations that refer only to “suitable” work. The legislative choice of the word “appropriate” was a conscious one; the original conference committee draft for Section 30 used the phrase “suitable employment” but this text was amended to use the word “appropriate employment.” Compare *Journal of the House*, 943-44 (using the term “suitable”) with House Bill 5981, p. 6-7 (July 1992) (substituting the term “appropriate”). Based on a review of the terms “appropriate” and “suitable” under welfare law (compare G.L. c. 118, § 3C (“appropriate”) with G.L. c. 117A, § 2 (“suitable)), arguably the term “appropriate employment” supports a broader standard than “suitable employment” and thereby supports the need for training for those individuals who cannot obtain a family-sustaining wage. See, e.g., DUA’s regulations under the analogous Workforce Training Fund, G.L. c. 151A, §14L at 430 CMR 14.03 defining “wage sufficient to support a family” as a wage that exceeds 50% of the most recent average weekly wage as determined under G.L. c. 151A, § 29(a). If a claimant whose job history is low wage work is determined not to need retraining, this legislative history supports an argument that where the prior work is not a living wage, to deny extended UI for training is to deny the claimant an opportunity to obtain appropriate work.

Although a claimant cannot quit a job to participate in training, there is a statutory exception to this rule if the claimant is employed during their benefit year in a part-time job and their employer is not a base-period employer (i.e., wages from this employer are not being used for the claimant’s benefits). G.L. c. 151A, § 25

(e), ¶ 10. Consequently, the Board has held that a claimant, who was retroactively awarded training benefits on appeal, may quit subsidiary part-time employment obtained during the benefit year because the part-time job interfered with training, without incurring disqualification or a constructive deduction. BR-0016 1648 59 (12/28/15) (Key). Similarly, where an eligible claimant applies and is admitted into an approved Section 30 training program, but has not yet received the nondiscretionary DUA approval for Section 30 benefits prior to leaving part-time employment, the claimant is not disqualified from regular and extended UI benefits. BR-1892833 (7/12/14).

Where DUA has approved of a claimant's submission of an application for retraining under § 30 prior to recall following a seasonal layoff, the Board has held that the claimant is excused from returning to work after recall and is permitted to collect regular and extended UI training benefits while attending school. The Board noted that because the claimant's timely submission of and approval for training benefits occurred before the employer's recall to work, the claimant was qualified for regular and extended benefits pursuant to § 30. BR-115501-OP (8/31/11). See also BR-0015 4767 58 (9/30/2015) (claimant separated from full-time seasonal position without definite recall date was eligible for Section 30 benefits even though the claimant had returned to seasonal position for several years). And where a claimant's work for an employer was part of the Section 30 full-time training program, the separation from work is controlled by G.L. c. 151A, §6(k), which exempts full-time students from the definition of "employment." Because the claimant's internship was an integral part of the § 30 training program, it is not included in the definition of "employment" and therefore could not be disqualifying within the meaning of G.L. c. 151A, §§ 6(k) and 30(c) and 430 CMR 9.07(1). BR-116867 (10/31/11).

The Board has held that a claimant is entitled to Section 30 benefits when the claimant continues to work during the training program in some situations. BR-0016 9388 06 (5/19/16) (holding a claimant working in a per diem job during participation in his training program does not disqualify him from extended training benefits where he was never offered any hours during the training program); BR-0012 9717 02 (9/8/15) (holding a claimant who continued part time employment during training program was not disqualified from receiving further Section 30 benefits under a new claim). (See **Question 8, Availability/Full-Time School Attendance**).

Typically, a claimant must take the first training program available and "appropriate to their circumstances." BR-0014 2251 21 (6/25/15) (claimant who did not take the first course available because it interfered with a pre-planned trip

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to China to visit family was eligible for section 30 benefits where the claimant took the first course available after the trip).

Under DUA's current regulations, a claimant will be deemed to be unable to obtain "suitable" work (rather than the statutory "appropriate" work, see above) if any of the following conditions apply, 430 CMR 9.03(c):

- i. The claimant has applied for or is participating in a course or training program authorized by the Workplace Innovation and Opportunity Act (WIOA), 29 U.S.C. §3101;
- ii. The claimant requires training to become reemployed in a current occupation because her present skills in that occupation are insufficient or technologically out of date; provided that the claimant has separated from a declining occupation or is unemployed as a result of a permanent reduction of operations and the claimant is in training for a demand operation. **Note:** The federal Department of Labor has interpreted the term "separated from a declining operation" to include those individuals who may have left work for a disqualifying reason and are ordinarily not eligible for UI. ("Federal law does not condition eligibility on the cause of separation where the separation is from a declining occupation.") Dept. of Labor, Employment and Training Admin.'s Unemployment Insurance Program Letter (UIPL), No. 14-09, Change 1, CH 1-5, p.2 (3/19/2009), available at: [http://wdr.doleta.gov/directies/corr\\_doc.cfm?DOCN=2732](http://wdr.doleta.gov/directies/corr_doc.cfm?DOCN=2732).
- iii. A claimant's existing skills are obsolete due to technological change or because no demand currently exists for these skills in his work search area (defined as "one of more economically integrated geographic units within reasonable traveling distance for job seeking and commuting), 430 CMR 9.02), or because a disability has made the claimant unable to perform the essential functions of jobs in the claimant's previous occupation;
- iv. The claimant has separated from a declining occupation or as a result of a permanent reduction of operations and she is training for a high-demand occupation. The training program must meet certain criteria as well. 430 CMR 9.04. The training must prepare the claimant for marketable skills in a demand occupation in the claimant's work search area, or any other work search area to which the claimant wishes to relocate or commute. 430 CMR 9.04(1).

In addition, 430 CMR 9.04(2) provides the following additional criteria for approval:

- a) Have achieved a training related employment of 70% during the recent 12-month period, except the UI rate is greater than 7%, this placement rate drops to 60% and is even lower when the UI rate is greater than 8% and the Director retains the discretion to consider other evidence. The Board of Review has waived this requirement for some claimants. BR-0016 0160 41 (9/24/15) (claimant was eligible for Section 30 benefits even though the training program had a job placement rate below 70% because of the claimant's veteran status and high GPA which made it likely he would be reemployed); BR-0012 3255 24 (9/10/14) (Key) (holding that claimant is eligible for extended benefits where the claimant can complete an associate's or bachelor's degree on a full-time basis within 2 years of filing a claim for UI and that the college is not required to meet the job placement rate requirement of the regulations).
- (b) Be a full time course—meaning, in most instances, at least 20 hours of supervised classroom or 12 credits. Although DUA's regulations require the training program to be a full-time course, the Board has held that a reasonable accommodation to claimant's disability permitted enrollment in fewer than 12 community college credits per semester. BR-115841 (12/17/10) (Key); and BR-0014 7628 50 (8/21/15) (claimant who had a traumatic brain injury that prevented full-time participation was entitled to Section 30 benefits).

Full-time is further defined for the following programs:

- i. University or College Programs.** For university degree programs, this is usually measured as taking 12 credits per semester, but that is not determinative. If the program uses an alternative measurement of full-time status, Section 30 benefits are allowed. See BR-0018 1732 53 (11/30/16) (claimant's 9 credit summer program considered full-time where summer classes are accelerated requiring more work); BR-0017 4895 95 (2/26/16) (claimant's training program could be considered full time where in addition to 10 academic credits the claimant also had 17 hours per week of clinical training); BR-0014 4043 74 (9/30/15) (claimant who took 17 credits during the summer semester, even though the summer semester was divided into three sessions that were less than 12 credits per session, was in a full-time program); BR-0014 0406 76 (3/4/15) (Key) (program satisfied the full-time training requirement where the claimant was required to engage in 120 hours of field work in addition to coursework); BR-106513 (5/5/08) (Key) (claimant qualified for extended benefits where the externship component of claimant's college program brought the average credit hours up to 13.3 hours).

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A program in a university that will earn a claimant a certificate rather than a degree must meet DUA job placement standards and consist of 20+ class hours per week to be considered full-time and to render a claimant eligible for Section 30 benefits, not the 12-credit requirement for university degree programs. BR-0014 1645 92 (3/10/15). The Board reversed a denial of all extended benefits because the claimant needed to attend part-time during the final term, BR-0018 3639 73 (11/30/16); a claimant's revised schedule after remand from District Court brought claimant into compliance with requirements, plus Board permitted a condensed summer program for 9 credits to meet the requirement as the shortened semester required the claimant to devote more hours to her studies, BR-0018 1732 53 (11/30/16); BR-0016 2849 49 (9/9/16)(also allowing revision of schedule after remand); Board refused to penalize claimant for a temporary reduction in course load while awaiting the resolution of the appeal of the denial of extended UI benefits as long as the course of study could still be completed within 2 years. BR-0017 7504 53 (5/24/16).

**ii. Part Practicum or Internship.** These programs are approved for the time needed to complete state or federal certification licensing requirements or the time needed to become employable.

**iii. English for Speakers of Other Languages (ESOL).** The Director may waive the 20-hour requirement if no program of 20 hours or more is available within a reasonable distance from the claimant's home

(c) be completed within 2 years measured from the date of approval of the application or the date the claimant starts training, whichever is later; but if it combines basic skills with vocational training, completion can be 3 years, unless a reasonable accommodation to an individual with disabilities requires an extended completion date.; BR- 2049196 (9/24/14) (claimant met the "2-year requirement" of a Section 30 DUA-approved program when enrolled in a bachelor's degree program, and due to a transfer of credits from junior college, would complete the program in less than 2 years); BR-0015 8286 38 (11/24/15) (claimant enrolled in accelerated bachelor's program could receive training benefits because degree could be completed in two years); BR-974525(2/19/15) (claimants are still eligible for Section 30 benefits where, as a reasonable accommodation to a disability, they take more than 2 years to complete a program that otherwise would take 2 years or less to complete, so long as they otherwise remain a full-time student); BR-123257 (3/30/15) (the 2-year requirement is measured from when the program starts, not from when claimants file their claim); BR-0017 0815 72 (2/26/16) (claimant met the 2-

year requirement by showing that degree completion was possible by taking a larger than average course schedule); BR-0011 9516 84 (9/18/15) (claimant could finish a training program in two years after including 12 credits that the training program granted to students who conveyed their personal experiences to the school); BR-0016 2718 53 (10/29/15) (claimant was entitled to extension of Section 30 benefits when the training program failed to provide software to perform coursework and the claimant exercised due diligence in trying to obtain the software); BR-0015 3668 03 (9/24/15) (claimant who prematurely withdrew from training program because of incorrect advice from college counselor was entitled to continue training benefits after enrolling in community college.)

- (d) Apprenticeship programs approved by the Massachusetts Division of Apprentice Standards and the Director under 430 CMR 9.04 and certain on-the-job training programs approved by the Director containing substantial periods of work may extend beyond the 2 years if enrollment and attendance in the program are interrupted by such work.

**Note 1:** Although historically DUA denied Section 30 benefits to claimants switching training programs on the grounds that the regulations permit claimants to participate in only one training program in a benefit year, the current regulations excuse claimants from this requirement where “circumstances beyond their control make participation, or continued participation in the original program impossible.” Importantly, the new application “shall be deemed to have been filed on the date the completed application for the originally approved program was filed.” 430 CMR 9.05(8). This now comports with the Board of Review decisions, see, e.g., BR 0022 2673 94 (1/31/18) (Key) (citing *Haefs v. Director of Div. of Employment Security*, 391 Mass. 804 (1984) to support holding that the date of first application submitted is controlling with regard to 20-week application deadline).

**Note 2:** Another related issue arises with the end of the claimant’s benefit year because a claimant must file a new claim for UI benefits to determine whether the claimant is entitled to regular UI based on intervening income. 430 CMR 9.06 (1). In this situation, DUA requires a claimant to reapply for training benefits, even if the prior application was approved. In a case adjudicated by the Board, DUA denied a training program under these circumstances even though the training program had previously been approved during the claimant’s benefit year. Although the Board acknowledged that there may have been reasons for the subsequent denial, it found that the interests of justice and equity are better served

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by approving claimant's request for training benefits to complete the same program that was previously approved. BR-0020 8639 98 (11/22/17).

**Note 3:** DUA has denied Section 30 benefits when claimants apply to programs that have not yet obtained Section 30 approval. The Board of Review has held that claimants are nevertheless entitled to Section 30 benefits in a number of these situations. BR-0012 5524 23 (10/29/15) (claimant was still eligible for Section 30 benefits after enrolling in a program with the help of DUA, and afterwards the program lost its Section 30 approval); BR-0017 0103 50 (11/22/15) (claimant was eligible for Section 30 benefits when the program in which the claimant had enrolled allowed its Section 30 approval to lapse, but the program was still listed on DUA's JobQuest database); BR- 0015 7145 16 (9/24/15 (same); BR-0016 2827 68 (12/31/15) (claimant was entitled to training benefits when program obtained Section 30 approval four weeks after the claimant's enrollment) ;BR-0014 4409 86 (12/17/15) (claimant was eligible for training benefits when a training program obtained Section 30 approval between the claimant's application for Section 30 benefits and appeal to the Board); BR-0016 3650 39 (5/11/16) (claimant approved for Section 30 benefits while pursuing a training program in Florida, where the sworn testimony of the out-of-state school's representative demonstrated that the program met the requirements).

**Note 4:** When a claimant's UI benefits are approved on appeal, the claimant can retroactively claim Section 30 benefits. BR-0016 1171 46 (12/18/15) (claimant's subsequent approval for training benefits applied retroactively to when she actually began training); BR-0014 7197 91 (12/17/15) (claimant could retroactively claim section 30 benefits when claimant is seeking work instead of continuing training program during his appeal of the section 30 denial); BR-0015 3683 19 (12/17/15) (claimant who attends a training instead of seeking work while his Section 30 disqualification is appealed is retroactively approved for Section 30 benefits when he wins his appeal); BR-0016 1648 59 (12/28/15) (claimant in a training program who began and quit a part time job while appealing Section 30 denial could still retroactively claim Section 30 benefits on winning his appeal and would not be subject to a constructive deduction). In addition, the Board has held that approval of §30 benefits on appeal means that the waiver of work search and availability requirements must similarly be applied retroactively to the period the claimant began training. BR-0016 9047 52 (8/31/16).

Although, **generally, a claimant must apply for an approved training program in order to receive extended UI benefits within the first 20 weeks of a new or approved claim, this deadline can be tolled** under 430 CMR 9.05(6), if:

- (a) The training program refuses to reasonably accommodate a qualified individual with a disability (under the Americans with Disabilities Act), tolling the application period from the date the claimant filed a complete application with DUA until the claimant was notified of the refusal or failure by the training provider.
- (b) DUA denies the application and the claimant's opportunity for applying will expire in less than 2 weeks, then the application period shall be extended once for 2 weeks from the date the DUA notifies the claimant. BR-0032 2245 11 (12/17/19); BR 0029-7008 15 (9/23/19) (Key) (Claimant, who was denied Section 30 benefits for failure to begin training as scheduled, remains ineligible for the program during that period, but has 2 weeks to submit a new Section 30 application).
- (c) When a claimant is initially denied benefits and the denial is later reversed by the Hearings Department, Board of Review, or Court, the 20 week period begins one week after DUA issues the claimant a decision reversing the denied claim, even if the benefit year has expired. BR-0027 1858 66 (3/20/19) (same, citing G.L. c. 151A, §30(c), as amended by St. 2016, c. 219, §§ 107 - 110).
- (d) If DUA fails to provide the claimant with written information regarding eligibility for extended UI benefits in the claimant's primary language as required under G.L. c. 151A, § 62A, including that the application shall be submitted no later than the 20th week of a new or continued claim unless the period is tolled by regulation or waived for good cause, or if DUA or its agents gave the claimant misinformation, the application period is tolled until the claimant learns of the eligibility requirements, provided that the claimant identifies the date and source of misinformation in situations where misinformation is cited as the reason for tolling. **Note:** DUA has committed to providing every claimant with a brochure explaining the section 30 program including the application deadlines.
- (e) If economic circumstances permit the provision of extended benefits or any other emergency UI funded in whole or in part by the federal government, the application shall be extended until the end of such period.
- (f) If a claimant who is not permanently separated at the time of the initial claim and becomes permanently separated during the benefit year, the 20-week application shall begin on the date the claimant became permanently separated;

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- (g) If a claimant has delayed applying due to the need to address the physical, psychological, or legal effects of domestic violence as defined in G.L. c. 151A, § 1(g1/2), the 20-week application shall start or resume on the date that the claimant was able to do so;
- (h) If a claimant has been separated from a declining occupation (one that has a demonstrated pattern of reduced employment or has suffered an immediate and significant reduction in employment), or if the claimant has been involuntarily and indefinitely separated from employment as a result of a permanent reduction of operations and the claimant is in training for a demand occupation (an occupation determined by DUA where opportunities are available or future growth is anticipated), the 20-week application period shall be extended until the end of the claimant's benefit year, or longer if applicable under 9.05 (6)(c).

In addition to extensions of the 20-week application deadline for reasons that toll the application deadline, the 2019 regulations implement the 2016 statutory requirement that the **20-week application period can also be waived for “good cause”** where “circumstances beyond the claimant’s control prevented the application from being filed within the prescribed time period.” 430 CMR 9.05 (7). The regulations provide the following non-inclusive examples of good cause:

- (a) The claimant did not understand the deadline due to illiteracy, mental disability, or limited English proficiency where the claimant’s language is not one included in M.G.L. c. 151A, § 62A;
- (b) A natural catastrophe such as a fire, flood, or hurricane;
- (c) Death or serious illness of an immediate family or household member;
- (d) The claimant’s training provider failed to act in a reasonably prompt manner; or
- (e) The Department or its agents discourages the claimant from applying for training under M.G.L. c. 151A, § 30(c).

Although the regulations do not define “agents,” in the tolling and good cause waiver regulations, the Board has also tolled the application deadline when the delay was due to actions by the MassHIRE Career Services (CS). BR- 0017 4269 54 (2/9/16) (holding the (then) 15-week application deadline was tolled because CS staff required the claimant to provide proof of citizenship and the resulting delay in obtaining the documents prevented timely enrollment); BR-107628

(2/13/2009) (Key) (claimant, who applied within the (then) 15 week deadline but could not enroll because CS was out of training funds and told claimant to re-apply after the deadline, was determined by Board to have met the timely filing requirement). The Board has also tolled the application deadline where the delay was due to the school or training provider. BR-0018 8316 46 (12/7/16) (school refused to fill out paperwork until claimant had registered for classes); BR-10675-CTRM (5/18/09); BR-105065-CTRM (12/20/07).

**Advocacy Tip:** All too often and inexplicably, DUA not only denies an individual Section 30 extended UI benefits but also stops the individual's UI altogether (however, a DUA Memorandum, "Issue Creation–Section 30 School/ Training Attendance," 10/22/09) instructs claims agents not to stop benefits if a claimant notifies DUA of current or anticipated school or training attendance; a copy of the memorandum is available at <https://www.masslegalservices.org/content/dua-memo-issue-creation-section-30-schooltraining-attendance>. If the claimant is participating in training that she started while working full time, or if the training program otherwise does not interfere with work search for permanent employment (such as part-time evening courses and the claimant never worked in the evening), contact the Section 30 program immediately at 617-626-5375. Numerous Board decisions have found that a claimant should be approved for UI benefits in instances where the claimant could be found to be either in an approved Section 30 program or be seeking work since the beginning of the claim. BR-0019 3195 11 (11/30/16); BR-0018 8094 32 (2/14/17)(although claimant did not have a history of working while a full-time student, full time studies did not interfere with customary work as a bar tender in the evening).

Even in instances where participation in training under the Section 30 program has been denied, the Board has reversed the determination of ineligibility for UI benefits. BR-108813(8/20/09); BR-107560 (4/14/09); BR-107331 (11/6/08); BR-106011(6/23/08). DUA's Memorandum and the Board decisions also provide grounds for arguing against denials of Section 30 benefits when an individual starts a program prior to receiving DUA final approval, see 430 CMR 9.06(2)(b), especially if the training program is a DUA preapproved program, or easily meets the regulatory criteria for approval of training programs, 430 CMR 9.05(2), or if DUA took far longer than 15 working days to approve the training application, 430 CMR 9.05(2). See (**Question 8, Availability, Full-Time School Attendance; Participation in Approved Training**).

Funding to pay for the job training may be available through the MassHIRE Career Centers. Priority for funding will be given to public assistance recipients, other low-income individuals and individuals who are basic skills deficient. 20

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CFR 680.120. The Workplace Innovation and Opportunity Act (WIOA), 29 U.S.C. §§ 3101 *et seq.* (Pub. L. 113-128) provides the authority for funding and assisting claimants. Among the many changes in the law under WIOA, three are highlighted for UI claimants:

1. Core services and intensive services will be provided together under the category of “career services.” These services are available to all “adults and dislocated workers through the MassHIRE delivery system.” 29 U.S.C. § 134(b)(2).
2. Adults and dislocated workers meeting certain requirements will be able to access training services without having first passed through those “career services (previously core and intensive services).” 29 U.S.C. § 134(b)(3).
3. “Wagner-Peyser” employment service officers will be co-located with MassHIRE Career Centers. 29 U.S.C. § 121(e)(3).

For additional details on WIOA, see U.S. Dept. of Labor, Employment and Training Administration information available at <http://www.doleta.gov/wioa/>.

Assistance in finding training programs funded under WIOA is available from the MassHIRE Career Centers. (See **Appendix A**.) Claimants must always make a timely (generally within 20 weeks of a new or approved claim) written application for Section 30 benefits (even if the program was approved for funding under WIOA) and must file the Section 30 application with DUA, not with the MassHIRE Career Center. For additional WIOA advocacy suggestions, consult the websites of the National Employment Law Project, [www.nelp.org](http://www.nelp.org), and the Center for Law and Social Policy, [www.clasp.org](http://www.clasp.org). More information on the Section 30 program and training opportunities (including training provided near a claimant’s zip code) is provided at Appendix F and at [www.mass.gov/dua/training](http://www.mass.gov/dua/training) (or search “job quest and training”). When on the Jobquest page, go to “Approved Course Type” – click on “ITA” (Individual Training Account) for funded programs and on “Section 30” for programs approved by DUA for extended UI benefits.

**Advocacy Tip:** Advocates should look to federal guidelines for support for expanded opportunities for unemployed workers to participate in training. The federal Department of Labor’s Employment and Training Administration has sent several advisories encouraging states to broaden their definition of “approved training” and to notify UI claimants of their potential eligibility for Pell Grants. See **Appendix P**.

Additionally, as outlined above, the Board of Review has issued numerous decisions overturning denials of Section 30 benefits.

***Trade Adjustment Assistance (TAA) and Trade Readjustment Allowance (TRA) Benefits***

Trade Adjustment Assistance (TAA) benefits and Trade Readjustment Allowances (TRA) are available to workers laid off (or at risk of being laid off) because of competition from imports or because the employer moves its jobs abroad. To qualify, the employer or employees must first petition for and be granted certification by the Department of Labor. Individuals apply for TAA benefits at Massachusetts' MassHIRE Career Centers. TAA supplements UI by providing additional cash benefits (called Trade Readjustment Allowances (TRA)) (with a deduction for the number of weeks of UI benefits already received). In some instances, additional TRA benefits are available. TAA also provides reimbursement for certain expenditures. More information about TAA and TRA Programs is available at the federal Department of Labor website at [www.doleta.gov/tradeact](http://www.doleta.gov/tradeact).

The Board of Review has restored additional TAA benefits in some situations. BR-0016 0797 10 (3/11/16) (holding that a claimant who withdrew from the TAA program when starting full-time job, but was then laid off shortly thereafter, was permitted to return to the TAA program because the claimant had never stopped participating in his on-line training. Since reinstated for TAA, TRA benefits were restored); BR-0027 4833 16 (5/20/19) (a claimant who had “exercised due diligence” by repeatedly contacting the agency about applying for TRA benefits, who had not been notified of the deadline until after it was passed and whom the state provided erroneous information was entitled to a good cause waiver of the application deadline); TAA-16 007 (4/13/17) (reversing denial of travel reimbursement in connection with training program even though claimant missed deadline based on equitable tolling principles that to hold otherwise would be unfair where claimant made genuine efforts); BR-0016 7644 17 (8/25/16)(reversing denial of TRA benefits where career center provided erroneous information that delayed meeting with trade counselor until after the deadline for applying had passed); BR-0008-9746 27 (5/29/14) (Key) (claimant may quit unsuitable work in order to continue the requirements of TAA program without jeopardizing UI benefits); BR-121844-TRA (3/27/12) (Key) (claimant who missed the TRA application deadline because the school did not complete and submit its application to become an approved training program to DUA in time, was entitled to an extension of the deadline for good cause).

## 54 What Are the Penalties for Fraud?

A claimant found to have fraudulently collected UI benefits while not in total or partial unemployment must repay not only the amount of the overpayment but also 1 week of benefits for each week of benefits collected. If the Director decides to deduct this amount owed by the claimant from future unemployment benefits, the deduction should not exceed 25% of the unemployment check. G.L. c. 151A, § 25(j), *as amended by* St. 2003, c. 142, § 9. G.L. c. 151A, § 47 provides for fines and imprisonment for knowingly making a false or misleading statement, assisting, abetting in the making of a false or misleading statement or for knowingly concealing or failing to disclose a material fact. G.L. c. 151A, § 69 (e) assesses a penalty equal to 15% of any erroneous penalty made due to the misrepresentation or failure to disclose a material fact.

A claimant is entitled to a hearing on the issue of whether any overpayment in benefits is due to fraud. G.L. c. 151A, § 25 (j). Moreover, the claimant must have been provided notice by DUA of the requirement to report income, and the notice must have been in the claimant's primary language (with some few possible exceptions). Most importantly, because a determination of fraud involves an examination of intent, DUA must evaluate the claimant's knowledge of the reporting requirements and the extent to which limited English proficiency may have adversely affected that knowledge. AH c. 9, § 5D. (See discussion of good cause policy for LEP persons in **Question 52**.)

Regulations defining "fault" in the context of overpayments were promulgated in June 2014 as part of the settlement of a GBLS/MLRI lawsuit challenging the adequacy of the evidentiary basis for DUA's determinations of fault (or "fraud"). The settlement agreement in this lawsuit (*Brugman v. Department of Unemployment Assistance*, Suffolk Superior Court, CA 10-2667-F (12/18/12)) is available at: <http://www.masslegalservices.org/content/settlement-agreement-brugman-v-dua>. DUA takes the position that "fraud" as used in G.L. c. 151A, § 25(j) means the same as the term "fault" in their regulation. AH c. 9, § 5B. The regulations, at 430 CMR 6.03 (6/20/14), expressly excludes "a good faith mistake of fact" as an instance of fault, and provide as follows:

*Fault, as used in the phrase "without fault," applies only to the fault of the overpaid claimant. The Department in making the overpayment does not relieve the overpaid claimant of liability for repayment. In determining whether an*

*individual is at fault, the Director, or the Director's authorized representative will consider the nature and cause of the overpayment and the capacity of the particular claimant to recognize the error resulting in the overpayment, such as the claimant's age and intelligence as well as any physical, mental, educational, or linguistic limitation, including lack of facility with the English language. A good-faith mistake of fact by the claimant in the filing of a claim for benefits that results in an overpayment of benefits does not constitute fault. A claimant shall be at fault if the overpayment resulted from the claimant:*

*(a) Furnishing information that the claimant knew, or reasonably should have known, to be incorrect; or*

*(b) Failing to furnish information that the claimant knew, or reasonably should have known to be material; or*

*(c) Accepting of a payment that the claimant knew, or reasonably should have known was incorrect. (Emphasis added).*

The Director's decision to impose a deduction is subject to full review and appeal. G.L. c.151A, § 25 (j). It is especially important to challenge fraud accusations against non-citizen workers because such a finding by an administrative agency could be harmful to a non-citizen's efforts to adjust her immigration status.

In addition, employers who fail to report wages to DUA for employees collecting UI will be subject to both a fine and a penalty. The fine equals the amount of contributions and interest due on unreported wages. The employer must also pay a penalty equal to the amount of UI that the employee collects that he would not have been entitled to if the employer had reported his wages to DUA. G.L. c. 151A, § 15 (a), *as amended by* St. 2003, c. 142, § 7.

Since 2015, DUA is authorized to enter into an agreement with the U.S. Treasury Department to participate in the Treasury Offset Program, enacted as part of the SSI Extension for Elderly and Disabled Refugee Act, PL. No. 110-328 (9/30/2008) under which the federal tax refunds of UI claimants who have determined to have been overpaid and have no remaining appeal rights from that determination may be intercepted. St. 2014, c. 144, §§ 25, 38, 58, 59, 68, 70, amending G.L. c. 151A and adding G.L. c. 151A, § 69B; UIPL No. 12-14 (5/20/2014); available at [http://workforcesecurity.doleta.gov/dmstree/uipl/uipl2k14/uipl\\_1214.pdf](http://workforcesecurity.doleta.gov/dmstree/uipl/uipl2k14/uipl_1214.pdf).

DUA triggers an intercept of federal tax returns by sending claimants a Notice of Intent to Intercept Federal Tax Return. Claimants have 60 days to respond to a Request for Review and can challenge the proposed intercept with evidence that

## Part 5 ■ Receiving Benefits

they are not the person listed on the notice, disagree with the amount of debt, have already paid the debt in full, have filed an appeal that is still pending on the determination that created the overpayment, have filed for bankruptcy, or have an application for waiver pending. UIPP # 2015.17 (9/11/2015). DUA cannot double dip and intercept federal and state taxes where the federal intercept satisfies the claim. BR- 69B-16-086 (11/01/2018) (where the claimant's outstanding overpayment had already been satisfied by a federal tax return intercept, a subsequent state tax refund intercept, undertaken pursuant to G.L. c. 151A, § 69B, was incorrect).

### ***Is There a Reward for Reporting Fraud?***

The UI statute provides that an individual who reports information to DUA concerning an employer's "false or fraudulent" contribution report may be entitled to up to 10% of the penalty collected (as a "whistleblower payment") against that employer. G.L. c. 151A, § 58A *as amended by* St. 2003, c. 142, § 13.

The State Unemployment Tax Avoidance Act (SUTA), Chapter 138 of the Acts of 2005, amended G.L. c. 151A by adding § 14N, which prohibits the employer from reporting its payroll under another employer's account to obtain a lower unemployment tax rate—a practice known as "SUTA dumping." In *Lincoln Pharmacy of Milford, Inc. v. Commissioner of the Div. of Unemployment Assistance*, 74 Mass. App. Ct. 248, 907 N.E.2d 1128 (2009), the Massachusetts Appeals Court found that substantial evidence established that the employer intentionally shifted payroll between two corporations in order to avoid the higher contribution rate. The case raised some interesting collateral issues, including the propriety of "witness coaching" by the Board and the evidentiary requirements on DUA and the employer in this case.

### ***What Can Be Done about Employer Misconduct and Fraud?***

Employers have numerous statutory obligations that DUA rarely enforces. Examples include:

1. The employer must provide notice of workers' right to file a claim for unemployment benefits, G.L. c. 151A, § 62A (g);
2. The employer must provide timely wage records, G.L. c. 151A, §15 (a);

3. The employer or its agent cannot knowingly make a false statement or representation in order to avoid paying benefits or to reduce their payment, G.L. c. 151A, § 47, ¶3;
4. The employer cannot attempt by threats or coercion to induce any individual to waive his rights under the UI law, G.L. c. 151A, § 47, ¶4.

Since 2005, DUA has a fund derived from fines and penalties collected when employers violate the provisions of owner transfers as they pertain to UI liability. G.L. c. 151A, §§ 14N, 14O. This fund's purpose is to support DUA's activities related to the detection, prevention, and administration of employer fraud provisions of the UI statute.

DUA regulations require employers and employer agents to provide information, under pains and penalties of perjury, in response to a claim for UI. 430 CMR 5.02(8) (6/11/10). If an employer's inadequate or untimely response to a claim results in an erroneous payment of UI benefits, the employer will not be relieved of charges for the claim. G.L. c. 151A, § 38A, *added by* St. 2013, c. 118, § 11. UIPP # 2013-08, *Changes to Sections 38 of Chapter 151A to Prevent Improper UI Payments*, (12/3/13). Nor does the incompetence of a third-party administrator that provides an erroneous response to a fact-finding questionnaire constitute good cause. BR-0021 7463 25 (8/23/17) (Key).

Additionally, Executive Order No. 499 (3/12/2008) established a Joint Enforcement Task Force on the Underground Economy and Employee Misclassification, now codified in Massachusetts law as the Council on the Underground Economy. St. 2014, c. 144, §§ 23, 24. This task force is charged with investigating employer fraud and a hotline has been established for this purpose: 1-877-96-LABOR.

Advocates should be aware that employer third-party agents (TPAs), who handle an employer's unemployment accounts, frequently provide erroneous information to DUA. All too often, this misinformation—the result of carelessness and/or lack of firsthand information—is provided to adjusters in employer-protested claims and results in the delay and/or denial of UI to eligible claimants. See Jason DeParle, *Contesting Jobless Claims Becomes A Boom Industry*, NEW YORK TIMES (4/3/2010).

Arguably, a claim may be available against these agencies under the Massachusetts Consumer Protection law, G.L. c. 93A, as the agency is providing a service that directly affects the people of the Commonwealth and is injuring an employee. See *St. Paul Fire and Marine Ins. Co. v. Ellis & Ellis*, 262 F.3d 53 (1st

## Part 5 ■ Receiving Benefits

Cir. 2001); *Boos v. Abbott Laboratories*, 925 F. Supp. 49, 55 (D. Mass. 1996) (holding that the protections under c. 93A do not require privity of interest). Additionally, liability may exist under the False Claims Act, 31 USC § 3729 *et seq.*, and G.L. c. 151A, § 47.

Advocates representing claimants who have been victimized by employer fraud, including misclassification of claimants as independent contractors, are encouraged to use the Underground Economy Hotline (see **Question 39**) and also to contact the Employment Rights Coalition.

# Part 6

## Appeals Process

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Unemployment appeals follow a two-tiered administrative process within DUA: the first tier is the Hearings Department; the second is the Board of Review. From there, the right of review lies with the District Court, then the Appeals Court, and, if accepted for review, the Supreme Judicial Court.

For discussion of sources of authority, legal standards and substantive issues, see **Introduction, Sources of Law Governing the UI Program; Eligibility, Part 2;** and **Separation from Work, Part 3**. The most common issues and important sources of authority are:

- deliberate misconduct or knowing violation of a work rule, G.L. c. 151A, § 25(e)(2);
- voluntary quit or leaving for such an urgent, compelling, and necessitous reason as to make the separation involuntary, G.L. c. 151A, § 25(e)(1);
- DUA regulations, 430 CMR 1.00 *et seq.*
- Informal/Formal Fair Hearing Rules, 801 CMR 1.02;
- Board of Review decisions,
- U.S. Dept. of Labor, Employment and Training Division, ET Handbook No. 382, *Handbook for Measuring UI Lower Authority Appeals Quality*, 3rd Edition, 2011, available at [https://wdr.doleta.gov/directives/attach/etah/et\\_handbook\\_no\\_382\\_3rd\\_edition.pdf](https://wdr.doleta.gov/directives/attach/etah/et_handbook_no_382_3rd_edition.pdf).

The Hearing Offices contacts are:

Boston: 1-617-626-5200

Lawrence: 1-978-738-4400

Brockton: 1-508-894-4777

Springfield: 1-413-452-4700.

Information regarding a Board of Review appeal is available at [www.mass.gov/dua/bor](http://www.mass.gov/dua/bor) or call 1-617-626-6400.

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## 55 If Unemployment Benefits Are Denied, How Long Does a Claimant Have to Request a Hearing?

If the claimant is disqualified, generally she has **10 days** after the date of hand-delivery or the postmark date on the notice of disqualification in which to request a hearing. DUA uses the date it receives the hearing request *or* the postmark date if received after the tenth day, to determine timeliness.

If using UI Online: For an appeal of the benefit amount (monetary appeal), click a link in the “Status” column of the Monetary Determination area of the page; for an appeal of an eligibility determination (non-monetary), click a link in the “Issue Determination” column of the Determination of Eligibility area. All appeal case documents can be viewed on these pages by selecting “View Appeal Case Documents.”

### ***Good-Cause Extension***

An appeal may be filed **within 30 days** if the claimant can show good cause for the late filing. The regulations at 430 CMR 4.14 set out the following examples of good cause:

- (1) A delay by the United States Postal Service in delivering DUA’s determination;
- (2) Death of a household member or an immediate family member (including a spouse, child, parent, brother, sister, grandparent, stepchild or parent of a spouse);
- (3) A documented serious illness or hospitalization of a party household member or an immediate family member during the entire ten day filing period or a portion of the appeal period if the party's ability to timely appeal is thereby affected;
- (4) An emergency family crisis which requires a party's immediate attention during the entire ten day filing period or a portion of the appeal period if the party's ability to timely appeal is thereby affected;

- (5) An inability to effectively communicate or comprehend English and the party is unable to find a suitable translator to explain the notice of determination within the ten day filing period;
- (6) DUA's determination is not received and the party promptly files a request for a hearing after they know or should have known that a determination was issued;
- (7) A continuing absence from the Commonwealth, while seeking employment, during all or most of the ten day filing period;
- (8) Intimidation, coercion or harassment by an employer resulting in a party failing to timely request a hearing;
- (9) A DUA employee directly discourages a party from timely requesting a hearing and such discouragement results in a party believing that a hearing is futile or that no further steps are necessary to file a request for a hearing.
- (10) An inability because of illiteracy or a psychological disability to understand that a request for a hearing must be filed within the ten day filing period;
- (11) The individual's need to address the physical, psychological and legal effects of domestic violence as defined in M.G.L. c. 151A, § 1(g<sup>1/2</sup>);
- (12) Any other circumstances beyond a party's control which prevented the filing of a timely appeal.

It is not required that a claimant exhaust all possible options to show good cause for a late appeal, instead claimants are held to a standard of reasonableness. The Board has held that a claimant has shown good cause for a late appeal when unable to open determination on line after it was sent by the DUA, and the claimant undertook reasonable efforts to try to read the determination and appeal it. BR-0029 2124 94 (6/20/19).

The Board held that a claimant's request for a hearing must be granted where the claimant submitted the request 19 days after the Notice of Determination was mailed to the wrong address. The Board relied on both G.L. c. 151A, § 39(b)'s allowance for submission of a hearing request within 30 days after the determination was mailed if the claimant had good cause, and the clarification in 430 CMR 4.14(6) that failure to receive the determination may constitute good cause if the party "promptly" files the hearing request. BR-112257 (3/11/2011) (Key). Likewise, a late request for a hearing is excused where the request was delayed due to the claimant's not receiving notice of the determination while working away from home for an extended period. BR-125584 (3/12/13).

## Part 6 ■ Appeals Process

The Board has also ruled that a claimant whose request for a hearing was due the day after Thanksgiving had good cause to file an appeal beyond the 10-day period due to a mistaken belief that DUA offices were closed the day after Thanksgiving. BR-113018 (2/28/11). Additionally, the Board has held that a mental health condition that prevents the claimant from filing a timely appeal constitutes good cause. BR-1841076 (10/14/14). Similarly, the Appeals Court has taken a broad view of good cause for an employer's failure to submit wage information to DUA on time. *Khodaverdian v. Dep't of Employment & Training*, 39 Mass. App. Ct. 414, 656 N.E.2d 1270 (1995).

In a Boston Municipal Court decision, the claimant had inadvertently chosen notification by email instead of postal mail when signing up for benefits on UI Online, although the claimant had very minimal computer access and rarely used email. Where the claimant was awarded UI but unaware of the employer's appeal failed to attend the hearing resulting in the reversal of the grant of UI benefits, the Court found good cause for a late appeal and remanded the case for a new hearing. *Wali v. Amante*, Boston Municipal Court, CA No. 2014 CV 117 (2014).

As a settlement of a Suffolk Superior Court case which challenged DUA's refusal to reinstate an appeal of a claimant who had defaulted while out of state due to a family emergency, DUA agreed to reinstate the claimant's appeal and adopt and follow sub-regulatory standards for the reinstatement of an appeal. *Hicks v. King*, Suffolk Superior Court, CA 00-04546-E (2000). A copy of the standards are attached as **Appendix O**.

### ***Beyond 30 Days: Tolling and Reconsideration***

Under *very* limited circumstances, an appeal may be filed after 30 days if equitable tolling principles apply (e.g., discouragement by DUA or the employer, or non-receipt of the notice). 430 CMR 4.15.

A DUA regulation at 430 CMR 4.13(4) extends the appeal period in certain instances involving LEP. (See **Question 52**.)

If all appeal times have elapsed and you do not have grounds to assert equitable tolling, consider seeking relief by a request for reconsideration made to DUA. G.L. c. 151A, § 71; 430 CMR 4.30 *et seq*. Generally speaking, a request for reconsideration must be made within 1 year from the determination or decision. G.L. c. 151A, § 71, ¶ 1

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## 56 As an Advocate, What Do You Need to Know About the Hearing Process?

Unemployment hearings are conducted by a review examiner in DUA's Hearings Department. They are relatively informal and occur around a conference table in a small room. They are audio-recorded and usually last about an hour but may run longer or be continued. If an interpreter is required, the hearings are scheduled for 1.5 hours. If the hearing is to be continued, ask the review examiner to schedule a date for the continued hearing and request adequate time to finish the hearing. You can also request a copy of the CD of the first hearing, however, due to the shortage of staff at DUA, be sure and do this quickly to allow the staff as much time as possible to process your request.

Review examiners ask an initial set of questions to determine the nature of the case. If the review examiner determines that it is a voluntary-quit case, the claimant will be questioned first and if the review examiner determines that it is a discharge case, the employer will be questioned first. Most review examiners ask questions first of each party, followed by a redirect by the claimant's representative and cross-examination by the other party's representative. A few will allow the claimant's representative to ask questions first.

The hearing is conducted in accordance with the standards set forth in the Massachusetts Administrative Procedure Act, G.L. c. 30A, and Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.02.

DUA more frequently conducts hearings by telephone (and does so in all one-party hearings), with the review examiner, claimant, and employer in separate locations. Under DUA's Telephone Hearing procedures (adopted in response to the filing of *Elliott v. King*, *Deputy Director of the Div. of Employment & Training*, Suffolk Superior Court, CA 97-5748-G (4/3/2000), a class action seeking declaratory and injunctive relief regarding the conduct of telephone hearings without any standards guiding the use of this type of hearing), these hearings are supposed to be limited to situations where the parties must travel more than 75 miles, where an accommodation is necessary for an individual with a disability, where there are safety or security concerns, or to expedite single-party hearings. DUA's telephonic hearing procedures are available at <http://www.masslegalservices.org/content/dua-telephonic-hearing-procedures>.

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If both parties agree, DUA will allow one party to attend in person and another party to participate by telephone. You should encourage claimants to attend in person where possible.

Because this is an administrative hearing, the formal rules of evidence including the hearsay rule of evidence do not apply. The Supreme Judicial Court has suggested that if the pertinent evidence before an administrative tribunal is exclusively hearsay, this cannot constitute substantial evidence sufficient to uphold the decision. *Sinclair v. Director of the Div. of Employment Security*, 331 Mass. 101, 103–04, 117 N.E.2d 164, 165–66 (1954). However, *Sinclair* was somewhat limited by *Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission*, 401 Mass. 526, 517 N.E.2d 830 (1988), in which the court found that, in some circumstances, hearsay could constitute substantial evidence. See also, *Edward E. v. Department of Social Services*, 42 Mass. App. Ct. 478, 480, 678 N.E.2d 163 (1997) (“The question before us is not whether the administrative decision was based exclusively upon uncorroborated hearsay but whether the hearsay presented at the fair hearing was reliable.”). Likewise, the Supreme Judicial Court has emphasized the need for an adequate record, even where the hearing is being conducted under the informal rules of procedure. *Costa v. Fall River Housing Authority*, 453 Mass. 614, 626, 903 N.E. 2d 1098, 1110 (2009) (“reliance on hearsay that is anonymous, uncorroborated, or contradicted by other evidence will create particular risk of error”).

And although the formal rules of evidence do not apply, a District Court has held that the parties and the hearing officer must still properly enter documentary evidence into the record. In *Willis v. Director, Department of Unemployment Assistance and Springfield Area Transit Company, Inc.*, Springfield District Court, CA 1823CV0694, Melikian, J. (9/21/18), the employer failed to produce the custody and control form with the results of the drug test that was the basis for the claimant’s discharge. Later in the hearing, the review examiner asked whether a potential witness the employer had declined to call, who was still in the waiting room, might have the document. The review examiner left the hearing room, returned with the drug test results, entered the document into the record on her own accord, and ruled against the claimant. On appeal, the District Court found that the review examiner had exceeded the authority granted to her under the Informal/Fair Hearing rules by considering evidence a party did not present at the hearing from an individual who did not testify and was not subject to cross examination. Concluding that the decision was made upon unlawful procedure affecting the claimant’s substantial rights, the Court reversed the decision and awarded UI. Similarly, the Board has held that the absence in the record of the employer’s video evidence or other first-hand account of the claimant’s purported

theft rendered the review examiner’s finding of theft unsupported and without evidence of misconduct. The disqualification was reversed. BR-0014 2245 68 (6/30/15) (Key).

One can argue that if the employer has the burden of proof—for example, in discharge cases—then the employer’s failure to bring available witnesses with firsthand knowledge means it has not met its evidentiary burden. (See **Question 11** for discussion of burden of proof in discharge cases).

Although no longer its practice, in settlement of a Suffolk Superior Court action, DUA at one time agreed that all issues in an unemployment claim must be determined together with appeals proceeding together. *Zimmer v. Commissioner of the Dep’t of Emp. & Training*, Suffolk Superior Court, CA 78566 (1989).

## 57 How Should You Prepare for a Hearing?

If DUA has already scheduled a hearing, you may have to act quickly to prepare, as postponements are often difficult to obtain, even if the time period stated on the notice of hearing for requesting a postponement has not yet expired. DUA’s Hearings Department may reject postponements for some conflicting engagements of the claimant and her representative, although consideration is given if the failure to postpone will cause a hardship. DUA regulations require that the Notice of Hearing be posted online and mailed to the claimant and to his authorized representative, at least 10 days before the hearing. 430 CMR 4.11 (regulation promulgated in response to *Bocchino v. Demong, Director of the Div. of Employment Security*, Suffolk Superior Court CA 78731 (circa 1980)(challenging the inadequacy of short hearing notices)).

The standard notice of hearing simply replicates the technical language of the UI statute and states almost every possible separation issue that could arise at the hearing, including voluntary quit, leaving for urgent and compelling personal reasons, deliberate misconduct, and rule violation. It also states that “able and available” may be an issue to be determined at the hearing. The notice departs from the federal Department of Labor guidelines. See ET Handbook No. 382, *Handbook for Measuring UI Lower Authority Appeals Quality*, 3rd edition, 2011 at p. 63, available at [https://wdr.doleta.gov/directives/corr\\_doc.cfm?DOCN=3049](https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3049). A due process challenge may lie where a *pro se* claimant is not sufficiently apprised

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about what issue will be heard at the hearing as a result of the notice's technical language.

For proper representation, plan on at least three meetings with the claimant: the first to allow ample time to hear the story, the second to prepare the client's direct examination and to do a mock cross-examination, and a final meeting before the hearing to review the direct. Always remind your client that a photo ID is required otherwise your client will not be able to enter DUA (nor will you without your ID) and your client may be defaulted if more than 10 minutes late. (See **Appendix H** for a checklist of steps to prepare a UI case.)

Other initial actions include:

- getting the client's Social Security number, DUA Docket No., and Issue ID No.;
- obtaining all facts from the client about the separation, stressing the importance of knowing any harmful facts, prior warnings, witnesses to events, and so forth;
- getting the employer's and witnesses' names, addresses, and phone numbers;
- finding out everything about the place of work—the chain of command, the way information is communicated, the nature of working relationships, and the details of the job;
- having the client sign releases for access to DUA case files, personnel files, medical documents if necessary, and information in other forums (**Note:** DUA now requires an attorney's signature and BBO# for claimant document requests);
- requesting a client to provide a copy of documents on her online file, or reviewing the documents at the computer with a client when the client is in your office. To view appeal case documents on UI Online:
  - 1) click **View and Maintain Account Information**;
  - 2) click **Monetary and Issue Summary**;
  - 3) click the applicable link on the **Monetary and Issue Summary** page;
  - 4) at the bottom of the Monetary Determination (or Eligibility Determination) page, select **View Appeal Case Documents** and click **Next**;
  - 5) the **Appeal Case Folder** page displays.

View a PDF version of any case document by clicking its **Title** link.

(Although DUA has long committed to providing claimant advocates with a

separate portal to review claimants' information with their permission, this change has yet to happen (this opportunity is already available to employer agents and greatly facilitates representation);

- obtaining and reviewing all relevant documents and materials your client may have from the job and from your clients' hearing file at DUA; and
- determining whether it is strategically wise to contact the employer to obtain the employee's personnel and other records; or, alternatively, to ask your client to retrieve personnel records and other records from the employer.

**Advocacy Tip for Separation Cases:** Follow the steps outlined in **Appendix H**. By the time of the hearing, you and your client should be able to summarize in a concise manner why your client is eligible for UI. You should know the theory of your case, the facts that support your theory, and how to address any facts that may not support the theory. The majority of UI hearings are scheduled for one hour. You need to prepare your client to tell their story in as concise a manner as possible, with a laser focus on those facts that are relevant in light of the statutory requirements described throughout this Guide. Simply put, your client's story must explain the reason for separation and must demonstrate why, under Massachusetts UI law, the separation qualifies your client for UI benefits.

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## 58 Have You Obtained All Documents?

Consider the documentary evidence you will want to present. Although difficult to enforce, discovery is available. 801 CMR 1.02(8). In addition, you may want to issue a subpoena *duces tecum* to obtain the needed documents. (See below.) It may be important to build a complete record for future appeal, if necessary.

Ask the claimant to bring you all relevant documents in her possession—for example, notices from the DUA; copies of online submissions, such as the initial application; any documents from the employer that could be related to the separation, such as relevant rules or policies, evaluations, warnings, and/or a termination letter. Obtain any employment contracts, personnel manuals, information on grievance procedures, medical evidence of illness and treatment, claims filed against the employer in other forums such as the Massachusetts Commission Against Discrimination (MCAD), and so forth.

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Most importantly, review the DUA hearings file, a right secured under G.L. c. 151A, § 39(b)(5), in order to review the employer's initial reason given for separation, the claimant and employer statements, the Notice of Disqualification, claimant and employer responses to questionnaires and any other documents submitted by either party.

Employers must keep personnel records for at least 3 years after the entry date of the record. G.L. c. 151, § 15. An employee has the right to obtain a copy of her personnel file. G.L. c. 149, § 52C (and further discussion below).

### *DUA Hearings Case File*

Even if the claimant has copies of DUA forms, obtain a copy of the entire DUA file by contacting the DUA Hearings Department. With the exception of documents for telephonic hearings, many of the file materials relevant to the hearing are not available on the client's UI Online account.

Always check to learn if the employer returned the UI Request for Information within the 10-day period; if the employer failed to do so without good cause, it no longer has party status—i.e., it has no right of cross-examination and may not appeal an adverse hearing decision, and the employer representative is present at proceedings only as a witness. G.L. c. 151A, § 38(a), (b).

### *Personnel Records*

Section 52C of G.L. c. 149 has two functions. First, it allows employees and their counsel access to all personnel records kept by the employer; second, it allows the employee to submit a written statement explaining her position as to any adverse information contained in those records, thus making her explanation a part of the personnel records.

For purposes of representing a UI claimant, the first function is more significant, as it may be the only formal discovery tool available. However, on the rare occasion when you see the employee before her separation from work occurs, it may be useful to have her obtain the file and place her explanations of adverse material in it.

The personnel file maintenance practices of employers vary greatly. Some keep only payroll, tax, and benefit information in a personnel file and maintain other information elsewhere. No matter how an employer maintains the information, employees are entitled to see their own personnel records.

The statute defines a “personnel record” functionally as any record that identifies the employee and “is used, or has been used, or may affect or be used” relative to the employee’s “qualification for employment, promotion, transfer, additional compensation or disciplinary action.” For employers with 20 or more employees, the file must contain a specific listing of documents to be included in the personnel file and the documents must be retained during the pendency of certain actions. If an employer with 20 or more employees has a written personnel policy, it must make it available for inspection.

For UI purposes, often the documents of most value are the employee’s attendance record, evaluations, and warnings and other records of disciplinary action or of any reasons the employer has given for termination. All these are within the scope of G.L. c. 149, § 52C, as is any document that the employer relied on in taking an action that led to the termination, as long as the document identifies the employee. Under G.L. c. 149, § 52C, any employer receiving a written request from an employee shall, within 5 business days, provide the employee both an opportunity to review his personnel record and a copy of the record.

An employee is entitled to review his record twice in a calendar year. The employer is required to notify the employee within 10 days of placing information in the employee’s record that may be detrimental to his employment status. Employee review of this potentially detrimental information does not count as one of the two annual opportunities to review the record. St. 2010, c. 240, § 148, amending G.L. c. 149, § 52C. (See sample Request for Personnel Records, **Appendix I.**)

### ***Using a Subpoena to Obtain Documents and Compel the Attendance of Witnesses***

Another useful way for a party to acquire information needed for his case is to issue a subpoena. A party may issue a subpoena to order a witness to attend a hearing. A party may also issue a subpoena *duces tecum*, which compels the attendance of a witness and also requires that she produce, at the hearing, specific documents that the issuing party requests.

Particularly for *pro se* claimants who need DUA’s assistance, DUA advises that the claimant contact the Regional Hearings Manager at the local hearing office at least 4 days before the hearing. G.L. c. 30A, § 12; 801 CMR 1.02 (10)(i).

However, as many of these positions are currently vacant, best bet is to call the Hearings Office (Boston: 617-626-5200; Lawrence: 978-738-4400; Brockton: 508-894-4777; Springfield: 413-452-4700). The party has the responsibility to

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serve the subpoena and pay the fees for travel and attendance, in accordance with the rules for witnesses in civil cases. G.L. c. 30A, § 12 (2). Similarly, petitions to vacate or modify the subpoena follow the procedures in G.L. c. 30A, § 12 (3), (4).

Subpoenas are particularly useful when you believe that a witness whose attendance is necessary to prove your client's case is unlikely to be present voluntarily at the hearing. Similarly, a subpoena *duces tecum* is a valuable tool to ensure that certain documents be available at the hearing. Advocates may also use subpoenas in advance of the hearing for discovery purposes; on rare occasions, they have been successful in using subpoenas to obtain documents prior to the hearing and then, depending on their content, deciding whether or not to introduce some or all of the documents as evidence. Some employers require 10 days' notice to any individual whose records are involved so that they have an opportunity to quash, so it is important to serve the subpoena as early as possible.

Subpoenas are enforceable in Superior Court. If the opposing party does not comply with the subpoena, be sure to bring to the hearing the return of service and the subpoena listing the documents requested.

A request can be made to continue a hearing if the subpoena is not complied with, but the hearing officer will not grant the request without a showing that the evidence is relevant.

(See **Appendix J** for a copy of the DUA subpoena form.)

**Note:** Witness employees are **protected against retaliation** for their participation in a claim for UI benefits. A notice of termination of employment or of any substantial alteration in the terms of employment within 6 months after an employee has provided evidence or testified in connection with a claim for UI creates a rebuttable presumption that such notice or other action is a reprisal against the employee for providing evidence, the proof of which warrants a rescission of any adverse alteration in the terms of employment, an offer of reinstatement, and liability for damages, the cost of the suit and attorney's fees. G.L. c. 151A, § 47, as amended by St. 2014, c. 144, § 67.

## 59 How Should You Present Your Case at a Hearing?

Be sure to prepare your client and witnesses and determine whether you need to subpoena any witnesses and/or documents to the hearing. G.L. c. 151A, § 43; G.L. c. 262, § 59. If necessary witnesses are unavailable for the hearing, obtain affidavits. You will generally be unable to obtain a continuance of the hearing date due to the unavailability of a nonparty witness (unless requested prior to the postponement date on the hearing notice).

There is no opening statement, and the review examiner usually conducts the initial examination of each party.

Prepare for direct examination of the claimant. This should include documents you wish to introduce into evidence. Bring three copies of each document—one for the review examiner, one for the other party, and one for yourself. In addition to your direct, prepare the client to answer potential open-ended questions by the review examiner—e.g., “Were you fired or did you quit?” “Why?” You will also need to prepare your client for the employer’s cross-examination.

Also prepare for your cross-examination of the employer and other potential witnesses. If the employer brings more than one witness, be sure and ask the review examiner to sequester the witnesses.

The closing statement should be very brief (aim for a couple of minutes). When you incorporate analysis of the applicable law, remember that review examiners hear these cases five times a day. Concentrate on facts introduced into the record that compel a finding of eligibility.

Prepare a memorandum of proposed findings and rulings of law before the hearing (see **Appendix K**), make the necessary revisions based on the testimony and exhibits produced at the hearing, and then seek permission to send it within 24 to 48 hours after the hearing. Assist the review examiner by citing the relevant facts and applying these facts to case law, especially “key” Board of Review decisions (see **Introduction, Sources of Law Governing the UI Program**), and Massachusetts Appellate Court decisions or to examples from the *Service Representatives Handbook*, particularly persuasive are those sections of the Handbook that have been revised in 2017 or later, it is unclear whether the earlier versions will be followed.

Remember that the hearing at this stage is the “trial” of the case with appellate review available through the Board of Review and the courts. For this reason, make sure that all relevant facts are introduced into evidence at the hearing. For a discussion about hearings in discharge cases where the employer fails to attend the hearing. (See **Question 11**).

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## 60 When and How Is a Hearing Decision Made?

You should receive a hearing decision within 2 to 4 weeks. Federal law, under the “when due” provisions of the Social Security Act and implementing regulations, requires timely decisions, 42 USC § 503(a)(1); 20 CFR Part 640. Under state law, DUA must make reasonable efforts to render a decision within 45 days of the request for hearing. G.L. c. 151A, § 39(b).

The decision must meet the requirements of the Massachusetts Administrative Procedure Act, including that it must be based on “substantial evidence” and free from “error of law.” G.L. c. 30A, § 14(7).

“Substantial evidence” is evidence that “a reasonable mind might accept as adequate to support a conclusion, taking into account whatever in the record detracted from its weight.” G.L. c. 30A, § 1(6). An “error of law,” in the context of UI cases, is usually a misapplication of the statutory grounds for disqualification. *Guarino v. Director of the Div. of Employment Security*, 393 Mass. 89, 92–94, 469 N.E.2d 802, 804–05 (1984). The decision must also contain adequate subsidiary findings of fact as to each critical issue. *McDonald v. Director of the Div. of Employment Security*, 396 Mass. 468, 487 N.E.2d 186 (1986), otherwise the court is “unable to determine whether the department’s order is supported by sound reasoning and fact finding.” *NSTAR Electric Co. v. Dep’t of Public Utilities*, 462 Mass. 381, 386, 986 N.E. 2d 895, 900 (2012).

Physical evidence, such as documents or video evidence, must be admitted into the record to constitute substantial and credible evidence. BR-158008 (6/30/15). Testimony about what a witness saw when watching a video, unsupported by the video itself and without the claimant’s having had an opportunity to present the claimant’s own testimony about its contents, does not constitute substantial and credible evidence. BR-10222139 (3/25/15)

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## 61 Does the Claimant Receive Benefits While a Further Appeal Is Pending?

If the decision is positive at this or any subsequent stage of appeal, follow through to make sure that the claimant gets the UI benefits to which the claimant is entitled. A claimant who wins at the hearing, has the right to collect UI benefits, including retroactive benefits, pending the employer's appeal. Also investigate potential eligibility for extended training benefits as the 20 week application deadline for extended benefits starts to run one week after DUA issues a decision reversing the denial of UI. (See **Question 53**).

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## 62 Can the Claimant Get an Overpayment of UI Benefits Waived?

### *Waiver of Overpayments*

If the hearing or other decision is adverse to the claimant, DUA may assert that UI benefits have been overpaid. Sometimes that assertion results from a redetermination of eligibility under G.L. c. 151A, § 71. Other times an overpayment is assessed because an initially favorable eligibility decision is overturned on appeal. However, under G.L. c. 151A, § 69(c), repayment is not mandatory.

You should always investigate the possibility of a waiver of overpayment if you can demonstrate that the overpayment was not the claimant's fault. A waiver is not allowed if there is a finding of fraud, which is why it is critical to dispute an erroneous fraud finding. If the overpayment was not due to misrepresentation or fraudulent intent on the claimant's part, the claimant may apply for a waiver of the outstanding balance of her overpayment pursuant to G.L. c. 151A. DUA's regulations on waivers of overpayment are found at 430 CMR 6.01 – 6.13. A waiver will be granted if you can show that the recovery of payments "would defeat the purpose of benefits. . . or would be against equity and good conscience." 430 CMR 6.05(1). These provisions have been interpreted to mean that either the repayment of UI benefits would cause financial hardship, or that the

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claimant relied to the claimant's detriment on the receipt of the UI benefits at issue. AH c. 9, § 5G. The claimant only needs to meet one of these two tests, but legal services clients frequently meet both prongs. If applicable, enter evidence of eligibility under both prongs.

Where a claimant's household does not have sufficient income to meet the family's ordinary and necessary living expenses, the Board has determined that, "as a matter of law," the claimant has satisfied the burden of proving that recovery of the overpayment would defeat the purpose of benefits. BR-204100 (5/13/14); 430 CMR 6.03 Definitions, Against Equity and Good Conscience; BR-0016 7936 34 (3/9/16) (Key) (income for determining waiver does not include non-liquid assets); BR-0018 0079 19 (11/7/16) (Board reversed denial of waiver on several grounds including that the review examiner erroneously used claimant's income before taxes); BR-0022 6462 67 (3/29/18)(Board reversed denial of waiver where review examiner erroneously converted weekly expenses to monthly expenses and used the claimant's gross income rather than net income); BR-028 2398 81 (6/28/19) (Board reversed denial of waiver where the claimant's monthly expenses exceeded his monthly income after taxes).

In determining whether repayment would be "against equity and good conscience," DUA looks at whether if due to the overpayment the claimant relinquished a valuable right or changed their position for the worse. See 430 CMR 6.03 Definitions, *Defeat the Purposes of Benefits Otherwise Authorized*. BR-0018 0079 19 (11/7/16) (claimant's one time expenditure for daughter's technician course constituted a "change in position" supporting a waiver of overpayment). The waiver application does not include much space to articulate eligibility under the "equity and good conscience" test, and ideally an advocate should include a cover letter explaining why your client is eligible under this prong of the statute.

DUA should notify the claimant of the right to request a waiver at the time it issues the determination regarding an overpayment. If DUA denies the request for waiver, the claimant has the right to file an appeal and have a hearing on the matter. 430 CMR 6.09. This hearing does not include an opportunity to revisit any substantive issues regarding the underlying eligibility for UI benefits. 430 CMR 6.13. The claimant may then appeal the hearing decision to the Board of Review, and then to the court. The time frame and the procedural steps for filing overpayment appeals are the same as that for appeals of disqualification. G.L. c. 151A, §69 (c).

A Waiver Application form is available on the claimant's UI Online account or should be requested from DUA so that it contains the claimant's bar code. Waiver applicants should be prepared to submit supporting documentation (e.g., copies of utility bills, rental agreements, mortgage documents, grocery receipts, etc.) with their request for waiver of an overpayment. A sample waiver letter, which lists the information DUA requests in order to act on a waiver application, is included as **Appendix D**. The information in the waiver letter should accompany the UI Online form that requests financial information and includes the claimant's bar code.

Under G.L. c. 151A, § 71, DUA has 1 year from the date it determined that UI benefits were overpaid to pursue the recovery of those benefits from the claimant. If DUA alleges that the overpayments were the result of a misrepresentation of fact, it has 4 years in which to pursue recovery.

**Advocacy Note:** DUA began a practice of denying waivers for claimants who clearly meet the standard for eligibility under the regulations notwithstanding the absence of a change in state law or court interpretations. Challenging this practice, GBLS filed a lawsuit, *Castillo v. Dep't of Unemployment Assistance*, Suffolk Superior Court, CA No. 15-85-CV-2960. The case settled under these terms:

**Retroactive relief:** DUA has agreed that 660 UI claimants and former claimants' waivers should have been granted. DUA forgave \$2.5 million of debt these workers owed DUA.

**Prospective Relief:** DUA promulgated a new regulation stating that recipients of Supplemental Security Income (SSI) benefits, (including SSI recipients who also receive some Social Security Disability Insurance (SSDI), benefits) or Emergency Assistance to Elderly, Disabled and Children (EAEDC) benefits will be presumptively eligible for a waiver. 430 CMR 6.05(3)(b). TAFDC recipients should still be able to demonstrate eligibility but will need to continue to complete the financial waiver form.

**Notice Relief:** DUA agreed to change the waiver notice so that when a waiver is denied a specific reason is provided as to why the waiver was denied, e.g., your income exceeds your expenses, etc.

DUA's new policy manual draft states that if no request for waiver is filed within 15 days after DUA informs the claimant of an overpayment, if a waiver of the overpayment is granted, any amount already collected by offset or direct payment will not be refunded. AH c. 9, § 5F.

## 63 How Do You Request Review by the Board of Review?

The decision of the review examiner of the Hearings Department can be appealed administratively by either party to the Board of Review, a three-member independent appellate review board within DUA. The current Chair of the Board is Paul T. Fitzgerald, and the two other members are Charlene A. Stawicki and Michael J. Albano.

The appeal to the Board, in the form of an application for further review, must be filed or postmarked within 30 days of the date the DUA mailed the review examiner's decision. G.L. c. 151A, § 40. See <https://www.mass.gov/how-to/file-an-appeal-with-the-board-of-review>. The regulatory "good cause" provisions do not apply to allow a late appeal to the Board. The Supreme Judicial Court upheld the postmark rule in 801 CMR 1.04(4) to govern the timeliness of applications to the Board under G.L. c. 151A, § 40. *Pavian, Inc. v. Hickey*, 452 Mass. 490, 496, 895 N.E. 2d 480, 486 (2008).

One may mail, fax, or hand-deliver appeals to: Board of Review, 19 Staniford Street, 4th floor, Boston, MA 02114, Fax #: 617-727-5874; or submit them through UI Online by clicking: View and Maintain Account Information → Monetary and Issue Summary → Issue ID → Appeal Issue. However, once submitted on line, it is difficult to find.

You may obtain a copy of the hearing CD from the DUA Hearings Department for \$7.00 (free for clients eligible for legal services).

After receiving an application for review, the Board has 21 days to decide whether or not to accept review. G.L. c. 151A, § 41(a). Once an appeal is filed, the case is assigned to a review examiner at the Board, who reviews the file, listens to the hearing CD, writes a summary, and makes a recommendation to the Board on whether to accept the application for review. The non-appealing party does not receive notice of a pending Board of Review appeal until the Board decides whether to accept the appeal.

Advocates for the claimant should submit a memorandum in support of the application for review, along with the appeal. If the original decision is not based on substantial evidence in the record, or if the case presents an error of law or a

novel issue of law, this should be pointed out to the Board. G.L. c. 151A, § 41(b). Additionally, citing to prior Board of Review decisions is persuasive, especially those decisions that the Board has identified as “key decisions. Given the volume of appeals, memos that are short and to the point are well-received and there is no necessity to repeat the facts.

**Note:** If the Board of Review makes no decision within the 21-day period, the case is deemed denied on the twenty-first day after the date of appeal. (This rarely happens). The review examiner’s decision is the final DUA decision, and the Board’s inaction after 21 days, or the Board’s decision to deny the appeal starts the appeal period for judicial review; the case must be filed in District Court within 30 days thereafter. G.L. c. 151A, § 41(a).

If the Board accepts review, it may:

- review the case on the record and make a decision;
- remand the case to the DUA Hearings Department for the taking of additional evidence or the making of subsidiary findings or for a *de novo* hearing; or
- take evidence at a hearing before the Board and make a decision.

G.L. c. 151A, § 41(b).

A Suffolk Superior Court ordered the Board to decide all cases coming before it, including those cases remanded to the DUA Hearings Department for additional evidence, within 45 days after the acceptance for review. *Burke v. Nordberg*, Suffolk C.A. 92-7030-C (Cratsley, J.) (12/18/92). Additionally, the State Auditor’s 2016 UI Special Commission Report, *available at* [www.mass.gov/auditor/docs/special-reports/2016/ui-commission-report.pdf](http://www.mass.gov/auditor/docs/special-reports/2016/ui-commission-report.pdf), recommended that the Director establish a method for prioritizing decisions (by determinations, Hearings Department and Board of Review) for claimants facing financial hardships while waiting for initial benefits or appealing denials. The Commission recommended that a claimant’s receipt of a needs-based benefit (e.g., food stamps) “shall be a sufficient but not necessary method of proof” of such hardship, and that other indicia of hardship may also be considered (e.g., imminent eviction, threats of wage garnishment due to debts, unmet medical or other critical needs of the claimant or claimant’s family due to delay of the receipt of UI benefits). We recommend that a claimant’s advocate call the Board of Review at 617-626-6400 to request an expedited decision where the claimant is facing a financial hardship. If a decision is still not forthcoming after a hardship

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request, advise the claimant to contact her state representative or state senator for assistance in obtaining a decision.

The Board of Review may make independent findings of fact only in cases where it opts to conduct its own evidentiary hearing. In *Boston Mutual Life Ins. Co. v. Director of the Div. of Employment Security*, 384 Mass. 807, 427 N.E.2d 748 (1981), the SJC noted that in those cases where the Board does not conduct an evidentiary hearing of its own, it is limited by the terms of G.L. c. 151A, § 41(b) to inquiring whether the review examiner's findings of fact are supported by substantial evidence; see also *Director of the Div. of Employment Sec. v. Fingerman*, 378 Mass. 461, 463, 392 N.E.2d 846 (1979).

In passing on questions of law, mixed questions of law and fact, or application of law to facts found, however, the scope of the Board's review is *de novo*. In *Fingerman*, the court stated that, when addressing questions that are not purely factual, "if it were left to final decision by the several review examiners, consistent application of the statute to persons similarly situated would be impaired. Application of law to fact has long been a matter entrusted to the informed judgment of the board of review." 378 Mass. at 463-64 (citing *Garfield v. Director of the Div. of Employment Security*, 377 Mass. 94, 95, 384 N.E. 2d 642 (1979)). Decisions of the Board of Review are binding precedent with respect to the DUA. *Dicerbo v. Nordberg*, No. 93-5947B, 1998 WL 34644, \*5-\*6 (Mass. Super. 1998). For this reason, advocates are advised to research the Board's Key Decisions on the issues relevant to their client's case.

An issue that comes up often is how to deal with a review examiner's adverse credibility findings on appeal to the Board or to Court as the responsibility for deciding credibility and the weight to be given to conflicting testimony rests with the review examiner as the trier of fact. *Nantucket Cottage Hosp. v. Director of the Div. of Employment Security*, 338 Mass. 1006, 446 N.E. 2d 75 (1983).

In confronting an adverse credibility finding, advocates should determine whether the finding is supported by substantial evidence in the record which requires an inquiry "upon consideration of the entire record." G.L. c. 30A, § 14(7). Under this standard, the Supreme Judicial Court has noted that "we are not required to affirm the board merely on a finding that the record contains evidence from which a rational mind might draw the desired inference." *New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 466 (1981). Courts must inquire as to whether a reasonable mind could accept an agency's conclusion based on the evidence in the record, and should consider the entire record for evidence that substantially tends toward the opposite conclusion. *Raytheon Co. v. Director of*

*the Div. of Employment Sec.*, 364 Mass 593, 595 (1974); *Allen of Michigan v. Deputy Director of the Div. of Employment & Training*, 64 Mass. App. Ct. 370 at 378, 833 N.E.2d 627 at 634 (2005).

Good examples of considering the entire record are found in many decisions. See, e.g., BR-0029-6022 98 (8/30/10) (rejecting review examiner's finding of misconduct based on a credibility assessment that failed to weigh other material evidence); BR-110773 (1/27/10) (Key) (holding that even if the claimant's credibility was in doubt, the review examiner may not ignore competent medical evidence that the claimant's medical condition rendered him to either perform or to preserve his job.) Especially in a discharge case where the burden of proof falls on the employer, rejecting the claimant's testimony as not credible does not suffice to fulfill the employer's burden to prove that the claimant willfully disregarded the employer's interests. *Magbagbeola v. Director of the Div. of Unemployment Assistance*, 76 Mass. App. Ct. 1119, 923 N.E.2d 122, 123 (2010).

For an insightful article about how credibility determinations are inappropriately influenced by narrative styles that reflect educational, cultural and linguistic influences, see 14 Harv. Latino L. Rev. 155, *Narrative Preferences and Administrative Due Process*, Spring 2011.

Although the Board has traditionally not held many hearings, recently a GBLS case was remanded from the District Court to the Board rather than to the Hearings Department which held its own *de novo* hearing. See *Curtis v. Commissioner of the Div. of Unemployment Assistance*, 68 Mass. Appt. Ct. 516, 525 (2007) ("... the board may take additional evidence or send this matter back to the review examiner ...). The remand order specified that the action be remanded to the DUA Board of Review for a *de novo* hearing. Advocates wishing a remand to the Hearings Department should ask that this be clearly stated in the Court's Order. In this particular case, the claimant and employer were questioned by all three Board commissioners and the Board's staff attorney resulting in a thoughtful opinion reversing the denial of UI.

(A sample appeal letter to the Board is attached as **Appendix L.**)

## 64 How Do You Appeal to the Court?

One must appeal the Board's final decision—whether it is a denial of the request for review, or a denial after acceptance of the decision—by filing a complaint for judicial review within 30 days of the date on the front of the page of the Board's decision.

Either party may file a complaint or petition for judicial review within 30 days of the Board's decision. Again, if there is no decision within the 21-day period, the application is deemed denied on the twenty-first day, and the party must take an appeal within 30 days thereof (i.e., within 51 days of filing the application for review). The Court must *receive* the complaint or petition before the expiration of the 30-day period; it is not sufficient for the complaint or petition to simply be postmarked within that time. *Garrett v. Director of the Div. of Employment Security*, 394 Mass. 417, 475 N.E.2d 1221 (1985).

An appeal lies in the District Court within the judicial district where a party lives, last worked, or has a usual place of business. G.L. c. 151A, § 42. As DUA's principal office is in Boston, a one-party appeal may be filed in the Boston Municipal Court. Judicial review is provided pursuant to the state Administrative Procedure Act, G.L. c. 30A, § 14.

For indigent claimants, the filing fee may be waived pursuant to G.L. c. 261, § 27C. Although the statute does not require it, many District Court clerks insist on documentary proof of the assertions in the Affidavit of Indigency (e.g., a copy of a claimant's EBT card (welfare receipt) or showing eligibility for food stamps, Medicaid, or other means tested programs) or require approval of the waiver request by a judge.

**Note:** Any delay in approving the waiver of the filing fee occasioned by a clerk's seeking further information or judicial approval does *not* toll the filing deadline for the complaint. Do not leave the courthouse without insuring that the clerk has filed and docketed your case—and ask the clerk to stamp your copy of the complaint with the date and the docket number. Although in some District Courts, the clerk will insist that the matter go before a Judge, if the affidavit is regular and complete on its face this should not be necessary. *Reade v. Secretary of Comm.*, 472 Mass. 573, 36 N.E. 3d 519, 525 (2015).

Under G.L. c. 151A, § 42, the plaintiff must serve the complaint upon each defendant (the Director of DUA and the employer, or simply the Director of DUA in a one-party appeal) by registered or certified mail, return-receipt requested, **within 7 days after commencing the action for judicial review**; and the defendant employer must file its answer within 28 days. In *Caldwell v. A-Sales, Inc.*, 385 Mass. 753, 754–55, 434 N.E.2d 174, 175 (1982), the SJC held that where an employer deliberately chose not to file an answer in an employee’s District Court action seeking review of denial of UI benefits, this went beyond an “innocuous mistake,” precluding the employer’s right to appeal the District Court’s judgment. The SJC also noted that because the requirement to file an answer within 28 days of service of the complaint was a statutory requirement and not governed by the rules of civil procedure, the District Court had improperly allowed the employer’s late-filed appeal. Nonetheless, DUA’s Legal Counsel has assented to late-filed answers by employers’ attorneys.

The answer does not include the record of the proceedings (including the transcript); DUA is simply required to make a “reasonable effort” to file the record with the answer. G.L. c. 151A, § 42. DUA may also file a copy of the record in lieu of an answer, which is increasingly DUA’s practice.

The court will review the administrative record but will not conduct an evidentiary hearing. The petitioner must mark up the case for a court hearing, although some District Courts will automatically schedule a hearing after receipt of the case record. Although DUA will argue that the court should defer to its expertise, the SJC has frequently held that “principles of deference [to the interpretation by administrative agencies] however, are not principles of abdication.” *Smith v. Commissioner of Transitional Assistance*, 431 Mass. 638, 646 (2000).

The court will only admit any new evidence after it has granted a motion to remand to DUA. *It is important to request that the court retain jurisdiction pending remand* to avoid the necessity of filing a new petition, along with an additional filing fee, if the claimant is again disqualified after the second DUA hearing and Board of Review appeal. Any further appeal from the District Court is taken to the Appeals Court in accordance with the Massachusetts Rules of Appellate Procedure.

(A sample complaint for judicial review is attached as **Appendix M.**)

## 65 How Do You Recover Attorney's Fees in Unemployment Cases?

If DUA itself violates federal law or the U.S. Constitution, a claimant who successfully challenges that failure may be entitled to recover attorney fees against DUA under the federal Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988. For example, if DUA unreasonably delays making an eligibility decision or has a practice that unreasonably delays decisions in a class of cases, DUA may be violating the "when due" requirement of the federal unemployment law, 42 U.S.C. § 503(a)(1). If the agency denies procedural due process because of a defect in its hearing procedures, it may violate the federal requirement that an aggrieved unemployment claimant receive a "fair hearing before an impartial tribunal." 42 U.S.C. § 503(a)(3).

DUA in a petition for a judicial review under G.L. c. 151A, § 42 will claim that the District Court has no jurisdiction to award attorney's fees, and has prevailed on that point. Although District Court decisions exist to the contrary, any constitutional or federal law claim with an attorney fee claim under § 1988 may simply be filed in Superior Court, which does have jurisdiction over federal claims and their attendant fee awards. The District Court petition for judicial review can then be consolidated with the Superior Court Action. The Supreme Judicial Court has held, in another context, that a proceeding for judicial review is an appropriate place to raise a federal attorney's fees claim. *Stratos v. Department of Pub. Welfare*, 387 Mass. 312, 439 N.E.2d 778 (1982). If the claimant prevails on nonfederal grounds, the Court need not decide the federal claim in order for the claimant to lay a basis for an attorney's fees award. It is enough that the undecided federal claim is not frivolous and that it shares "a common nucleus of operative fact" with the other claims on which the claimant prevailed. *Draper v. Town of Greenfield*, 384 Mass. 444, 425 N.E.2d 333 (1981). Under the principles of 42 U.S.C. § 1988, reasonable attorney's fees should reflect the objective market value for comparable legal services in the private sector. *Stratos v. Department of Pub. Welfare*, 387 Mass. 312, 439 N.E.2d 778 (1982).

A private attorney who has represented a UI claimant must petition DUA, (either the Director or the Board of Review, as appropriate) for approval of attorney's fees before collecting attorney's fees from the claimant. G.L. c. 151A, § 37. An approved practice is to place the fee in an IOLTA account and then obtain approval after services has been rendered. An instruction sheet for petitioning

DUA for attorney's fees is available at [www.masslegalservices.org](http://www.masslegalservices.org), under Employment → Unemployment Insurance.

Requests for approval of fees should be submitted at the Hearings Level to DUA Director's Suite, 3rd Floor, Fee Approval Requests, 19 Staniford Street, Boston, MA 02114 or email: [section37fee@massmail.state.ma.us](mailto:section37fee@massmail.state.ma.us) and at the Board of Review to Department of Unemployment Assistance, Board of Review, 4th Floor, 19 Staniford Street, Boston, MA 02114.

**Note:** As a practice point, an advocate determines what fee to claim based on what the advocate charged the client for representation and what the claimant agreed to under their fee agreement. If there was no clear fee agreement, it is likely that it will be difficult to get the Board's approval for attorney's fees.



# Appendix A: Unemployment Insurance Centers—Statewide List



## DEPARTMENT OF CAREER SERVICES

### Find a MassHire Career Center Near You

Visit a MassHire Career Center for:

- Job search assistance;
- Career planning information;
- Workshops on job search techniques including interviewing, networking, and resume writing;
- Data on the current statewide and local job market; and
- Resources to help you find the right training opportunities;
- Tools to help you conduct an effective job search.

#### Greater Boston

##### MassHire Boston Career Center

1010 Harrison Avenue  
Boston, MA 02119  
(617) 541-1400, TTY#: (617) 442-3610

##### MassHire Downtown Boston Career Center

75 Federal Street, 3rd Floor  
Boston, MA 02110  
(617) 399-3100, 800-436-WORK (9675)

##### MassHire Metro North Career Centers

186 Alewife Brook Parkway, Suite 310  
Cambridge, MA 02138  
(617) 661-7867, (888) 454-9675  
TTY#: (800) 439-2370

(affiliated limited services)\*

4 Gerrish Avenue  
Chelsea, MA 02150  
(617) 884-4333

100 TradeCenter  
Suite G-100  
Woburn, MA 01801  
(781) 932-5500, (888) 273-WORK

##### MassHire Framingham Career Center

1671 Worcester Road  
Framingham, MA 01701  
(508) 861-7993

##### MassHire Norwood Career Center

32 Day Street  
Norwood, MA 02062  
(781) 269-5494

#### Northeastern Massachusetts

##### MassHire Merrimack Valley Career Centers

Haverhill Opportunity Works  
(HOW Building)  
671 Kenoza Street,  
Haverhill, MA 01830  
(978) 241-4730

255 Essex Street  
Lawrence, MA 01840  
(978) 722-7000

##### MassHire Lowell Career Center

107 Merrimack Street  
Lowell, MA 01852  
(978) 458-2503, TTY#: (978) 805-4915

#### MassHire North Shore Career Centers

70 Washington Street  
Salem, Massachusetts 01970  
(978) 825-7200

(affiliated limited services)\*

5 Pleasant Street  
Gloucester, MA 01930  
(978) 283-4772

(affiliated limited services)\*

North Shore Community College  
300 Broad Street, LE-102  
Lynn, MA 01901  
(781) 691-7450

##### MassHire North Shore Youth Career Center\*\*

117 Franklin Street  
Lynn, MA 01902  
(781) 691-7430

#### Southeastern Massachusetts

##### MassHire Attleboro Career Center

95 Pine Street  
Attleboro, MA 02703  
(508) 222-1950

##### MassHire Cape & Islands Career Center

372 North Street  
Hyannis, MA 02601  
(508) 771-JOBS (5627),  
TTY#: (508) 862-6102

##### MassHire Greater Brockton Career Center

34 School Street,  
Brockton, MA 02301  
(508) 513-3400

##### MassHire Greater Brockton YouthWorks\*\*

34 School Street, lower level  
Brockton, MA 02301  
(508) 584-9800

##### MassHire Fall River Career Center

446 North Main Street  
Fall River, MA 02720  
(508) 730-5000

##### MassHire Youth Connections\*\*

139 South Main Street  
Fall River, MA 02720  
(508) 675-9245

##### MassHire Greater New Bedford Career Center

618 Acushnet Avenue  
New Bedford, MA 02740  
(508) 990-4000

#### MassHire Taunton Career Center

72 School Street  
Taunton, MA 02780  
(508) 977-1400

#### MassHire South Shore Career Centers

36 Cordage Park Circle, Suite 214B  
Plymouth, MA 02360  
(617) 376-5170

1515 Hancock Street  
Quincy, MA 02169  
(617) 745-4000

#### Central Massachusetts

##### MassHire North Central Career Center

100 Erdman Way  
Leominster, MA 01453  
(978) 534-1481, TTY#: (978) 534-1657

##### MassHire Southbridge Career Center

5 Optical Drive, Suite 200  
Southbridge, MA 01550  
(508) 765-6430, TTY#: (508) 765-6437

##### MassHire Worcester Career Center

340 Main Street, Suite 400  
Worcester, MA 01608  
(508) 799-1600

#### Western Massachusetts

##### MassHire Franklin Hampshire Career Centers

One Arch Place  
Greenfield, MA 01301  
(413) 774-4361, TTY#: 413-772-2174

(Affiliated limited services)\*

20 West Street  
Northampton, MA 01060  
(413) 774-4361

##### MassHire Holyoke Career Center

850 High Street  
Holyoke, MA 01040  
(413) 532-4900, TTY#: (413) 535-3098

##### MassHire Berkshire Career Center

160 North Street  
Pittsfield, MA 01201  
(413) 499-2220, TTY#: (413) 499-7306

##### MassHire Springfield Career Center

95 Liberty Street, Third Floor  
Springfield, MA 01103  
(413) 858-2800, TTY#: (413) 858-2800

For more information about MassHire Career Centers, visit [www.mass.gov/careercenters](http://www.mass.gov/careercenters)

\* Affiliated limited services - Contact the career center for hours of operation and services available.

\*\* Youth-specific Career Center.

## Appendix B: DUA Directory (By Activity)

### UI Phone Listing By Activity

Apply for UI Benefits (File a Claim), Re-activate Your Claim, Change Your Address, Customer Assistance	TeleClaim Center 1-617-626-6800 1-877-626-6800 toll-free (from area codes 351, 413, 508, 774, 978)
Request benefit payment (sign or certify) by phone (in English, Spanish and Portuguese)	TeleCert 1-617-626-6338 6:00 a.m. to 10:00 p.m.
Verify your UI check status	Payment Status Service 1-617-626-6563
Change Your PIN (Personal Identification Number)	PIN Service 1-617-626-6943
Contact Training Opportunities Program, Trade Readjustment Allowances and WorkShare	Special Programs Unit 1-617-626-5521
Answer questions on Child Support Garnishments	Child Support Unit 1-617-626-6393
Request Overpayment Waiver	Benefits Collection Unit 1-617-626-6300
Get help for an Interstate Claim	Interstate Department 1-617-626-6800
Report Fraud	Fraud Hotline 1-800-354-9927
Apply for Approved Training	Training Opportunities Program Unit 1-617-626-5521

Hearings main lines

Boston

1-617-626-5200

Lawrence

1-978-738-4400

Brockton

1-508-894-4777

Springfield

1-413-452-4700

Relay service for use by deaf and hard of hearing individuals

1-800-439-0183 or 711

**Appendix C: Reserved for Future Use**

## Appendix D: Sample Letter Requesting Waiver

[Date]

Department of Unemployment Assistance  
19 Staniford Street  
Boston, MA 02114

***Re: XXXXX XXXXX's (SSN: 000-00-0000) Request for a Waiver of an Overpayment***

To Whom it May Concern:

I am submitting a request for a waiver of an overpayment on behalf of my client XXXXX XXXXX. Enclosed please find a copy of the statement of overpayment and Ms. XXXXX's waiver request. As explained in detail below, Ms. XXXXX is entitled to a waiver as she meets the standards set forth at 430 CMR 6.05 as the recovery of the overpayment would defeat the purpose of benefits otherwise authorized and recovery would be against equity and good conscience.

### **Brief Factual Background**

Ms. XXXXX received a statement of overpaid account alleging she was overpaid unemployment insurance. Ms. XXXXX applied for UI benefits in January of 2011 and received benefits from April through the end of June. Ms. XXXXX was determined to be ineligible for UI benefits as result of appeal by the employer, which resulted in an overpayment of \$2,277.00. The Division of Unemployment Assistance correctly determined that the overpayment was due to an error and not the claimant's fault. Ms. XXXXX seeks a waiver for the full amount of \$2,277.00.

**1. Ms. XXXXX is entitled to a waiver because it is against equity and good conscience to recover the payment because Ms. XXXXX would have been entitled to other benefits but for the error.**

In determining whether recovering an overpayment would be against good conscience and equity, DUA is required to look at whether the receipt of UI resulted in the claimant relinquishing other rights or changed her position for the worse. Ms. XXXXX clearly meets this standard.

Ms. XXXXX is a single mother of 2 children who does not receive child support. If Ms. XXXXX had not received UI, she would have been eligible for supplemental payments of Transitional Aid to Families with Dependent Children (TAFDC) through the Department of Transitional Assistance. Her supplemental TAFDC grant would have been \$478.00 per month. *See 106 CMR 204.420, Table of Payment Standards.*<sup>1</sup> Because DTA regulations do not provide

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<sup>1</sup> This calculation is based on the Table of payments for a family of 4 as well as the fact that the first \$50 of child support is non-countable income for TAFDC.

any mechanism to pay TAFDC retroactively, if DUA were to recoup the overpayment for this period there is no possibility that Ms. XXXXX can recover the TAFDC payments she would otherwise have received

Moreover, Ms. XXXXX relinquished additional monetary rights by not applying for TAFDC during this period. Ms. XXXXX's food stamp allotment would have been significantly increased during this period if her source of income was TAFDC and child support. Her monthly rental obligation would have been significantly reduced<sup>2</sup>.

For all of the above reasons, the recoupment of the overpayment would be against equity and good conscience and Ms. XXXXX's request for a waiver should be approved.

**2. Ms. XXXXX is entitled to a waiver because it would defeat the purpose of benefits otherwise authorized if DUA recovered the overpayment.**

Ms. XXXXX is eligible for a waiver under DUA's alternative consideration. In determining whether a claimant is entitled to a waiver under this test the inquiry is whether the claimant and her family are able to afford to pay back the waiver. Ms. XXXXX's financial information is included in the waiver form, but I want to take this opportunity to elaborate on her desperate financial situation.

Ms. XXXXX has been actively seeking full-time work but cannot secure any employment. She is currently behind on her auto insurance payments and utility bills. For all of the above reasons it is clear that Ms. XXXXX does not have the financial resources to pay back the overpayment.

**Conclusion**

Ms. XXXXX's request for a waiver of an overpayment should be approved as she clearly meets both tests that DUA employs in determining waivers. Thank you for your consideration of this request. If you have any questions please call me at xxx-xxx-xxxx.

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<sup>2</sup> There are a multitude of other benefits that Ms. Richardson may have relinquished by not having received TAFDC during these weeks. TAFDC eligibility provides automatic entitlement to related childcare benefits as well as education and training opportunities.

**Appendix E: Reserved for Future Use**

**Appendix F: Reserved for Future Use**



# WORK SEARCH ACTIVITY LOG

The Massachusetts Department of Unemployment Assistance (DUA) requires that as a condition of eligibility you **must**:

- Make at least 3 work searches per week. Each work search must be conducted on a different day;
- Keep a detailed written log of your work search activities. Remember to bring printed completed copies of all Work Search Activity Logs to your Career Center appointments;
- Provide your work search information to DUA upon request.

This log is provided to help you track your work search activities. Most likely you have done more, but you only need to list one activity on three (3) different days for each week claimed. If you need additional logs, you can download a copy at [www.mass.gov/dua/worksearch](http://www.mass.gov/dua/worksearch) or obtain a copy at your local Career Center.

**PRINT A COPY OF WORK SEARCH ACTIVITY LOG (this form) PRIOR TO SUBMISSION.**

Name \_\_\_\_\_ Social Security Number \_\_\_\_\_  
 Previous Occupation \_\_\_\_\_ Occupation of Interest \_\_\_\_\_  
 Previous Pay Rate \$ \_\_\_\_\_ Minimum Acceptable Pay Rate \$ \_\_\_\_\_

Week beginning Sunday: 11 / 02 / 14 through Saturday: 11 / 08 / 14

DATE	POSITION	PAY RATE	EMPLOYER/ADDRESS/TELEPHONE	JOB ID OR PERSON CONTACTED	HOW CONTACTED: (WEB, PHONE, MAIL, JOB FAIR, NETWORKING, ETC.)	RESULTS
11/3/14	Analyst	\$52,000 per year	ABC Research, Incorporated Jobtown, MA 508-774-9876	Jen Smith	Informational Phone Interview	Made Network Contact
11/5/14	Cook	\$12 per hour	Joe's Diner Anytown, MA 508-791-1110	Joe Jones	Walk-in	No openings
11/7/14	Personal Trainer	\$25 per hour	Personal Best Training	Contact Name or Job ID Number	Web	Closed

Week beginning Sunday: \_\_\_/\_\_\_/\_\_\_ through Saturday: \_\_\_/\_\_\_/\_\_\_

DATE	POSITION	PAY RATE	EMPLOYER ADDRESS/TELEPHONE	PERSON CONTACTED	HOW CONTACTED: (WEB, PHONE, MAIL, JOB FAIR, NETWORKING, ETC.)	RESULTS

Week beginning Sunday: \_\_\_/\_\_\_/\_\_\_ through Saturday: \_\_\_/\_\_\_/\_\_\_

DATE	POSITION	PAY RATE	EMPLOYER ADDRESS/TELEPHONE	PERSON CONTACTED	HOW CONTACTED: (WEB, PHONE, MAIL, JOB FAIR, NETWORKING, ETC.)	RESULTS

									NETWORKING, ETC.)	

Week beginning Sunday: \_\_\_/\_\_\_/\_\_\_ through Saturday: \_\_\_/\_\_\_/\_\_\_

DATE	POSITION	PAY RATE	EMPLOYER ADDRESS/TELEPHONE	PERSON CONTACTED	HOW CONTACTED: (WEB, PHONE, MAIL, JOB FAIR, NETWORKING, ETC.)	RESULTS

Week beginning Sunday: \_\_\_/\_\_\_/\_\_\_ through Saturday: \_\_\_/\_\_\_/\_\_\_

DATE	POSITION	PAY RATE	EMPLOYER ADDRESS/TELEPHONE	PERSON CONTACTED	HOW CONTACTED: (WEB, PHONE, MAIL, JOB FAIR, NETWORKING, ETC.)	RESULTS

Week beginning Sunday: \_\_\_/\_\_\_/\_\_\_ through Saturday: \_\_\_/\_\_\_/\_\_\_

DATE	POSITION	PAY RATE	EMPLOYER ADDRESS/TELEPHONE	PERSON CONTACTED	HOW CONTACTED: (WEB, PHONE, MAIL, JOB FAIR, NETWORKING, ETC.)	RESULTS

Week beginning Sunday: \_\_\_/\_\_\_/\_\_\_ through Saturday: \_\_\_/\_\_\_/\_\_\_

DATE	POSITION	PAY RATE	EMPLOYER ADDRESS/TELEPHONE	PERSON CONTACTED	HOW CONTACTED: (WEB, PHONE, MAIL, JOB FAIR, NETWORKING, ETC.)	RESULTS

## Appendix H: GBLS Unemployment Insurance Claim Checklist

### PREPARATION FOR UNEMPLOYMENT INSURANCE (UI) HEARING & APPEAL: A Greater Boston Legal Services' Checklist Manifesto

#### 1. Initial client meeting.

- a. Interview client.<sup>1</sup>
- b. Client retainer signed.
- c. DUA limited or full release signed. Medical releases signed, if necessary.
- d. Authorization for release of personnel records signed.
- e. Collect documents from client:
  - \_\_\_\_\_ All notices and decisions from DUA.
  - \_\_\_\_\_ All letters, statements, and warnings from employer.
  - \_\_\_\_\_ Medical documents, if relevant.
  - \_\_\_\_\_ Pay stubs, if relevant.
  - \_\_\_\_\_ Union contract, if applicable.
  - \_\_\_\_\_ Employment contract, if applicable.
  - \_\_\_\_\_ Employer policy manual, rule book, guidebook or handbook, if applicable.
- f. Ask client whether employer provided DUA-approved information on the right to file for UI (if not, or other good cause for delay, can predate claim if necessary – see G.L. c. 151A, §62A (g)).

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<sup>1</sup> We suggest at least 3 client interviews for fact-gathering and hearing preparation. Please be sensitive to potential problems of transportation costs (and reimburse or provide Charlie cards). The first interview serves as an introduction and should include open-ended questions to obtain as much information as possible about the place of work and what happened. It is critical that you build trust at this meeting so that the client understands that he/she should tell you everything --- especially "bad facts," and the client has a chance to vent. The second meeting, occurring after you have developed the theory of the case, can be much more focused with more closed questioning and explaining to client what facts are relevant to the case (often clients need to know that this is not a "trial" over the separation but rather a hearing to get UI benefits – therefore, only certain facts will be relevant). The third meeting allows you to do mock direct and have someone else do a mock cross of your client. Some clients will require yet another meeting to feel prepared and confident.

- g. Inform client of job search requirements (including weekly certification requirement and need to keep a work search log of at least 3 contacts a week) and determine whether or not client is claiming benefits each week.
- h. Inform client of potential availability of extended UI while participating in training under G.L. c. 151A, § 30 (the Training Opportunities Program). Be sure to inform the client that up to 26 weeks of extended UI benefits are **available only if client applies within 1st 20 weeks of a new or approved claim** and the possibility that there may be available funds to pay for a training program. For more information about training programs, refer client to MassHire Career Center. The client must timely apply for the extended UI benefits with DUA, unless the 20 week period can be tolled or waived for good cause. If the client was initially denied UI, and the denial is reversed, the 20 weeks starts to run one week after the decision reversing the denial.
- i. For clients without any source of income, check for eligibility for other programs, such as TAFDC cash assistance (welfare), SNAP (see [www.gettingfoodstamps.org](http://www.gettingfoodstamps.org)), Fuel Assistance, and charitable assistance. This is especially important if the claimant is appealing a UI disqualification. You may wish to speak with a welfare advocate to explore all possibilities of income maximization, including subsidized child care. For advice, use the Legal Resource Finder, [www.masslrf.org](http://www.masslrf.org). The LRF provides contact information for legal aid and other programs that may be able to help for free or at a low cost. It will also provide links to legal information and self-help materials.
- j. Inform client of potential eligibility for earned income credit. (Call 1-800-TAX-1040.)
- k. Scan the client's signed DUA release and fax it to the DUA Hearings Department to request a copy of the DUA appeal folder for the hearing. Call the Hearings Department to confirm their receipt of the faxed request.

## 2. Review Hearing file.

- a. If DUA is not mailing or faxing the appeal folder to you, bring the client release form to DUA Hearings Department to obtain the DUA appeal folder. You always need a picture ID to get into DUA.
- b. Make a copy of the appeal folder, and review it. Next, review all documents (DUA appeal folder, and, if applicable, personnel and medical records) with client - focusing especially on the claimant and employer statements.

- c. Check for timeliness of employer's response to claim (if beyond 10 days without "good cause" employer loses party status and is a witness only).
- d. For clients who are able to establish access to their UI Online account, ask them to log-in during the interview so that you can ascertain all outstanding issues. Emphasize the importance of keeping UI Online access confidential by advising clients to refrain from sharing their SSN and password.
- e. If client has a telephone hearing, the DUA appeal folder should be accessible via their UI Online account, unless they have chosen U.S. Mail for all notifications, in which case DUA will mail the appeal folder to the client in advance of the hearing.

**3. Obtain other documents.**

- a. The claimant's personnel records from the employer<sup>2</sup>
- b. Subpoena documents for hearing, if necessary
- c. Medical records, if relevant.

**4. Contact and interview potential witnesses.**

- a. Prepare affidavits for witness to sign if witness cannot attend hearing; however, in person testimony carries more credibility and is preferred.
- b. Subpoena witness to compel attendance at hearing, if necessary and strategically wise.

**5. Hearing preparation.**

- a. Review administrative hearing rules (801 C.M.R. 1.02).
- b. Review relevant area of law (including UI Advocacy Guide, Statute, Regulations, Adjudication Handbook, Unemployment

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<sup>2</sup> It is a strategic decision whether to seek a copy of the claimant's employment record or subpoena documents to a hearing. On the plus side, this information will provide you with information that may be relevant to the claimant's case. The downside is that such a request tips off the employer that the claimant may be represented at the hearing and the employer may come to the hearing better prepared than s/he may otherwise. Of course, your client may obtain the personnel file and has the right to do so. See G.L. c. 149, § 52C.

Insurance Policy and Performance memos, and all pertinent Board of Review “key decisions.”)

- c. Develop the theory of your case, the facts that support your theory, and how to address any facts that may not support the theory. Prepare your client to tell his or her story in as concise a manner as possible, with a laser focus on those facts that are relevant in light of the UI statutory requirements. Simply put, your client’s story must explain why she no longer works for the employer and must demonstrate why, under Massachusetts UI law, the separation qualifies your client for UI benefits.
- d. Prepare direct examinations of your witnesses, including your client.<sup>3</sup> Advise your witnesses to: 1) answer only the question being asked; 2) refrain from providing unnecessary details; 3) refrain from guessing; 4) refrain from answering a question not understood; 5) attest to what the witness directly observed and heard; and 6) to always tell the truth. Assure your client that you will elicit all of the relevant information favorable to the client’s case through your direct questioning of the client and the client’s witnesses.
- e. Review hearing procedures with client and witnesses, and role-play direct examination by review examiner and advocate and cross-examination of client and witnesses by employer.
- f. Prepare cross-examination of employer’s potential witnesses<sup>4</sup>.
- g. Prepare proposed findings of facts and rulings of law and include, where possible, key decisions of the Board.
- h. Review appeal folder. Organize your proposed exhibits. Bring 3 copies of each proposed exhibit to the hearing – one to submit, one for yourself and one for opposing party.
- i. Prepare brief closing statement - no more than a couple of minutes.

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<sup>3</sup> Take sufficient time to think through and draft the direct and cross. Your client’s direct is the heart of the case and requires careful attention. For an excellent resource on developing the theory of your case as well as the direct and cross-examination, see Thomas Mauet, Trial Techniques and Trials, Aspen Publishers, 10th Ed., 2017.

<sup>4</sup> Do not ask an employer witness a question unless you know what their answer will be. Do not rely on employer witnesses to win your case. Employer witnesses may not recall events with the same clarity or detail as your client and may be compelled to support the employer’s view of the case to keep their job.

## 6. Hearing.

- a. Bring picture identification and remind your client to bring a picture ID to in-person hearings, otherwise you will not be let into the building. Get to hearing at least 30 minutes early due to delay passing through security. If there is a long line, announce to the guards that you are present for a hearing and head to the security desk to check-in. Note: you can be defaulted if you are 10 minutes late! Bring a pad of paper for your client to write notes and request a brief recess if necessary. Review the DUA appeal folder one more time at DUA before the hearing to make sure that nothing has been removed or added.
- b. If this is an interpreter-assisted hearing, be sure and arrive early so that you can review the file with your client and interpreter. This is a good way to assess the interpreter's skills, get your client and the interpreter comfortable with each other, and serves to familiarize the interpreter with the issues at the hearing in a way that does not compromise her impartiality.

## 7. Favorable Hearing Decision from DUA.

If hearing decision is favorable to claimant, inform the claimant that the employer has 30 days to file an appeal and that the claimant should contact you immediately if notified of an appeal. Remind your client of the availability of extended UI training benefits and the 20 week application deadline for submitting a completed application to DUA. The 20 week clock starts running once the claimant becomes a recipient of UI.

## 8. Unfavorable Hearing Decision.

If the hearing decision is unfavorable, file an application for review with the DUA Board of Review within 30 days after the mailing date of an adverse hearing decision, or the date of such decision if email notification is chosen. The DUA Review Examiner's decision provides the appeal form needed.

- a. Listen to CD of prior hearing (free for legal services clients), and review Hearing Appeal Results and all hearing exhibits.
- b. Prepare memorandum of law in support of application for review and submit with the appeal request, or within five business days of the request, with prior Board permission. The UI Guide is full of helpful Board decisions and the Board webpage posts the most recent decisions available. Keep the memo short and to the point.

- c. Board of Review will review the hearing CD and all exhibits and analyze the review examiner's decision. The Board rarely grants a new hearing, but if so repeat steps 6 – 8.

## 9. Appeal to the District Court.

If the Board of Review denies the application for review within 21 days, you must file a complaint for judicial review in District Court within 30 days of the mailing date on the Board of Review's decision or the date of the decision where email notification is chosen. If the Board of Review does not take action within 21 days of filing, the application for review is deemed denied, and you must file a complaint for judicial review in the District Court within 30 days (51 days from date of filing the application for review with the Board of Review).

- a. Serve complaint on DUA and employer within **7 days** of filing in court by certified mail, return receipt requested. Some courts require the enclosure of a subpoena as well.
- b. Answer is due within 28 days of service, a statutory requirement. DUA files the complete administrative appeal record, including a transcript of the hearing and all hearing exhibits, in lieu of an Answer. Corporate employers must be represented by counsel in court. Most employers depend on DUA to defend BOR decisions favorable to them. Send court a copy of the return receipt proving service with cover letter explaining service under G.L. c. 151A, § 42.
- c. Call opposing DUA counsel, get agreed date and mark up for hearing giving notice to both DUA and employer (or employer's attorney, if attorney participated below or if attorney has noticed appearance), if the court has not earlier set a date for oral argument.
- d. If employer appeals, DUA will usually defend the Board's decision awarding your client UI. However, it is helpful to your client if you enter an appearance as well and work with the DUA Lawyer assigned to the case. Be sure to file your answer within the 28 day period required by statute.
- e. Prepare for court hearing, including a short brief, ideally no more than 10 pages long. Depending on the case, you may want to reach out to the DUA counsel assigned to the case to ascertain the possibility of a favorable settlement that includes a reversal or remand for a new hearing; a remand for a hearing to elicit additional testimony from witnesses; or a remand to the review

examiner to make specific additional findings based on the existing record.

**10. Let Us Know**

Please let Brian Reichart, Mass Law Reform Institute know about the outcome of your case at the Board or in Court. If the decision is a Board decision, send a redacted copy of the decision. Email Brian at [breichart@mlri.org](mailto:breichart@mlri.org).

Thank You!

# Appendix I: Request for Personnel Records

## Request for Personnel Records and Release Authorization Form

Company Name: \_\_\_\_\_

Address: \_\_\_\_\_

Attention: \_\_\_\_\_

Dear Employer:

I hereby request copies of any and all files, records, or documents including pay records that you have concerning or referring to me within **5 business days** pursuant to Section 52C of chapter 149.

**(DECIDE whether to have them sent to client directly or not. )** Please send copies of these records to my legal representative, \_\_\_\_\_ of Greater Boston Legal Services, 197 Friend Street, Boston, MA 02114.

Name: \_\_\_\_\_

SS#: \_\_\_\_\_

Address: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

**SAMPLE PUBLIC RECORDS REQUEST FOR DUA FILE**

[Date]

Karen Pare  
Keeper of the Records  
Division of Unemployment Assistance  
19 Staniford Street  
Boston, MA 02114

**Re: Claimant, SS# xxx-xx-1234**

Dear Ms. Pare:

Kindly send me all documents at the Division of Unemployment Assistance pertaining to [Claimant's] claim for unemployment insurance benefits. I have enclosed a signed release.

Thank you for your attention to this matter.

Sincerely

[Advocate]

Enc (1)

Cc: Client

# Appendix J: Sample Subpoena for Use in UI Cases



THE COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF UNEMPLOYMENT ASSISTANCE

Hearings Department

## SUBPOENA

ss.

(County)

TO:

\*\*\*\*\*

YOU ARE HEREBY REQUIRED, in the name of the Commonwealth of Massachusetts,  
Department of Unemployment Assistance, to attend and appear at an administrative hearing to be held at

\_\_\_\_\_  
(Location and address of place of hearing)

on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

at \_\_\_\_\_ o'clock in the \_\_\_\_\_ and at any recessed or adjourned date,

to testify and to give evidence of what you know relating to an unemployment compensation appeal by:

\_\_\_\_\_  
(Appellant's name and address)

**BRING WITH YOU** all books, contracts, documents, payroll records, or other data bearing in any way upon the  
above-mentioned matters. You are further required to bring with you

\_\_\_\_\_  
(Include a description of any specific documents or other written materials which you may want brought to the hearing)

Your failure, without a sufficient excuse, to attend the hearing, may be brought to the attention of the Superior Court which  
may order you to attend and give testimony or be deemed guilty of a contempt of Court and liable for such penalties as  
are provided by law (see reverse side).

Dated at \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_\_

Your appearance is on behalf of: _____ Requested by: _____ Attorney (if applicable) _____ (Address) _____
--

\_\_\_\_\_  
(Authorized Official)

\_\_\_\_\_  
(Title)

If Notary Public  
my commission expires: \_\_\_\_\_

GENERAL LAWS CHAPTER 30A

Section 12. In conducting adjudicatory proceedings, agencies shall issue, vacate, modify and enforce subpoenas in accordance with the following provisions:

(1) Agencies shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence or documents, relating to any matter in question in the proceeding. Agencies may administer oaths and affirmations, examine witnesses, and receive evidence. The power to issue subpoenas may be exercised by any person or persons designated by the agency for such purposes.

(2) The agency may prescribe the form of subpoena, but it shall adhere, in so far as practicable, to the form used in civil cases before the courts. Witnesses shall be summoned in the same manner as witnesses in civil cases before the courts, unless another manner is provided by any law. Witnesses summoned shall be paid the same fees for attendance and travel as in civil cases before the courts, unless otherwise provided by any law.

(3) Any party to an adjudicatory proceeding shall be entitled as of right to the issue of subpoenas in the name of the agency conducting the proceeding. The party may have such subpoenas issued by a notary public or justice of the peace, or he may make written application to the agency, which shall forthwith issue the subpoenas requested. However issued, the subpoena shall show on its face the name and address of the party at whose request the subpoena was issued. Unless otherwise provided by any law, the agency need not pay fees for attendance and travel to witnesses summoned by a party.

(4) Any witness summoned may petition the agency to vacate or modify a subpoena issued in its name. The agency shall give prompt notice to the party, if any, who requested issuance of the subpoena. After such investigation as the agency considers appropriate it may grant the petition in whole or part upon a finding that the testimony, or the evidence whose production is required, does not relate with reasonable directness to any matter in question, or that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive, or has not been issued a reasonable period in advance of the time when the evidence is requested.

(5) Upon the failure of any person to comply with a subpoena issued in the name of the agency and not revoked or modified by the agency as provided in this section, any justice of the superior court, upon application by the agency or by the party who requested that the subpoena be issued, may in his discretion issue an order requiring the attendance of such person before the agency and the giving of testimony or production of evidence. Any person failing to obey the court's order may be punished by the court for contempt.

TO: NOTARY OR JUSTICE OF THE PEACE

This is a form used by the Department of Unemployment Assistance for the issuance of Subpoenas for attendance of witnesses at hearings.

Notaries and justices of the peace are authorized by M.G.L. c. 30A § 12 and by 801 CMR 1.02(10)(i) to issue such subpoenas upon request of a party to a hearing before the Department of Unemployment Assistance.

Your cooperation in the issuance of this subpoena is appreciated.

CERTIFICATE OF SERVICE

I \_\_\_\_\_, being a person not interested in the outcome of this case, certify that on \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_ I served this subpoena by delivering<sup>1</sup> it to \_\_\_\_\_ on \_\_\_\_\_ or by leaving<sup>1</sup> it at \_\_\_\_\_ the place of abode of \_\_\_\_\_

Signed under the pains and penalties of perjury this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_  
\_\_\_\_\_  
(Address)

<sup>1</sup> Fill in whichever is appropriate.

## Appendix K: Proposed Findings of Fact and Rulings of Law

### COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF UNEMPLOYMENT ASSISTANCE HEARINGS DEPARTMENT

In Re: Ms. X  
SS # 0xx-xx-xxxx  
Docket # 4xxxxx

#### CLAIMANT'S PROPOSED FINDINGS OF FACT AND RULINGS OF LAW

The following proposed findings of fact and rulings of law are submitted on behalf of Ms. X, in support of her claim for full unemployment benefits. These proposed findings and rulings demonstrate that DUA's approval of her claim is correct.

#### Proposed Findings of Fact

1. The claimant, Ms. X, was employed by Rxxxx, a temporary agency, from December 8, 2004, to January 21, 2005. During this time, she worked as an Executive Assistant on an assignment at Byyyy.
2. When Ms. X started the assignment at Byyyy, she was told that it would last for six months. To her surprise, the Rxxxx recruiter, Ms M. who was based at Byyyy, told Ms. X on Friday, January 21, 2005, that the assignment was ending that day (after only six weeks).
3. Ms. X was upset when Ms. M. told her that the assignment was ending. Ms. M. suggested that Ms. X contact her on Monday to request a new assignment.
4. Ms. X did in fact call Ms. M. on Monday, January 24, and left a voice mail message.
5. Ms. M. returned Ms. X's call on Tuesday, January 25, and recommended that Ms. X contact L.M., a recruiter at Rxxxx's Cambridge office. Ms. X called and spoke to L.M. right away and then emailed her resume and references, stating that she was "available to start any assignment immediately."
6. As a result of her contacts with L.M., Ms. X interviewed with a company called Vzzzz on either January 26 or January 27, for another temporary assignment through Rxxxx.
7. Following the interview, Ms. X repeatedly called L.M. to follow up; however, she never received a response from the interview.
8. Rxxxx never advised Ms. X, in writing or otherwise, that failure to contact the agency for reassignment would result in being deemed to have voluntarily quit employment.

#### Proposed Rulings of Law

Ms. X 's claim is properly analyzed under the provisions of G.L. c. 151A, § 25(e), applying to a temporary employee of a temporary help firm.

**A. Ms. X 's Separation Shall Not Be Deemed a Voluntary Quit Because She Was Never Advised in Writing of the Obligation to Contact Rxxxx upon the Completion of an Assignment.**

G.L. c. 151A, § 25(e) provides that “a temporary employee of a temporary help firm shall be deemed to have voluntarily quit employment if the employee does not contact the temporary help firm for reassignment before filing for benefits. . .” However, the statute further provides that “[f]ailure to contact the temporary help firm shall not be deemed a voluntary quitting unless the claimant has been advised of the obligation in writing to contact the firm upon completion of an assignment.” Ms. X never received, in writing or otherwise, any notification of an obligation to contact Rxxxx upon completion of her assignment. For this reason alone, Ms. X may not be disqualified from receiving unemployment benefits under G.L. c. 151A, § 25(e)(1).

**B. Even If Ms. X Had Received Notification of the Obligation to Contact Rxxxx upon Completion of an Assignment, She May Not Be Disqualified Because She Did in Fact Fulfill this Obligation.**

Regardless of whether Rxxxx notified Ms. X of the obligation to contact the agency upon completion of an assignment, Ms. X may not be disqualified from receiving unemployment benefits under G.L. c. 151A, § 25(e)(1), because she did in fact contact Rxxxx in an effort to obtain a new assignment.

On Friday, January 21, 2005, Ms. X discussed at length with Ms. M., the Rxxxx recruiter, her dismay at the fact that her Byyyy assignment was ending significantly earlier than she had expected. Ms. M. told Ms. X to contact her on Monday, January 24, about seeking a new assignment.

Ms. X did in fact contact Ms. M. on January 24 and left a voicemail message, although Ms. M. was out that day due to a snow storm. When Ms. M. returned the call on January 25, Ms. X immediately followed her advice to contact L.M., a recruiter in Rxxxx's Cambridge office. After speaking to L.M. on the telephone, Ms. X emailed a resume and cover letter.

As a result of these efforts, Ms. X received an interview, through Rxxxx, for a temporary position with a company called Vqqqq. Although Ms. X repeatedly followed up with L.M. and other Rxxxx recruiters, she never received an offer for the Vqqqq position or any other temporary position through Rxxxx.

As a result of her contacts with Rxxxx, following the end of her assignment with Byyyy, and her efforts to obtain a new job assignment through Rxxxx, Ms. X may not be disqualified from receiving unemployment benefits under c. 151A, § 25(e)(1).

**Conclusion**

As the foregoing facts and discussion make clear, Ms. X may not be disqualified from receiving unemployment benefits under the temporary employee provisions of c. 151A, § 25(e).

Respectfully submitted,  
Ms. X  
By her attorney,

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Ab L. Attorney  
Legal Services  
123 Pal Street  
Boston, MA 02114  
(617) 371-1234

Dated: May 3, 2006

## **Appendix L: Sample Memorandum to the Board of Review**

[Editor's note: This memo from a successful appeal demonstrates the importance of highlighting how the facts in the case do not support the Review Examiner's conclusions.]

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF UNEMPLOYMENT ASSISTANCE  
BOARD OF REVIEW**

In Re: Jane Claimant  
Claimant ID No.: 123456  
Claim ID No.: 109876

**MEMORANDUM IN SUPPORT OF APPLICATION FOR  
FURTHER REVIEW BY THE BOARD OF REVIEW**

The Claimant, Ms. Jane Claimant, ("Claimant") respectfully requests that the Board of Review accept her application for further review of a Department of Unemployment Assistance ("DUA") hearing decision denying her unemployment insurance benefits (UI). Claimant requests that the Board reverse the decision and award UI because the employer failed to meet its burden showing that Claimant engaged in "deliberate misconduct". Alternatively, Claimant requests that the Board remand the case for a *de novo* hearing because the Review Examiner's factual findings, including credibility findings are not supported by substantial evidence.

Claimant was employed as a childcare teacher's assistant on August 14, 2014, was promoted to child care teacher in the summer of 2015 and was discharged on September 21, 2015. Claimant was fired for allegedly sleeping on the job. However, the sole support of this allegation is a photograph taken of Claimant and testimony of the employer. The Review Examiner concludes that the photograph proves that Claimant was sleeping, even though the photograph is consistent with Claimant's testimony that she was rocking the baby with her eyes closed while singing. Because the photograph only captures a moment and it is consistent with

both the employer's story and Claimant's it cannot be deemed substantial evidence to deny UI. To support the denial of UI the Review Examiner credits the employer's testimony that Claimant was observed sleeping and that she had been previously warned about sleeping on the job. The Review Examiner fails to address the countless contradictions and inconsistencies in the employer's testimony. These contradictions include the following:

**1. The employer's testimony regarding prior warnings was inconsistent and contradictory.**

In support of his denial of UI, the Review Examiner explicitly credits the employer's testimony that she was counseled about sleeping on the job prior to the incident that led to her termination. However, even a cursory review of the record shows that this conclusion is unfounded. The employer presented as its primary witness, Mr. Smith, the owner and director of the daycare center. At the first day of the hearing, Mr. Smith testified that there were no concerns about Ms. Claimant's performance prior to September, 2015. Most importantly when asked whether Claimant ever fell asleep on the job prior to the September 2015 allegation, Mr. Smith clearly answered no. The Review Examiner's finding that there were no prior warning is not only consistent with Claimant's testimony but it was the testimony of the employer's primary witness.

The allegation that Claimant received warnings only came on the second day of the hearing and it was the testimony of the owner's wife. When she was asked whether Claimant was ever warned about sleeping on the job she answered that Claimant was warned numerous times in June 2015 about sleeping on the job. Her testimony regarding these incidents was vague and she was unable to provide any dates. Also left unexplained is why the employer did not terminate, or at least discipline, a childcare teacher who is caught several times in one month

sleeping while caring for infants<sup>1</sup>. Ms. Smith's explanation that she counseled Claimant about these incidents—with no written documentation of warnings—is also inconsistent with the fact that Claimant was promoted from teacher assistant to a teacher position starting September 2015. The Review Examiner himself implicitly appears not to credit Ms. Smith's testimony as he only references that the employer warned Claimant about one prior incident, not several as she had testified. There is no explanation as to why the Review Examiner accepts as credible that Claimant was warned once about sleeping on the job when the employer testified she was warned repeatedly for the alleged behavior. The Review Examiner also makes no attempt to reconcile the testimony of the primary witness who on the first day of the hearing explicitly stated there were no prior warnings with the vague and contradictory testimony of the witness on the second day of the hearing. It is an error of law to deem such blatantly contradictory evidence as substantial evidence.

**2. The employer's testimony regarding Claimant's termination was inconsistent and contradictory.**

In the DUA questionnaire and in his testimony, Mr. Smith identified an employee, Ms. Snitch, as the person who “woke up” Claimant on September 15. However, Ms. Smith contradicted this testimony and instead insisted it was Ms. Other-snitch, a different employee, who saw Claimant sleeping.

More importantly, the testimony regarding the observation of Claimant was also contradictory. The affidavit provided by Ms. Snitch, the employee identified by Mr. Smith as

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<sup>1</sup> Claimant adamantly denies she was ever warned about sleeping on the job. However, the Review Examiner's conclusion, even if true, is legally flawed. If, as the employer claimed, Claimant was spoken to about sleeping on the job multiple times but she was never disciplined or terminated, her alleged sleeping on the job in September, 2015 is not disqualifying activity. If the employer's testimony is true, Claimant had no reasonable expectation that sleeping on the job would lead to her termination. *New England Wooden Ware Corp. v. Commissioner of the Dep't of Employment & Training*, 61 Mass. App. Ct. 532 (2004).

the direct witness of the incident, is of questionable credibility. In her affidavit, Ms. Snitch claims that when she witnessed Claimant sleeping, she feared for the safety of the child so she went and took a picture. The Review Examiner never examines the plausibility of testimony that Claimant was observed sleeping while holding an infant and that the first action taken was to take a picture instead of securing the safety of the child.<sup>2</sup> There was also contradictory testimony how long Claimant was allegedly asleep and whether she was snoring or not.

Mr. and Ms. Smith also offered contradictory testimony regarding what actions were taken after the incident in question. Mr. Smith testified that there were no further conversations with Claimant until she was terminated on September 21. Ms. Smith claims the incident was discussed with Claimant the same day, September 18, and not on September 21, the day she was terminated.

For the above reasons, Claimant respectfully requests the Board accept her appeal and overturn the hearing decision and award UI or remand the case for a *de novo* hearing.

Respectfully Submitted,

Jane Claimant  
By her Attorney,

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Abe L. Lawyer  
The Greatest Legal Services  
197 Pal Street  
Boston, MA 02114  
617-xxx-xxxx  
June 22, 2016

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<sup>2</sup> Claimant contends that the employer terminated her after she made her concerns known regarding conditions at the employer's workplace. For purposes of UI eligibility, Claimant does not need to prove her termination was pretextual but the fact that an employee took a picture of Claimant instead of securing a child allegedly in danger does suggest there are other motivations behind the employer's actions.



called the office, but she remained uncertain of her condition and the extent of her illness. Upon her return, B provided her employer with notices from two doctors and expected to resume work. B was informed that her clients had been reassigned, but that the supervisor would make some calls and possibly connect her with some new clients. B was never told that she had actually been terminated, but as the employer gave her no further assignments, she applied for and was denied UI.

The UI program provides critical financial assistance to unemployed Massachusetts workers who have lost their jobs through no fault of their own and who are able and available for work. Plaintiff seeks a reversal of this decision because denying UI benefits under these circumstances is an error of law unsupported by substantial evidence.

### **JURISDICTION**

1. Jurisdiction is conferred on this Court under G.L. c. 30A, § 14(7) and c. 151A, §42.

### **PARTIES**

2. Plaintiff, ANN B, is a resident of 123 Main Street, Boston, Massachusetts, 02114. At all relevant times, she was employed by defendant employer, Home Health Services, Inc., and worked at defendant's location at 123 State Street, Boston, SUFFOLK COUNTY, Massachusetts, 02108.
3. Defendant, RICHARD JEFFERS, is the Director of the Department of Unemployment Assistance and in that capacity is charged under G.L. c. 23, §§ 1, 9J with the administration of the UI program in Massachusetts pursuant to the Massachusetts Unemployment Insurance Law, G.L. c. 151A, § 1 *et seq.* Defendant's principal place of business is at the Charles F. Hurley Building, 19 Staniford Street, Boston, SUFFOLK COUNTY, Massachusetts, 02114.

4. Defendant, HOME HEALTH SERVICES, INC., (“employer”), is Plaintiff’s former employer, which, on information and belief, has its principal place of business at 123 State Street, Boston, SUFFOLK COUNTY, Massachusetts, 02114.

**STATEMENT OF FACTS**

5. Plaintiff, Ann B, worked for the employer part-time, approximately 18-28 hours per week, as a home health aide from February 2010 through March 23, 2012.
6. B worked in clients’ homes, assisting with personal care and household tasks.
7. On March 26, 2012, B went to the emergency room and was diagnosed with diverticulitis and perforation of the colon.
8. B was scheduled to work on March 26 and March 27, 2012.
9. B was formally admitted into the hospital on March 27, 2012 and was discharged on March 31, 2012. While admitted, B was given narcotics to manage her pain. During this time, B was heavily sedated.
10. While hospitalized, B realized that she had to submit her timesheet by Tuesday in order to receive a paycheck. On Tuesday, March 27, 2012, with the assistance of a nurse, B faxed her time slips to her employer.
11. On or about March 27, 2012 or March 28, 2012, B had conversations via the telephone with her employer during which B explained that she was in the hospital, that she had faxed in her time slips, and that she did not know how long she would remain in the hospital. B believed that she had properly notified her employer of her continuing absence until some indeterminate date in the future.

12. On March 31, 2012, B discharged herself, despite the fact that she still had a fever and felt ill. Upon her release, the doctor at the hospital told B to see her primary physician and wrote a note saying that B could return to work on Wednesday, April 4, 2012. On April 5, 2012, B saw her primary physician as instructed. The primary care physician wrote her a note excusing her from work on April 5, 2012. B continued to experience pain and felt too ill to work.
13. On Monday, April 9, 2012, B returned to work with the two doctors' notes and stated that she was ready to return to work.
14. The employer terminated B's employment on April 2, 2012 for allegedly being a No Call/No Show on April 2, 2012.
15. On April 9, 2012, B's supervisor informed her that B's clients had been reassigned to other employees since B had not returned to work when expected. B was upset that her clients had been reassigned and indicated that she wanted to keep working for the employer. The supervisor said that there were some new cases and she would make some phone calls – indicating that there were potentially some cases that could be assigned to B. The employer did not contact B with any new cases.

#### **PRIOR PROCEEDINGS**

16. B applied for UI on April 27, 2012 with an effective date of April 22, 2012.
17. On June 5, 2012, DUA sent B a Notice of Disqualification on the grounds that she failed without adequate reason to inform her employer of her inability to return to work and thus the separation became final.

18. On June 7, 2012, B filed a timely request for a hearing.
19. On July 31, 2012, a hearing was held in the DUA's Boston Office before a duly appointed DUA Review Examiner. B was present but due to a misunderstanding, the employer expected a telephone hearing and did not attend. The Review Examiner took evidence at this hearing.
20. On August 28, 2012 the hearing was re-convened before a DUA Review Examiner and both parties participated in the hearing.
21. On September 4, 2012, the DUA Review Examiner reversed the decision to deny B UI and found that she was entitled to benefits. The Review Examiner concluded that there was a miscommunication between the parties and that the plaintiff believed her prior conversation with her employer excused her from making any further calls to the employer until she was feeling able to return to work. The Review Examiner further concluded that the plaintiff's lack of communication with the employer was a lapse in judgment and not deliberate or intentional wrongdoing.
22. On or about September 2012, the employer appealed.
23. On December 28, 2012, the Board of Review ("Board") allowed review, affording the parties the opportunity to submit written reasons for agreeing or disagreeing with the decision. Only B responded and supplied a memorandum on October 22, 2012.
24. On December 28, 2012, the Board issued a decision that reversed the Review Examiner. Although the Board adopted all of the Review Examiner's findings of fact, without the benefit of holding its own hearing, it concluded that B engaged in deliberate misconduct

in willful disregard of the employer's interest by failing to notify it on April 2, 2012 that she was going to be absent from work.

25. On April 5, 2013, the Board issued a corrected decision.
26. Under G.L. c. 151A, § 41, the decision of the Board is the final decision of DUA for the purposes of judicial review.
27. B now seeks judicial review of DUA's final decision pursuant to G.L. c. 151A, § 42.

### **CAUSES OF ACTION**

28. Plaintiff repeats and incorporates the allegations contained in paragraphs 1 – 27.
29. DUA's decision is based upon an error of law in violation of G.L. c. 30A, § 14(7)(c) under G.L. c. 151A, §25(e)(2), because there is no evidence in the record to support a showing that B had the state of mind to support a disqualification for deliberate misconduct or willful disregard of the employer's interest, or a knowing violation of a work rule or policy.
30. DUA's decision is unsupported by substantial evidence in violation of G.L. c. 30A, §14(7)(e) where it ignores substantial and unrefuted evidence in the record which demonstrates that the plaintiff did not have the requisite state of mind required for deliberate misconduct. DUA's decision also impermissibly relies on uncorroborated hearsay in forming the basis of its decision.
31. DUA's decision to deny B UI where she presented substantial evidence demonstrating that she did not have the requisite state of mind to support a disqualification, is also a violation of G.L. c. 151A, § 74, which mandates that unemployment law "shall be

liberally construed in aid of its purpose, which purpose is to lighten the burden which now falls on the unemployed worker and his family.”

32. DUA’s decision is otherwise based upon error of law, unsupported by substantial evidence, arbitrary and capricious, an abuse of discretion, and not in accordance with the law in violation of G.L. c. 30A, §§14(c), (e), and (g).

**RELIEF SOUGHT**

WHEREFORE, Plaintiff prays that this Honorable Court:

1. Reverse the decision of the defendant DUA and award B UI;
2. Grant such further relief as is equitable and just.

Respectfully submitted,  
Ann B  
By her attorney,

---

Ab L. Available  
BBO# 1234567  
*The Greatest Legal Services*  
123 Friend Street  
Boston, MA 02114  
(617) 371-1234  
aavailable@tgls.org

Dated: April 24, 2015

Certificate of Service

I, Ab. L. Available, Plaintiff's Attorney, certify that I served a copy of this Complaint for Judicial Review on the defendants by mailing a copy first class certified mail, return receipt requested to Robert Cunningham, Director, Department of Unemployment Assistance, 19 Staniford Street, Boston, MA 02114 and Home Health Services, Inc., 123 State Street, Boston, MA, 02114 this 24<sup>nd</sup> day of April, 2013.

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Ab L. Available

## Appendix N: DUA's Glossary of Terms

### Glossary

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**Alternate Base Period**

Is based on the wages paid during the three most recently completed calendar quarters, plus the time between the last completed quarter and the effective date of your claim. If you are not monetarily eligible for benefits using the primary base period, and would be eligible using the alternate, DUA will automatically use this method to determine your benefits. Also, you may elect to use the alternate base period if you provide credible documentation showing that your Benefit Credit would be increased by at least 10% by using the alternate base period.

**Average Weekly Wage**

Is calculated by using a formula established by law based on the total amount of wages paid during your base period.

**Benefit Credit**

Is the total amount of benefits you are potentially eligible to collect during your benefit year if you meet all the other eligibility requirements of the law.

**Benefit Rate**

Is 50% of your average weekly wage, up to the current maximum.

**Benefit Year**

Is the 52 weeks following the effective date of your claim.

**Duration of Benefits**

Is the maximum number of weeks you can collect. This is determined by dividing your benefit rate into your benefit credit. The maximum number of weeks you can collect full benefits is 30 weeks (capped at 26 weeks during periods of extended benefits).

**Effective Date of Your Claim**

In general, the effective date of your claim is the Sunday of the calendar week in which you initially filed your claim.

**Interstate claims**

Are claims filed by Massachusetts workers who have moved to another state.

**Intrastate Claims**

Are claims filed by Massachusetts workers who live in Massachusetts.

**PIN**

Is the four digit Personal Identification Number you select to access TeleCert.

**Primary Base Period**

Is the last four **completed** calendar quarters immediately preceding the date on which your claim is effective. Your claim is based on wages received during this period.

**Social Security Number**

Is the unique identifier to process your claim for benefits. DUA is required by the federal IRS Code of 1954, as amended in 26 USC 85; 6011 (a), 6050B, 6109(a) to use your Social Security Number in processing your claim for benefits.

**TeleCert**

Is the interactive telephone method for claiming weekly benefits. TeleCert is available in English or Spanish .

**Waiting Period**

By Massachusetts law, the first week of your claim for which you are eligible to collect benefits is your waiting period. Every effort will be made to pay benefits three weeks from the first week you filed your claim, if you are deemed eligible. The total number of weeks for which you are eligible is not reduced by this waiting period.

**WebCert**

Is the online method for claiming weekly benefits. WebCert is available in English.

## **Appendix O: DUA Good Cause Guidelines**

### **DIVISION OF EMPLOYMENT AND TRAINING HEARINGS DEPARTMENT**

#### **GUIDELINES FOR DETERMINING GOOD CAUSE**

The following are guidelines for what constitutes good cause for failure to appear at a hearing. In determining good cause, Hearings Department staff may look for guidance to analogous regulatory and statutory provisions, such as 430 CMR s. 4.14.

#### **GOOD CAUSE REASONS**

- The hearing notice was not received by the appellant due to postal service failure, address error, or other reason beyond the appellant's control.
- The hearing notice was received late by the appellant due to postal service delay, address error, or other reason beyond the appellant's control, and the late receipt attributed to the appellant's failure to appear.
- An urgent situation arose on the day of the hearing that required immediate attention and prevented the appellant from notifying the Hearings Department of the appellant's inability to appear. Examples include, but are not limited to the following: family emergency, illness, accident, weather-related difficulties, incarceration, transportation difficulties.
- Death of a household member or an immediate family member (including a spouse, child, parent, brother, sister, grandparent, stepchild or parent of a spouse).
- The appellant was absent from the Commonwealth for the purpose of seeking employment between the date of the Notice of Hearing and the hearing.
- The appellant is unable to effectively comprehend English and is unable to find a suitable translator to explain the Notice of Hearing.
- The appellant arrived, with justifiable reason, after the ten-minute grace period. Examples include, but are not limited to the following: illness, accident, weather-related difficulties, transportation difficulties, unfamiliarity with the hearing location.

- The appellant relied upon information from a DET employee and based on this information did not appear.
- Any other circumstance beyond the appellant's control which prevented the appellant from appearing at the scheduled hearing.

### **POSTPONEMENTS**

Since parties may request a postponement of a scheduled hearing that conflicts with an earlier scheduled appointment of some importance, consideration should be given as to why the appellant failed to request a postponement. If the appellant responds to the Notice of Failure to Appear with a reason that would have allowed for a timely request for a postponement, the reason for the appellant's failure to request a postponement must be reviewed and considered. If necessary, Hearings Department staff should contact the appellant and obtain sufficient facts to establish whether the appellant has good cause for failure to request a postponement. If good cause is established, the default will be removed and a new hearing will be scheduled. If no good cause is found, the appeal may be dismissed.

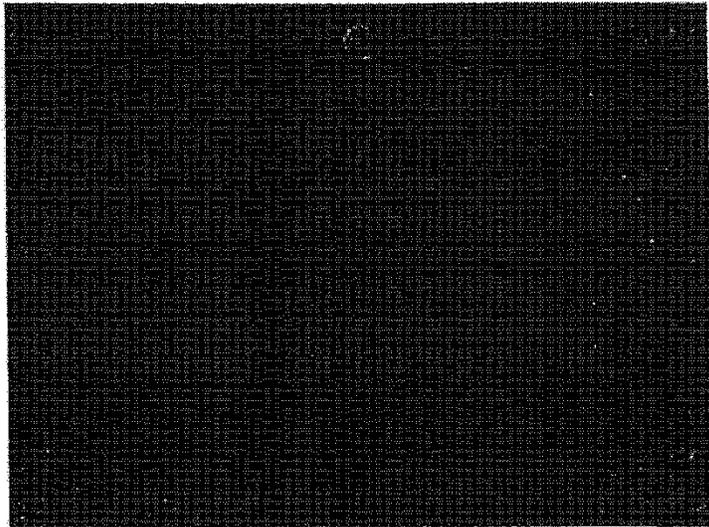
If the appellant responds with a good cause reason, such as a last minute emergency that prevented a request for a postponement, the default will be removed and a new hearing will be scheduled.

If an appellant defaults on a hearing for which a requested postponement was denied, the appeal may be dismissed.

### **LATE RESPONSE TO NOTICE OF FAILURE TO APPEAR**

If the appellant responds with a good cause reason for non-appearance but the response is postmarked beyond the 10-day limit, the reason for the late response must be reviewed and considered. Examples of such good cause for late response include, but are not limited to the following: family emergency, illness or hospitalization, out of the area, late receipt of hearing notice, delay in having default notice interpreted.

# HEARINGS DEPARTMENT CLERICAL PROCEDURES HANDBOOK



*Some good  
aws &  
guidelines  
XIII-P3*

ISSUED BY HEARINGS  
ADMINISTRATIVE UNIT  
~~DECEMBER 1, 2000~~  
FIRST EDITION

XIII  
DEFAULTS-REMOVALS/  
DISMISSALS

XIII-1

**DIVISION OF EMPLOYMENT & TRAINING**  
**HEARINGS DEPARTMENT**

**DEFAULT REMOVAL/DISMISSAL POLICY**

**What is a Default?**

A default occurs when an appellant (i.e., the party who filed the appeal and requested the hearing) either fails to appear for a scheduled hearing or arrives more than ten minutes late to the hearing. In such a case, no hearing is held. To notify the appellant that they are in default, the Hearings Department sends a "Notice of Dismissal for Failure to Attend a Hearing" (see sample at the end of this section).

**Why is no hearing held without the appellant?**

In accordance with current practice, an appellant must show that they are interested in the appeal in order for the hearing to go forward.

**Why does the Hearings Department allow just ten minutes for the appellant to appear?**

A ten minute "grace" period is allowed because hearings are allotted only one hour and most of that time is needed by the hearing officer to conduct a thorough hearing. Generally, a hearing officer is scheduled for five hearing per day. Waiting longer than ten minutes for an appellant who may not be interested in pursuing an appeal is not practical. If hearings did not begin on time, all subsequent hearings would be delayed and this, in turn, would cause customer service problems and further delays.

**Is the default final?**

If the appellant responds to the "NOTICE OF DISMISSAL" in writing within ten days from the mailing date of the NOTICE and includes good cause reasons for his or her failure to attend the hearing, the default is removed, and the appeal may be reinstated (see next section for further explanation of "good cause" reasons and the default removal policy). If the appellant responds late or does not provide good cause reasons, then the appellant is notified in writing that the dismissal is final.

(see the next section for a further explanation of final dismissals). If the appellant does not respond at all, no further notice is sent. The "NOTICE of DISMISSAL" simply becomes final.

The Hearings Department will consider removing a default and rescheduling a hearing if a **WRITTEN** response...

- 1) Is received timely
- 2) Is received late due to documented mail delivery delay, **AND**
- 3) Demonstrates a good cause reason for missing the hearing.

### **TIMELY REQUEST**

- A request will be considered timely if received postmarked by close of business on the 10<sup>th</sup> day after the "Default/Notice of Dismissal for Failure to Attend a Hearing" was mailed to the party. The following are **EXCEPTIONS** to the rule:
- If the 10<sup>th</sup> day falls on a Saturday, Sunday, or legal holiday, the request will be considered timely if received on the next business day.

If the request is received beyond ten days and the party indicates the reason for the late response is due to either non-receipt or late receipt of the "Default/Notice of Dismissal for Failure to Attend Hearing", the request will be considered timely.

**IMPORTANT NOTE:** If the appellant's written response contains insufficient information, is unclear, or confusing, attempts to contact the appellant by telephone shall be made. All attempts must be documented in the folder. If clarification is not received, the case may be dismissed.

### **GOOD CAUSE FOR REMOVAL OF DEFAULT**

- The hearing notice was not received due to postal service failure (in this case, the party will be urged to provide a secondary address and to call the Hearings Department voice response system to check on the date of the hearing to prevent a second default for non-receipt of the hearing notice).

- The hearing notice was received late.
- An urgent situation arose on the day of the hearing that required immediate attention, such as illness, accident, weather related difficulties, incarceration, and prevented a request for postponement.
- An administrative DET error occurred which prevented the hearing from going forward.
- The party arrived beyond ten minutes past the scheduled time for the hearing for a justifiable reason (illness, accident, weather related difficulty, poor directions caused them to “get lost”).
- The party arrived at the wrong location for the hearing.
- The party called after the postponement deadline or on the day of the hearing with a stated urgent situation (illness, court appearance for which they could not provide documentation in time for the hearing to be postponed but they include such documentation with their response).
- A reasonable error on the appellant’s part – misreading the date or time of the hearing.
- The appellant relied upon information from a DET employee and based on this misinformation, does not attend the hearing.

***{ ONLY THE CUSTOMER SERVICE REPRESENTATIVE OR THE PRINCIPAL REVIEW EXAMINER HAS THE AUTHORITY TO REMOVE A DEFAULT.***

**NOT GOOD CAUSE – RESPONSE TO STATEMENT ON FAILURE TO ATTEND A HEARING**

A case may only be dismissed after consultation with the PRE for one of the below listed reasons.

- The response is late, regardless of the reason for the appellant’s non-attendance.
- If an appellant alleges a second non-receipt of notice, judgment should be

exercised by the CSR or PRE.

- The party claims a non-urgent conflict (some examples of non-urgent conflicts may include business meetings, job interviews, routine medical appointments, training sessions, unavailability of witnesses or documents) prevented them from attending (the party may also have been denied a postponement for the same reason).
- The party has been denied a postponement for a non-urgent conflict.
- Late or non-receipt of hearing notice within the parties' control, e.g., mail not forwarded to correct department by company mail room, company shut down – mail not routed to appropriate personnel, claimant/employer moves and does not notify DET of new address or make arrangements to pick up mail.
- Failure to provide documentation (medical note, sudden court appearance) to substantiate that an emergency arose on the day of the hearing if the stated reason for non-attendance is due to an emergency.
- The explanation for the non-attendance conflicts with other reliable information (e.g., agent/attorney appears at hearing without appellant, gives reason for appellant's absence to hearing officer but in responding to the default the explanation differs from the reason given to the hearing officer).
- The appellant fails to explain the reason for non-attendance, rather, simply requests reinstatement.
- The appellant arrives for the hearing late for non-urgent reasons that should have been anticipated (routine traffic delays, public transportation delays). Some examples of urgent reasons may include extreme weather conditions, accidents, or serious public transportation difficulties – disabled trains.
- The appellant "forgot" the date of the hearing.
- Unavailability of an attorney when the appellant has not established they have made a reasonable, timely search for an attorney.
- The appellant does not attend due to a desire not to pursue the appeal at the time, but later determines that they are interested in the appeal.

## INSTRUCTIONS FOR THE ISSUANCE AND DATA ENTRY OF REMOVAL/DISMISSALS

If a response to a default is timely and with good cause, a Response to Statement on Failure to Attend a Hearing notice must be typed, with the first box checked, and mailed to all parties (see sample at the end of this section). This notifies parties that the case will be reassigned for hearing and another notice mailed to all parties informing them of a new date and time of the hearing.

The case must then be reactivated and put back on the schedule. You must go into the UAPP screen on the UI system to add the appeal data again.

If the response to a default is not timely and does not provide good cause reasons, a Response to Statement on Failure to Attend a Hearing must be typed, with the second box checked, and mailed to all parties. This notifies the parties that the reasons given do NOT constitute good cause for failure to attend and that the case is being dismissed.

You must then go into the hearing system main menu, select the "F" screen and enter the date of dismissal in the amended mail date field. The case then gets filed in the completed case drawer under that date.



Boston Regional Hearings Office  
Charles F. Hurley Building  
Government Center  
Boston, MA 02114  
Phone: 617/727-1301

### RESPONSE TO STATEMENT ON FAILURE TO ATTEND A HEARING

APPEALING PARTY:

DOCKET NUMBER:

S.S. NUMBER:

DATE OF MAILING: 1/28/99

In response to a notice on your failure to attend a hearing, you submitted a statement containing the reasons for failing to attend the hearing on unemployment insurance.

- You are hereby notified that the reasons given DO constitute good cause for your failure to attend the previously scheduled hearing. The case will be reassigned for hearing and due notice will be sent to all parties.
  
- You are hereby notified that the reasons given DO NOT constitute good cause for your failure to attend the previously scheduled hearing. The case is hereby dismissed, (801 CMR 1.02 (10)(e) of the Standard Rules and Practice and Procedure).

Sharon Navarro  
Principal Review Examiner

INTERESTED PARTY:

Commonwealth of Massachusetts

Argeo Paul Cellucci, Governor

Angelo Buonopane, Director Department of Labor & Workforce Development

John A. King, Deputy Director Employment and Training

Form 3701 Rev. 7-96

XIII-7

Appellants occasionally respond to "Response to Statement on Failure to Attend a Hearing". Although the Department is not required to respond in writing, a response is recommended for a persistent appellant (see sample form letter).

FORM LETTER TO BE ATTACHED TO THE APPELLANT'S COPY OF THE  
DEFAULT REMOVAL IF APPELLANT DID NOT RECEIVE HEARING  
NOTICE DUE TO MAIL DELIVERY PROBLEMS

The attached letter notifies you that a hearing will be rescheduled because you have indicated that you did not receive the previous hearing notice. Be advised that a hearing notice will be mailed approximately one week from today to the address you have provided. You are urged to contact the regional Hearings Department at (617) 727-6561 to hear recorded information about your new hearing date.

If you frequently experience mail delivery problems, you may wish to provide the Hearings Department with a secondary address for the receipt of the new hearing notice. If you notify the Department of the secondary address, a hearing notice will be mailed to this address in addition to the address originally provided.

**FORM LETTER – ISSUED AFTER A DISMISSAL WHEN A SECOND INQUIRY IS RECEIVED**

Date \_\_\_\_\_

Appellant name \_\_\_\_\_

Street Address \_\_\_\_\_

City, State, Zip \_\_\_\_\_

Re: Docket # \_\_\_\_\_

SS# \_\_\_\_\_

Dear Appellant:

Your response to a "Notice of Dismissal for Failure to Attend a Hearing" was received and carefully reviewed. The Hearings Department either did not consider your reasons for failing to attend the scheduled hearing to constitute good cause OR determined that your written response was not filed in a timely manner. The case was, therefore, dismissed in accordance with 801 CMR 1.02 10(e) of the Standard Rules of Practice and Procedure.

We regret to inform you that no further review will be conducted on this matter and the previous decision to dismiss the above referenced case remains in effect.

Sincerely,

Hearings Department

## Appendix P: Information on Pell Grants

### Eligibility for Pell Grants and Other Financial Aid for UI Claimants

DUA does not pay for training. However, on May 8, 2009, President Obama announced that customers receiving UI benefits will receive special consideration for financial aid to help defray the cost of education and/or job training opportunities. This action by the U.S. Department of Education and Department of Labor will enable more workers collecting UI benefits to pursue job training to assist them in developing their skills while the economy recovers.

#### Pell Grants

The Pell Grant program is a post-secondary, educational grant program sponsored by the U.S. Department of Labor (USDOL). The grants can cover up to \$5,350 in education and training expenses and are accepted at nearly all universities and community colleges and many trade and technical schools. All Pell Grant awards are based on need and other factors. If you do not qualify for a Pell Grant, you may be eligible for other financial aid.

**Please note:** Pell Grants are only available for individuals enrolled at least half-time in an undergraduate degree or certificate program. Pell grants *are not available* to individuals who have already received a bachelor's degree.

#### How to Apply for Financial Aid

Applying for financial aid and finding training opportunities is not difficult. The U.S. Departments of Education and Labor have created a single web site, [www.opportunity.gov](http://www.opportunity.gov), where you can find helpful information. If you are interested in pursuing these opportunities, here are some helpful steps you should take:

- Decide what type of education or training best meets your needs. You may want to visit [www.careeronestop.org](http://www.careeronestop.org), or visit your local community college or MassHIRE Career Center for help in identifying potential opportunities. To locate the nearest MassHIRE Career Center, you can visit [www.mass.gov/careercenters](http://www.mass.gov/careercenters) or call the toll free number: **1-877-US-2-JOBS** (1-877-872-5627).
- Apply for financial aid. An application is available at [www.fafsa.ed.gov](http://www.fafsa.ed.gov) or by calling **1-800-4-FED-AID**. Note: If you need the 1099G form to apply for financial aid (FAFSA), you can print the form by accessing your account online.
- After you've applied for financial aid and the education or training program of your choice, contact the program's financial aid office. You will be able to bring this letter to a financial aid office for up to 90 days from the date of this letter to verify your status as an unemployment insurance beneficiary. After the 90 days has expired, please contact our agency at (617) 626-6800 to receive current documentation of your unemployment status.
- Make sure to contact your local MassHIRE Career Center to assist you in starting the Training Opportunities Program process that will determine if you can continue to receive UI benefits while enrolled in the program you have chosen. Although the President has strongly encouraged states to allow more kinds of training in their unemployment programs, not every training program excuses you from the requirement that you must be seeking and available for work in order to receive unemployment benefits.
- Finally, if you are seeking other types of financial assistance through the Career Centers, please note that additional eligibility requirements may apply.

# Appendix Q: Health Care Provider's Statement



THE COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT  
DEPARTMENT OF UNEMPLOYMENT ASSISTANCE



173140382

CLAIMANT ID: \_\_\_\_\_

CLAIM ID: \_\_\_\_\_

Issue ID #: 0033 5737 82-01

## Health Care Provider's Statement of Capability

The Healthcare Provider's Statement of Capability is a required statement only if you have indicated you are not capable of working during weekly certification. Failure to return a completed form to the Department of Unemployment Assistance (DUA) for consideration by your deadline may result in disqualification. This document should be completed by a licensed physician or medical practitioner who is either familiar with the patient's condition, or has reviewed the patient's medical records. Once completed, patient is responsible for returning this form to DUA by 1/1/20.

Patient's Name: \_\_\_\_\_ Patient's Address: \_\_\_\_\_

Date you began treating patient: \_\_\_\_\_ Date you last saw patient: \_\_\_\_\_

What is the nature of the condition you are treating the patient for? \_\_\_\_\_

Has the patient been able (or capable) to work since \_\_\_\_\_ : (Check Box) Y  N

Is the patient currently able to work in a full-time capacity with no restrictions? (Check Box) Y  N

If yes, when did the patient become able to return to work full-time? \_\_\_\_\_

If no, on what date did the patient become unable to work full-time? \_\_\_\_\_

If no, list why the patient cannot work full-time without restrictions, or, if the patient can work with restrictions, explain the restrictions.  
\_\_\_\_\_  
\_\_\_\_\_

Is the patient currently able to work in a part-time capacity with no restrictions? (Check Box) Y  N

If no, list why the patient cannot work part-time or explain what restrictions the patient has in his/her ability to work in a part-time capacity?  
\_\_\_\_\_  
\_\_\_\_\_

If the patient is unable to work, when do you anticipate the patient will be able to return to work?

\_\_\_\_\_

If the patient is pregnant, what is the expected date of delivery? \_\_\_\_\_

Please list any other information regarding the patient's capability to work full-time:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**THIS STATEMENT MUST BE SIGNED PERSONALLY BY THE HEALTHCARE PROVIDER**

I am a duly licensed physician/practitioner in the State of: _____
Name of physician/practitioner: _____
Signature: _____
Address: _____
Date of Statement: _____ Contact Phone Number: _____

**Notice/Disclaimer**

The information you provide will be used by the Department of Unemployment Assistance solely to determine whether the named individual is capable of performing suitable work, a condition of eligibility for unemployment benefits.

Patient is responsible for returning this form to DUA by

**RETURN THIS FORM:**

You can upload the completed form by logging in to your MA DUA account at [www.mass.gov/dua](http://www.mass.gov/dua). Go to your "Home Page", "View and Maintain Account Information" and select "Monetary and Issue Summary". Select the Issue Identification Number 0033 5737 82-01 and use the Upload button available to upload supporting documentation.

Or mail it to:

Department of Unemployment Assistance  
Central Document Processing Unit  
19 Staniford Street  
Boston, MA 02114

# Appendix R: Assistance Programs for Massachusetts Residents

## Assistance Programs for Massachusetts Residents

Where to find help, information, and referrals

The Commonwealth of Massachusetts and partner organizations provide a wide range of services to help individuals who have exhausted or may soon exhaust their unemployment insurance claim. Unemployed individuals may be eligible for assistance to meet basic needs as well as other services such as health care, counseling, employment and training assistance, and more. You can either call 2-1-1 to learn about a broad range of resources or contact these agencies and organizations directly to inquire about their programs.



**2-1-1** is available 24 hours a day, 7 days a week and is staffed by counselors that can get you the help you need.

All calls are free and confidential. Trained counselors can assist you with almost any challenge such as child care options, workforce retraining, mental health issues, housing, and rental assistance.

[www.mass211help.org](http://www.mass211help.org)



Commonwealth of Massachusetts  
Deval L. Patrick, Governor  
Executive Office of Labor and Workforce Development  
Joanne F. Goldstein, Secretary

### HEALTHCARE COVERAGE

#### MassHealth

Pays for health care for certain low- and medium-income people living in Massachusetts.  
[www.mass.gov/mashealth](http://www.mass.gov/mashealth) **800-841-2900**

### FOOD AND DIRECT ASSISTANCE

#### Food Assistance

Supplemental Nutrition Assistance Program (SNAP) (formerly known as Food Stamps) benefits help low-income families buy nutritious food at most grocery stores, convenience stores, and pharmacies.

[www.mass.gov/snap](http://www.mass.gov/snap) **866-950-3663**

#### Direct Assistance

##### Transitional Aid to Families with Dependent Children (TAFDC)

Cash assistance to families with children and pregnant women in the last 120 days of pregnancy, with little or no assets or income.

##### Emergency Aid to the Elderly, Disabled, and Children (EAEDC)

Emergency Aid to the Elderly, Disabled, and Children (EAEDC) is a state funded program which provides cash assistance to those in need to stabilize their lives.

##### Application Information Hotline (for TAFDC and EAEDC).

For additional information go to Department of Transitional Assistance.

[www.mass.gov/dta](http://www.mass.gov/dta) **800-249-2007**

#### Foodsources Hotline - Project Bread

To locate food pantries and other nutrition resources in your community.

[www.projectbread.org](http://www.projectbread.org) **800-645-8333**

### HOUSING RESOURCES

#### Mass Housing Consumer Education Centers

Nine Centers across Massachusetts provide Housing Information and Referrals. Connect to resources on foreclosure prevention, rental assistance, and subsidies, housing search, transitional and support housing for the homeless, and more.

[www.masshousinginfo.org](http://www.masshousinginfo.org) **800-224-5124**

#### Department of Housing and Community Development

For housing, shelter and fuel assistance.

Division of Housing Stabilization **877-418-3308**

Fuel Assistance and Weatherization **800-632-8175**

Division of Public Housing and Rental Assistance **617-573-1150**

#### [www.mass.gov/dhcd](http://www.mass.gov/dhcd)

#### Foreclosure Assistance

Foreclosure counseling and assistance for homeowners.

[www.mass.gov/ocabr](http://www.mass.gov/ocabr) **888-995-4673**

### VETERANS' BENEFITS

#### Department of Veterans' Services

Benefits and resources for veterans and their families may be available through your local Veterans' Service Officer.

[www.mass.gov/veterans](http://www.mass.gov/veterans) **617-210-5480**

### CHILD SUPPORT ASSISTANCE

#### Department of Revenue

For assistance with child support orders.

[www.mass.gov/cse](http://www.mass.gov/cse) **800-332-2733**

### ELDER SERVICES

Assist elders and their families to identify services and opportunities.

[www.mass.gov/elder](http://www.mass.gov/elder) **800-243-4636**

### COMMUNITY-BASED RESOURCES

#### Massachusetts Association For Community Action (MASSCAP)

Call or visit the MASSCAP website to see what community action agencies serve your town. Community action agencies provide fuel assistance, weatherization, emergency food assistance, child care, and can connect you to job training and housing resources.

[www.masscap.org](http://www.masscap.org) **617-357-6086**

PLEASE SEE OTHER SIDE FOR ADDITIONAL INFORMATION

## JOB SEARCH ASSISTANCE Jobs, careers, and training



A proud partner of the  network

**One-Stop Career Centers** – a cooperative effort among numerous state and local agencies, businesses and non-profit organizations - providing job seekers with an easily accessible and extensive menu of information and quality services - at no cost.

### Job seekers can:

- Get assistance to find jobs
- Work with experienced career counselors
- Learn about job search strategies including interviewing, networking, and resume writing
- Attend workshops and short-term training, including basic computer training
- Network with other job seekers
- Access up-to-date local, statewide, and national job listings
- Locate vocational training/educational opportunities
- Access resource room services including computers, newspapers, professional journals, business directories, fax machines and copiers, publications on job search activities and careers

### One-Stop Career Centers are located across the state.

To find the most convenient career center, along with a list of its services, hours of operation, and directions, go to [www.mass.gov/careercenters](http://www.mass.gov/careercenters) or call **877-872-5627**. To access the latest job postings, go to [www.mass.gov/jobquest](http://www.mass.gov/jobquest) or call **888-578-6599**.

## Supplemental Nutrition Assistance Program (SNAP)



The Supplemental Nutrition Assistance Program (SNAP) is a nutrition program for families and individuals that meet certain income and resource guidelines. SNAP benefits help low-income families buy nutritious food at most grocery stores, convenience stores, and pharmacies. SNAP recipients can be working and still qualify for SNAP benefits.

**SNAP Hotline**  
(formerly known as Food Stamps)  
**866-950-3663**  
[www.mass.gov/snap](http://www.mass.gov/snap)



### Commonwealth of Massachusetts

Deval L. Patrick, Governor

Executive Office of Labor and Workforce Development  
Joanne F. Goldstein, Secretary

Equal Opportunity Employer - Auxiliary Aids and services are available upon request to individuals with disabilities.

Form 2504 Rev. 11-13