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Unemployment Insurance and Disability Insurance in California

A GUIDE FOR UNION REPRESENTATIVES

HOW TO COLLECT UNEMPLOYMENT/DISABILITY INSURANCE--A GUIDEBOOK FOR UNION REPRESENTATIVES

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HOW TO COLLECT UNEMPLOYMENT/DISABILITY INSURANCE -- A GUIDEBOOK FOR UNION REPRESENTATIVES

INTRODUCTION

The aim of this publication is to:

(1) explain what to tell union members when they apply for unemployment or disability insurance, especially if the claim may be disputed by the employer;

(2) familiarize the representative with the "rules of the game" and how the system works;

(3) explain how an appeal hearing works and how to present a case before the administrative law judge;

(4) familiarize representatives with the most important precedents and rulings, traps and pitfalls that exist in the system;

(5) provide suggestions for further help;

(6) provide the latest information on types and levels of benefits.

BRIEF HISTORY OF THE SYSTEM

Unemployment insurance came into law after the passage of the Social Security Act of 1935. This law mandated payments by employers into a federal unemployment insurance program unless a state had a plan of its own. In

1935 only Wisconsin had any form of unemployment insurance. In the year following passage of the Social Security Act, all of the states created some form of unemployment benefits for laid off workers. This created a diversity of benefit programs which continues to this day.

At one time workers in California paid 1% of their wages into the unemployment insurance fund and the employers paid the rest. In 1948, Governor Warren and his administration created the Disability Insurance Program to protect the earnings of workers who lost time from work because of non work related injuries or illnesses. The money previously paid by workers into the unemployment fund was paid into the new disability insurance fund. Workers' contributions make up 100% of the disability fund and employers' contributions make up the unemployment insurance fund.

To give the reader some idea of the magnitude of the benefits paid out for the one year period 7/1/84 to 6/30/85, the total of UI benefits paid was $2,085,172,000; the total of DI benefits was $1,077,847,000.

Currently the maximum weekly benefits for unemployment insurance is $166 per week, and $224 per week for disability insurance. (See the schedules on pp 63-65.)

Many people want to know why the rates of pay are so different. The answer is that workers pay some portion of their income, currently 6/10 of 1% of earnings up to $21,900, into the disability fund each year. For unemployment insurance, however, the employers are taxed only on the first $6000 of wages paid to each worker. When disbursements exceed income or taxes paid into the fund, the employers have to pay more up to a ceiling of $7000, but this still comes out to less than is paid into the disability insurance fund. The difference in benefits flows directly from the difference in the tax base for the two systems.

Other people comment on the difference in collecting from the two benefit plans. There are rarely disputes over disability pay but employers frequently protest workers' entitlement to UI benefits.

This is because the UI system is "experience rated." The less unemployment an employer creates, (by not laying off workers who make unemployment claims) the lower his/her taxes. This provides an incentive for employers to challenge all UI claims. To counter employer opposition, workers and their unions must handle UI claims with care and skill.

HOW TO HELP A WORKER WITH AN UNEMPLOYMENT INSURANCE PROBLEM

A representative can help workers through many steps in the process of collecting UI benefits. Representatives can brief workers on the rules, help them fill out claim forms correctly, and conduct appeals when workers are denied benefits.

Representatives who are familiar with the process of collecting UI benefits can often use their knowledge and connections to help out workers. If your organization represents a lot of people who experince seasonal unemployment and hence file lots of unemployment insurance claims, it pays to drop by the unemployment office and establish a personal relationship with those who will be processing the members' claims.

On occasion when a person applies on their own for unemployment insurance or disability insurance and is turned down, don't hesitate to call the local office. If there was a misunderstanding, or the claimant did not tell the whole story or didn't phrase the story in the best way, a discussion with the supervisors can bring about a reversal of the denial of benefits without having to go to the trouble of a formal hearing or appeal. (Be sure, in any

case, to file a timely appeal in the event you cannot reach the local office.)

THE FIRST STEP: KNOWING THE RULES

The California unemployment insurance law was intended to provide compensation for people who are looking for work and who are out of work through no fault of their own. In order to be eligible to receive unemployment insurance benefits, a worker must:

(1) be unemployed;

(2) not have voluntarily quit his/her most recent work or have been fired for misconduct;

(3) be able and willing to work;

(4) be searching for work in accordance with Employment Development Department requirements.

In order to help workers collect unemployment insurance, representatives must be thoroughly familiar with these rules.

Words and phrases such as "unemployed," "voluntarily quit," "misconduct," and "able and available" have taken on specific legal meanings for purposes of collecting unemployment insurance. While these legal definitions are usually logical, they can be complex. The meanings of these words and phrases are discussed in detail on pages 36-53.

In areas where more than 5% of the population speaks a language other than English, the Department is supposed to provide a translator for claimants in that language group. For example, if 10% of the local population speaks Spanish as the primary language, then, even if a claimant can understand some English, s/he is entitled to have a

translator's assistance at the UI office and at all interviews and hearings. Union representatives are allowed to serve as translators; take advantage of this if possible. Written information must also be provided in translation in areas where more than 5% of the population uses a language other than English. Ask for translated materials for your non-English speaking claimants.

Non-citizens are not eligible for UI. The initial claim form asks, "Have you been a U.S. citizen for the past 19 months?" If the claimant checks "yes," then the Department is not allowed to ask any further questions about the claimant's citizenship; such questioning would be a violation of his/her civil rights. (See UI Code Section 1254A.)

A step-by-step guide to helping workers through the UI maze follows on pages 10-21. But because the definitions of voluntary quit and discharge for misconduct are so complex, a caveat is in order here: Briefing a worker or member on what to expect at the unemployment insurance office is **critical when you are advising a member who was fired or quit for any reason.**

THE SECOND STEP: KNOWING THE JARGON

Like everything else in our society, knowing the language people use is the key to being able to operate effectively. Following is a glossary of terms used in the UI process.

Claimant - The person applying for unemployment insurance.

Benefits - Money paid claimants from taxes paid by the employer to the State of California based on the earnings of a worker during a base period (see below) before a claim was filed for unemployment insurance.

Covered Employment - Work for which the employer must pay unemployment insurance taxes. In California almost all workers, including agricultural workers, are covered.

The main categories of jobs not covered are: domestic service workers who make less than $1,000 in a quarter of a year, family workers, and independent contractors. (To be an independent contractor, a person must be working independently under his/her own supervision.)

Covered Wages - Wages for which the employer contributed unemployment insurance taxes. These are the wages paid in the base period used to compute the award of monies.

Base Period - The base period of the claim is a 12 month period which is determined by the beginning date of the claim.

For claims beginning in:	**The base period is the 12 months which ended the previous:**
Feb.-March-April	*September 30*
May-June-July	*December 31*
Aug.-Sept.-Oct.	*March 31*
Nov.-Dec.-Jan.	*June 30*

Benefits are computed on the quarter of this base period year during which wages were highest. It is important to time the filing of claims so that the base period includes the highest wages possible.

Most Recent Work - This refers to the work a person performed prior to and nearest to the time s/he makes the claim for benefits. It includes any covered employment, part or full time, that the person did for wages in an employer-employee relationship. How a person left his/her

most recent work figures into whether or not that person is eligile for UI benefits.

Maximum Benefit Award and Weekly Benefit Amount - After a claim is filed, the claimant will receive a form from Sacramento which will show the maximum total amount of money they can get from UI and also the amount to be received each week. The form will also show the total wages upon which the determination is based. This figure should be carefully checked because many times errors are made and not enough benefits are paid. If there is reason to dispute the amount of money determined by the department, file an appeal promptly.

Notice of New Claim Filed - This form starts the claim and determines the twelve month base period on which benefits will be computed. The claimant must answer the questions on this form, including the reasons for leaving the job, in order to qualify for benefits. A copy of this form is sent to the employer to verify the reason given for the claim. (See attached copy.)

Claimants Separation Statement - This form is given to the claimant on completion of the initial paperwork. This form asks the claimant to explain in detail why s/he left the job. The claimant fills out the form and brings it to the determination interview (see below) which will have been scheduled.

Continued Claim Card - Sent to the claimant who is receiving benefits, this form must be completed and returned in order to continue benefits. The form asks the claimant to verify s/he is still eligible for benefits.

Claimant's Handbook - This pamphlet, which is usually given to claimants **after** the claim is filed, explains the rules for collecting unemployment insurance. In order to make the best use of this pamphlet, **the claimant should ask for a copy and read it before a claim is filed.**

Determination Interview - If, when the claimant turns in the initial forms, there is any issue which may make the claimant ineligible for benefits, a determination interview is scheduled. The claimant's eligibility is determined at this interview. If the claimant is denied benefits, the decision may be appealed informally at the local office or formally by filing an official appeal.

Ineligible or Disqualified - A worker is ineligible to receive benefits if s/he **left work voluntarily without good cause or was discharged for misconduct** (see below). A worker may be disqualified from receiving benefits if s/he violates any other rules connected with unemployment compensation or if the Department on review of the evidence, decides that the claimant quit voluntarily or was fired for misconduct. The disqualification may be permanent or temporary. In some cases, the claimant may have to pay back money that was paid to her/him wrongly.

Voluntarily Quit Without Good Cause - A person who left his/her most recent work voluntarily, without a good reason is not eligible for UI. A more complete discussion of "voluntary quit" without good cause is found on page 36-40.

Discharged for Misconduct Connected with the Work - If a claimant is fired for action or inaction which is willful and could harm the genuine interests of the employer, then s/he is disqualified from collecting unemployment insurance. This will be discussed in detail later since this is the most frequent grounds used by employers for discharging pro union employees. See pages 40-44.

Laid Off, Lack of Work - A claimant who is laid off because there is no longer any work to do is eligible for benefits. This is the situation the UI system was designed for and there should be no problem collecting benefits for claimants out of work for this reason.

Able to Work - A person must be physically and emotionally able to work in order to be eligible for UI benefits.

Available for Work and Looking for Work - The state expects and requires that a person collecting unemployment insurance shall be available and looking for work every day of each week. Being unavailable even one work day can cancel benefits for that week. If a person reports being ill or being out of town as a reason for not looking for work in a given week, s/he will lose benefits for that week.

Available: Benefits Reduced - A person who would have been available except for the fact that s/he was ill is entitled to "reduced benefits." The benefits will be paid for the week, with one-seventh reduction for each day of illness. This applies to personal illness only, not family illness.

Willful false statements - If a person willfully withholds information or makes an intentional false statement in order to collect UI, s/he may lose benefits. If someone else fills out the claim form, the claimant is still liable for what it says.

Determination - The notification from the Department which tells a person whether they will or will not receive benefits. Watch for the 20 day time limit to appeal such decisions.

Appeal - A claimant appeals when s/he wants to challenge an unfavorable decision on the claim. The Department requires that an appeal be in writing but it can be a simple letter as will be discussed later. The appeal must be postmarked within 20 days of the determination.

Referee - A hearing officer or administrative law judge who hears the appeals and decides whether a claimant is

entitled to unemployment insurance. His/her decision may be further appealed to Sacramento.

A SIMPLE CASE WHERE NOTHING GOES WRONG

When a person enters an unemployment office for the first time, there are usually a lot of people around and it is hard to know where to start. Various offices in the state do things somewhat differently but there is usually a reception counter where one can ask about filing a claim for unemployment insurance.

An unemployment insurance office employee will give the claimant all the necessary forms. These include an initial claim form and a "Pension Questionaire." Other forms and information are also given out. The forms vary, depending on the particular office and whether any special programs are in effect.

The initial claim form asks the claimant to tell why, in his/her own words, s/he is out of work. In doing this, the less said the better. In a normal layoff, just have the claimant state s/he was laid off on a certain date because of lack of work. If the layoff was a discharge or quit, then more care needs to be used in filling out the form and the representative should help the worker write out what will be said. If the form is not properly filled out, the Department may use the claimant's own words as a basis for denying benefits.

The "Pension Questionaire" is used to determine whether the claimant is receiving pension money which would make him/her ineligible for benefits. (Many forms of pensions, including Social Security, do not make a person ineligible. If there is any doubt as to eligibility due to a pension, it is best to have the person you represent go ahead and apply. The UI rules regarding pensions change often.)

When the claimant completes all the forms, s/he returns them to a Department employee who reviews the forms. This person then schedules the claimant for an interview, to take place in about three weeks.

What takes place at this interview depends on what has happened in the interim three weeks. During this time the Department reviews the claim to see if there are any "eligibility issues," such as an apparent voluntary quit, a discharge for misconduct, or a disability which would prevent the claimant from working. The Department also contacts the last employer listed on the "Notice of New Claim Filed" form to verify the claimant's reason for leaving the job. (Note: After the employer is notified of a claim, s/he has ten days to protest or appeal the claim. Sometimes, however, the Department illegally waives this ten day deadline for employers. Check the claimant's file to insure that this hasn't happened. If it has, file a written complaint with the Department and use this complaint in an appeal if necessary.)

During these weeks the Department also computes the potential UI award. A "Notice of Computation" will be mailed to the claimant. This form will show whether the claimant is eligible for benefits. If the claimant is determined eligible, then the Notice will also show the total amount that the claimant can collect in UI benefits (the "maximum benefit award") and the amount that can be collected each week ("weekly benefit amount").

If the Notice of Computation showed the claimant to be *ineligible*, then the interview, which was scheduled for three weeks after the initial claim, is used as a "determination interview."

This interview is conducted by a "determination interviewer". This person is a very important component in the process of getting benefits. S/he has a large workload with lots of stress and hassles and is limited in what s/he can do for a claimant. Advise the person you represent to treat the interviewer like a police officer. Like police officers, determination interviewers make notes on a form

that may later be used against the claimant. If a person guesses at the answers and these guesses are recorded as facts and are incorrect, the person may not get benefits. Advise the claimant to be brief, polite, presentable, honest, and not argumentative. The claimant should give names of witnesses that s/he absolutely knows will be helpful and should present any documents which may be helpful. Just as with a police officer, if the interviewer can be convinced, the claimant can stay out of the legal system of appeals, hearings, delays with possible loss of benefits. If the Department is satisfied that the claimant is entitled to insurance, benefits will be paid even while an employer appeal is being processed. In many cases however, the appeal of the most recent employer will hold up benefits until the disputed issues are settled. What to do when either the claimant or the employer wants to appeal the interviewer's decision will be discussed below.

If the claimant is found *eligible*, then the interview is used to inform the claimant of his/her rights and responsibilities under the UI law. The Department employee who conducts this interview will make sure the claimant understands the rules for remaining eligible and can answer any questions the claimant might have about the UI process. The weekly award is based on the highest earnings in covered employment a claimant has in a given three month period (quarter) during the 12 month base period, as specified by law.

Suppose the person you represent has a seasonal job and high covered wages in August and September. If the person files a claim in December or January, instead of February, the award will not be calculated on the highest wages. By waiting a few weeks before establishing a claim, the amount of the award can be substantially greater. Realize however, that a loss of benefits will occur if filing is delayed and the highest wages were in a quarter which is dropped. In short, a higher award may result from carefully calculating the earnings before filing a claim. For most people with a relatively steady salary or wage, this is not a significant question.

See page 63 for a chart designating the current amounts a person may receive based on the highest quarterly earnings.

If the claimant is eligible, benefit checks are sent to the claimant by mail every two weeks. Payments do not begin until seven days after the claim is filed. A "continued claim form" is sent in the same envelope as the benefit check. The claimant must fill out and return this form (by mail) in order to continue to receive benefits. On this form, the claimant verifies that s/he is still unemployed and is able, available and searching for work.

As long as the claimant is able, available and searching for work, benefits will be paid out, until the total amount paid out is equal to maximum benefit amount.

STEP BY STEP GUIDE TO HELPING A WORKER WITH AN UNEMPLOYMENT INSURANCE PROBLEM

A worker may ask for assistance in two different situations: (1) s/he has been fired or laid off and has not yet filed for unemployment insurance; or (2) s/he has been denied unemployment insurance.

(1) **A worker comes to you because s/he has been fired or laid off and has not yet filed for unemployment insurance benefits.**

When a worker files for UI, s/he must give a written statement telling why s/he is out of work. If the worker was laid off for lack of work, the worker should be advised to simply state this as his/her answer and s/he should have no difficulty filing a claim alone.

If the worker quit or was fired, it is extremely important to word this answer carefully so that the Department will not construe the quit to be a

"voluntary quit" or the discharge to be a "discharge for misconduct." In the case of a quit, see pages 36-40 on "voluntary quit without good cause," to see whether it's worth it to file a claim and if so, how to word the "reason for leaving."

It is crucial to try to establish eligibility through the initial application. You can always appeal but, unless the Department determines from the beginning that the claimant has a "prima facie case" (a case that looks good at first glance), then the claimant won't receive benefits during the long wait until the appeal hearing. This is another reason why the wording of the initial "separation statement" is so important.

In the case of discharges, employers often allege misconduct, especially in cases where workers have really been fired for union activism. Follow these steps in representing a worker who was fired from a job.

(a) Help the claimant write a draft response to the question of why s/he left his/her most recent work. Review pages 36-44 to make sure that the words or phrases used do not give the impression that the worker quit voluntarily or was discharged for misconduct.

(b) Find out in detail the circumstances of the discharge, including names of witnesses, dates, and background history. Get a statement from the claimant as to exactly what the employer said when s/he was discharged. Try to get statements in writing from possible witnesses. Don't wait until the hearing. By that time memories will have faded and fellow workers' anger over the incident will no longer be as strong.

On an appeal, you have the right to subpeona company records and witnesses. But you must

ask for these well in advance of the hearing date on the appeal.

Sometimes, if you subpeona especially "sensitive" documents from the employer, the employer will be prompted to drop an appeal rather than make certain company information public. For this reason, it doesn't hurt to subpeona any and all information which may be helpful to your case.

Finally, research the legal issues involved in the case by using this manual and the other references we suggest.

(c) If the discharge involved health and safety issues, file a claim with the Labor Commissioner's office. Under the State Labor Code, workers who are disciplined or discharged for engaging in efforts to improve health and safety at the workplace have a right to reinstatement with back pay. The Labor Commissioner's office can be used to pursue this right. Since decisions of the Commissioners are handed down rapidly but are subject to lengthy legal delays, it is also wise to file for unemployment insurance. Information discovered in a UI appeal hearing can be useful in preparing for the hearing before the Labor Commissioner and vice versa.

(d) If the discharge involved union activism, file a complaint with the National Labor Relations Board. A final decision from this agency could take years, so file for unemployment insurance. Information developed in the UI case can be helpful in preparing the case for the NLRB.

(e) If the person who was fired is represented by a union, a grievance should be filed under the terms of the union agreement. Again, sometimes months go by waiting for the arbitrator's

decision, so unemployment benefits can be a great help.

(f) The rules governing lawful discharge are different from public agency to public agency and arbitration is still a different process, relating to the terms of a specific union agreement. Representatives can be of the greatest help to workers if they are thoroughly familiar with the rules of these various institutions. Be aware that a person may be denied UI benefits and still be reinstated by an arbitrator. And sometimes workers can collect unemployment insurance and be denied reinstatement. Be sure to know the rules for each system and don't be surprised to find inconsistent rules at various agencies.

(g) If the worker was discharged because s/he was engaged in union activities or health and safety activities or because of discrimination, the worker should be advised to state that as the reason for the discharge. A copy of the complaint filed with the NLRB or the FEPC will often convince Department officials to pay benefits, even though an employer appeal is pending.

(h) As long as the worker is unemployed, able, available and looking for work, and has drafted a statement explaining why s/he left his/her most recent work, s/he should have little difficulty in filing a claim alone. Remind the worker to answer questions on the forms honestly, since s/he can be disqualified for wilful false statements. If s/he is unsure of an answer, s/he may write, "Not sure. Please interview."

(i) If the claimant is scheduled for a determination interview, brief him/her on how to phrase answers to questions. Conduct a practice inter-

view with the claimant to go over the crucial issues. You have a right to accompany the claimant to the determination interview. This is particularly important when the claimant has language problems. Be polite, but firm, in asserting the right to be present. The interviewer may not allow you to say anything at the interview but if you sense that the claimant is having trouble, you can get the claimant to ask for a break in the interview so you can advise him/her.

(j) Once the the claim is filed, make sure the person you represent complies with rules regarding availablity for work and looking for work, even if the claim is rejected by the department or benefits are held up because of an employer protest. Compliance is necessary even though many weeks may elapse during the appeal process.

(k) If benefits are denied and an appeal is necessary, study this manual for appeal procedures, definition of terms, and past precedents. Then follow the instructions in (2) below.

(2) A worker has been denied unemployment insurance.

(a) First of all, find out if the worker has filed an appeal yet. If not, and if it appears that the denial was questionable, immediately help him/her draft a letter appealing the decision of the Department. The appeal must be in writing and signed by the person denied benefits. The appeal must be addressed to the proper office of the Department, as indicated on the Notice denying benefits. If the claimant has lost that Notice, find out from the claimant at which office s/he applied for benefits and call that office to get the proper information. Although

the Department wants detailed grounds for an appeal, it is sufficient to merely state that you wish to appeal and develop your detailed reasons later. The Department must accept an appeal if it is on time.

(b) Get all the relevant documents from the person you are assisting so you can find out the exact reasons for denial of benefits.

(c) If the worker does not have all of the documents, request copies from the office of the Department which is handling the claim. You will need an authorization from the claimant.

(d) Receipt of benefits can be delayed by either an employer appeal or a Department determination. Caution the person you represent to continue to report to the Department, to seek work, and to comply with all of the Department's requirements.

(e) In some cases, the Department will pay benefits despite an employer appeal. This usually occurs in cases where the employer claims misconduct as the reason for the discharge and the Department finds, from looking at the initial facts, that the behavior of the claimant was not misconduct, as the Department has defined it.

(f) Read this manual to familiarize yourself with the nature of the UI system and the appeal procedure.

(g) Sometimes after you have investigated a case completely, you can furnish some simple evidence to the Department which will convince them to reverse the denial of benefits without going through the whole formal appeal. Try this whenever it seems likely that all that is needed for a reversal of the decision is a little evidence or a clarification. Note that it is

difficult to get such a reversal without some "exceptional" reason.

(h) Research to win your case. First, read this manual, particularly the discussion of misconduct on pages 40-44 and the section entitled "Effective Ways to Handle an Appeal." Second, consult *California Employer-Employee Benefits Handbook* by David O'Brien (see p. 36). This publication is updated yearly. We highly recommend it for the office of any advocate who deals with unemployment insurance claimants. Finally, the appeals offices have up-to-date case law relevant to UI appeals.

AVOIDING SOME TYPICAL TRAPS

Most people run into problems with collecting unemployment insurance because they quit their most recent work without good cause or were fired from their most recent work for misconduct connected with the work. The key issue of whether misconduct, as defined by law and developed in case decisions, was the reason for the separation will be discussed below.

If you represent a claimant who voluntarily quit or has been fired for misconduct, consider advising him/her to get a temporary job and then when s/he is laid off from such a job, s/he can file for unemployment insurance and receive benefits. The benefits will be based on the earnings on the long term job, not the temporary job (depending on how long the temporary job lasts).

Finding temporary work is sometimes possible through the union, or through the State's employment office, or through an agency. It must be understood however, that if, after the claimant is on UI, s/he is offered other employment similar to the temporary work, s/he must accept it or face losing benefits. For example: A carpenter accepts a temporary dishwashing job, gets laid off from

that job and starts collecting UI benefits. If, while this person is searching for work, s/he is offered another dishwashing job, s/he must accept it, even though it is not his/her customary work and the pay is lower. (One way for the claimant to avoid such a job is to start asking the person offering the dishwashing job about whether it is a union job or not. That discourages most non-union employers enough to withdraw the offer. Then the carpenter can collect UI until called back to carpentry.)

Claimants are also commonly denied benefits because of their failure to tell the Department exactly why they left their last job. This is why it is essential for a representative to go over the forms and the information with the claimant and to help the claimant make a clear statement. It is important that claimants report exactly what they were told by the boss when terminated or discharged.

If there is no time to help a claimant prepare a statement, advise him/her to answer, "Not sure, please interview," to the question, "Why are you no longer working on your most recent job?" on the Initial Claim Card. You can then review with the claimant the kinds of questions to expect at the interview. Once again, be sure to tell the claimant to be honest.

Advise the claimant you represent to continue to look for work each week while the claim is being processed. Even if no benefits are received pending an appeal, hearings or further appeals, the Department periodically determines if the person is actively looking for work and will disqualify a person for any weeks in which that is not the case. Normally there is not much effort on the part of the Department to determine if someone is actively seeking work. However if it is reported to the Department that a claimant has turned down work or if the claimant fails to file the proper forms, this can go against him/her. Every six weeks or so a personal interview is held with the claimant in which the department will ask questions and request an accounting in detail of how the claimant is trying to find work.

Claimants must always report other earnings. Note: a person can earn up to $24.99 per week without a deduction from benefits and after that the earnings are pro-rated up to the full amount of the weekly unemployment insurance check. Sometimes a person will try to collect benefits and work for some employer at the same time. This is foolish and dangerous; penalties include jail, fines and reimbursement.

EFFECTIVE WAYS OF HANDLING AN APPEAL

The following is taken from **Twenty Seven Ways to Avoid Losing Your Unemployment Appeal**, *a pamphlet written by William DeMartini, and modified to suit the needs of a representative. (Department or EDD refers to Employment Development Department. Administrative Law Judge is abbreviated to ALJ.)*

In most cases, you will not win an appeal unless the facts and law are in your favor. It is possible, however, to bungle a potential winner. The unemployment appeal process is simple and tailored for claimants and employers who do not have an attorney. At an informal hearing the ALJ advises all parties of their rights and conducts most of the questioning of witnessses. Most of the technical rules restricting the admission of evidence encountered in a courtroom do not apply in unemployment hearings.

In other words, there are no technical traps. There are, however, a number of ways to hamper your own efforts and increase your chances of losing. The following material deals with avoiding the most common pitfalls.

NOTE: If you are representing a number of claimants in appeals on the exact same issue, request that the Department combine the appeals into one hearing. It will save everyone lots of time.

1. File the appeal on time.

An appeal to an ALJ must be filed within **20 days** of the **mailing date** of the Department's determination or ruling (Section 1328, California Unemployment Insurance Code). The mailing date is on the Notice of Determination or ruling. Also, the last day to appeal is set out in the lower right hand of the notice. The appeal is considered late if filed after 20 days.

Good Cause for Late Appeals. If you file the appeal **after** the deadline, there must be good cause for failing to file within the time limit. Good cause generally means a person was prevented from making the deadline by circumstances beyond his/her control and which could not have been reasonably anticipated. Excuses such as forgetting or not making note of the deadline on the Department document, do not constitute legal good cause.

It is the claimant's responsibility to arrange with his representative to have the appeal filed on time.

How to Appeal. The law requires only that the appeal be in writing, state the grounds on which the appeal is based (Section 5024, Title 22, California Administrative Code), and be filed with any Office of Appeal or EDD office on or before the 20th day. **If the appeal is mailed, the envelope must be postmarked on or before the 20th day.**

You may use an appeal form obtainable from any EDD or Appeals Board office, but it is not necessary to use this form. You may simply write a letter on behalf of the claimant, signed by him or her, identifying the claim and stating your wish to appeal. The requirement that the grounds upon which your appeal is based be stated is not strictly enforced. A written statement clearly indicating your desire to appeal and stating the general reasons for appealing, will be accepted.

2. If the appeal was filed late, be prepared to state the reasons.

Section 5028, Title 22, California Administrative Code, provides a late appeal **must** be dismissed if the appellant fails to establish good cause for delay in filing.

Appellants occasionally defeat their own appeal by sending a representative to the hearing who is prepared to present evidence on the main issues of the case but knows nothing about the cause of the late filing of the appeal.

3. Prepare the case before the hearing.

Recollections rapidly fade, witnesses move, and documents are discarded. Evidence grows stale quickly.

As soon as possible after filing an appeal, or learning that the other party has filed (see below), interview witnesses, review the necessary documents and records, and begin to gather the essential evidence necessary to present the appeal.

A good place to start is the Department's appeal file. You may see this file by visiting the EDD office where the claim was filed or the Office of Appeal to which the hearing has been assigned. If the claimant is notified that, due to distance from the hearing, s/he will participate and/or testify by telephone, copies of the appeal documents will be mailed to him/her. Otherwise, copies are not supplied and you must visit the EDD or appeals office to inspect and copy from the documents.

The Department file should reveal the information gathered by Department representatives in making the determination being appealed. Once you review this material you should have an idea what you will need to challenge or support, as the case may be, the Department's conclusions.

4. Be prepared on all the issues.

Parties to appeals, particularly claimants, often focus their attention only on the separation (discharge or voluntary quit) issue and overlook such additional issues as alleged false statements, overpayments, availability or claim filing requirements. Such a claimant may have more than one hurdle to clear before s/he can be paid benefits.

Check all Department documents, and if in doubt, contact a Department representative to make sure you are aware of all the issues of eligibility raised by Department determinations.

5. If the other side filed the appeal, prepare your case anyway.

Keep in mind that even when the Department has issued a determination favorable to the claimant the employer has the right to appeal. The employer may present a much stronger case on appeal so it is important to prepare your own case before going before an ALJ. If you approach preparation of the case as if it were your own appeal, you will be better prepared to meet whatever contentions the other side raises.

Needless to say, if it is not advisable for the respondent (the party who did not appeal) to appear at the hearing unprepared, it is doubly perilous not to appear at all.

6. Analyze the case.

Parties to appeals often misconceive the issues. Sometimes a claimant who has been disqualified for quitting without good cause spends time and energy producing such things as favorable performance reports to prove that s/he was a good worker or, in a case where s/he was fired for alleged misconduct, comes to the hearing with a long list of complaints about the employing company and his/her job conditions.

A common mistake is preparing only to smear the good name of the employer. If you wish to win the appeal you should concentrate your efforts on the legal issues which control eligibility. Read the explanation of the issues of eligibility set forth on the reverse side of the Department's notice of determination and the brief description of the issues on appeal checked on your hearing notice.

Take great care in cases in which employers allege misconduct when claimants were really fired for union activity. It is important to introduce evidence that the claimants were discharged for union activity, but is equally important to address the misconduct issue. Try to establish that the alleged misconduct did not, in fact, occur or was not, in fact, misconduct. Sometimes, the charge of firing for union activity will make the ALJ suspicious of the misconduct charge, but you can never afford to let the misconduct charge go unchallenged.

7. Take notice of the Notice of Hearing.

The Notice of Hearing, which should be examined carefully as soon as you receive it, sets out two vital pieces of information: (1) The time, date and place of hearing, and (2) the issues to be covered in the hearing.

It is a good idea to keep a copy of the notice, and to bring it to the hearing. Mistakes seldom occur but they have been made. If the ALJ's calendar and/or the copy of the notice in the appeal file shows a different time or date, your copy is the best proof the mistake is not yours.

Note item (2) carefully so that you will be prepared on all the issues to be taken up at the hearing. Claimants occasionally overlook or forget the fact that there may be more than one issue of eligibility at stake, particularly when two or more Department determinations or notices of overpayments are combined in one hearing. If the notice of hearing does not list issues you expect to be covered at the hearing, contact the Office of Appeals as soon as possible. (See item 4.)

8. If you have a problem with the date of the hearing, promptly request a new date.

Section 5045, Title 22, California Administrative Code, states, in part:

Lack of good cause will be presumed when a continuance (postponement, new hearing date) was not requested promptly upon discovery of the reasons for inability to appear at the hearing.

9. Subpoena witnesses whose attendance you cannot control.

Due process of law requires only that you be given one reasonable opportunity to present your evidence. The fact that you believed the missing witness would voluntarily appear does not usually entitle you to a second chance.

The Office of Appeals to which your appeal is assigned will, at your request, either: issue a **subpoena**, or mail out a **Notice to Attend Hearing.**

The subpoena will be given to **you** (or your representative). **You** must arrange to have it personally served on the witness.

The **Notice to Attend Hearing** is **mailed** to the witness. The Office of Appeals does the mailing.

In either case, you must supply the witness's name and current address. The complete name and address is needed to insure delivery of the notice or subpoena.

If you don't know which is best in your case, a subpoena or a Notice to Attend Hearing, ask at the Office of Appeals (the telephone number is in the lower left-hand corner of your hearing notice).

10. Make an early request for subpoenas or notices to attend hearing.

Witnesses are entitled to reasonable advance notice that their attendance at the hearing is required. You must make allowance for mailing time if you request notices of hearing, and/or provide adequate time for service of subpoenas. If your witness is subpoenaed, or served with a notice of hearing, at the last possible minute, you run the risk of the Subpoena or Notice to Attend Hearing being unenforceable.

11. Don't subpoena witness(es) against you.

Take it on faith: if the witness made statements adverse to you at some prior time, s/he will almost certainly say the same--and when challenged, make his/her statements stronger--at the hearing.

You have no obligation to produce evidence adverse to you. There is always the chance the other party will not produce that witness. In most cases, there is no reason why you should not permit that possibility to work in your favor.

12. Discuss your witness's testimony with him/her before the hearing.

There is nothing improper about reviewing witness's testimony with him/her prior to the hearing. This is not to suggest that you would coach or attempt to induce your witness to give false testimony. Witnesses, however, often innocently create the wrong impression, or, failing to understand the issues on appeal, go off on a tangent.

It is also possible that after discussing the witness's knowledge of the events in question, you may decide you do not want that person to testify. This decision is better made before the hearing than in the middle of the witness's testimony.

13. Show up on time.

Section 5045, Title 22, California Administrative Code, provides that the ALJ may dismiss the appeal if the appellant fails to appear at the hearing. If it is your appeal and you do not appear at the appointed hour, and s/he received no other communication from you, the ALJ has no way of knowing whether you will appear at all. It is only fair and reasonable that the ALJ will then allow the other party and witnesses to leave. Even if you show up later, the hearing cannot be held if the other side is not present.

The law provides no leeway. Although ALJs customarily wait 15 minutes for the appellant before sending the other side home and dismissing the appeal, you have no legal right to the 15 minutes grace. If you are not the appellant the hearing will proceed, on schedule, without you.

The printed hearing notice form instructs you to arrive 10 minutes early. It is a good idea to do so, if for no other reason than to make a last minute check of the documents and records in the appeals file to see whether something new has been filed since you reviewed the contents of that folder.

If you have a last minute emergency or a delay en route to the hearing, contact the Office of Appeals immediately to request a postponement.

14. When in doubt, present testimony.

A claimant may not need to attend the hearing in person and may submit the evidence in the form of written statements and/or declarations or may submit the case for decision upon the documents and records in the appeals file.

This may be a satisfactory method of proof in certain cases, such as where the only evidence necessary is in a physician's certificate. In any case where there is a dispute over what was said or done, however, the decision not to

present live testimony should not be lightly made. Written statements are not entitled to the same evidentiary weight, principally because a document cannot be cross-examined.

15. Present the eye-witness.

The best form of evidence to an event is the testimony of an eye-witness.

If you had a photograph taken at the instant the disputed action took place, you would present the photo. You wouldn't dream of submitting only a second-hand description of what the photo depicted. Nevertheless, failing to produce the witness with the most first-hand knowledge is among the most common mistakes made. It can be a double-edged trap. Not only do you deprive yourself of the best evidence on your behalf but the law provides that less weight should be given to the evidence offered when it is within the power of the party to produce stronger or more satisfactory evidence (California Evidence Code, Section 412).

16. Present the document.

This is a corollary of bringing the key witness. The best evidence of the contents of a document is the document itself. If you do not have possession of the key document, contact the Office of Appeals and arrange to have this document subpoenaed.

Do not hesitate to bring the original copy of the document to the hearing. Unless special circumstances require that the original be kept in the appeals file, the ALJ will make a copy for the appeals file and return the original to you at the conclusion of the hearing.

17. Summarize voluminous written material.

Submitting documents in evidence can be overdone. Occasionally parties produce a bewildering stack of written

materials, such as personnel records, or time cards or sheets. You have a right to offer all the documents and records you see fit. But if you produce a haystack, it is wise to help the ALJ find the needle. Prepare a simple chart or written summary setting forth key information. ALJs review all evidence carefully, but company records can be confusing and abbreviations or symbols can be ambiguous. If you have failed to summarize this material and/or to point out key items in lengthy documents, you run the risk of the ALJ failing to take proper note of those items.

In addition to the summary, always have the original written material, such as all pertinent time records, available at the hearing. The other side has the right to challenge your summary and to examine the original material from which the summary was compiled.

18. In questioning your witness(es), avoid leading questions.

A leading question is one which suggests the answer. If you are asking your witness a series of questions, all of which call for a yes or no answer, you are probably asking leading questions. Ordinarily the ALJ will interject and stop you from leading your witness, but he is not required to do so. Not only are leading questions objectionable, they detract from the credibility of your witness.

If it is necessary for you to question your witness, it is best to use short questions which can be answered by relating a fact, rather than answering yes or no. It is also best to ask a series of such questions leading up to the crucial point in the case. When you reach that point, simply ask your witness: "What happened next?" or something to that effect, and turn him or her loose (and hold your breath). Needless to say, your witness will be more believable if allowed to relate critical events in his/her own way.

19. Once your witness(es) have testified, don't attempt to get them to change the testimony.

Each person has a different way of expressing him/herself. Even if your witness does not testify exactly as you would have, it is best not to attempt to prod him/her into changing his/her testimony by further questions, unless s/he made an obvious misstatement which can be easily rectified. Otherwise, attempting to induce him/her to change usually causes confusion, and makes him/her repeat the part you are dissatisfied with.

If your witness testified to something you know not to be true, you have a right to impeach your own witness (California Evidence Code Section 785). "Impeach" simply means you may offer evidence contrary to the witness's testimony or tending to show the testimony was incorrect.

20. Explain technical terms, occupational slang and strange customs of the trade.

Parties to appeals are often tempted to show-off a little, using esoteric terminology. The ALJ presiding at the hearing gets the feeling he is listening to a private argument. In such cases, both sides run the risk that the ALJ's confusion or lack of understanding may result in a disappointing decision. Part of your job in presenting your appeal is clearly to define and explain those special terms and customs of your industry or occupation.

21. On cross-examination, don't simply ask the opposing witness to repeat his testimony.

The paramount rule on cross-examination is: If you don't know what to ask, don't ask. Merely asking questions which require the adverse witness to repeat his testimony, in the hope that something will turn up, generally does you little good and much harm. At best, you get into an argument with the witness over precisely what his previous testimony was. At worst, you highlight the points the witness made against you.

22. On cross-examination, resist the temptation to rub it in.

Another fundamental rule of cross-examination has been expressed this way: When you strike oil, stop drilling. You have no obligation to produce evidence against yourself or ask questions which may weaken your case. If the adverse witness gave an answer which makes a point in your favor, don't push your luck. Beware that follow-up question which begins something like: "In other words, Witness, it is your testimony that...." You are simply giving the witness an opportunity to change or explain his testimony or bring out some further fact which hurts your case.

23. Resist the urge to fight every point your opponent makes.

As the hearing progresses, keep your eye on the ball. The "ball" is the key issue in the case. Parties are often tempted to oppose every single point the other side is making without regard to the effect on the outcome.

This pitfall is best illustrated by an example: In a case where the claimant allegedly assaulted his supervisor, which the claimant denies, the claimant's representative goes to great lengths to prove that the supervisor was a nasty SOB. He overlooks the obvious fact that he is tending to prove that the claimant probably was provoked into striking the supervisor.

The employer's competitive instincts are now aroused. He proceeds to spend the remainder of the hearing attempting to prove the supervisor is a perfect saint and no person could conceivably wish to strike such an individual. It never dawns on the employer that the claimant's evidence is in the employer's favor; and the evidence the employer now offers, in retaliation, only tends to prove there would be no reason for the claimant to strike the foreman.

Moreover, some points the other side raises may not affect the outcome one way or another. If the other side is

wasting breath, don't confuse the issues, and prolong the hearing, by wasting yours.

24. Don't assume the ALJ knows every law ever enacted.

We are a society literally drowned in laws, rules, and regulations. No individual is capable of knowing all the laws, or even of knowing of the existence of all of them.

If you are relying on a point of law in the unemployment insurance field, the ALJ most likely knows about it. It is not necessary to cite or point out that law. If your case turns on decision, rule, or regulation in another field, however, you should cite that statute or decision to the ALJ. If you don't have the full text of the law, at least be prepared with an accurate citation which enables the ALJ to find it easily. If you have that rule, regulation or decision available, it is not a bad idea to submit a photocopy. At least you have eliminated the possibility of error in quoting the law, and you might enable the ALJ to issue a decision promptly.

25. Don't rely solely on another ALJ's decision.

There is an understandable temptation to rely on the fact that some other ALJ at some other time made a decision which, it now appears, supports your position. To mention that decision does no harm, but it should not be all you have to offer. **Your** case must stand on its own. In that **other** case, the facts may have been slightly, but significantly, different, the law may have changed, or the ALJ may have been wrong.

26. Don't base your appeal entirely on an off-the-wall theory.

In an unemployment appeal there are no prizes for originality. It is unlikely that you will win on some unique theory or novel argument. Your best approach is to stick to

a down-to-earth presentation keyed to the essential issues of unemployment eligibility, backed up by solid evidence.

One losing argument favored by claimants is that conduct is protected by the Constitutional rights of free speech or religion. Without further exploring the complexities of these Constitutional safeguards let it be said that free speech does not entitle an employee to deliberately insult his employer's best customer and still collect unemployment benefits. Nor does freedom of religion allow a claimant to attempt to perform an exorcism on his foreman during working hours.

Employers succumb to the same temptation. More than one employer has appeared at the hearing totally unprepared to give evidence on the essential issues and armed only with a stirring philosophical argument, hoping to establish that the unemployment insurance program is contrary to fundamental law and justice, not to mention the Constitution. However sympathetic the ALJ may be to the plight to the employer, he does not have jurisdiction to declare the entire unemployment insurance program null and void.

27. When you get stuck, say something.

The ALJ is required to protect the rights of both parties and to aid and assist the parties in presenting their cases. There may come a point in the hearing when you are caught by surprise, don't know what to do or say next, or realize you have overlooked or forgotten something. You may be tempted to remain silent to avoid embarrassment. To do so is a mistake.

You are entitled to request a few minutes recess to examine your documents for personal reasons and so forth. Many representatives are not aware of this right and do not avail themselves of it when they get stumped momentarily in the hearing.

In making the decision, the ALJ is confined to the evidence in the record and, on further appeal, you will ordinarily not be allowed to offer additional evidence. If you keep silent, the ALJ, or someone reviewing the record, will have no way of knowing there exists other evidence you might have produced or some other point or argument you might have made.

In other words, do not be embarrassed; bring your problem to the attention of the ALJ. If necessary, make a simple request for a continuance of the hearing or for the right to produce further documents. In many cases the ALJ may suggest a way to make your point without having to continue the hearing to another time. If s/he denies your request, at least you have made it a matter of record. If the ALJ was wrong, it may be grounds for reversal on appeal.

Okay, so you have tried to avoid the pitfalls and you still lost the appeal. You may be tempted to:

(1) Grouse and grumble that the whole system is rotten.

(2) Write or telephone the EDD office; the Office of Appeals; the Administrative Law Judge; your Congressman; the Governor; the news media -- and raise hell.

(3) Give up.

All of the above have one thing in common: They don't do any good. You still have one reasonable course of action: **file an appeal with the California Unemployment Insurance Appeals Board.**

Obtain the appeal form from any Office of Appeals. Without further ado or cost to you, the Appeals Board will review all the evidence and issue a written decision. If the Board believes the ALJ was wrong, his/her decision will be reversed or modified.

But there is a **time limit on filing** an appeal to the Board (20 days) so don't delay.

THE MAJOR ISSUES WITH WHICH YOU MAY BE CONFRONTED IN UNEMPLOYMENT INSURANCE APPEAL HEARINGS.

There are many problems that arise which may result in a person not getting unemployment insurance. Over the years, through rulings on appeals, court decisions and in some cases amendments to the law, there have developed policies which govern what will be decided in any given case. It is not our intent to cover all of these situations but only the most common ones.

We strongly urge that each organization buy *California Employer-Employee Benefits Handbook*, written by David W. O'Brien, Attorney, published by Winter Book Publishing Co., Post Office Box 1106, Covina, CA 91722. This publication contains a through explanation of Workers Compensation, Unemployment Insurance and Disability Insurance; it covers in detail rulings, interpretations, latest legal developments and related matters. It has a good index for each topic so if, for example, you want to know whether a person can collect unemployment during a week in which a death in the family occurs, the book will tell you. With this book in your office and what is covered in this manual, you should have no trouble effectively representing someone in an appeal hearing. Moreover, if you cannot find a precedent in this book, an unlikely event, each referee's office has a library of cases which you are free to consult.

Voluntary Leaving Without Good Cause

If a person left his or her most recent work voluntarily without good cause, s/he is not eligible for UI. Since employers want to keep their UI "experience ratings" low by minimizing the number of successful claims, employers will often claim that a person left voluntarily even if it

isn't true. The Department will try to figure out who was the "moving party" in ending the employment. If the employee was the one who left, they'll try to determine if s/he did it voluntarily, for instance if the employee quit because s/he didn't like his or her co-workers. **If a person quits voluntarily, no benefits will be given unless s/he had "good cause."** "Good cause" usually means that the reason for quitting has to do with the work, but there are some good personal reasons that the Department recognizes: "When he is compelled to do so by necessitous circumstances or because of legal or family obligations, his leaving is voluntary with good cause." The courts ask, "Would a reasonable person genuinely desirous of retaining employment take a similar action?"

The Department looks at the way the employee ultimately left the job. If the person "voluntarily" quit because s/he anticipated being fired, it's the quitting that counts in the end for UI. **For UI purposes, it's worth it to stick it out: tell the person you represent not to leave until s/he is fired or laid off so that s/he can collect UI.** If it's too late for that and the person has already been disqualified for voluntrily leaving, s/he can (maybe) get a temporary job. If s/he earns five times the weekly UI benefit, s/he can be eligible again.

Here's a rundown on what is considered voluntary leaving **without good cause**:

(1) leaving in anticipation of being discharged;

(2) leaving to attend school;

(3) leaving because of "surmountable" or temporary commute problems;

(4) leaving because the person does not want to work certain days or hours, with no "compelling" reasons for the restrictions;

(5) leaving because hours are reduced; presumably one can look for a new job during the hours one would have been working;

(6) leaving to look for another job (but leaving to take a job that was promised, which later falls through, is good cause);

(7) leaving to become self-employed, unless there are no prospects of continued work in a person's regular occupation;

(8) leaving because of a "trade dispute" (see below);

(9) leaving because of dissatisfaction with the boss or co-workers, unless the situation is "intolerable" and the person asks to have it corrected and it is not;

(10) leaving because there are no opportunities for advancement, unless this is caused by discrimination, or the employer reneges on a specific promise of promotion.

The following are examples of voluntary leaving **with good cause:**

(1) leaving because of transportation difficulties which are "of a substantial nature and not surmountable by ordinary common sense and prudence."

(2) leaving because a contract expires or work is complete or the employer goes out of business;

(3) leaving because the health of the employee or his/her family requires it or because a person reasonably fears for his/her health and safety on the job;

(4) leaving because of "necessary and compelling" personal, family, legal, or moral obligation such as:

(a) moving with one's spouse in order to keep a marriage together

(b) caring for a family member when no other care is available

(c) leaving because the health of a pregnant employee or her baby requires a person not to work

(d) leaving because working conditions pose an "undue risk" to an employee's morals, i.e., there is illegal, immoral, dishonest, or unethical behavior at the workplace.

(5) leaving because one cannot work certain days or hours, with good cause; "good cause" is any of the reasons listed here; however, an employee should ask for a schedule change first;

(6) leaving because of a substantial pay cut ("substantial" has to be at least 10%, sometimes at least 25% -- be careful -- check with Department for current rulings);

(7) leaving because of one of the following intolerable working conditions:

(a) unreasonable production requirements

(b) working conditions which are more hazardous than normal for the industry or which are more hazardous to the worker than to most people

(c) the employer unreasonably imposes duties outside the scope of employment

(d) the employer "materially breaches" the contract under which the person was hired

e) interference with the right to engage in union activities.

In all of these, the burden of proof can be with the claimant.

Constructive Quit

This is the term that the Department uses to describe the situation where, technically speaking, a person is fired, but fired because of some voluntary action on his/her part. It covers cases like these: being in jail through one's own fault; losing a license which one needs for a job through one's own fault; refusing to join a union or pay dues or remain a member in good standing; being absent from work for more than 24 hours without notice. A **constructive quit, even though it's officially a discharge, is treated as though the person left voluntarily; s/he will not be eligible for benefits.**

Constructive quits are often subject to litigation. A constructive quit ruling is worth appealing.

Discharged for Misconduct

A person discharged from work for "misconduct" will not be eligible for UI benefits. Now, the State's definition of misconduct is often different from that used by employers and found in some union agreements. Here is how misconduct was described by one court:

> *... The term "misconduct" is limited to ... such wilful or wanton disregard for the employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or occurence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good*

performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith error in judgement or discretion are not to be deemed "misconduct" within the meaning of the statute.

In other words, an employee must to do something **really awful** for it to be misconduct **and** it has to be **done on purpose** or "wilfully". Since the purpose of unemployment insurance is to compensate those who are out of work through no fault of their own, the misconduct must be serious for one to be ineligible for benefits. If a worker's conduct is unsatisfactory, even if the employer has good reason to fire the worker, it isn't a discharge for misconduct. **Misconduct is limited to wilful or wanton disregard of the employer's interests. Simple negligence isn't enough, but repeated negligence may be.** A claimant will be judged by the standards of the occupation, so a claimant with special training or responsibility may be required to take more care than the average person. Also, workplace grievance procedures which govern discharges have no bearing on the UI decision. So if in grievance arbitration it is found that an employee was fired "for cause," s/he may still be eligible for UI if there was no misconduct as defined here.

Misconduct is very hard to prove and in most cases, it will be worthwhile to fight for benefits. The key questions are: Did the employee tend to harm a legitimate interest of the employer? Did the employee do it on purpose? If the answer to either or both of these is no, then the employee probably was not discharged for misconduct, no matter what the employer says, and it will be worth while to fight for benefits.

The following guidelines on what constitute misconduct are very general. Some warnings are in order. **First, the law is continually changing.** Representatives should check O'Brien or with the ALJ for the most recent precedents. **Second, the case you handle may itself set a precedent.** If your case is a logical exception to past rules and you can make your point understood, you may convince the ALJ to

rule in your favor. **Last and most important, each case is different.** Even if a rule seems to apply to the case you are handling, if you can distinguish your case from past precedent-setting cases, the rule may not apply to your case. Be careful, through, to have a good reason as to why the differing circumstances should have a different rule. Here is a list of things that have been found to constitute misconduct:

(1) Absence or tardiness without a compelling reason or notice. **A person must first be warned or reprimanded or this behavior must have been frequent.**

(2) An altercation (i.e. a fight or noisy or angry dispute) unless there are extenuating circumstances.

(3) Lying on an application **if it tends to injure the employer.** (The exception to this is that applicants are allowed to lie in answer to questions which are illegal to ask in the first place.)

(4) Lying about one's ability to do work. (One is allowed to exaggerate.)

(5) Taking (stealing, appropriating, converting) employer's products, supplies, food, or money without authorization. **(Even scrap materials count.).**

(6) Failing to inform the employer of an illegal act. **The employer must prove that the worker knew about the illegal act.**

(7) Insubordination such as refusal to comply with reasonable instructions, excessive arguing, obscene or insulting language, or carelessness and negligence of such degree as to constitute "misconduct." **Usually there must be repeated acts of insubordination or one really bad one to constitute "misconduct".** A person who thinks s/he

was given an unreasonable order, is obligated to protest in some other way than insubordinately.)

(8) Intoxication or drinking on the job or problems at work caused by alcohol. (Exception: if the problem is due to alcoholism, it's not misconduct because alcoholism is not seen as voluntary.) **If the drinking has no effect on how a person does the job , it's not misconduct.** In fact, it's none of the employer's business.

(9) **Gross or recurring neglect** such as failing to follow warnings, sleeping on some jobs, dangerous conduct, or mishandling of money. Usually these actions involve a safety issue or a very expensive mistake. **It takes more than "ordinary" neglect.** For instance, for a person with a driving job , one or two vehicle accidents don't usually count as gross or recurring neglect, but falling asleep at the wheel would be gross neglect.

(10) An off-duty offense can be misconduct if it has an effect on doing the job, i.e. losing a license, being incarcerated, etc. (Note: sometimes such situations will be categorized as "constructive quits." However, the adverse impact on eligibility is the same.) **A person with a criminal charge pending against him/her is entitled to a presumption of innocence.**

(11) Use of profanity if it is in disregard of employer's interests or one's duties as an employee.

(12) Threats of violence.

(13) Endangering employer's interests through one's relationship with fellow employees, the public, or customers.

(14) Violation of rules, if the rules are reasonaable, well known to the employees, and accepted by the

union. Usually, employees must be warned or reprimanded first.

Note that in any case where employer's interests were harmed, those interests must be **legitimate** in order to justify a finding of misconduct. If, for example, the employer has an interest in keeping a union out of the workplace and a worker harms that interest by **working to establish a union, that is not misconduct** because the employer's interest is illegal under the National Labor Relations Act.

Unemployment

To be eligible for benefits, a person must be unemployed. How does the Department define "unemployed?" **A person is unemployed if s/he**

(1) isn't working for pay at all;

(2) is working for pay but is earning less than his/her weekly benefit amount.

Wages

For any wages a worker earns over $25 per week while unemployed, the State will reduce weekly benefits by that amount. But the question of what constitutes wages can be tricky. For instance, is "severance pay" wages? The Department says no. Anything the employer pays as compensation for being unemployed, such as severance pay or supplemental UI benefits, doesn't count as wages and can't be deducted from the weekly benefit amount. The exception to this rule is "in-lieu-of-notice pay." (This is when the employer says, "OK, I'm giving you two weeks notice, but I don't want you around for the two weeks so here's two weeks pay. Now get lost!") **In general, wages are anything that is payment for the work that a person did before s/he was "separated" from the job.** This does not include retirement payments or health or disability insurance payments. Vacation pay counts as wages if a person leaves the job to take a vacation but it doesn't count as wages if

s/he leaves because of a layoff and the employer pays vacation pay after the layoff.

Able and Available for Work

For every day that a person is not "able and available" for work, s/he can lose the share of benefits for that day. So what does "able and available" mean?

"Able" means physically and mentally able to do the kind of work that one is seeking. And in addition, there must be a "reasonable" labor market for the kind of work one is able to do. This means that if the only kind of work that a person is "physically and/or mentally able to do" is to play tiddly winks and there's no such thing as a paid tiddly wink player, then that person is out of luck as far as UI benefits are concerned. But take note that when the Department says "reasonable labor market," they don't mean that there must be a reasonable number of job openings; they mean a reasonable number of jobs in the field, whether there are openings in that field or not.

"Available" is trickier to define. **Based on past Appeals Board and court decisions, the Department will find a person available if s/he is (1) willing to accept suitable work which s/he has no good cause to refuse; and (2) available to a substantial field of employment.** The general guidelines are that a person can place restrictions on the work that s/he will accept as long as the restrictions are made with "good cause" and as long as it doesn't mean that s/he couldn't work a job in his/her field around these restrictions. The following are some rules that have been developed to determine whether a person is "able and available."

(1) A person who is out of town for a day or more, may be found "unavailable" unless that person can prove that s/he missed no work opportunities or that s/he was travelling primarily to look for work. This can be shown, for example, by being on an approved union hiring hall list and making provisions so that the person could be called back and be ready for work within 24 hours should

work become available. If there is a death in the immediate family and a person must leave town, s/he is given a little leeway. One is allowed to leave for 2 days if s/he stays in the state and for 4 days if s/he has to go out of state before benefits will be reduced.

A person who is ill may have his/her benefits witheld only for the days of illness, not for the entire week. See *Available: Benefits Reduced*, p. 9.

(2) One can place **"good cause" restrictions** on days and hours that one can work and still be considered available as long as there is a "reasonable labor market" for one's services during the unrestricted days and hours. Some restrictions that were found to have good cause:

(a) Caring for a child or an invalid family member when there is no other reasonable care available.

(b) Attendence in school which restricts hours.

(c) Unwillingness to risk working in a neighborhood that is known to be dangerous at certain hours.

(d) Religious belief prohibiting work on certain days.

(e) Jury duty or having been subpeonaed as a witness restricts hours.

(3) A person can also place restrictions on the **kind** of work that s/he will accept if there is "good cause" for doing so and there remains a "reasonable labor market" for his/her services. Following are examples of restrictions that were found to have "good cause:"

(a) Health reasons, including pregnancy or disability, prevent a person from doing certain kinds of work, but there are still jobs which the person is capable of performing.

(b) A person may refuse to perform non-union work **only if** union agreement(s) exist with a "substantial percentage" of the employers of people in the field.

(c) A person may refuse jobs that pay less than the prevailing wage or which have hours and working conditions which are less favorable than prevailing conditions.

(d) Religious belief prohibits certain kinds of work, or a person conscientiously objects to signing a loyalty oath.

(e) A person may turn down jobs which aren't "suitable work." (See below.)

(4) Some restrictions may make a person **unavailable** for work. Even the "good cause" restrictions listed above could put a person in the "unavailable" category if it means that there's no labor market left for his/her services. This is a rare occurance. One would have to place round-the-clock restrictions on work hours for this to happen. A person may also be found unavailable if:

(a) S/he is in jail. However, if it's only for "a couple of hours" or if s/he was unlawfully arrested or if it was for less than two days and the charges were dropped, s/he is still considered available.

(b) The union controls employment in the person's field and s/he doesn't pay dues, or refuses to transfer membership if s/he moves, or if a person doesn't use the union's placement services.

(c) A person refuses to work, for less than his/her usual wage. A person must accept "suitable" (see below) employment at the "going wage."

(d) A person refuses to do certain work which s/he is qualified to do.

(5) If a person is a seasonal worker, s/he is considered "able and available" for off-season work only if s/he is looking for "suitable" off-season work.

(6) Old age doesn't disqualify a person from receiving benefits. If there's a reasonable labor market in the geographical area in which the person is able and willing to work, s/he is "able and available" and eligible for benefits.

Searching for Work

To be eligible for benfits, a person is supposed to "make a reasonable effort to seek work on his/her own behalf." What a reasonable effort is depends on a person's occupation and labor market conditions. If it's painfully obvious that there is no work in a person's field at the time, the person won't be required to keep calling places just to hear them repeat that they're not hiring. If the Department finds that a person is "willfully" doing something to discourage employers from hiring him/her, that person will not meet the "searching for work" requirement.

Methods of search vary from occupation to occupation. A person may only have to register with a union hiring hall to carry out what the Department considers an effective search. On the other hand, a person who has been out of work a long time may be required to take more extensive

measures. The Unemployment Office will generally "prescribe" a suitable search. They will usually approve of the following methods: registering for work at the Department; registering with a union hiring hall or placement facility or the placement facility of a professional organization; applying for jobs with former employers or employers that could reasonably be expected to hire him/her; registering with a placement facility at a school or college or with a private employment agency; applying for or taking exams for suitable government or civil service work; answering want ads. Note: they cannot require a person to pay a fee to use a private employment agency.

Suitable Employment

A person who refuses to accept "suitable employment" when it's offered or who fails to apply for "suitable employment" when the employment office gives a referral, can be disqualified from receiveing benefits for 2 to 10 weeks. In order to be disqualified, the following three conditions must hold:

(1) The person must have received an actual offer which contained enough information to determine whether the job was suitable. If there's not enough information, the person has the duty to investigate the working conditions before s/he has good cause for declining the job offer.

(2) The employment office or the union referral service must have made the referral properly.

(3) It must have been an offer or a referral to "suitable employment." If it was "suitable employment," a person can still refuse it if s/he has "good cause."

So what is "suitable employment?" **It is employment in a person's usual occupation or other work for which s/he is reasonably fitted.** The employment office gets to determine what other work is reasonable but they will usually

refer a person to work in his/her usual occupation unless there are few jobs available at the time.

Workers are also protected from having to accept certain kinds of work or work with certain employers. These include:

(1) employers who don't have appropriate licenses;

(2) employer's who don't contribute to the UI fund;

(3) employers who don't carry workers' compensation insurance;

(4) positions which are vacant due directly to a strike, lockout or trade dispute;

(5) work for which the wages, hours or working conditions are substantially less favorable than those prevailing for similar work in the area;

(6) work which requires a person to join a company union or which requires a person not to belong to a bona fide labor organization.

What if a person is offered "suitable employment" and wishes to turn it down? When does s/he have "good cause?" **Here are some recognized "good causes:"**

(1) There is good reason to believe that the job poses a risk to health, safety (relative to the customary level of safety in the industry), or morals.

(2) A person is not fit to do the work or lacks prior training for the work.

(3) The wages are too low. "Too low" means less than the weekly benefit amount or substantially lower than the prevailing wage which the person was previously receiving. However, a person can be required to take a job which pays less than the former wage if the person has been out of work

for a long time or the labor market is tight or the person has, in the past, worked at a temporary job which paid a lower rate.

(4) One honestly objects to having to take a loyalty oath.

(5) One would have to make a substantial investment in equipment in order to do the job.

The following reasons are not "good cause:"

(1) The job provides no opportunities for advancement. A person must accept the work unless it would cause his/her skills to deteriorate or would injure a person's future career.

(2) A person refuses to accept non-union work, unless such work would cause him/her to lose union membership. A person cannot refuse non-union work just because s/he would lose fringe benefits or the right to strike.

A Hint: Sometimes union members accept temporary non-union work at less than union wages. If these union members are later offered permanent work at these wages, the Department usually requires that it be accepted. One way around this problem is for the union members to inquire whether the offered job is a union job or not. If a worker states his/her strong preference for a union to a non-union employer, the offer will usually be withdrawn.

Trade Disputes

A person who is not working due to a "trade dispute," will not be eligible for UI benefits as long as the dispute is in active progress. Since this issue is very complex and rules are quickly being modified by court decisions, it is best to check with an attorney for up-to-date advice. If in doubt, go ahead and file for benefits. The worst that will happen is that the claim will be denied. Just about anything such as a strike or lockout is a trade dispute--usually. A trade

dispute does not have to involve an established union; it covers any organized or unorganized dispute over the terms and conditions of employment.

The main exception to this rule is that if the trade dispute is over an unfair labor practice, workers will be entitled to benefits. This is because the U.S. Constitution and the National Labor Relations Act, which prohibits unfair labor practices, take precedence over the state legislation which governs unemployment insurance benefits. It is an unfair labor practice if an employer interferes with the following protected acts: the right to self organize; the right to bargain collectively through representatives of workers' own choosing; and the right to engage in concerted acts for collective bargaining or other mutual aid or protection. Thus a group of employees can walk off the job when the employer refuses to keep the workplace heated at a decent level and they would still be eligible for UI benefits, since they were engaged in a concerted act for mutual protection.

In order to be ineligible for UI benefits because of a trade dispute, a person must have voluntarily left work because of the dispute. If a strike in another bargaining unit means that it's not possible for a worker to do his/her job, s/he is still eligible. A person must be **voluntarily** not working **directly** due to a trade dispute.

A person who takes "meaningful action" to disavow a trade dispute, such as crossing a picket line, and still gets sent home, will be eligible for UI benefits. But a person who refuses to cross a picket line won't be eligible for benefits, unless it would have been truly dangerous for him/her to cross it. A person who is still on the job and is picketing during off hours and gets laid off or fired, can receive UI.

A person who has been disqualified from UI benefits because of involvement in a trade dispute can regain eligibility when any of the following things happen:

(1) The employer sells the business or permanantly closes it.

(2) The employer's establishment is destoyed (by fire, etc.).

(3) The worker is fired and/or strikebreakers are hired to permanently replace him/her; this may act as an "intervening cause." In such a case, the termination of employment may be due to something other than a trade dispute. However, cases vary on this point.

(4) A person is a seasonal worker and the season ends before the trade dispute ends.

(5) The person obtains other full time, permanent employment in his/her usual occupation. The person must intend to sever his/her old employment relationship.

(6) The person offers to return to work, doing everything in his/her power to abandon the dispute.

(7) The person voluntarily resigns from his/her job with good cause.

(8) The trade dispute ends.

While these rules are rather rigid, representatives should be aware of ways to get around them. For example, if seasonal workers stay out on strike all season, at the end of the season they can make an unconditional offer to return to work (knowing there is no work) and when their offer is denied, they could collect unemployment insurance.

NOTE ON WORKSHARING

The Employment Development Department operates a work sharing program to help ease the burden of unemployment. An employer may choose to participate in the program instead of simply laying people off. If the employer intends to cut total work hours and total wages by 10% or more, it can instead participate in the work sharing program and cut everyone's hours and income just a little bit. Unemployment insurance is then used to supplement the income of the people affected by the cuts. The benefits may not be as high as they are when a person is completely laid off (there is a special benefit schedule for this program), but they help.

Employers must be official participants in this program in order for partially laid off workers to be eligible for benefits. Some employers are not eager to participate in the worksharing program for fear that their UI rates will rise. Unions, therefore, often need to aggressively negotiate for such a plan. For more information, write to: EDD-UI Division -- Worksharing, P.O. Box 942880, Sacramento, CA 94280-001, or call 916/324-5959.

DISABILITY INSURANCE

The system which administers the Disability Insurance program is very similar to the Unemployment Insurance Program. There are, however, some notable differences.

California began its Disability Insurance program in 1946. The program pays benefits to people who are out of work due to illness or injury not caused by (or related to) work. (The Workers' Compensation system covers work related injury or illness.) Between 1960 and 1980, Californians out of work due to illness or injury received $7 billion from the State Disability Insurance fund and more than $1 billion through voluntary plans.

The Disability Insurance fund is financed by workers who pay a certain percentage of their income into the fund. (This percentage varies. Currently, it is 6/10 of 1% of income up to $21,900.) When a worker has a non-work related injury or illness that causes him or her to miss more than a week of work, s/he is paid benefits of up to $224 per week. The level of benefits depends on the person's "base period" wages. (The base period is similar to the base period for UI but the timing is different. See p. 6 for a definition and, p. 64 for the Disability Insurance requirements. A benefits table appears on p. 65.

Employers and workers can choose to contribute to their own private disability insurance plan instead of the state's program. Such plans are called "voluntary plans" and must be approved by the state DI Administration. In order to be approved, voluntary plans must be at least as beneficial to workers as the state plan. Voluntary plans can be advantageous because, in some cases, the percentage tax on workers' wages is less and in other cases employers contribute to the fund. A worker covered by a voluntary plan must make a claim for DI benefits through his or her employer, not through the state. About 6% of DI coverage is in the form of voluntary plans.

The eligibility requirements for DI are as follows:

(1) The person must be "disabled;" that is unable to do his or her **usual or customary work** due to a physical or mental illness or injury. The person must suffer a wage loss due to this disability. This includes communicable disease, acute alcoholism, pregnancy, childbirth, or pregnancy and childbirth complications.

(2) The person must be disabled for a waiting period of seven days before payment is made. **However**, if the person is hospitalized, only a one day waiting period is required. If the person has already been disabled for 21 days at the time the claim is made, the waiting period may be waived.

(3) The person must have earned at least $300 in wages subject to DI tax during the 12-month base period of the claims (see pp. 6 and 64. Those wages can be earned in part time or full time employment. (Special rules apply for workers whose wages were less than $300 because they were receiving unemployment insurance or Workers' Compensation benefits. See O'Brien at pages 441-442.)

(4) The person must be under the care and treatment of a duly authorized medical or religious practitioner. The term "medical or religious practitioner" includes physicians, surgeons, dentists, podiatrists, osteopathic and chiropractic practitioners, psychologists, and duly authorized practitioners of any bona fide church, sect, denomination or organization whose principles or teachings call for dependence for healing upon prayer or other spiritual means. (Note: if a person is under the care of a religious practitioner, the person must in good faith adhere to the religion which advocates such healing.)

(5) The person must file a claim for DI benefits along with a "Doctor's Certificate" from an authorized medical or religious practitioner.

How to File a Claim

A disabled worker does not need to go to the DI office to file a claim. Claim forms are available from many doctors, hospitals, and unions or a claimant can call the DI office and have a claim form mailed to him or her. The claim form can be returned by mail to save the disabled worker a trip to the DI office. The claim should be filed no later than the 20th day after the first day for which benefits are payable (that is, after the first day following the seven day waiting period). Unless the claimant has a good explanation, late filing results in loss of payment for the number of days the claim is late.

The claim form is simple to complete. The claimant fills out the section called "Claim Statement of Employee" and then gives the form to his/her doctor so that the doctor can complete the "Doctor's Certificate." Usually, the doctor will then mail the claim form to the DI office.

The claimant is entitled to see a doctor of his or her choice. The Employment Development Department has the right to require claimants to submit to examination by a medical practitioner designated by the state. The Department usually requires this only if the disability lasts a long time or the Department for some reason suspects that the disability is not genuine. Even though the Department has the right to send claimants to its doctors, claimants are under no obligation to accept treatment from these doctors. (Claimants who depend on prayer or spiritual means for healing do not have to submit to such examinations.)

A person does not have to be unemployed in order to be eligible for DI benefits. A person working part time instead of full time due to a disability is entitled to benefits as long as his or her part time weekly wage is less

than the weekly wage from his or her regular and customary work. However, the sum of the benefits and the part-time wage must be no greater than the full time wage.

A person is not eligible for DI benefits if s/he does not suffer a "wage loss" because of the disability. That is, if the employer continues to pay the person wages during the disability, she or he will not be entitled to DI benefits. In general, the term "wages" is used the same way it is for UI purposes (see p. 44). For instance, bonus pay, severance pay, supplemental UI payments, and pay for vacation earned before the time the disability occurs **are not** counted as wages for DI purposes. On the other hand, sick pay is counted as wages for DI purposes. A person who received his or her full wages in sick pay would not be entitled to DI benefits for as long as the sick pay was in effect. But if the sick pay was less than the person's full weekly wages, the person would be entitled to partial DI benefits up to the amount of the full weekly wage.

What is a Disability?

"Disabled" means unable to do one's usual or customary work due to a physical or mental illness or injury which is not "work related."

Illnesses or injuries which are "work related," (i.e., caused by or arising out of work) are supposed to be covered by Workers' Compensation benefits. But as most workers know, Workers' Compensation benefits are subject to numerous bureaucratic and legal delays. The Workers' Compensation system, like the UI system, is experience rated: the more work-related injuries an employer is responsible for, the higher the employer's Workers' Compensation insurance premiums. Employers therefore frequently challenge Workers' Compensation claims and workers' claims for benefits are frequently denied.

If a person is denied Workers' Compensation benefits because an employer challenges the injury as being unrelated to work, then the person is eligible for disability

benefits. This person may appeal the decision on Workers' Compensation and later be found eligible. In that case, the Workers' Compensation fund would pay back the DI fund and pay the injured worker any difference between Workers' Compensation benefits and DI benefits. Then the injured worker would receive Workers' Compensation benefits for as long as he or she is eligible. In the meantime, the injured or ill worker should file a claim for DI when Workers' Compensation benefits are initially denied.

In addition, if a person is receiving Workers' Compensation benefits and those benefits are less than the weekly benefits the person would receive through disability insurance benefits, then that person is entitled to collect the difference from the DI fund. In order to collect this difference, it is necessary to file a claim with the DI office. For example, if an injured worker receives $150 a week from Workers' Compensation but would be eligible for $224 per week from DI (the maximum weekly benefit), then that worker can file a claim with the DI office, checking "Yes" in answer to the question, "Are you claiming or receiving Workers' Compensation Benefits for any one-the-job injuries or illnesses during the period covered by this claim?"

Then the DI office calculates the partial DI benefits for which the person is eligible, that is, the excess of DI benefits eligibility above Workers' Compensation benefits, which, in this case is $74 per week. Note that DI benefits are not always higher than Workers' Compensation benefits and that this supplemental benefit comes only from the DI fund at times when DI benefits are higher than Workers' Compensation benefits.

Pregnancy. Pregnancy and childbirth are subject to the same test as other disabling conditions: does pregnancy or childbirth prevent a woman from doing her usual or customary work? If so, she is eligible for DI benefits. Doctors usually certify the last four weeks of pregnancy and the six weeks following delivery as a disability.

It is important to note that, even though pregnancy can be a disability, it is illegal for employers to discriminate against pregnant employees. Pregnancy and childbirth must be treated the same as any other disability. Pregnant employees must receive the same benefits and privileges as other employees similar in their ability or inability to work.

Eligibility Issues

Illegal aliens. An illegal worker may be eligible for disability insurance benefits if she or he paid into the DI fund and is otherwise entitled to DI benefits. The fact that she or he is working in the country illegally has no bearing on eligibility.

Trade disputes. Trade disputes (strikes or lockouts) have no bearing on eligibility for DI. Trade disputes only affect eligibility for unemployment insurance benefits.

Appeals

There are fewer appeals under DI than under UI. For DI, since employees' contributions make up the entire fund, employers have no financial incentive to challenge a claim. Workers do not often face any difficulties in collecting DI benefits but occasionally the Department will determine that a person is ineligible for benefits. When this happens, the claimant has twenty days to appeal the determination. This 20 day period begins with the date of mailing of the "Notice of Determination" issued by the Department. As with appeals to UI, the appeal to DI must be in writing. The appeal can be an informal letter or the claimant can obtain an appeal form from the Department. The appeal must contain the claimant's name, address, and Social Security number and the reason for objecting to the Department's determination.

There are three main reasons why the Department denies or discontinues benefits:

(1) The Department did not find that the claimant was disabled. This situation arises when there is a problem with the Doctor's Certificate or if someone at the Department is suspicious of the findings of the claimant's doctor. The Department has the right to have a state appointed doctor examine the claimant.

(2) The Department found that the claimant was able to do his or her "usual or customary work." This situation arises when the Department and the claimant disagree on what the claimant's usual and customary work was. For example, a claimant who has worked as both a nurse and a hospital receptionist may be unable to work as a nurse due to a back injury. The claimant maintains that nursing is his or her usual work but the Department may maintain that the receptionist job is the claimant's usual work. If the claimant is able to work as a receptionist then the Department would deny benefits. On appeal, the claimant must prove that nursing is his or her usual or customary work. The term "usual or customary" refers to the work performed on a regular basis for a reasonable period of time prior to the disability.

(3) The Department finds that the claimant is no longer disabled. This can happen if the Department physician examines the claimant and finds the claimant able to work.

On any appeal issue, the claimant and his or her representative must be prepared to convince the Department that the reason for the denial was unfounded. The system of appeal hearings is identical to that under UI. See pages 17 to 36 for tips on preparing an appeal. O'Brien (see p. 36) has further details.

Finally, it is important that a claimant who was denied benefits and is appealing the decision continue to certify for benefits while the appeal is pending. If the claimant is eventually found eligible, he or she can only receive

benefits for the weeks when he or she sent in a "Continued Claim" form to the Department and met all eligibility requirements.

UNEMPLOYMENT INSURANCE BENEFITS TABLE

In order for your claim to be found valid, you must have at least $1,200 in earnings, or $900 and eight weeks of employment with earnings of at least $20 per week, in the base period. ***The quarter in which you were paid the highest wages determines the weekly benefit amount you will receive.*** The table below shows how your weekly benefit amount varies with the amount of wages you received during the highest quarter of your base period:

BENEFIT AMOUNTS TABLE

Wages in highest quarter	*Weekly benefit amount*	*Wages in highest quarter*	*Weekly benefit amount*	*Wages in highest quarter*	*Weekly benefit amount*
$ 225.00 – 688.99	30	$2,002.00 – 2,040.99	76	$3,848.00 – 3,899.99	121
689.00 – 714.99	31	2,041.00 – 2,066.99	77	3,900.00 – 3,938.99	122
715.00 – 740.99	32	2,067.00 – 2,105.99	78	3,939.00 – 3,990.99	123
741.00 – 766.99	33	2,106.00 – 2,144.99	79	3,991.00 – 4,042.99	124
767.00 – 792.99	34	2,145.00 – 2,170.99	80	4,043.00 – 4,079.99	125
793.00 – 818.99	35	2,171.00 – 2,209.99	81	4,080.00 – 4,116.99	126
819.00 – 844.99	36	2,210.00 – 2,248.99	82	4,117.00 – 4,153.99	127
845.00 – 870.99	37	2,249.00 – 2,287.99	83	4,154.00 – 4,190.99	128
871.00 – 896.99	38	2,288.00 – 2,326.99	84	4,191.00 – 4,227.99	129
897.00 – 922.99	39	2,327.00 – 2,352.99	85	4,228.00 – 4,264.99	130
923.00 – 948.99	40	2,353.00 – 2,391.99	86	4,265.00 – 4,301.99	131
949.00 – 974.99	41	2,392.00 – 2,430.99	87	4,302.00 – 4,338.99	132
975.00 – 1,000.99	42	2,431.00 – 2,469.99	88	4,339.00 – 4,375.99	133
1,001.00 – 1,026.99	43	2,470.00 – 2,508.99	89	4,376.00 – 4,412.99	134
1,027.00 – 1,052.99	44	2,509.00 – 2,547.99	90	4,413.00 – 4,449.99	135
1,053.00 – 1,078.99	45	2,548.00 – 2,586.99	91	4,450.00 – 4,486.99	136
1,079.00 – 1,117.99	46	2,587.00 – 2,625.99	92	4,487.00 – 4,523.99	137
1,118.00 – 1,143.99	47	2,626.00 – 2,664.99	93	4,524.00 – 4,560.99	138
1,144.00 – 1,169.99	48	2,665.00 – 2,703.99	94	4,561.00 – 4,597.99	139
1,170.00 – 1,195.99	49	2,704.00 – 2,742.99	95	4,598.00 – 4,634.99	140
1,196.00 – 1,221.99	50	2,743.00 – 2,781.99	96	4,635.00 – 4,671.99	141
1,222.00 – 1,247.99	51	2,782.00 – 2,820.99	97	4,672.00 – 4,708.99	142
1,248.00 – 1,286.99	52	2,821.00 – 2,859.99	98	4,709.00 – 4,745.99	143
1,287.00 – 1,312.99	53	2,860.00 – 2,898.99	99	4,746.00 – 4,782.99	144
1,313.00 – 1,338.99	54	2,899.00 – 2,937.99	100	4,783.00 – 4,819.99	145
1,339.00 – 1,364.99	55	2,938.00 – 2,989.99	101	4,820.00 – 4,856.99	146
1,365.00 – 1,403.99	56	2,990.00 – 3,028.99	102	4,857.00 – 4,893.99	147
1,404.00 – 1,429.99	57	3,029.00 – 3,067.99	103	4,894.00 – 4,930.99	148
1,430.00 – 1,455.99	58	3,068.00 – 3,106.99	104	4,931.00 – 4,967.99	149
1,456.00 – 1,494.99	59	3,107.00 – 3,158.99	105	4,968.00 – 5,004.99	150
1,495.00 – 1,520.99	60	3,159.00 – 3,197.99	106	5,005.00 – 5,041.99	151
1,521.00 – 1,546.99	61	3,198.00 – 3,236.99	107	5,042.00 – 5,078.99	152
1,547.00 – 1,585.99	62	3,237.00 – 3,288.99	108	5,079.00 – 5,115.99	153
1,586.00 – 1,611.99	63	3,289.00 – 3,327.99	109	5,116.00 – 5,152.99	154
1,612.00 – 1,637.99	64	3,328.00 – 3,379.99	110	5,153.00 – 5,189.99	155
1,638.00 – 1,676.99	65	3,380.00 – 3,418.99	111	5,190.00 – 5,232.99	156
1,677.00 – 1,702.99	66	3,419.00 – 3,470.99	112	5,233.00 – 5,265.99	157
1,703.00 – 1,741.99	67	3,471.00 – 3,509.99	113	5,266.00 – 5,298.99	158
1,742.00 – 1,767.99	68	3,510.00 – 3,561.99	114	5,299.00 – 5,332.99	159
1,768.00 – 1,806.99	69	3,562.00 – 3,600.99	115	5,333.00 – 5,365.99	160
1,807.00 – 1,832.99	70	3,601.00 – 3,652.99	116	5,366.00 – 5,398.99	161
1,833.00 – 1,871.99	71	3,653.00 – 3,704.99	117	5,399.00 – 5,432.99	162
1,872.00 – 1,897.99	72	3,705.00 – 3,743.99	118	5,433.00 – 5,465.99	163
1,898.00 – 1,936.99	73	3,744.00 – 3,795.99	119	5,466.00 – 5,498.99	164
1,937.00 – 1,975.99	74	3,796.00 – 3,847.99	120	5,499.00 – 5,532.99	165
1,976.00 – 2,001.99	75			5,533.00 and over	166

The maximum amount that can be paid is 26 times the weekly benefit amount or one-half of the total base-period wages, whichever is less. The following example illustrates how the ***base period*** and ***weekly benefit amount is computed:***

If Claim begins in:	***The Base Period is: July 1, 1982 – June 30, 1983***			
Jan. 1984 →	Jul. Aug. Sep. 1982	Oct. Nov. Dec. 1982	Jan. Feb. Mar. 1983	Apr. May Jun. 1983
If wages paid were:	$1,800	$800	$750	$1,000

In this example, the high quarter earnings are $1,800. The weekly benefit amount is $69. The ***maximum benefits*** will be $1,794 (26 weeks).

CALCULATING DISABILITY INSURANCE BENEFITS

HOW YOUR BENEFIT RATE IS DETERMINED

The weekly and maximum benefit amounts of your claim will be based on the wages paid to you during a certain past 12-month period known as the ***base period.*** Only wages subject to the disability insurance tax law can be used and they must total at least $300. The date on which your claim begins determines what your base period will be and thus the wages which will be used in computing your benefits. If you wish your claim to begin at a date later than the date your disability begins, contact the nearest Disability Insurance Office before you submit your claim.

The ***base period*** is divided into four consecutive calendar quarters. The month in which your claim begins determines which four quarters must be used. To determine your base period use the following chart which shows how base periods are determined:

If your claim begins in:	Then Your Base Period is the Twelve months ending the last:				
FEB-MAR-APR	September 30	(OCT-NOV-DEC	JAN-FEB-MAR	APR-MAY-JUN	JUL-AUG-SEP)
MAY-JUN-JUL	December 31	(JAN-FEB-MAR	APR-MAY-JUN	JUL-AUG-SEP	OCT-NOV-DEC)
AUG-SEP-OCT	March 31	(APR-MAY-JUN	JUL-AUG-SEP	OCT-NOV-DEC	JAN-FEB-MAR)
NOV-DEC-JAN	June 30	(JUL-AUG-SEP	OCT-NOV-DEC	JAN-FEB-MAR	APR-MAY-JUN)

For example: A claim beginning in July is based on the four quarters of the previous year. A claim beginning in August uses the last three quarters (nine months) of the previous year plus the first quarter of the year in which the claim begins.

EXCEPTIONS: If you were paid less than $300 in wages in the base period ***and*** your claim begins during an Unemployment Insurance Benefit Year, the Unemployment Insurance base period will be substituted.

If you were in the military service, received workers' compensation benefits, or did not work because of a trade dispute during your base period, you may be able to substitute wages paid in prior quarters to make your claim valid or increase your benefit amount. If your claim is invalid because of extended unemployment during your base period, you may also be able to substitute wages paid in prior quarters to make your claim valid.

WAGE CONTINUATION

WAGES: If you receive wages from an employer while disabled, benefits and wages added together are limited to your weekly wage (less overtime) immediately prior to disability.

BENEFIT MAXIMUMS

The maximum amount of benefits is 52 times the weekly rate but not more than your total base period wages, ***except:***

WHILE RESIDENT IN AN ALCOHOLIC RECOVERY HOME OR A DRUG-FREE RESIDENTIAL FACILITY: While participating in an approved alcoholic recovery program or drug-free residential program on referral or recommendation of a doctor, disability benefits are payable for a limited period.

- Disabilities caused by acute or chronic alcoholism, or drug abuse, being medically treated do not have this limitation.

BENEFITS ARE *NOT* PAYABLE

1. When you are entitled to temporary disability benefits for workers' compensation, ***except*** if they are at a lesser weekly rate than your disability insurance, the difference may be paid to you.
2. When you are entitled to unemployment insurance.
3. If you had left the labor market prior to becoming disabled.
4. When legal custody is the cause of unemployment.
5. When confined by court order or certification as a dipsomaniac, drug addict or sexual psychopath.

DISABILITY INSURANCE BENEFITS TABLE

BENEFIT SCHEDULE

Here is how your "weekly" rate (the amount of benefits paid for a seven-day period) is determined from the quarter of your base period during which you were paid the highest wages.

Wages in Highest Quarter	Weekly Benefit Amount	Wages in Highest Quarter	Weekly Benefit Amount	Wages in Highest Quarter	Weekly Benefit Amount	Wages in Highest Quarter	Weekly Benefit Amount
$ 75–1149.99	$50	$2250–2274.99	$ 95	$3375–3399.99	$140	$4500–4524.99	$185
1150–1174.99	51	2275–2299.99	96	3400–3424.99	141	4525–4549.99	186
1175–1199.99	52	2300–2324.99	97	3425–3449.99	142	4550–4574.99	187
1200–1224.99	53	2325–2349.99	98	3450–3474.99	143	4575–4599.99	188
1225–1249.99	54	2350–2374.99	99	3475–3499.99	144	4600–4624.99	189
1250–1274.99	55	2375–2399.99	100	3500–3524.99	145	4625–4649.99	190
1275–1299.99	56	2400–2424.99	101	3525–3549.99	146	4650–4674.99	191
1300–1324.99	57	2425–2449.99	102	3550–3574.99	147	4675–4699.99	192
1325–1349.99	58	2450–2474.99	103	3575–3599.99	148	4700–4724.99	193
1350–1374.99	59	2475–2499.99	104	3600–3624.99	149	4725–4749.99	194
1375–1399.99	60	2500–2524.99	105	3625–3649.99	150	4750–4774.99	195
1400–1424.99	61	2525–2549.99	106	3650–3674.99	151	4775–4799.99	196
1425–1449.99	62	2550–2574.99	107	3675–3699.99	152	4800–4824.99	197
1450–1474.99	63	2575–2599.99	108	3700–3724.99	153	4825–4849.99	198
1475–1499.99	64	2600–2624.99	109	3725–3749.99	154	4850–4874.99	199
1500–1524.99	65	2625–2649.99	110	3750–3774.99	155	4875–4899.99	200
1525–1549.99	66	2650–2674.99	111	3775–3799.99	156	4900–4924.99	201
1550–1574.99	67	2675–2699.99	112	3800–3824.99	157	4925–4949.99	202
1575–1599.99	68	2700–2724.99	113	3825–3849.99	158	4950–4974.99	203
1600–1624.99	69	2725–2749.99	114	3850–3874.99	159	4975–4999.99	204
1625–1649.99	70	2750–2774.99	115	3875–3899.99	160	5000–5024.99	205
1650–1674.99	71	2775–2799.99	116	3900–3924.99	161	5025–5049.99	206
1675–1699.99	72	2800–2824.99	117	3925–3949.99	162	5050–5074.99	207
1700–1724.99	73	2825–2849.99	118	3950–3974.99	163	5075–5099.99	208
1725–1749.99	74	2850–2874.99	119	3975–3999.99	164	5100–5124.99	209
1750–1774.99	75	2875–2899.99	120	4000–4024.99	165	5125–5149.99	210
1775–1799.99	76	2900–2924.99	121	4025–4049.99	166	5150–5174.99	211
1800–1824.99	77	2925–2949.99	122	4050–4074.99	167	5175–5199.99	212
1825–1849.99	78	2950–2974.99	123	4075–4099.99	168	5200–5224.99	213
1850–1874.99	79	2975–2999.99	124	4100–4124.99	169	5225–5249.99	214
1875–1899.99	80	3000–3024.99	125	4125–4149.99	170	5250–5274.99	215
1900–1924.99	81	3025–3049.99	126	4150–4174.99	171	5275–5299.99	216
1925–1949.99	82	3050–3074.99	127	4175–4199.99	172	5300–5324.99	217
1950–1974.99	83	3075–3099.99	128	4200–4224.99	173	5325–5349.99	218
1975–1999.99	84	3100–3124.99	129	4225–4249.99	174	5350–5374.99	219
2000–2024.99	85	3125–3149.99	130	4250–4274.99	175	5375–5399.99	220
2025–2049.99	86	3150–3174.99	131	4275–4299.99	176	5400–5424.99	221
2050–2074.99	87	3175–3199.99	132	4300–4324.99	177	5425–5449.99	222
2075–2099.99	88	3200–3224.99	133	4325–4349.99	178	5450–5474.99	223
2100–2124.99	89	3225–3249.99	134	4350–4374.99	179	5475 and over	224
2125–2149.99	90	3250–3274.99	135	4375–4399.99	180		
2150–2174.99	91	3275–3299.99	136	4400–4424.99	181		
2175–2199.99	92	3300–3324.99	137	4425–4449.99	182		
2200–2224.99	93	3325–3349.99	138	4450–4474.99	183		
2225–2249.99	94	3350–3374.99	139	4475–4499.99	184		

PENALTIES

You may be disqualified for receipt of benefits:

- for the amount of time a claim is late (without good cause).
- if you have made a false statement or failed to report a material fact.
- if you fail to have an independent medical examination when requested (fees for such examinations are paid by the Department).

The Unemployment Insurance Code provides for penalties of fine, imprisonment and loss of benefit rights for fraud against the disability insurance system.

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