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Attorneys and Counselors

Assessing & Defending Unemployment Insurance Claims in Illinois

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Agenda

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- ✓ Determining Eligibility for UI Benefits
- ✓ Disqualification of Eligible Employees
- ✓ Mechanics of a Claim for UI Benefits

Determining Eligibility for UI Benefits

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- ✓ Employee Eligibility
- ✓ Chargeable Employer

Employee Eligibility

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- ✓ Earned wages
- ✓ Unemployed
- ✓ Vacation Pay
- ✓ Underemployed
- ✓ Employee/Independent Contractor

Employee Eligibility – "Earned Wages"

- ✓ At least $1,600 during "base period." At least $440 must have been paid to the employee outside the quarter in which he or she was paid the most.
- ✓ Base period is the first four of the last five completed calendar quarter years immediately preceding the month in which the "benefit year" begins.
- ✓ Benefit year is the one-year period beginning with the Sunday of the week in which the former employer first files a claim for unemployment compensation.

Employee Eligibility – “Unemployed”

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- ✓ Suspension
- ✓ Voluntarily Termination/Resignation
- ✓ Retirement

Employee Eligibility – Vacation Pay

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- ✓ If a terminated employee receives vacation pay as part of the separation, the employer must file a Notice of Possible Ineligibility with the IDES no later than 10 days after receiving notice that a claim has been filed.

- ✓ The Notice must identify the amount of vacation pay and the period for which it was allocated.

- ✓ Employee is ineligible to receive benefits for any week in which he is entitled to receive payments made in connection with a layoff or separation that are in the form of vacation pay.

Employee Eligibility – Vacation Pay

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- ✓ Example
  - An individual's weekly benefit amount ("WBA") is $130. Upon separation, he is entitled to 3 days of vacation pay at $50.00 per day, an amount which would be treated as wages. The individual is ineligible to receive benefits for that week because the $150 in vacation pay exceeds the $130 WBA.

  - An individual's WBA is $130. Upon separation, he is entitled to 2 days of vacation pay at $50.00 per day, an amount which would be treated as wages. The individual is eligible to receive $30 in reduced benefits for that week.

Employee Eligibility – "Underemployed"

- ✓ Definition
  - Income for part-time work is less than the claimant's WBA.
  - Individual is eligible to receive benefits equal to the individual's WBA reduced by that part of the wages for *less than full-time work*, which are in excess of 50% of the individual's WBA.
- ✓ Example

(a)	WBA	$130
(b)	50% of that amount	$65
(c)	Wages for < than FT work	$86
(d)	< FT wages exceed 50% WBA	$21
(e)	Difference of (a) and (d)	$109

Employee Eligibility

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- ✓ An individual is ineligible for benefits for any week in which he performs FT work, regardless of whether the amount of wages received during that week equal or exceed the WBA because the individual is not considered unemployed.

- ✓ Example
  - An individual receives $137 for FT work. His WBA is $150. Because he is working FT, the claimant is ineligible for benefits even though his wages are less than his WBA.

“Employee/Independent Contractor”

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- ✓ Generally, an “employee” is someone who performed compensable services for an employer
- ✓ Presumption that the person is an “employee” entitled to benefits
- ✓ Burden of proof is on the employer

"Employee/Independent Contractor"

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- ✓ Criteria for an independent contractor
  - The person has been and will continue to be free from control or direction over the performance of such services;
  - The person is either outside the usual course of the employer's business **OR** the service is performed outside of all the places of business of the enterprise; and
  - The person is engaged in an independently established trade, occupation, profession or business.

Employee Eligibility

- ✓ No hours requirement.
- ✓ Currently, in Illinois, an employee can receive up to 25 weeks of state unemployment compensation.

Chargeable Employer

- ✓ The employer whose account will fund the unemployment compensation benefits.

- ✓ The last employer with whom the employee worked for 30 days in the past 18 months. The 30 days do *not* have to be consecutive. A "day" is considered *any day* in which compensable services are actually performed for the employer.
  - Paid sick days, vacation days, holidays or other non-working days ("show up" or stand-by pay days) are not counted toward 30-day requirement.

Disqualification of Eligible Employees

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- ✓ Discharge for Misconduct
- ✓ Specific Cases & Problems Involving Misconduct
- ✓ Voluntary Termination
- ✓ Specific Cases Involving Voluntary Terminations
- ✓ Refusal of Work
- ✓ Unavailable for Work
- ✓ Practice Tips

Discharge for Misconduct

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

Elements of "Misconduct" Definition

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- ✓ Deliberate and willful violation
  - Question is whether the employee *intended* to do the act that caused the harm. Does not necessarily require an intent to harm the employer.
  - Misconduct does not include mere inefficiency, normal negligence or errors in judgment *when made in good faith*.
- ✓ Of a reasonable rule or policy of the employing unit
  - The rule or policy does not have to be written (but should be) or even articulated where the behavior violates a rule or policy that is self-evident ("common sense" rule, *e.g.,* sexual harassment).
  - But proof of a rule or policy is *required* where an employee would not be aware that certain conduct is proscribed.

Elements of "Misconduct" Definition

- ✓ Governing the individual's behavior in the performance of his work
  - If an employee violates a rule that does not govern the behavior of the employee in his work performance, this is not misconduct, even though the employer may feel the conduct is contrary to its interests.
  - Off-duty actions that materially jeopardize the public's perception of the employer's services or a claimant's ability to properly and fully carry out his duties, such as committing a felony in connection with the employee's work (*e.g.* teacher *convicted* of, or admitting to having sexual relations with a minor student).

Elements of "Misconduct" Definition

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- ✓ Violation that *harms* the employing unit or other employees
  - The phrase "harm," includes, but is not limited to:
    - Physical or quantitatively measureable damage;
    - Other damage or injury to other employees' well-being or morale or to the employer's property, operations, or goodwill.
      - Without authorization, a teacher enters a district administrator's office, opens a desk drawer and removes and photocopies confidential bargaining information. Even if the teacher decides not to pass along this information to the union, the removal and photocopying of this confidential information likely would constitute harm (e.g. disregard of standards of behavior).

Elements of "Misconduct" Definition

- Damage or injury that could be reasonably foreseen to occur but for the individual being prevented from either carrying out his act or continuing to work.

  - A school bus driver applicant applies for a job but fails to disclose that his driver's license had been suspended. One year later, the district learns of the suspension. Although the bus driver has not yet been involved in any accidents, it is reasonable to foresee that one may occur and that the district's insurance company would deny liability because of the individual's omission. The bus driver's omission on his application constitutes harm.

- Employers, therefore, do not necessarily have to present evidence of a specific tangible harm, but rather, the existence of an actual or potential harm that can be presumed from the circumstances may be sufficient.

Elements of "Misconduct" Definition

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

Insubordination

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- ✓ The refusal to perform a job or work function as directed by a supervisor.
- ✓ Being argumentative in a conversation with a supervisor, even in a loud voice, generally is not misconduct. The critical component is whether there is an intentional disregard of the employer's interests.
- ✓ Thus, choosing to "have it out" with your supervisor in front of other employees may arise to misconduct because the words are considered insubordinate in that they violate expected behavioral standards.

Job Performance Problems

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- ✓ Poor work performance, such as inefficiency or failure to perform to the employer's expectations because of inability or incapacity, inadvertence or ordinary negligence *generally* is *not* misconduct.

- ✓ "Stupidity" is not misconduct (your fault for hiring).

Performance Problems

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- ✓ If the performance fails to improve after repeated counseling and repeated failures harm the employer, the result *may* be different.

- ✓ Be sure to reinforce the notion that continued poor performance will result in harm.

- ✓ The risk to the employer, the knowledge of that risk by the employee, joined with efforts to assist and re-train the employee are crucial components to the difference between discharge for poor performance (eligible for benefits) and discharge for misconduct (ineligible for benefits).

Attendance or Tardiness

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- ✓ Generally, attendance or tardiness is not misconduct if:
  - The claimant has a good reason for being absent *and* notifies the employer; or
  - The claimant has a good reason for *not* doing so because of something out of the employee's control (*e.g.,* babysitter cancelled at the last minute).

- ✓ However, attendance or tardiness may be considered misconduct if:
  - The employee could have avoided being absent or tardy; or
  - The employee fails to notify the employer when he could have done so.

Attendance or Tardiness – Practice Tips

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- ✓ Issue written warnings for every attendance violation and tardy.

- ✓ On the final warning, specify that pursuant to policy, the employee must provide documentation upon returning to work to verify any further absence, tardiness or leaving early. Failure to provide this document could result in termination due to insubordination.

Voluntary Termination

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- ✓ For an individual's separation from work to be a voluntary leaving, the individual must have the option to remain employed.

- ✓ The separation is a discharge if the individual does **not** have the option to remain employed.

Voluntary Termination

- ✓ Examples
  - The individual is told that he will be discharged because of poor performance. However, in order to avoid having a discharge on his record, he is allowed to submit a resignation. This separation is likely not a voluntary leaving because the individual does not have the option to remain employed.
  - The employer tells the individual that his position has been eliminated, but a similar position with the same pay is available. The employee leaves rather than accept the new position. This is likely a voluntary leaving.
  - An individual is involved in a car crash and will be unable to work until released by his doctor. The employer advises that it cannot offer a leave of absence and cannot keep his job open. This is likely a discharge because the employer has not given the employee the option of remaining employed.

Voluntary Termination

- ✓ An individual has good cause for leaving work when there is a real and substantial reason that would compel a reasonable person who was genuinely desirous of remaining employed to leave work and the employee has made a reasonable effort to resolve his leaving, when such effort is possible.

- ✓ Example
  - An individual's paychecks are repeatedly returned due to insufficient funds, despite the individual's numerous complaints to his employer. Upon having a another paycheck returned due to insufficient funds, the individual resigns. The individual likely has good cause for leaving.

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

Voluntary Termination

- ✓ Examples
  - When hired, the individual commuted 5 miles each way to work. The employer than relocates to a town over 150 miles from the employer's residence, causing a substantial increase in the employee's commuting time. As a result, the individual leaves his/her job. The individual has good cause for leaving.

  - The individual relocates to a town over 150 miles from his job. Because the commute would take more than 2 hours each way, the individual resigns. The individual's reason for leaving is not attributable to the employer because the employer had no control over where the employee chose to live.

Voluntary Termination - Exceptions

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- ✓ Leaving work after having been deemed physically unable to work by a physician or leaving work upon the advice of a licensed physician to care for a spouse, child or parent;
- ✓ Leaving work due to domestic violence;
- ✓ Accepting other unsuitable work (trial period);
- ✓ Leaving work due to being sexually harassed, if the employer knew or should have known about it, but failed to take timely and appropriate action;
- ✓ Leaving work to avoid “bumping” a coworker; and
- ✓ Because, due to a change in location of employment of the individual's spouse, the individual left work to accompany his or her spouse to a place from which it is impractical to commute or because the individual left employment to accompany a spouse who has been reassigned from one military assignment to another.

Refusal of Work

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- ✓ Refusing either to apply for available, suitable work when so directed by the IDES or to accept suitable work, results in a disqualification of benefits.

- ✓ However, the following are considered "acceptable" reasons for rejecting suitable work:
  - Significantly lower wages or skills
  - Safety or other potential hazards
  - Other "good cause" factors

Unavailable for Work

- ✓ School Personnel Disqualification
  - Individuals employed in *any capacity* for a non-profit or public educational institution, including an institution of higher learning, are ineligible for unemployment benefits during extended vacation periods, school breaks, or time between terms and academic years.

School Personnel Disqualification -
Reasonable Assurance of Continued Employment

- ✓ Reasonable assurance of continued employment is presumed if the individual has a written, verbal or implied agreement that covers or extends into the subsequent academic year or term or after a vacation period or holiday recess, to perform for any educational institution.

- ✓ To rebut this presumption, an employee must establish by a preponderance of the evidence (*i.e.* more likely than not) that he no longer has a reasonable assurance of continued employment. Such evidence may include a written notice of dismissal from the employer or a written statement under oath.

School Personnel Disqualification -
Reasonable Assurance of Continued Employment

- ✓ If, however, the employer protests the claim and gives additional assurance that the employee will continue to be employed in the next academic year or term, then the presumption of reasonable assurance remains.
- ✓ Example
  - Notices of dismissal are routinely sent out to employees at the end of the academic year or term, simply as a precaution on the chance that the budget may not be approved. The individual submits this notice in evidence when filing a claim for benefits, but the district affirmatively asserts in its response to the notice that the individual still has a reasonable assurance of continued employment. Such individual will be denied benefits because the presumption of his returning to work remains in effect.

Considerations in Managing Seasonal Employment

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- ✓ Summer seasonal workers (students and teachers)
- ✓ Advertise for and/or hire only high school, college students or teachers looking for jobs for the period of June through August.

Practice Tips for Establishing Disqualifying Events

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

Mechanics of a Claim for UI Benefits

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- ✓ Challenges by Employer
- ✓ Written Determination
- ✓ Telephone Hearing
- ✓ Appeal to Board of Review & Circuit Court

Challenges by Employer

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- ✓ A protest or challenge filed by an employer triggers the employer's right to receive an IDES Adjudicator's Determination as to the claimant's eligibility for benefits.

- ✓ A protest should contain the names, addresses and telephone numbers of any person having first-hand knowledge or information supporting the protest.

- ✓ The ability to make successful protests regarding disqualification issues requires a strong familiarity with all of the different grounds for disqualification.

Challenges by Employer

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

Challenges by Employer

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- ✓ Acceptable statements of supporting facts:
  - The claimant came into my office the morning of 5/6/10 at 10:30 a.m. and told me to "take this job and shove it."
  - The claimant is unavailable for work because he has enrolled as a full-time student at Marquette University.
  - The claimant was given written notice of reasonable assurance that the school district will retain him as a substitute teacher on an as needed basis for the 2010-2011 school year.
  - The claimant voluntarily quit her employment because she informed us that she wanted to spend more time with her two children.

Challenges by Employer

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

Challenges by Employer

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

Written Determination

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- ✓ Following an investigation, assessment of the claim and review of information provide in support of a protest, the Adjudicator will issue a written Determination.
- ✓ The decision will describe the factual and legal basis underlying the Adjudicator's written Determination.
- ✓ A claimant can appeal the Adjudicator's Determination to an IDES Hearing Referee within 30 days after the Determination was mailed or hand delivered to the parties.

Telephone Hearing

- ✓ The referee/telephone hearing level is scheduled fairly soon after an Adjudicator's Determination.

- ✓ This is the time to submit *all* the evidence needed to support your position.
  - The claimant and Hearing Referee must receive all evidence you may conceivably use to support your position within 24 hours of the telephone hearing, otherwise it may not being admitted during the telephone hearing and excluded from the record on appeal.

- ✓ However, while all documents may be admitted and incorporated into the record, they may be given little or no "weight."

Telephone Hearing

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- ✓ During the telephone hearing, matters of witness credibility or believability are left to the discretion of the Referee.

- ✓ Do not rely on second hand testimony, *i.e.,* "hearsay." All relevant individuals should be present and available to testify. Do not duplicate testimony.

- ✓ Once the Hearing Referee's decision is issued, it becomes a guide for any basis to appeal to the Board of Review, upon an adverse finding.

Appeal to Board of Review & Circuit Court

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- ✓ 30 days to appeal the Hearing Referee's decision to the Board of Review.
- ✓ On appeal to the Board of Review, a party can argue against the factual findings as well as the manner in which the facts were applied to the law. An appellant can also argue that the decision applied the wrong law.
- ✓ Judicial Review from the Board of Review to the Circuit Court – 35 days after the receipt of Board of Review's decision.

Q & A