

Unemployment Advocacy Guide

*An Advocate's Guide to Unemployment
in Massachusetts*

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Massachusetts Unemployment Advocacy Guide

About MLRI, GBLS and LACCM

The Massachusetts Law Reform Institute (MLRI) is a statewide legal advocacy and support center whose mission is to represent low-income people, elders and disabled people in their struggle for basic human needs, to defend against policies and actions that harm and marginalize people living in poverty, and to advocate for systemic reforms that achieve social and economic justice. MLRI's activities include advice, litigation, policy analysis, research, technical assistance and public information.

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

The Legal Assistance Corporation of Central Massachusetts (LACCM) provides free civil legal advice and representation to low-income and elderly persons in Worcester County. LACCM's mission is to protect and advance the legal rights of low-income and elderly people in order to secure access to basic needs and to challenge institutional barriers to social and economic justice. LACCM's employment work has focused on unemployment representation and advocacy, employment discrimination, leave act violations, wage and hour law violations and wrongful terminations.

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Much of the content builds on significant contributions by individuals to prior versions including Vida Berkowitz, Shoshana Erlich, GBLS Employment Unit—Monica Halas, Cyndi Mark, Audrey Richardson, Leonor Suarez, Jennifer Tschirch—and most especially Allan Rodgers of MLRI. Funding for GBLS’ work on the Guide has come from the Massachusetts Bar Foundation and the staff of the Massachusetts Continuing Legal Education, Inc. produced the Guide.

The guiding inspiration for Legal Services’ unemployment advocacy for over three decades has been Allan Rodgers, MLRI’s Executive Director. As head of the Employment Rights Coalition (ERC), Allan has led Legal Services advocates and private practitioners in efforts to insure that individuals who are unemployed through no fault of their own receive the unemployment insurance benefits to which they are entitled.

ERC’s advocacy has encompassed administrative and legislative advocacy and litigation in both individual cases and in declaratory and class actions. These efforts have produced significant improvements in the unemployment insurance system especially for low wage workers, workers with children, workers without health insurance, and workers who survive domestic violence.

Moreover, ERC has benefited from partnering with numerous effective allies, including the advocates at the Volunteer Lawyers Project, who secure pro bono representation for countless claimants, the Legal Advocacy and Resource Center, which does intake and provides referrals, and our friends in labor—the Massachusetts AFL-CIO, the Massachusetts Building Trades Council, and the UAW Massachusetts CAP Council—who provide an effective voice at the State House for all workers.

Advocates are also directed to *Your Rights on the Job*, by Robert M. Schwartz, an excellent and comprehensive guide to employment laws in Massachusetts. It is available through The Labor Guild of Boston, 83 Commercial St., Weymouth, MA 02188.

This Guide is dedicated in memoriam to Massachusetts Senator Edward M. Kennedy, an unequalled champion of the American worker. His legislative achievements include not only significant improvements to the Unemployment Insurance system, increases to the minimum wage, a better workforce development system and family leave legislation, but also a legacy of fighting to improve living standards, expand economic opportunities, and provide health care for every American. His leadership will be missed, but, as he said many times, the work continues.

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Introduction

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

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

The need for UI advocates has increased in recent years, as fewer workers have job security ensured by collective bargaining agreements or statutory protections such as anti-discrimination laws. Lacking job security safeguards, these workers are now more vulnerable to periods of job loss and are often entirely dependent on UI for income support. And with unemployment at its highest level in decades, with the availability of federal extended benefits for claimants after their state benefits have been exhausted (See **Question 48**), and as more employers are contesting their former employees' claims to UI, advocacy on behalf of claimants is more urgently needed than ever.

The legal analysis of a worker's UI claim is fundamentally different from the analysis of his or her right to employment. The issue in a UI case is not whether the employer was justified in discharging the claimant but whether UI benefits should be granted or denied. *Torres v. Director of the Div. of Employment Sec.*, 387 Mass. 776, 443 N.E. 2d 1297 (1982). The UI statute presumes eligibility unless the circumstances of a worker's separation from employment fall within a particular statutory disqualification. The overall statutory mandate is to interpret the law "liberally in aid of its purpose, which purpose is to lighten the burden which now falls on the unemployed worker and his family." G.L.c. 151A §74;

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Raytheon v. Director of the Div. of Employment Sec., 344 Mass. 369, 372, 182 N.E. 2d 293, 295 (1962).

Over the last decade, many important court decisions, legislative changes, and regulatory and policy changes have, by and large, improved access to and receipt of unemployment benefits by unemployed workers.

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

Advocates should be aware that UI not only can provide workers with critical income supports, but also can provide additional important benefits, such as education and training opportunities and medical insurance. These benefits, discussed in more detail in **Questions 53 and 54** below, can significantly increase the economic well-being of workers who have lost employment, and we encourage advocates to help workers take greater advantage of them. Moreover, rights in each of these areas have been greatly expanded as a result of the passage by Congress of the American Recovery and Reinvestment Act of 2009 (ARRA) and the recent enactment of companion legislation in Massachusetts (Chapter 30 of the Acts of 2009, An Act Mobilizing Economic Recovery in the Commonwealth).

This guide is an overview of the relevant law and regulations of the UI system. In addition to this guide, advocates should obtain and review DUA’s regulations and its sub-regulatory policies promulgated in the Massachusetts Unemployment Insurance Service Representatives Handbook, also identified throughout this Guide as SRH. The SRH was recently updated, and the new version includes some important policy changes, including a new policy on domestic violence. Information about obtaining a copy of the SRH is included under the Sources of Law paragraph below.

An advocate involved in any DUA appeal should have knowledge of unemployment law. UI applicants whose current income fits within low-income guidelines (generally 125% of the Federal Poverty Income Guidelines) can obtain

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assistance free of charge from various community legal services programs. The Legal Advocacy & Resource Center (LARC), which is part of Volunteer Lawyers Project, provides this referral information at 617-371-1123 or outside the 617 area code at 1-800-342-5297.

In addition, the Massachusetts Bar Foundation funds a Pro Bono Unemployment Representation Project through the Employment Law Unit at Greater Boston Legal Services in cooperation with the Volunteer Lawyers Project and the Massachusetts Bar Association Labor and Employment Section. Client referrals are handled through LARC. Lawyers who participate receive a complimentary copy of this Guide, training and supervision. If you are a lawyer and want to participate, call the Volunteer Lawyers Project at 617-423-0648.

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

Note on Related Laws and Benefits

Advocates should be aware of other laws and benefits that may affect their clients. DUA and One Stop Career Centers are covered under the Americans with Disabilities Act (ADA). If a client is denied services or needs an accommodation because of a disability, the advocate should consult with disability advocates for advice. Additionally, DUA and the Career Centers have a legal obligation to provide equal services to claimants who have Limited English Proficiency, (LEP) under both federal Department of Labor regulations and the Massachusetts unemployment law. *See*: 68 Fed. Reg. 32290 (May 29, 2003) codified at 28 C.F.R. §§ 42.101–42.412. (Department of Labor regulations implementing the Title VI prohibition against national origin discrimination affecting Limited English Proficient persons); G.L. c. 151A, § 62A.

Furthermore, many clients have worked for employers covered under the federal Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 et seq. If a client's separation from work was due to a serious health reason for either her or an immediate family member, the advocate should check to see whether the employer's discharge violated the FMLA (requirements include company size of 50 employees or more and employment for a year). Most employees working in

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companies of six or more employees in Massachusetts are also entitled to up to eight weeks of job-protected unpaid leave for birth or adoption under the Massachusetts Maternity Leave Act, G.L. c. 149, § 105D. Employees of Massachusetts employers who meet the more stringent requirements of company size and duration of employment for the FMLA may also be eligible for up to 24 hours per year of job-protected unpaid leave to participate in children's school and medical appointments, and care of elderly relatives under the Small Necessities Leave Act, G.L. c. 149, § 52D.

Workers who lose their jobs either due to plant closings (or a closing of a significant portion of the plant) or due to business closings triggered by NAFTA are eligible for additional pre-separation notice, weeks of benefits and/or training. See **Question 54** for a description of rights under the Trade Adjustment Assistance program.

Low wage workers, including UI recipients, may also be eligible for other income support programs, such as the Food Stamp program and the Earned Income Tax Credit program and for housing assistance, such as the Section 8 program and the Massachusetts Rental Voucher Program. Changes in the welfare system have forced increasing numbers of single mothers into the low-wage labor market. Some UI claimants may be eligible for cash assistance (Transitional Aid for Families with Dependent Children, or TAFDC) while waiting for approval of their UI claims. Receiving TAFDC during this gap not only provides much needed income, it may also allow the mother to secure subsidized childcare when she does return to work. We encourage advocates to become familiar with these other potential sources of income support as part of their representation of their clients. The Massachusetts legal services website, www.masslegalservices.org, provides information in all these areas.

What Is Unemployment Insurance?

The unemployment insurance (UI) system was created by Congress in 1935 as part of the Social Security Act, 42 U.S.C. §§ 501 *et seq.*, to stabilize the economy and to provide short-term relief to displaced workers. UI provides temporary cash benefits to workers with a recent attachment to the workforce who have become unemployed through no fault of their own and are currently capable of, available for and actively seeking work. G.L. c. 151A, § 6.

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UI is administered by state agencies. The federal government sets up certain guidelines and funds the states' administrative costs. In times of high unemployment, the federal government may also supplement state UI benefits with a federally funded extension. See **Question 54**. Individual states have wide discretion to determine UI benefit levels, the maximum duration of benefits and the reasons for disqualification. The UI program in Massachusetts is administered by the Division of Unemployment Assistance (DUA), formerly called DET, the Department of Employment and Training.

As of October 2008, the maximum benefit rate in Massachusetts was \$628 per week (not including an additional allowance of \$25 per dependent); the maximum benefit is adjusted annually on October 1. Generally, the benefit rate paid to qualified workers is one-half of the claimant's average weekly gross wages up to the weekly maximum, plus the dependency allowance. Massachusetts provides up to 30 weeks of coverage to each eligible claimant and up to 26 weeks when there is a federal extension in effect. The federal American Recovery and Reinvestment Act (ARRA) passed in February, 2009 also provided all UI claimants with an additional \$25 a week; these payments will last through the week ending July 3, 2010. Section 2002 ("Increase in Unemployment Compensation Benefits") of Division B, Title II, the Assistance for Unemployment Workers and Struggling Families Act, of the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5.

Claimants who are in a DUA-approved training program, who have been laid off because of a plant closing, or who have lost their jobs due to NAFTA and other foreign competition may also be entitled to additional federal or state benefits. (See **Question 54**). Massachusetts also provides health insurance coverage for claimants receiving UI. (See **Question 53**). Unemployment benefits are generally taxable income for both federal and state tax purposes, but under the federal Recovery Act (ARRA), for 2009, the first \$2,400 of UI is not counted as income for the purposes of federal income tax (and for the purposes of calculating the Earned Income Tax Credit). Section 1007 ("Suspension of Tax on Portion of Unemployment Compensation") of Division B, Title II, the Assistance for Unemployment Workers and Struggling Families Act, of the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5.

Who Is Covered by Unemployment Insurance?

Covered employee

Almost every employer in Massachusetts takes part in the unemployment program, and almost every worker is covered. All employees within the Commonwealth are covered by the Massachusetts UI law (G.L. c. 151A) with the exception of those types of employees listed in G.L. c. 151A, § 6 (such as employees of churches, trainees at certain nonprofit organizations, work-study jobholders at a college or university, certain federal employees, prison inmates and certain agricultural laborers).

Employee, not independent contractor

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

Sources of Law Governing the UI Program.

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

- n G.L. c. 151A, especially §§ 1 (definitions), 24, 25, 30, 39–42, 74;
- n 430 C.M.R. §§ 1.00 *et seq.*—DUA regulations on selected topics and procedural issues;
- n 801 C.M.R. §1.02—rules governing informal hearings; and
- n various Massachusetts court decisions, many of which are described in this Guide.

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Advocates should also obtain copies of DUA's Service Representative Handbook (SRH). Although it does not carry the force of law and UI advocates contest some SRH interpretations, this policy manual contains fact patterns with interpretations used for initial eligibility determinations, and may also be cited at the hearing. It is a useful resource available from DUA Customer Service at 617-626-5400, and it is also available at www.masslegalservices.org, under "Employment."

Other useful guides, also available from DUA (in their walk-in offices or on their website), are Unemployment Insurance: A Guide to Benefits and Employment Services, Applying for Approved Training, and Health Insurance for UI Claimants. Hearing decisions can be reviewed administratively within DUA by appealing to the Board of Review. Board of Review decisions are now available at the Board of Review, Department of Workforce Development, 19 Staniford Street, Boston, MA 02114. There is also useful information including numerous multilingual forms at DUA's website: www.mass.gov/dlwd. Click on the Division of Unemployment Assistance.

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

- n 26 U.S.C. §§ 3301 *et seq.*,
- n 42 U.S.C. §§ 501 *et seq.*;
- n 20 C.F.R. pts. 640, 650—Department of Labor regulations
- n Department of Labor Directives (including Unemployment Insurance Program Letters (available at <http://wdr.doleta.gov/directives>).

The most important aspects of the overarching federal framework are that it requires the state agency to establish administrative procedures calculated to deliver benefits reasonably promptly "when due," and to provide parties with procedures (including initial determinations and hearings) that meet federal due process standards. 42 USC § 503(a). Additionally, the Federal Unemployment Tax Act, "FUTA," also has numerous important requirements that set either a "floor" or a "ceiling" on the limits of state law. Advocates should review in particular, 26 USC § 3304(a) which lists the requirements of state law necessary to obtain the approval of the Department of Labor. Examples of these requirements include suitability criteria, including the "prevailing conditions of work" test, § 3304(a)(5); UI benefits while in job training, § 3304(a)(8) limitations on canceling wage credits, § 3304 (a)(10); protections against the denial of UI solely due to pregnancy, § 3304(a)(12); and limitations on deductions from UI for retirement pay, § 3304(a), ¶2.

What Is the Role of the Division of Unemployment Assistance?

The Massachusetts DUA, now a division of the state's Department of Workforce Development, within the Executive Office of Labor and Workforce Development, administers the Commonwealth's unemployment insurance compensation program. The DUA levies a tax on the first \$14,000 of employee wages of every employer covered under the Employment Security Act. The tax rate is based in part on the number of employees the employer has employed and discharged in the past year and who subsequently receive UI; this amount is called the experience rating.

The employer's tax rate is also determined by the rate schedule in effect. The schedule is designed to automatically increase employer assessments if the UI Trust Fund balance falls too low in relation to UI claims. G.L. c. 151A, §14. Schedules are denoted by a letter (AA – G) with higher letters signifying higher overall tax rates. Notwithstanding the purpose of the employer rate schedule to maintain a sufficient balance in the UI Trust Fund automatically, the Legislature has frequently intervened to set a rate lower than that called for by the schedule, most recently in 2008, *see* Chapter 42 of the Acts of 2008.

The experience rating was designed to encourage employing units to keep people on the payroll. One negative consequence, however, is that when an employee leaves, the employer has a financial incentive to argue that the claimant should be denied unemployment benefits in order to keep its experience rating low. Certain nonprofit and government employers can opt out of paying these taxes and instead reimburse DUA for the actual benefits paid to their former employees. Sometimes these employers contest claims even more vigorously than employers who pay the taxes, because they have to reimburse UI payments on a dollar for dollar basis.

DUA performs a wide range of unemployment-related functions, including:

- n determining and collecting employer contributions,
- n processing claims for UI,
- n establishing eligibility for UI,
- n job search and retraining services,

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n administering health insurance for the unemployed, and

n collecting employer contributions under the new health care law.

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

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Part 1

The UI Claims Process

1 How Does a Worker Apply for Benefits?

A worker whose employment stops or is reduced should immediately file a claim with DUA. Generally, the later the worker applies, the greater the likelihood of receiving less unemployment benefits.

Workers who need to file a new claim, reopen a claim or obtain information on a current claim should call the telephone numbers listed below:

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

Currently, information is provided in English for claimants by pressing #1, for employers by pressing #2. For information in Spanish, press #3; for information in Chinese (Mandarin is offered first with a subsequent option to select Cantonese), press #4; for information in Haitian-Creole, press #5. Calls may be made between the hours of 8:30 a.m. to 6:30 p.m. Monday through Friday and 8:00 a.m. to 1:30 p.m. on Saturdays. To reach a DUA agent more quickly, claimants should be advised to call on Monday if the last digit of the social security number (SSN) is 0,1 or 2; Tuesday for SSN 3,4 or 5; Wednesday for SSN 6 or 7; Thursday 8 or 9; any last digit Friday or Saturday.

In addition, claimants may apply in person on a walk-in basis at one of the fifteen regional DUA offices. However, because so many people are now applying for UI, claimants are advised to arrive to the walk-in center before 8:30 a.m. in order to be seen that day. See **Appendix A**. DUA walk-in centers also provide general information, application assistance, claims information, and orientation. By statute, DUA must provide the orientation within 15 days of the application and

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must inform the claimant about the determination process, eligibility criteria (including worker profiling), health insurance, and extended training benefits. G.L. c. 151A, § 62A (c). However, this orientation is not routinely provided, and therefore failure to provide it may provide an advocacy handle. While claimants may be sanctioned for failure to attend orientation, due to the volume of claims, DUA has suspended sanctions.

Claimants with employment and wage histories in more than one state can file a UI claim in one of the states in which they earned wages during the base period. See **Question 46**.

All DUA notices must contain the address and telephone number of the regional office serving the individual, as well as a statewide toll free number for telephone claims services (1-888-626-5553). Additionally, the statute requires DUA to prepare notices and materials explaining the right to file in English, Spanish, Chinese, Haitian Creole, Italian, Portuguese, Vietnamese, Laotian, Khmer, Russian and any other language that is the language of one-half of one percent of all Massachusetts residents. G.L. c. 151A, § 62A (d)(iii). See **Question 52** for more information on DUA's obligations under this statute. A claimant is considered to have initiated a claim as of the date that he or she first contacts or attempts to contact DUA. G.L. c. 151A, § 62A(f). This means that if the claimant is discouraged from filing or delays filing for some other reason, the claims filing date relates back to the date of first contact. A list of the addresses and phone numbers of the DUA UI and one stop career centers is provided in **Appendix A**.

2

What Information Does DUA Require?

A worker may be asked to furnish some or all of the following information to DUA when applying for unemployment:

- n name (in English), address and telephone number;
- n Social Security number or card;
- n proof of citizenship or satisfactory immigration status, including work authorization, permanent resident alien card (the “green card”) or other official documentation from United States Citizenship and Immigration Services (CIS, formerly INS) (see **Question 51**);

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- n names, addresses and telephone numbers of all employers during the four most recent completed calendar quarters and any earnings since the most recent completed quarter;
- n check stubs or records of earnings, if available;
- n separation notice, termination notice or pink slip;
- n proof of dependent children (any one of the following is acceptable: birth certificate, “green card,” passport, Social Security card, school document, medical record, health insurance card or tax form) (see **Question 47**); and
- n if applicable, a doctor’s certificate of any work restrictions, or of the claimant’s ability to work at least part-time.

If eligibility for benefits is questioned, a DUA claims adjudicator conducts an investigation. First, he or she calls or writes the employer, and the employer’s response is recorded on Form 113B. Second, the claimant is informed about the employer’s response and is given an opportunity to provide his or her explanation of the reason for separation.

The claimant and employer statements appear on DUA’s On-Line Web Forms, which are available in hard copy in the Hearings Department file and should be reviewed as a routine part of the preparation for a hearing. Advocates should look carefully to see whether an actual contact with your client was made and, if there are language barrier issues, determine if an interpreter was used. At the conclusion of this initial adjudication of the claim, the adjudicator issues a Notice of Approval or a Notice of Disqualification on the claimant’s eligibility for unemployment benefits based on the information gathered. (**See Appeals Process, Part 6.**) If the local claims adjudicator decides a claimant is eligible, benefits date back to the date of application.

Generally, information collected under the UI statute is not a public record, not admissible in any other proceeding, and is absolutely privileged. G.L. c. 151A, § 46(a). *See Tuper v. North Adams Ambulance Service, Inc.*, 428 Mass. 132, 137, 697 N.E.2d 983, 986 (1998) (affirming that the confidentiality provisions of § 46 provided additional support for a judge’s allowance of defendant’s motion to preclude any reference to a UI decision and proceedings in a subsequent civil action). Anyone who unlawfully discloses information collected during the claims process may be punished with a maximum fine of \$100 and no more than six months in jail. G.L. c. 151A, § 46(e). The Appeals Court has ruled, however, that the “basic underlying fact of...receipt of benefits” is not information

protected by section 46(a). *Howell v. Enterprise Publishing Co.*, 72 Mass. App. Ct. 739, 752, 893 N.E.2d 1270, 1283 (2008).

There are some limited exceptions to this confidentiality/non-admissability rule. *See* G.L. c. 151A, § 46(b)-(c). Recently, the statute was amended to allow disclosure to the Division of Health Care Finance and Policy for administration and enforcement of the new health care law including the “free rider” surcharge on employers who do not provide health insurance and the employer’s “fair share” assessment. G.L. c. 151A, § 46(c)(7).

3 What is the Initial DUA Eligibility Process?

A claim for UI benefits is initiated by filing a claim over the telephone or in person. If the DUA service representative initially finds the claimant eligible, he or she notifies the employer of the claim by mailing a UI Request of Information to the employer which notifies it of the claim. The employer has 10 days in which to respond by returning the completed UI Request to DUA. The due date for the response is on the upper right hand corner of the form.

If the employer fails to respond without “good cause” within this 10-day period, the employer is barred from participating as a party to any related proceedings. The lead case on the subject of good cause for failing to timely respond is *Torres v. Director of the Div. of Employment Sec.*, 387 Mass. 776, 443 N.E.2d 1297 (1982). In *Torres*, the Supreme Judicial Court ruled that an employer who did not receive notice because of a misaddressed envelope had good cause. An employer who has lost “party” status may nevertheless still participate in the unemployment hearing, but as a witness only. This means that the employer may provide testimony and/or documents regarding the claimant’s job separation, but has no right to cross examine the claimant, to postpone the hearing, or to appeal the decision.

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

If the employer checks the box marked “laid off,” the employee is deemed eligible and should begin to receive benefits immediately. (See **Receiving Benefits, Part 5.**)

On the other hand, if the employer checks a range of other options, UI benefits are withheld until DUA does a determination of eligibility by telephone. Thus in discharge or quit cases, or in cases where the circumstances of separation are questionable, or where there are other issues on a claim, the claim is then sent to a DUA claims adjudicator for a determination.

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

Note: Under DUA policy, DUA adjudicates all separations that occurred during a claimant’s last eight weeks of employment. This means that even if a claimant worked multiple jobs and left one job before learning that he or she would lose another job, DUA will adjudicate both separations and can still disqualify the claimant based on the first separation. See **Question 45.** Further, a claimant may receive more than one notice of disqualification and must appeal each one in order to preserve eligibility for full UI benefits.

4 How Are Benefits Calculated?

Calculating the Benefit Rate:

Step 1: Figure out the four completed calendar quarters prior to the filing of the claim. These four quarters make up the claimant’s primary base period. The claimant may use more recent wages, called his or her alternate base period, if the claimant is ineligible for UI using the primary base period, or if using the alternate base period results in a 10% higher benefit credit. See **Question 7** and **Appendix C** for a description of primary and alternate base periods.

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

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wage. (If the claimant worked only two quarters or less in the base period, the average weekly wage is determined by dividing the highest quarter by 13.)

Step 3: The benefit rate is the average weekly wage divided by 2.

Step 4: The total amount of benefits in the benefit year (the 52 weeks following the effective date of a claim) is the “benefit credit” and is equal to the lesser of 30 times the weekly benefit rate or 36% of the total earnings in the base period.

Note: Under Section 2002 of the federal American Recovery and Reinvestment Act (ARRA), in addition to the benefits calculated above, all UI claimants receive an additional \$25 per week through the week ending July 3, 2010. This additional amount is funded by the federal government.

Calculating the Duration of Benefits:

Step 5: The duration of benefits is calculated by dividing the benefit rate into the total amount of benefits.

There are some exceptional circumstances in which the process for calculating the amount and duration of benefits is different. For a more complete description of how to determine benefits, see **Appendix C**.

5 When Do Benefits Begin?

An unemployed claimant must wait one week before being eligible to begin collecting UI benefits. The waiting period starts on the Sunday before the date of application. However, if the claimant is re-opening a previous claim, the one-week waiting requirement is waived. Under G.L. c. 151A, § 62A(f), a claimant is deemed to have initiated a claim on the first day that he or she contacts or attempts to contact DUA, whether or not the claimant actually is able to speak with a DUA representative on that day: this is the reason that workers whose employment stops should file UI claims immediately. The effective date of the claim is the Sunday before the date that the claimant first attempts to contact DUA (subject to the one-week waiting period). The employer must display a DUA poster called, “Information on UI Benefits” and provide former workers with written notice of how to file for UI benefits within 30 days of the last day work was performed.

If the employer does not give written notice and the claimant doesn't file a timely application for benefits, he or she is entitled to have the claim pre-dated to the first week of UI eligibility. G.L. c. 151A, § 62A(g). For additional provisions concerning predated claims, see 430 CMR 4.01(3),(4); SRH §§ 1620-22.

Within a week after filing an initial claim for benefits in person or by telephone, a worker will be expected to begin doing weekly certifications of his or her work search, and report any earnings. DUA has replaced mail certification with "WebCert" and "TeleCert." (See **Question 6**).

Once the claimant is determined eligible for UI, a check will generally be mailed about two weeks after DUA receives the certification form. For information on how to properly complete the certification form, see **Appendix D**.

Note: Advocates should be sure to remind claimants to continue completing the claim certifications by phone or by WebCert even if they are initially disqualified so that they can collect all retroactive benefits if they win their appeal.

6

What Needs to Be Done to Keep Getting Checks?

Certification

A claimant needs to "certify" on a weekly basis whether or not he or she is currently working and has been looking for work for each week of collecting benefits. DUA has replaced mail certification with "WebCert" and "TeleCert." WebCert is an online certification program that can be used by signing up at www.mass.gov/dlwd. WebCert hours are Sunday 7:00 a.m. to 10:00 p.m., and Monday through Friday 7:00 a.m. to 7:00 p.m. WebCert is not available on Saturdays or holidays. While a claimant may certify work search under WebCert, he or she must file an initial claim for benefits, or reopen a claim, in person or over the telephone.

Because of the heavy volume caused by the record numbers of UI claimants, DUA warns that claimants may experience difficulty or delay with the WebCert service, particularly on Sunday (the first day for signing weekly benefits). DUA

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encourages claimants to sign during the expanded hours of 7:00 to 10:00 p.m. on Sundays or use TeleCert during those expanded hours.

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

n For Area Codes **351, 413, 508, 774** and **978**: **877-626-6800**

n For Area Code **617 and all others**: **617-626-6338**

The hours for the TeleClaim Center are Monday through Friday, 8:30 a.m. to 4:30 p.m. The TeleClaim Center (listed in **Appendix A**) can provide information about the status of the claim. For check information, call the claims center, and follow the directions for checking on the status of your check certification.

Documenting Work Search

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

- n make a minimum of three work search contacts for each week in which benefits are claimed;
- n keep a log of those work search contacts; and
- n provide a work search log to DUA upon request.

For an example of a completed Worksearch Activity Log see **Appendix G** and for downloadable copies of Activity Logs, see <http://www.mass.gov/Elwd/docs/dua/1750T.pdf>

DUA Language Notice Requirements

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

Part 2

Eligibility

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

To qualify for unemployment compensation benefits, a claimant must be

n **financially eligible:**

- n must have earned wages of at least 30 times the weekly benefit rate (generally about 15 weeks of earnings) **and** at least \$3,500 (an amount calculated from the state's minimum wage, G.L. c. 151A, § 24(a)) during the base period. The base period is determined either by using the “primary base period,” i.e., the last four completed quarters immediately preceding the effective date of claim, or by using the “alternate base period,” i.e., the three most recently completed calendar quarters plus the “lag period,” i.e., the period between the last completed quarter and the effective date of the claim. A claimant is eligible to use the alternate base period if: A. the claimant does not have sufficient wages in the primary base period to meet the earnings requirements of G.L. c. 151A, § 24(a); OR B. a claim was established using the primary base period, and the total benefit credit is less than \$15,027 (this amount changes annually on Oct. 1st), and there is “credible substantiation” that the alternate base period would result in at least a 10% higher benefit level. See 430 C.M.R. §§ 4.81 *et seq.* (establishing procedures under which the alternate base period will be used).

Only wages paid rather than earned during a particular period are counted. *Naples v. Commissioner of the Dep’t of Employment and Training*, 412 Mass. 631 (1992). Arguably, however, this should not be the case if the late payment is due to violation of wage laws concerning timely payment of wages. G.L. c. 149, § 148.

Part 2 □ Eligibility

n personally eligible:

- n be in partial unemployment (an individual's hours have been involuntarily reduced) or total unemployment. G.L. c. 151A, §§ 1(r), 29(b)
 - capable of, available for and actively seeking work. **Note:** To satisfy this element, the claimant should continue certifying eligibility even if the application for benefits was initially denied
 - unable to obtain work in his or her usual job or another job for which he or she is reasonably suited. G.L. c. 151A, § 24(b)
 - not disqualified under G.L. c. 151A, § 25(e), i.e., the claimant must show that he or she did not leave work...
 - 1) by discharge shown to the satisfaction of DUA by substantial and credible evidence to be attributable to deliberate misconduct in willful disregard of the employing unit's interest or due to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence; or
 - 2) voluntarily, unless the employee establishes by substantial and credible evidence that he or she had good cause for leaving attributable to the employing unit or its agent or left for a reason that is of such an urgent, compelling and necessitous nature as to make the separation involuntary; or
 - 3) because of conviction of a felony or misdemeanor.

Each of these three disqualifications is discussed in detail in **Part 3**.

8

What are the Capability, Availability and Suitability Requirements of the Personal Eligibility Test?

To be personally eligible, a claimant must be

- n capable of work,
- n available for and actively seeking work, and
- n unable to find work in his or her usual occupation or any other occupation for which he or she is reasonably suited.

G.L. c. 151A §§ 24(b), 25(c).

Capability

In order for an individual to be considered capable of work, he or she must be able to perform some type of remunerative work, even though it need not be his or her most recent or even customary occupation. For example, if an individual's physical condition has changed due to illness, injury, or disability, the most recent work performed may no longer be suitable, but he or she may still be *capable* of some other employment. If capability arises as an issue, a claimant may be required to submit a Health Care Provider's Statement of Capability form (see Appendix Q) indicating that the individual can work *either* full-time or part-time *with or without an accommodation*. See Service Representatives Handbook (SRH) §§ 1005(A), 1015(A),(B).

Availability

Availability is a *continuing eligibility requirement*—it can arise at any time in a case even if not specifically made part of a notice of disqualification. To satisfy this criterion, an individual must be genuinely attached to the workforce and be ready to accept work that is “suitable.” Although the individual may not impose unreasonable restrictions to such an extent that obtaining work would be unlikely, there are certain “good cause” restrictions that have been found permissible. “Good cause” includes personal reasons such as family responsibilities or the unavailability of childcare, health or disability reasons.

The rules governing UI eligibility for unemployed workers who are available only for part-time work, are set out in 430 C.M.R. §§ 4.42 through 4.45. However, the Superior Court recently invalidated the regulations' eligibility restrictions on individuals seeking part time work. See, *Leary v. Malmberg & Bump*, Suffolk Sup. Ct. CA 07-2156D, (Cratsley, J.) May 5, 2009. DUA has proposed new regulations on part-time eligibility, however, they do not fix the impermissible restrictions on denying claimants UI who seek part time work, and are equally susceptible to legal challenge.

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Prior to Leary, individuals who did not have a “history” of part time work were ineligible for UI (with the exception of individuals with disabilities). The regulations now provide that an individual is UI eligible if: 1) she had an urgent, compelling and necessitous reason for leaving, 2) the *same* reason requires the individual to limit her availability for work during the benefit year to part-time work, and 3) she has not effectively removed herself from the labor force. See Proposed regulation, 430 CMR 4.45 (1)(b).

Note to advocates: A public hearing on these proposed regulations is set for November 9, 2009 and the regulations may be revised.

The unemployment law also provides an exception to the availability requirement during an approved illness (AI), G.L. c. 151A, § 24 which permits up to three weeks of AI during a benefit year. DUA has extended this exception to a period of bereavement for an individual in the immediate family or household. SRH § 1005(H).

A full-time student may be eligible under two scenarios: first, the student is in an approved DUA training program which waives the requirements that an individual be available for work, (see discussion on Section 30 training in **Question 54**); second, a full-time student who is not in an approved program may nonetheless be eligible if the student can demonstrate availability during work hours typical for the individual’s usual occupation or that the student is willing to rearrange the school schedule in order to accept employment.

Actively Seeking Work

With a few exceptions, including claimants who have a definite recall to work within four weeks and workers in DUA-approved training programs, all claimants must be able to prove that they are actively seeking work. DUA has recently tightened up these requirements, requiring the claimant to show that at least three work search contacts have been made each week, the claimant has kept a written log of these contacts (noting date, employer name, how contacted, and the results), and provides the work search log to DUA on request. *See* SRH § 1015(C). A sample work search log is sent to claimants (see **Appendix G**) and can also be downloaded by going to www.mass.gov/dlwd.

Additionally, for those claimants receiving federal extended benefits, proof of work search must be provided on a weekly basis.

Suitability

To be eligible for unemployment benefits, an individual needs only to be eligible for suitable work. *Conlon v. Director of the Div. of Employment Sec.*, 382 Mass. 19, 413 N.E.2d 727 (1980).

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

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

In addition, no work is deemed suitable, if:

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

The Federal Unemployment Tax Act (FUTA) requires states receiving FUTA funds to ensure through state law that "compensation shall not be denied ... to any otherwise eligible individual for refusing to accept new work ... if the wages, hours or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality." 26 U.S.C. § 3304(a)(5)(B). This is known as the "prevailing conditions of work" test, and is codified at G.L. c. 151A, § 25(c). The "*prevailing conditions of work*" test is very useful for determining whether a job is suitable, especially concerning temporary employment. The U.S. Department of Labor has set out detailed guidelines on how this test should be applied in the Employment and Training Administration's Unemployment Insurance Program Letters No. 41-98 and No. 41-98, Change 1. *See also* SRH 1131.

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In considering whether or not a job is a suitable job for a victim of domestic violence, the job must be determined to be one which reasonably accommodates the individual's need to address the physical, psychological, and legal effects of domestic violence. G.L. c. 151A, § 25(c), ¶2; SRH 1043.

If a claimant has failed to accept suitable employment, he or she may be subject to a reduction of the individual's benefit credit (i.e., a reduction of the total amount of benefits on the claim). **Note:** although DUA applies an automatic benefit credit reduction (4 times benefit rate if the work was available for at least 4 weeks and less than 8 weeks, and 8 times benefit rate if work was available for 8 or more weeks), the statute states that the commissioner make a determination "from the circumstances of each case." G.L. c. 151A, § 25(c). This may leave room for an advocate to seek a smaller reduction under compelling circumstances.

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

The following are a few examples of winning "suitability" cases:

A job offer from the same employer at substantially reduced wages makes the job unsuitable, *Graves v. Director of the Div. of Employment Sec.*, 384 Mass. 766, 429 N.E.2d 705 (1981); *President and Fellows of Harvard College v. Director of the Div. of Employment Sec.*, 376 Mass. 551, 382 N.E.2d 195 (1978).

An employee's reasonable belief that the job is hazardous to his or her health also makes the job unsuitable and, therefore, constitutes good cause for leaving the job. *Carney Hospital v. Director of the Div. of Employment Sec.*, 382 Mass. 691, 414 N.E.2d 1007 (1981).

A reasonable belief that the job is detrimental to the health of an employee because of pregnancy also makes the job unsuitable and, therefore, constitutes good cause for leaving the job. *Director of the Div. of Employment Sec. v. Fitzgerald*, 382 Mass. 159, 414 N.E.2d 608 (1980).

The appellate courts have also applied a good faith standard to a UI recipient's alleged failure to seek or accept suitable work, *Haefs v. Director of the Div. of Employment Sec.*, 391 Mass. 804, 464 N.E. 2d 387 (1984), and good cause standards to a refusal of an offer of suitable work, *Conlon v. Director of the Div. of Employment Sec.*, 382 Mass. 19, 413 N.E. 2d 727 (1980).

A recipient who takes another job on a trial basis will not be disqualified if she leaves that job because it turns out not to be suitable. *Jacobsen v. Director of the Div. of Employment Sec.*, 383 Mass. 879, 420 N.E. 2d 315 (1981).

9 Who Does DUA Consider to be Totally or Partially Unemployed?

A claimant must be in total or partial unemployment in order to be eligible for benefits. G.L. c.151A, § 29(b).

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

A person is in partial unemployment in any week he or she is working less than full-time, or has earned less than the weekly unemployment benefit she or he would be entitled to if totally unemployed during that week, and the failure to work full-time is due to the employer's failure to provide full-time work. G.L. c. 151A, § 1(r)(1).

The following individuals are not considered to be unemployed:

- n A person who is on a leave of absence at his or her request;
- n An employee of an educational institution during a period between academic years or terms, if the person has a "reasonable assurance" of work in the subsequent year or term; and
- n On-call workers who have *any* work in a given week.
- n An person who is self-employed.

- n A person who receives vacation pay when the employer closes a business for vacation purposes.

10 What Happens If Benefits are Denied, Either Initially or After the Claimant Has Begun Receiving Them?

If the claimant is disqualified from receiving benefits, she or he remains disqualified indefinitely, and until he or she has had eight weeks of work and in **each** of said weeks earned at least his or her weekly benefit amount. G.L. c. 151A, § 25(e).

Note 1: If your client is unable to requalify for UI due to low wages which are less than her prior weekly benefit amount, please contact the Employment Rights Coalition which is doing advocacy on this issue. See Introduction for contact information.

Note 2: If the claimant is initially disqualified, it is extremely important that he or she keep certifying his or her claim for benefits and work search via TeleCert or Webcert. Doing so establishes that the worker has met job search requirements on a continuous basis (see **Question 6**). Failure to do so may jeopardize the right to receive retroactive benefits in the event of the subsequent determination of eligibility. According to DUA, all applicants are informed of this requirement initially, but many claimants do not know that they are supposed to continue certifying. Additionally, DUA may have failed to inform a claimant of this requirement in his or her primary language. G.L. c. 151A, § 62A. If that is the case, the claimant should be permitted to file the weekly certifications late, without penalty.

Reconsideration of a Claim After the Claimant Has Begun Receiving UI

G.L.c. 151A § 71 allows for reconsideration of any DUA determination, within certain time frames and conditions. The criteria and procedures for a party to request a reconsideration, or for the Director to reconsider on his own initiative, are set out in DUA regulations. 430 CMR §§ 4.30 – 4.35. Under § 71, the

Part 2 □ Eligibility

Director can reconsider any determination within one year of the original determination where there has been a non-fraud error which is an accidental act or failure on the part of DUA, the claimant, agent, or employer or where there are newly discovered claimant wages from the benefit year.

If DUA finds that benefits were allowed or denied based on a misrepresentation of facts, the reconsideration period is extended to four years. If DUA finds that the misrepresentation was as a result of a knowing failure, then any overpayment that has resulted is subject to 12% interest under section 69(a). Note: advocates are concerned that there is no independent analysis of whether there was a knowing misrepresentation; DUA routinely issues fraud determinations without doing the necessary factual inquiry.

When DUA commences a reconsideration of a claim, it notifies the claimant by sending a form 3733, Notice of Claim Discrepancy. If the claimant is already receiving UI, benefits are continued to the Saturday prior to the date of the notice. The claimant must have 14 days for an opportunity to rebut the new evidence or allegations before benefits are terminated.

Following this fact-finding, DUA issues a form 3727B- Notice of Redetermination and Overpayment. 430 CMR 11.01-11.10.

Note: These procedures were established when claimants received UI checks on a bi-weekly basis. However, because checks are now received on a weekly basis, benefits are stopped before the time for response has expired! The problem of responding to a Notice of Claim Discrepancy is exacerbated by the large number of claims; many claimants report being unable to get through to speak to their claims adjuster.

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

DUA regulations provide that a party may request that the Director reconsider a determination after 30 days and no later than one year following the original determination. 430 CMR 4.33 (4). The reconsideration will only be considered if no appeal has been taken under G.L. c. 151A, § 12 (determination whether employer is a covered employer) or § 40 (appeals to the Board of Review). 430

Part 2 □ **Eligibility**

CMR 4.33(1). The reconsideration does not stay any appeal periods and the decision of the Director shall be considered final. 430 CMR 433 (6); 435(1).

Practice Tip: While DUA could use this provision to correct clear errors brought to its attention, or where it has named the wrong interested party for a hearing, § 71 is primarily employed to terminate ongoing benefits of claimants.

Part 3

Separation from Work

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

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

- n by **discharge** shown to the satisfaction of DUA by substantial and credible evidence to be attributable to deliberate misconduct in willful disregard of the employing unit’s interest or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be a result of the employee’s incompetence;
- n **voluntarily**, unless the employee establishes by substantial and credible evidence that he or she had good cause for leaving attributable to the employing unit or its agent or for urgent and compelling personal reasons; or
- n **because of conviction** of a felony or misdemeanor.

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

A party may dispute DUA’s characterization. For example, DUA may accept the employer’s version of facts and treat the case as a quit, whereas the claimant believes he or she was fired. See **Question 35**. This characterization can be challenged in a hearing (see **Appeals Process, Part 6**). In a recent unpublished opinion, the Appeals Court affirmed DUA’s practice of treating the “failure to call in” as job abandonment under §25(e)(1). “An employee who anticipates a

Part 3 □ Separation from Work

legitimate absence from work must take reasonable steps to preserve [her] employment. Where an employee fails properly to notify the employer of the reason for his absence, his resulting termination is tantamount to a voluntary resignation under G.L. c. 151A, § 25(e)(1).” *Flores v. Acting Director of the Div. of Employment Assistance*, 70 Mass. App. Ct. 1102 (2007), citing *Scannevin v. Director of the Div. of Employment Security*, 396 Mass. 1010, 1010-1011 (1986). At the outset of the hearing, the review examiner asks preliminary questions and decides whether the hearing will proceed as a discharge case or a quit case.

While this decision will determine the order of the testimony, both the discharge and quit issues remain before the review examiner, who will make findings of fact as to the separation.

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

A. DISCHARGE: QUESTIONS 11–20

11 Was the Discharge for Disqualifying Reasons?

Discharge cases are further broken down into deliberate misconduct and rule violation cases. Sometimes the distinction is not entirely clear, and a case should be developed along both theories when appropriate.

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

Deliberate misconduct and willful disregard are separate elements. Each must be established, and the review examiner must make findings of fact on each element. *Smith v. Director of the Div. of Employment Sec.*, 376 Mass. 563, 382 N.E.2d 199 (1978).

It is not enough simply to show that the employee engaged in a wrongful act; it must also be shown that he or she knew it was contrary to the employer’s interest.

The Supreme Judicial Court has repeatedly reaffirmed that the burden of proof as to each element in a discharge case is on the employer. *Torres v. Director of the Div. of Employment Security*, 387 Mass. 776, 780 n. 3 (1982) (discussion of employer's burden in deliberate misconduct case); *Still v. Commissioner of the Dept. of Employment and Training*, 423 Mass. 805, 809, 672 N.E.2d 105 (1996) (“[i]n accordance with the directives of § 74 [of G.L. c. 151A, directing that the unemployment statute shall be liberally construed in aid of its purpose, which is to lighten the burden which falls on the unemployed worker and his family], the grounds for disqualification in § 25(a)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer.”)

Findings are required as to the claimant's state of mind at the time of the alleged misconduct to determine both whether it was “deliberate” and whether the conduct was in “willful disregard” of the employer's interest. *See Jones v. Director of the Div. of Employment Sec.*, 392 Mass. 148, 465 N.E.2d 245 (1984); *Wedgewood v. Director of the Div. of Employment Sec.*, 25 Mass. App. Ct. 30, 514 N.E.2d 680 (1987). This point was recently restated in *South Central Rehabilitative Resources, Inc. v. Commissioner of the Div. of Employment & Training*, 55 Mass. App. Ct. 180, 770 N.E.2d 17 (2002).

When a discharged worker seeks unemployment benefits, the issue is not whether the employer was justified in discharging the claimant but whether the Legislature intended that benefits should be denied in the circumstances. The fact that an employer had good cause for discharge under a collective bargaining agreement or statutory scheme will not necessarily mean that the employee can be disqualified for unemployment benefits. *Director of the Div. of Employment Sec. v. Mattapoissett*, 1983 Mass. App. Div. 131, *aff'd*, 392 Mass. 858, 467 N.E.2d 1363 (1984) (teacher discharged for disruptive, belligerent behavior under “conduct unbecoming” language of G.L. c. 71, § 42).

12 Did the Claimant Engage in Deliberate Misconduct?

Deliberate misconduct is the intentional disregard of standards of behavior that the employer has a right to expect. These standards may be established by rule, policy, warnings, direct order or otherwise.

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Mere unsatisfactory performance, however, is not misconduct, unless the employer proves that the claimant deliberately failed to perform his or her work to the employer's satisfaction. *Trustees of Deerfield Academy v. Director of the Div. of Employment Sec.*, 382 Mass. 26, 413 N.E.2d 731 (1980); *Reavey v. Director of the Div. of Employment Sec.*, 377 Mass 913, 387 N.E.2d 581 (1979) (claimant drove forklift into wall).

An employee who is generally unsatisfactory cannot be disqualified due to misconduct. *Nantucket Cottage Hospital v. Director of the Div. of Employment Sec.*, 388 Mass. 1006, 446 N.E.2d 75 (1983) (poor personal hygiene, inability to accept criticism and profane language).

Absence or tardiness for compelling reasons is not misconduct, but failure to notify the employer in accordance with company rules is. *Hoye v. Director of the Div. of Employment Sec.*, 394 Mass. 411, 475 N.E.2d 1218 (1985) (employee did not call in absence to appropriate persons, despite many prior warnings); *Moore v. Director of the Div. of Employment Sec.*, 390 Mass. 1004, 457 N.E.2d 279 (1983) (zoo employee persisted in reporting to work at 9:30 when starting time was 8:30).

An employee who avails himself or herself of a legal right cannot thereby commit misconduct. *Kinch v. Director of the Div. of Employment Sec.*, 24 Mass. App. Ct. 79, 506 N.E.2d 169 (1987) (claimant refused to work hours in violation of wage and hour laws). It is immaterial whether the employee is aware of or asserts the legal right, or its source, at the time of the discharge. An adjudication of the claimed right by a court or another agency, however, may have a preclusive effect. *Lewis v. Director of the Div. of Employment Sec.*, 397 Mass. 918, 400 N.E.2d 264 (1979) (claimant's assertion that her wearing a "Strike—G.D." jacket to work at General Dynamics plant was protected by the National Labor Relations Act was foreclosed by adverse arbitration decision under the Act).

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

The Supreme Judicial Court has held that even though the employee's disqualification from UI had been upheld on a different ground than that given by the employer, the decision was correct if the ground given arose out of the same

conduct. *Quintal v. Commissioner of the Dept. of Employment and Training*, 418 Mass. 855, 641 N.E.2d 1338 (1994).

No Longer “Solely Due to Misconduct.”

Because of a 1992 statutory change which took out the word “solely,” an employer is no longer required to prove that the deliberate misconduct was the sole reason for the employee’s discharge. According to the Service Representatives Handbook (SRH), an employer may now support the reasons for discharge with evidence of prior incidents so long as the final act or reason for discharge constitutes deliberate misconduct in willful disregard of the employer’s interest. SRH § 1305(B).

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

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

In establishing state of mind, the history of the employment relationship is important. As a general matter, an employee cannot be found to have the requisite state of mind if he or she has not been made aware of the employer’s expectations through rules, policies, warnings, instructions and so forth. If, however, the conduct at issue is clearly wrongful, such as theft or falsification of records, a claimant may be found to have acted in willful disregard even in the absence of explicit instructions not to engage in the conduct. *See Jorgenson v. Director of the Div. of Employment Sec.*, 394 Mass. 800, 477 N.E.2d 1005 (1985) (falsifying pay records); *Babize v. Director of the Div. of Employment Sec.*, 394 Mass. 806, 477 N.E.2d 1009 (1985) (same). Where an allegation of theft or misappropriation of funds is the basis for discharge, the employer must provide “substantial and credible evidence or proof” that the theft or misappropriation occurred, SRH § 1334, and that the claimant was involved in the theft.

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

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

An employee who reasonably believes that his or her disobedience of an order is required to further a more important purpose of the employer is not acting in willful disregard of the employer's interest. *Jones v. Director of the Div. of Employment Sec.*, 392 Mass. 148, 465 N.E.2d 245 (1984) (employee who continued to work on deadline, although ordered not to do the work, not disqualified although he had previous warning for insubordination). Similarly, a worker who is discharged for his or her refusal to follow an order that requires the worker to violate state or federal law is not disqualified. SRH §§ 1330(A), 1332(A).

Even if the employee's judgment is erroneous, good faith errors are not willful disregard of the employer's interest. *Garfield v. Director of the Div. of Employment Sec.*, 377 Mass. 94, 384 N.E.2d 642 (1979) (rearranging the store schedule without notifying district manager).

Personnel policies known to the employee are probative evidence regarding the claimant's state of mind. An employee's reliance on these policies, where they may contradict other statements of the employer, can be used to show a lack of willful disregard. *Goodridge v. Director of the Div. of Employment Sec.*, 375 Mass. 434, 377 N.E.2d 927 (1978) (employee left to file discrimination charge with Equal Employment Opportunity Commission where he thought personnel handbook gave permission to do so; employer claimed he left without permission); *Hawkins v. Director of the Div. of Employment Sec.*, 392 Mass. 305, 465 N.E.2d 786 (1984) (claimant disqualified when fired for refusing to take off radio earphones while working after being warned twice).

Mitigating Circumstances

The presence of mitigating circumstances should be explored and presented in both misconduct and rule violation cases. If an employee’s misconduct is attributable to mitigating circumstances, then he or she has not acted in willful disregard. In the case of an employee fired for being late after a prior warning, for example, there is no willful disregard if the lateness was due to an extraordinary circumstance, such as sudden illness of a family member.

Also, if the claimant is an alcoholic and his or her conduct is a “product of an irresistible compulsion to drink,” it will not be regarded as intentional misconduct. SRH § 1336. At present, the DUA does not treat drug abuse in the same manner, and a drug-addicted client is more likely to be regarded as having acted willfully even while under the influence. *Id.* See **Question 34**.

Any discharge due to circumstances resulting from domestic violence, including the need to address the physical, psychological and legal effects of domestic violence, is not disqualifying. For example, a claimant who was discharged for violating the attendance policy due to incidents of domestic violence, or her need to seek treatment or protection. SRH §§ 1043, 1305(B). See **Question 33** for discussion of domestic violence in separation cases.

14 Was the Claimant Discharged for a Rule Violation?

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

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

- n the rule or policy existed,

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- n it was effectively communicated to the employee,
- n the rule was reasonable,
- n it was uniformly enforced, both as to the claimant and other employees,
- n the claimant knowingly violated the rule, and
- n the violation was not the result of the claimant’s incompetence.

The employer has the burden of proving these elements by introducing “substantial and credible” evidence on each one. For example, an employee discharged for failing a drug test administered before he was hired could not be disqualified because the employer’s work rule applied only to drug usage during or affecting the employment. *O’Connor v. Commissioner of the Dept. of Employment and Training*, 442 Mass. 1007, 809 N.E.2d 1051 (1996).

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

15 Did the Claimant Commit a *Knowing* Violation?

According to the SRH §§ 1305 and 1310, the following elements must be satisfied for a knowing violation:

- n the work rule or policy actually existed—i.e., the rule must either be in writing or there must be substantial and credible evidence that the rule was verbally communicated to the claimant;

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- n the claimant was consciously aware at the time that he or she was engaging in conduct that violated the rule;
- n the rule or policy was in fact violated;
- n the rule or policy violation was done with the intent to violate the rule. *Still v. Commissioner of the Dept. of Employment and Training*, 423 Mass. 805, 672 N.E.2d 105 (1996).

In *Still*, the claimant was discharged for swearing at a patient who had provoked her. The Commissioner argued that because Still had admitted that she had prior knowledge of the employer's policy that patients were to be free from mental and physical abuse and that she understood that the consequences of violation of this policy included discharge, this was sufficient to establish that she had "knowingly violated the policy."

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

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

SRH § 1315(C) sets out a detailed analytical framework for rule violation cases. While the term "state of mind" is not used, it is clear from the emphasis on "conscious awareness" both of the act and the rule violation, that state of mind is a critical element.

16 Was the Rule Reasonable?

The rule or policy must be reasonable in light of an employer's interest—i.e., there must be a clear relationship between the rule or policy and the employer's stake in it, and it must be one that could be expected to be adhered to in the normal course of events. A rule that conflicts with or violates any legal right of the employee is *per se* unreasonable. SRH § 1310(A). The reasonableness of a rule must be evaluated in light of a claimant's protection under the Americans with Disabilities Act, SRH § 1324(C), and other state and federal laws protecting workplace rights.

The application of the rule must also be reasonable—i.e., a rule would not be reasonably applied where there are circumstances of an “unusual nature.” SRH § 1320. Examples of such circumstances include the following:

- n serious weather-related problems.
- n unavoidable transportation problems.
- n adherence to supervisory rules that are contradictory.
- n family emergencies, such as illness, that may lead to a violation of absence or tardiness rules. To the extent that extensive absences are covered by the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 *et seq.* (FMLA), or the Massachusetts Maternity Leave Act, G.L. c. 149, § 105D, they are generally not disqualifying for UI purposes. SRH § 1322.
- n rules that regulate an employee's conduct outside the workplace.
- n adherence to rules that could result in injury to the health or safety of an individual.
- n compliance with rules that would violate federal or state law, public policy or ethical or professional standards.
- n inability to comply with the rule due to circumstances resulting from domestic violence. SRH §§ 1305(B), 1322B and 1338.

- n any other objectively verifiable circumstances that are of an unusual or urgent and compelling nature with which the claimant could not reasonably be expected to comply.

17 Was the Rule Uniformly Enforced?

The employer bears the burden of demonstrating that the work rule or policy has been uniformly enforced—i.e., the employer must show that it treats all similarly situated employees subject to the workplace rule or policy in a similar manner when a rule or policy is violated. The employee’s status within a progressive discipline system must also be considered. SRH §§ 1310(C), 1315(E).

In *New England Wooden Ware Corp. v. Commissioner of the Dep’t. of Employment and Training*, 61 Mass. App. Ct. 532, 811 N.E. 2d 1042 (2004), the Appeals Court provided the first guidance on the question of uniform enforcement of a work rule. The Court found that the claimant, who was fired for violating the employer’s written policy on unexcused absences, was entitled to benefits where the policy included undefined terms and the policy was unevenly applied in practice. The Court considered the employer’s failure to apply the policy uniformly to the claimant as evidence of non-uniform enforcement, even if it was to the claimant’s benefit. “Failure to enforce a policy uniformly, whether to the employee’s benefit or detriment, still influences the employee’s belief regarding the consequences of his actions.” 61 Mass. App. Ct. at 535. *See also, Gold Medal Bakery, Inc. v. Commissioner of the Div. of Unemployment Assistance*, 74 Mass. App. Ct. 1105, 903 N.E. 2d 1145 (2009)(Unreported)(holding that where an employer could not demonstrate that its attendance policies were uniformly enforced, an employee discharged for calling in sick in violation of attendance policies was eligible for UI).

18 Was the Claimant Incapable of Following the Rule?

DUA's UI Request for Information sent to employers at the initiation of a UI claim includes as a non-disqualifying reason for separation: "Released due to inability to meet performance standards. No misconduct or violation of company rule or policy." DUA's handbook describes "incompetence" as a "defense" to disqualification. SRH § 1310(D). To the extent that this places the burden of proof on the claimant, it may be inconsistent with the statutory scheme. To establish incompetence, a claimant can show that he or she was incapable of adhering to the rule due to a lack of ability. If the claimant's work is not satisfactory to the employer but there is no deliberate lack of effort on the claimant's part, incompetence is similarly established.

In some circumstances, a claimant's incompetence may be due to a temporary factor (such as stress attributable to a divorce or a family illness causing loss of concentration), even though the claimant has the inherent ability to perform the job. SRH § 1310(D).

19 How Does A Suspension Affect Eligibility?

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

Public employees who are suspended following indictment are disqualified from receiving UI, even if for an indefinite period. See G.L. c. 151A, § 22; c. 30, § 59

(applies to officers and employees of the Commonwealth); G.L. c. 268A, § 25(applies to county, municipal and district officers).

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

DUA typically asks the following questions to ascertain UI eligibility in discharge cases:

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

IF RULE VIOLATION:

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

IF NO RULE VIOLATION:

9. Was the conduct deliberate? Was there an intentional act of omission on the part of the claimant?
10. What was the employer's expectation?
11. How did the claimant know of the expectation?
12. Was there any extenuating circumstance that was the cause of the behavior?

WARNINGS:

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13. Were any warnings issued? If so: When? How many? By whom? What was the content? Copy of warning given in writing or was warning verbal?
14. Were actions condoned?
15. Was the conduct so outrageous that no warnings were necessary?

B. VOLUNTARY QUIT: QUESTIONS 21–28

21

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

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

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

22 Was the Separation Voluntary?

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

- n for “urgent, compelling and necessitous” reasons;
- n caused by circumstances beyond the claimant’s control; or
- n coerced or required by the employer.

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

23 Was the Separation Coerced or Required by the Employer?

Did the Employee Quit in Reasonable Anticipation of Being Fired?

A separation is not voluntary if it is imposed by the employer. An employee who leaves work because of a reasonable belief that he or she is about to be fired will not be disqualified under G.L. c. 151A, § 25(e)(1).

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

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

Although it is not an unemployment case, practitioners should be aware of the SJC's decision in *Upton v. JWP Businessland*, 425 Mass. 756, 682 N.E.2d 1357 (1997), holding that it was not a violation of public policy to terminate an employee at will who, due to her responsibilities as a single parent of a young child, could not work the additional overtime hours which her employer required. The court did note, however, that the legislature has directed that unemployment should be available where domestic responsibilities limit a person's availability to work. 425 Mass. at 756. Therefore, if the employee were discharged, she should not be disqualified under §25(e)(2), and if she resigned in anticipation of discharge, she should not be disqualified under §25(e)(1).

Retirement

Massachusetts General Laws Chapter 151A, § 25(e) specifically precludes the disqualification of an employee who is required to retire. In certain cases, an employee who has some control over the actual date of retirement may still qualify for UI benefits. Thus, in *O'Reilly v. Director of the Div. of Employment Sec.*, 377 Mass. 840, 388 N.E.2d 1181 (1979), an employee who accepted his employer's proposal to accelerate his retirement by six months was not disqualified from receiving benefits since job separation was inevitable. However, an employee will not be deemed eligible if he or she opts for early retirement without reasonable belief that mandatory retirement is inevitable. See *Klockson v. Director of the Div. of Employment Sec.*, 385 Mass. 1007, 432 N.E.2d 704 (1982) (finding claimant's belief that he would soon have been discharged unreasonable where the employer had no mandatory retirement policy, several employees older than the 65 year old claimant worked for the employer and the claimant had more than 10 years' seniority).

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

that if the employer created uncertainty about whether the individual would or would not be laid off as part of a RIF, then accepting a voluntary severance package does not disqualify one for UI. *State Street Bank v. Deputy Director of the Div. of Employment and Training, et al.*, 66 Mass. App. Ct. 1, 10-12 (2006); *Charette v. Commissioner of the Div. of Unemployment Assistance*, 72 Mass. App. Ct. 1114 (2008) (unpublished decision).

Layoff

Generally, an employee who is laid off involuntarily is eligible to receive benefits. This is true even when an employer's layoff scheme grants limited discretion to its employees to decide which workers are laid off. For example, where an employer announces a layoff plan which contains voluntary and involuntary components, and creates an environment in which an employee is forced to speculate on the likelihood that her or she will be involuntarily terminated, such employee has "good cause attributable to the employer" to leave work and take a Voluntary Severance Package. See, *State Street Bank & Trust Co. v. Deputy Director of the Div. of Employment and Training, et al.*, 66 Mass. App. Ct. 1, 845 N.E.2d 395 (2006); *Charette v. Commissioner of the Div. of Unemployment Assistance*, 72 Mass. App. Ct. 1114, 892 N.E. 2d 837 (2008)(unpublished opinion).

When given a choice by management of remaining at work or accepting a layoff due to a general reduction in the work force, a claimant who agrees to be laid off is not subject to disqualification. SRH § 1208(E). This is because it is the employer who decides to lay off staff and the employer can accept or reject the claimant's offer. *Morillo v. Director of the Div. of Employment Sec.*, 394 Mass. 765, 477 N.E.2d 412 (1985); *Charette v. Commissioner of the Div. of Unemployment Assistance*, 72 Mass. App. Ct. 1114, 892 N.E. 2d 837 (2008)(unpublished opinion).

24 Was the Separation for Good Cause?

Even if the separation is voluntary, an employee is entitled to benefits if the underlying reason is good cause reason attributable to the employing unit or its agent. The circumstances leading to the separation need not be company policy or known to policy-level management in order to constitute good cause, as long as

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the supervisory-management personnel appeared to have authority to act as they did.

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

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

Reasonable disciplinary action is not good cause for leaving. *Leone v. Director of the Div. of Employment Sec.*, 397 Mass. 728, 493 N.E.2d 493 (1986) (bank branch manager disqualified for quitting after being warned about inability to get along with supervisor). See also *Fergione v. Director of the Div. of Employment Sec.*, 396 Mass. 281, 485 N.E.2d 949 (1985).

Good cause is most often found where the employer violates the employee's rights, fails to correct unsafe or unhealthy work conditions, reduces the employee's compensation, subjects the employee to unfair or unduly harsh criticism or changes the work to something "antithetical" to that for which the employee was hired. In *Guarino v. Director of the Div. of Employment Sec.*, 393 Mass. 89, 469 N.E.2d 802 (1984), remand was required for findings on whether the claimant, a fish packer, was required to "push fish," which was not part of her job, and whether there were available remedies she had failed to pursue. Notably, the Court rejected the notion that the claimant must request a transfer to other work or a leave of absence in these circumstances. 393 Mass. at 94.

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An employer may not defeat the payment of unemployment compensation by reducing an employee's hours to the point where he or she must quit, *Manias v. Director of the Div. of Employment Sec.*, 388 Mass. 201, 445 N.E.2d 1068 (1983) (employer changed claimant's schedule to eliminate most of her overtime), or laying him or her off and offering to reemploy the employee at substantially reduced wages. *Graves v. Director of the Div. of Employment Sec.*, 384 Mass. 766, 429 N.E.2d 705 (1981). If an employer reduces an employee's hours with the result that the employee would neither qualify for partial benefits under G.L. c. 151A, § 29(b) nor be able to earn a living wage, the employee may have an urgent, compelling and necessitous reason for leaving work. SRH § 1220(G). See **Question 29**.

Unfulfilled promises concerning pay or benefits can constitute good cause for leaving employment, if the promise was sufficiently definite. A remand was required in *Svoboda v. Director of the Div. of Employment Sec.*, 386 Mass. 1004, 436 N.E.2d 1218 (1982), for findings on whether the employer had failed to pay the claimant in accordance with the employment agreement, for such a failure could have constituted good cause for leaving. See also, SRH § 1222(E).

A remand for findings on this issue was also required in *Hunt v. Director of the Div. of Employment Sec.*, 397 Mass. 46, 489 N.E.2d 696 (1986), where the employer hired the claimant as a temporary secretary with representations that the position would probably become permanent after six months, and permanency would have entitled the claimant to employee benefits. The claimant left after the employer extended her temporary status indefinitely.

If the employer changes a job so that it becomes significantly different from the job which the employee originally accepted it may be considered "unsuitable." If an employee's job becomes unsuitable, then he or she has good cause to leave it. *McDonald v. Director of the Div. of Employment Sec.*, 396 Mass. 468, 487 N.E.2d 186 (1986). The burden of establishing unsuitability is on the claimant. For a more detailed explanation of the "suitability" requirement, see **Question 8**.

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

Good cause for leaving does not exist where the claimant expected or requested a raise which was not unconditionally promised. See SRH § 1222(D).

A claimant's "mere" disappointment with pay, working conditions or management, where there was no justifiable expectation that conditions would be otherwise, is not good cause attributable to the employing unit. In *Fanion v.*

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Director of the Div. of Employment Sec., 391 Mass. 848, 464 N.E.2d 69 (1984), the claimant accepted a change in position with a pay increase to take place after six months. After five months she learned the details of the increase, felt that the pay was not commensurate with the pressures of the job, quit and was disqualified. See also *LeBlanc v. Director of the Div. of Employment Sec.*, 398 Mass. 1010, 501 N.E.2d 503 (1986).

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

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

25 Was There a Reasonable Concern Regarding Health or Safety?

A claimant who leaves work due to reasonable concerns regarding unsafe working conditions or inadequate lighting, heat, ventilation or sanitation can have good cause for quitting. See SRH §§ 1214(A) (faulty or unsafe equipment), 1224(B) (inadequate working conditions), and 1224(C) (risk of injury or danger to health). For example, a claimant leaves work for good cause when working conditions expose him/her to a risk of injury or danger to health beyond the normal hazards of the job. However, the claimant should attempt to resolve the

hazardous condition or faulty equipment by making a complaint to the employer prior to leaving work. *Id.*

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

Specific language in G.L. c. 151A, § 25(e) precludes disqualification if the separation was caused by sexual, racial or other unreasonable harassment but only where the employer, its supervisory personnel or its agent knew or should have known about the harassment. *See* 430 C.M.R. § 4.04 (5)(b).

An employer is deemed to have knowledge of the harassment when committed by supervisory personnel or an agent regardless of whether the employer had actual knowledge. Accordingly, an employee is not required to report such harassment. Nor is an employee required to take steps to preserve his or her employment where the harassment is committed by the employer, a manager or supervisor.

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

DUA has adopted regulations governing harassment in the workplace as it bears on UI eligibility, and claimants have been winning many more of these cases. The regulations define what constitutes racial, sexual or other unreasonable harassment. 430 C.M.R. § 4.04(5)(a) and (b). Further, the regulations provide that in cases of alleged racial, sexual, or other unreasonable harassment, where the employer, its agents or other supervisory employees knew or should have known about the harassment, the employee need not take reasonable, or even, any, steps to resolve the situation before leaving. 430 C.M.R. § 4.04(5)(c)¶¶ 1 and 2. *See Tri-County Youth Programs*, 54 Mass. App. Ct. 405, 413, 765 N.E. 2d 810, 817 (2002).

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

27 Did the Claimant Take Reasonable Steps to Preserve His or Her Job?

Other than in sexual, racial or other unreasonable harassment cases, discussed above, an employee has a duty to take all reasonable steps to preserve the employment relationship before resigning, unless such efforts would be futile. Where an employee has failed to do this, he or she is said to have caused his or her own unemployment and his or her leaving is not considered involuntary because there was, or may have been, an alternative. Review examiners appear to take this matter very seriously. Following are some cases on this point.

Requesting Leave of Absence or Transfer to Another Position

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

In *Reissfelder v. Director of the Div. of Employment Sec.*, 391 Mass. 1003, 460 N.E.2d 604 (1984), the claimant left work after unsuccessfully requesting a day off to go to court on a custody matter. She was disqualified because she failed to provide her supervisor with her reason for needing to go to court, but might have been given the time off, and preserved her job, had she done so. Note: It is illegal for an employer to discharge, penalize, or threaten to discharge or penalize an employee who has taken time off to testify in a criminal action if the employee is a victim or is subpoenaed to testify if the employee has notified her employer prior to the day she is required to be in court. G.L. c. 268, § 14B.

In some situations, transfer to another position will cure or diminish the employee's problem with his or her current position. For example, if the employee is physically unable to do one job, DUA will expect the employee to request transfer to a less demanding position, if one might be available. Again, if no such position is available, or the claimant can show the employer would not have granted the transfer request, no request should be required. And an employee

should not be required to request transfer to a position with substantially lower pay or much less favorable conditions

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

A claimant's leaving may be considered voluntary if he or she quits without first informing the employer of the problem with the job and giving the employer an opportunity to take steps to solve it. For example, an employee whose child care responsibilities change so that they conflict with his or her hours of work should notify the employer of the problem to give the employer a chance to offer the employee different work hours. An employer might also be able to offer an injured employee a transfer to light duty. Similarly, a multi-state employer might be able to offer an employee who must move out of state a transfer to a workplace in the new state.

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

DUA typically asks the following questions to ascertain UI eligibility in voluntary quit cases:

1. Why did you leave your job?
2. Did you have other choices other than leaving your job? Could you have asked for a transfer or a leave of absence?
3. Did you attempt to resolve the problem that caused you to leave your employment?
4. did you try to work out a solution with your employer prior to leaving? When? With whom? How many times? What is the company policy for filing a complaint? How did you try and resolve the problem?
5. What do you believe your employer could have done to resolve the situation?
6. Did you request a transfer? Why not? Was the transfer granted? If you had requested a transfer would it have been granted?

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7. Did you request a leave of absence? Why not? Was the leave granted? If you had requested a leave would it have been granted?
8. Do you know if the company grants leaves of absence or transfers?
9. Was there a personal reason for leaving your job?

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

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

Claimants who leave work due to “urgent, necessitous, and compelling circumstances” leave involuntarily and are eligible to receive benefits under G.L. c. 151A § 25(e). According to the SRH § 1204(D), the phrase “urgent, compelling and necessitous” describes “overwhelming” reasons for leaving work. There are no hard and fast rules regarding what constitutes “urgent, necessitous, and compelling” circumstances for leaving a job; such determinations are largely driven by the facts of the individual case. However, there are some general categories which a review examiner would typically find to meet the definition.

Leaving work for compelling personal reasons is not disqualifying. For example, an employee who must leave work due to illness or the need for treatment (including treatment for alcoholism), to escape domestic violence, or due to family responsibilities, such as to care for an ill family member or because child care arrangements unexpectedly collapse, may do so for compelling personal reasons and, if so, should not be disqualified. *See Raytheon Co. v. Director of the Div. of Employment Sec.*, 364 Mass. 593, 307 N.E.2d 330 (1974). In another case, an employer-imposed schedule change interfered with the claimant’s child care responsibilities, and the court found that the claimant left for compelling personal

reasons. *Zukoski v. Director of the Div. of Employment Sec.*, 390 Mass. 1009, 459 N.E.2d 467 (1984). In such situations, however, the employee will be expected to explore other, less drastic alternatives before quitting. The most common expectation is that the claimant will request a leave of absence, unless it would be futile to do so. See **Question 30**.

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

Other common "urgent, compelling and necessitous" reasons are described in the following sections.

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

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

- n he or she reasonably believed leaves of absence were not available or that his or her request for a leave of absence would have been denied; or
- n a leave would not have resolved the underlying problem.

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

A claimant is not required to request a leave if he or she did not know a leave might be available, or if the employer would not grant a leave. *See* SRH § 1212(B). Nor should a leave request be required where the leave would not remove or diminish the claimant's problem with the job, for example, where the employee is physically unable to do the job and a leave would not improve his

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or her ability or where the employee is suffering from job-related stress and there is no reason to think the job would be less stressful upon return from a leave of absence. SRH § 1204(D).

Note: Ensure that the claimant would actually have been eligible for a leave under the applicable federal or state law and that the employer followed the requisite posting and notification requirements.

Domestic Violence and Sexual Harassment Exceptions

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

Note: Claimants who are on a leave of absence granted at their request will be considered “not in unemployment” and therefore ineligible for UI benefits during the period of their leave.

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

31 Was There a Transportation Problem?

A lack of transportation may be a compelling reason if caused by circumstances beyond the employee’s control and he or she has no other means of getting to work. However, the claimant may be disqualified if he or she fails to take reasonable steps to mitigate the transportation issue. For example, a disqualification was upheld where the employee’s car broke down but he declined to make temporary use of available public transportation or ride with coworkers. *Navarra v. Director of the Div. of Employment Sec.*, 382 Mass. 684, 409 N.E.2d 1306 (1980). Had the employee claimed at the hearing that he had quit because

his employer's relocation increased his transportation burden, this might have constituted good cause.

An employee who leaves work because he or she moved outside of a reasonable commuting distance is generally ineligible to receive benefits. *See* SRH § 1211(A). However, if an employee moves outside of a reasonable commuting distance for “urgent, necessitous, and compelling reasons” (i.e. domestic violence, medical reasons of self or spouse, etc.) then the claimant is not disqualified for leaving work. *Id. See also Brightwell v. King, Deputy Director of the Div. of Employment and Training*, District Court Dept., Greenfield Div., Docket No. 9741 CV 539, March 2, 1998 (Hodos, J.). If the employee leaves work because the employer moves beyond commuting distance from the employee's home, then the leaving is involuntary. *Id.*

Loss of License Required for Work

Where a person cannot work, or get to and from work, because of the loss of a professional license or driver's license and it is established that the loss is due to the employee's fault, the employee is considered to have brought about his own separation, and is considered to have left work voluntarily. *Olmeda v. Director of the Div. of Employment Sec.*, 394 Mass. 1002, 475 N.E.2d 1216 (1985) (conviction of driving while intoxicated); *Rivard v. Director of the Div. of Employment Sec.*, 387 Mass. 528, 441 N.E.2d 257 (1982). But where the license loss is not the employee's fault, the leaving is deemed involuntary. SRH § 1208(G). Despite an unappealed District Court decision to the contrary, *Carey v. Deputy Dir. of DET*, Greenfield District Court Decision, (Docket No. 0041-CV-0251, decided 06/04/01) (claimant, who was an admitted alcoholic, qualified for UI notwithstanding his loss of license for failure to take a breathalyzer test because any conduct arising out of his irresistible compulsion to drink was not “voluntary”), DUA maintains that the voluntary leaving would include cases where the claimant's loss of license is due to an alcohol-related incident and the claimant is an admitted alcoholic. See **Question 34**.

32 Was There a Pregnancy/Maternity or Illness Issue?

Pregnancy and Maternity

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

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

An employee who has properly applied for maternity leave and is not reinstated at the end of the leave is eligible for benefits; the employer-employee relationship is deemed to continue during the leave. *Western Electric Co. v. Director of the Div. of Employment Sec.*, 340 Mass. 190, 163 N.E.2d 154 (1960). This principle applies to any type of leave. An extended unpaid leave, however, may affect the claimant's benefit credit, and thus his or her monetary eligibility and benefit rate. G.L. c. 151A, § 24(a).

Illness of the Employee

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

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skin infection was caused by the work environment. In another case, a remand was required to enable the claimant (who was without representation at her hearing) to procure medical evidence of elevated blood pressure and recurrent headaches that she had referred to in her letter of resignation. *Hunt v. Director of the Div. of Employment Sec.*, 397 Mass. 46, 489 N.E.2d 696 (1986). A claimant need not prove that the employment caused the ailment, only that it was reasonable to believe that a causal connection between the employment and the ailment existed. SRH § 1216(E).

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

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

Leaving work due to illness can also constitute "urgent, necessitous, and compelling circumstances" even if the illness is not caused by the job, where the illness permanently disables the employee from performing the job (but not other kinds of work) or when the illness is temporary and the employer refuses to grant a leave of absence. See SRH § 1216(B) and (C).

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

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In any case where a claimant leaves work because of a health condition, he or she will probably be questioned about whether she or he is able and available to accept future work, pursuant to G.L. c. 151A, § 24(b). DUA currently interprets §24(b) in certain circumstances to disqualify claimants available only for part-time work. See **Question 8**.

D. OTHER SEPARATION ISSUES: QUESTIONS 33-36

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

Domestic violence frequently spills into the workplace; 96 percent of employed victims of domestic violence experience some kind of work-related problem due to violence. Victims may need to take time off from work to participate in criminal and civil legal proceedings and to address the effects of domestic violence such as relocating their family or obtaining medical care.

Chapter 69 of the Acts of 2001, An Act Relative to the Eligibility for Unemployment Benefits for Victims of Domestic Violence, made numerous important changes to the unemployment law, resulting in the payment of benefits to individuals whose separation from work is attributable to domestic violence *or* the need to deal with the physical, psychological or legal effects of domestic violence on the worker and his or her family.

The statute extends special considerations and eligibility provisions for victims of domestic violence which are found in the: voluntary quit provisions, leaving work for “urgent and compelling” personal reasons, the discharge analysis, able and available and suitability requirements, and access to training. For example, voluntary quit provisions now clearly provide for eligibility if an individual leaves a job because: (1) the individual fears future domestic violence at or en route to

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and from the individual's place of employment; (2) the individual needs to relocate to another geographical area in order to avoid domestic violence; (3) the individual needs to address the physical, psychological and legal effects of domestic violence; (4) the individual needs to leave employment as a condition of receiving services or shelter from an agency which provides support or shelter to victims of domestic violence; or (5) the individual's leaving is due in any other respect to a reasonable belief that terminating employment is necessary to ensure his or her safety or the safety of his or her family. G.L. c. 151A, § 25(e), ¶ 7.

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

Additionally, the law now addresses an issue which previously resulted in UI denials. In order to qualify for UI, an individual must show he or she is "able and available" for *suitable* work. This law modifies the requirement by limiting availability to availability for work which is determined suitable only if the employer reasonably accommodates the individual's need to address the physical, psychological and legal effects of domestic violence. G.L. c. 151A, § 25(c), ¶ 2.

DUA has expanded access to training opportunities for victims of domestic violence by tolling the requirement that an individual must apply for approved training within the first 15 weeks of the unemployment claim if the delay is related to addressing the effects of domestic violence. G.L. c. 151A, § 30(c).

Advocacy note: The revised Service Representatives Handbook has excellent sections on how domestic violence issues should be handled, emphasizing the need for sensitivity and ensuring a claimant's privacy. SRH §§ 1043, 1231-33 and 1338. However, the SRH sections on discharge fail to include any language concerning domestic violence. If a client reveals domestic violence, and this issue has not previously come to the attention of DUA, contact the Policy and Determinations unit. ***It is not necessary to prove that the employee divulged the domestic violence to her employer prior to leaving.***

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

Employee substance abuse, or conduct that derives from substance abuse, is often a factor in determining employee eligibility for UI benefits. It may arise in both quit and discharge cases discussed in the previous section—a UI claimant with a drinking problem may be disqualified for having voluntarily quit a job without good cause, or for engaging in alcohol-related misconduct or rule violations. Generally, if the employer can demonstrate that the claimant violated a company policy regarding drugs or alcohol, the claimant will be disqualified. However, if the claimant leaves work due to an alcohol-related incident, either on or off the job, he or she will not be disqualified under § 25(e)(1) so long as he or she admits to being an alcoholic and is making a sincere effort to overcome the alcoholism. SRH § 1216(G). DUA’s SRH policy statements and state court cases have long recognized that a person who is addicted to alcohol is subject to an irresistible compulsion to drink. This negates the intentionality required for the claimant to be disqualified under either the deliberate misconduct or knowing rule violation standard. *Shepard v. Director of the Div. of Employment Sec.*, 399 Mass. 737, 506 N.E.2d 874 (1987). Any conduct that is the product of an irresistible compulsion to drink (alcoholism) cannot be considered to be deliberate or willful and should not incur a disqualification for misconduct. SRH §§ 1325, 1336. Alternatively, if the claimant is an admitted alcoholic, he or she was temporarily incapable of adhering to the rule, due to alcohol-caused incompetence. It is less clear whether DUA applies this same “illness model” to workers’ addiction to illegal drugs, but there is no analytical reason for it to be treated differently.

DUA maintains that a person who loses their job due to loss of license has voluntarily caused their own separation. *Olmeda v. Director of the Div. of Employment Sec.* 394 Mass. 1002, 475 N.E.2d 1216 (1985) (claimant whose separation was caused by loss of license deemed to have voluntarily quit his job). However, *Olmeda* did not raise the question of alcoholism. If the loss of license resulted from admitted alcoholism, a claimant should still qualify for UI. See *Carey v. King, Deputy Dir. of DET*, Greenfield District Court Decision, (Docket No. 0041-CV-0251, decided 06/04/01) (claimant, who was an admitted alcoholic, qualified for UI notwithstanding his loss of license for failure to take a breathalyzer test because any conduct arising out of his irresistible compulsion to drink was not “voluntary”).

A claimant's need to seek alcohol-related treatment may constitute an urgent, necessitous and compelling personal reason for leaving work, rendering the separation involuntary. However, the employee should request a leave of absence first, unless such a request is futile. SRH § 1216(H). A person in an intensive and/or inpatient treatment program may not be "able and available" for UI purposes until they finish their treatment program.

DUA policies and the agency's administrative decisions suggest that the agency is ambivalent about whether to apply this same "illness model" to workers' addiction to illegal drugs. An employee who seeks drug or alcohol treatment and who can't obtain a leave of absence from the employer is considered to have left involuntarily, for urgent, compelling and necessitous reasons. SRH § 1216(H), (I). However, while some hearing officers have recognized the same lack of intentionality and irresistible compulsion in cases where the separation is caused by addiction to legal, and illegal, substances. There is no analytical basis for distinguishing the state of mind issue based upon the legality of the substance. This area is ripe for advocacy, particularly where the drug-related misconduct or rule violation is rather innocuous and/or where the addiction is to (over)-prescribed medications.

Note: Advocates may be able to prevail if drug use was during non-work hours and off work premises, and prior to the start of employment. Additionally, where client denies drug use, advocates should challenge the accuracy and reliability of the drug test. Advocates may also want to explore the somewhat complex questions relating to whether the claimant's drug or alcohol use qualifies as a "disability" within the meaning of the Americans with Disabilities Act.

35 When does DUA Treat a Discharge as a Quit?

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

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The logic behind the decision, which is sometimes referred to as a “constructive quit” analysis, is that the claimant voluntarily chose to refrain from paying the fee and thereby left work voluntarily.

A similar analysis was applied in *Rivard v. Director of Div. of Employment Sec.*, 387 Mass. 528, 441 N.E.2d 257 (1982) where the claimant was fired from a city job when his employer realized that he had failed to take steps to remove a statutory impediment to his ability to hold the position. *See also Olmeda v. Director of the Div. of Employment Sec.*, 394 Mass. 1002, 475 N.E.2d 1216 (1985); *Harvard Student Agencies v. Director of the Div. of Employment Sec.*, 12 Mass. App. Ct. 871, 421 N.E.2d 470 (1981); SRH §§ 1208(G), (H).

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

The same logic, if applied to other cases of deliberate misconduct, would lead to unfair results in many cases. An employee who is fired for drinking on the job, or embezzling the employer’s money, or refusing to follow orders could be described as voluntarily acting in a manner which would bring about his or her own unemployment, which could give rise to a § 25(e)(1) disqualification. The flaw in this analysis is that it switches the burden of proof from the employer, who bears it under § 25(e)(2), to the employee, who has the burden under § 25(e)(1) and may circumvent some of the careful “state of mind” assessment required under § 25(e)(2).

DUA sometimes overuses the “constructive quit” analysis, and advocates should be on guard and insist that the principles of cases like *Rivard* and *Olmeda* be limited strictly to their facts and to situations where a claimant’s actions and expressions show a clear intent to end his or her employment relationship. The Appeals Court has addressed this issue in an unpublished opinion, *Saunders Enterprise Payroll Corp. v. Commissioner of the Dept. of Employment and Training*, 61 Mass. App. Ct. 1123, 814 N.E.2d 36 (2004). *See also*: Annotation, *Unemployment Compensation: Eligibility Where Claimant Leaves Employment under Circumstances Interpreted as a Firing by the Claimant But as a Voluntary Quit by the Employer*, 80 ALR 4th 7 (1990).

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

Leaving work because of a conviction of a felony or misdemeanor is disqualifying under a separate clause of G.L. c. 151A, § 25(e)(3). A disqualifying separation must result directly from the conviction, either because the employer fired the claimant or because the claimant was incarcerated. *Glasser v. Director of the Div. of Employment Sec.*, 393 Mass. 574, 471 N.E. 2d 1338 (1984) (claimant failed to prove he would have been reinstated but for unlawfully excessive sentence).

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

An individual who notifies his or her employer of an inability to continue work because of incarceration and who subsequently is not convicted of the offense charged is not subject to disqualification under §25(e)(3). SRH § 1352.

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Part 4

Special Situations

37 Employees of Educational Institutions

A special law limits UI eligibility of all employees (not just teachers but custodians, bus drivers and aides) of schools and other educational institutions when they are out of work between academic years or terms, even if they receive no pay over the break. If the worker has a contract of employment or a “reasonable assurance” of employment that is substantially the same or better in the next term or year, then they will not qualify for UI benefits. G.L. c. 151A, § 28A. In order for this limit to apply, DUA should determine:

- n If the employer is an educational institution. If the employer is a private bus company that contracts with a school, this provision does not apply.
- n That the claim is being filed between two successive academic years or terms.
- n Whether the claimant has a contract or received a “reasonable assurance” of re-employment in the same or similar position for the next academic year or term. A reasonable assurance is more than the mere possibility of re-employment, and must be submitted in writing to DUA.

For non-professional employees of educational institutions, if the worker is then not given an opportunity to perform work in that next academic term, the worker is entitled to retroactive UI benefits. 430 C.M.R. §§ 4.91–4.98.

38 Employees of Temporary Help Agencies

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

Temp agencies act as labor intermediaries, hiring employees and then sending them out to work for another firm. Because the temp agency is the employer for Unemployment Insurance purposes, temp agencies have a financial interest in lowering their UI costs and keeping employees from collecting UI while they are between assignments. Nationally, the temp industry has made a concerted effort to change state unemployment law to make it more difficult for employees to collect UI.

Under a Massachusetts law passed in November 2003, a temporary worker may be deemed to have voluntarily quit his or her job if he or she files for unemployment benefits after the completion of an assignment without first contacting the temp agency for reassignment. G.L. c. 151A, § 25(e), *as amended by* St. 2003, c. 142, § 8. The legislation and implementing regulations further provide, however, that this failure to contact the temp agency for reassignment will not be deemed a voluntary quit “unless the claimant has been advised of the obligation *in writing* to contact the firm upon completion of an assignment.” *Id.*, 430 C.M.R. § 4.04 (8)(b)(2). Further, the employer’s notice of this obligation must specify the method for requesting a new assignment in a manner that is consistent with the normal method and manner of communication between the employee and the temporary employment firm, and that failure to request a new assignment may affect eligibility for unemployment benefits. 430 C.M.R. § 4.04 (8)(e). If the temp agency is unable to provide proof that proper notice was provided to the claimant, that employee will be deemed to have been laid off and therefore entitled to UI, if otherwise eligible.

Practice Note: If the temp agency provided proper notice and the employee is unable to prove to DUA that he or she contacted the temp agency at the end of the previous assignment to request a new assignment, she or he will be deemed to

have “voluntarily quit” her job. Often, a worker's cell phone records are helpful to document contact with the temp agency. Where the worker returns to the temp agency at the time of receiving her final paycheck, any conversation that occurs at that time regarding future work should satisfy the “seeking reassignment” requirement.

Although the statute and DUA’s regulations are silent on these matters, UI advocates should explore possible due process claims. For example, if the claimant was provided notice but in a language she cannot read, arguably the temp agency has not met its burden to provide proper notice. Likewise, often times employees work for a temp agency and take months off before returning to seek work. If the employee was only provided notice about the requirement to seek reassignment at the time of her initial hire, it is reasonable to argue that the employer had a duty to provide new notice when she was rehired or even at the time the most recent assignment ended. 430 C.M.R. § 4.04 *et seq.*

Temp agencies and “suitable work”

The requirement that an employee at a temporary agency must seek reassignment does not mean that the new position must be *accepted* in every case. The suitable work provisions still apply, and include the “prevailing conditions of work” test. SRH § 1230(B). For example, if a claimant finished an assignment as a secretary and is offered an assignment as a cleaner, this would not constitute “suitable work” and a refusal should not result in disqualification. See **Question 8**.

Moreover, although neither the statute nor the regulations define the duration of work that is to be considered temp work, the Division of Occupational Safety, the agency that registers temp agencies, G.L. c. 140, § 46A, defines a temp assignment as one that lasts 10 weeks.

39 Worker Misclassification Issues

The UI law carries a strong presumption that services performed are “employment.” Sometimes employers wish to have their employees characterized as independent contractors in order to reduce unemployment, workers’ compensation and other employee costs. The UI law uses a three-part test, under which any individual performing services will be presumed to be an employee unless the alleged employer can prove ***all three*** of the following: (1) the worker

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has been and continues to be free from control and direction in performance of the service; (2) the work is performed either outside the usual course of business, or outside all of the places of business of the enterprise; and (3) the worker is customarily engaged in an independently established business of the same nature as the service performed. G.L. c. 151A, § 2. The employer bears the burden of proof on this issue and the employer's description of the work in an employment contract or elsewhere is not controlling. SRH §§ 2009, 2011(D). *See also, Driscoll v. Worcester Telegram & Gazette*, 72 Mass. App. Ct. 709, 893 N.E. 2d 1239 (2008) (news carriers were employees where newspaper retained control over order in which newspapers were delivered and retained authority to discharge carriers because of customer complaints); *Commissioner of the Dept. of Unemployment Assistance v. Town Taxi of Cape Cod*, 68 Mass. App. Ct. 426, 862 N.E.2d 430 (2007) (taxi drivers who had discretion to choose which shifts they worked and which customers to accept from company dispatch were independent contractors); *Coverall North America, Inc. v. Commissioner of the Dep't of Unemployment Assistance*, 447 Mass. 852, 857 N.E.2d 1083 (2006) (although employer claimed individual was a franchisee and not an employee, the court held that janitorial services performed by claimant were as an employee where the nature of the business effectively compelled her to accept work solely from the employer).

If a question about employee status is raised by the alleged employer, the case is sent to the Status Department where the DUA Adjuster conducts a “status determination,” asking a series of questions of both parties to get at the facts relevant to the three-part test. An advocate may intervene and provide the Status Department with information. Both the alleged employer and the claimant are interested parties to this determination and may appeal an adverse determination.

In March, 2008, Governor Patrick signed Executive Order #499 establishing the Joint Employment Task Force on the Underground Economy and Employee Misclassification. More than 17 state agencies participate in the Task Force, whose mission is to ensure business compliance with applicable state labor, licensing and tax laws. A toll-free referral line, 1-877-96-LABOR is available to provide information and to receive complaints about suspected cases of misclassification.

40 On Call Workers

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

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

A full or part-time schedule where the person works approximately the same number of hours per week in accordance with a posted or advance schedule is *not* an on-call situation and a reduction of hours could qualify for partial UI benefits. See SRH § 1220 (I) – (N).

41 UI Eligibility During a Labor Dispute

An individual may be disqualified from receiving benefits if unemployment is due to a “stoppage of work” because of a labor dispute. G.L. c. 151A, § 25(b). In order for there to be a stoppage of work, operations must be “substantially curtailed.” How much disruption is required to constitute a substantial curtailment is a fact-specific inquiry; there is no percentage threshold or numerical formula. *Hertz Corp. v. Acting Director of the Div. of Employment and Training*, 437 Mass. 295, 297, 771 N.E. 2d 153, 155-56 (2002) (no decrease in rentals or revenue); *Reed Nat. Corp. v. Director of the Div. of Employment Sec.*, 393 Mass. 721, 473 N.E. 2d 190 (1985) (25% drop at one plant only did not constitute substantial curtailment).

The burden is on the claimant to prove that she or he falls within the exceptions to the provisions of the statute denying eligibility for unemployment benefits when unemployment results from a stoppage of work due to a labor dispute. *General Electric Co. v. Director of the Div. of Employment Sec.*, 349 Mass. 358, 208 N.E. 2d 234 (1965).

The bar to benefits does not apply before the strike begins if the individual is involuntarily unemployed during contract negotiations or after the strike has ended if the individual is not recalled within one week of the end of the strike. G.L. c. 151A, § 25(b).

This bar also does not apply if the individual did not as an individual or as a member of a group participate in, finance, or have a direct interest in the labor dispute (notwithstanding the payment of union dues). G.L. c. 151A, § 25(b)(1), (2). However, even if an individual is not a member of a union participating in the strike, the requirement of “direct interest” is met if the individual’s wages, hours, or conditions of work will be either favorably or adversely affected by the outcome. *Wheeler v. Director of the Div. of Employment Sec.*, 347 Mass. 730, 200 N.E. 2d 272 (1964).

If there has been a “lockout,” i.e., either a physical shut-down of a plant or a communication by the employer to its employees that there will be no more work until the end of the labor dispute, individuals are eligible for unemployment benefits whether or not there has been a stoppage of work as long as the workers are willing to work under the terms of the existing or expired contract pending the negotiation of a new contract. The payment of benefits under these circumstances

can be prevented by the employer only if it demonstrates by a preponderance of the evidence that the lockout is in response to damage or threats of damage by bargaining unit members with express or implied approval of the union's officers, that the employer has taken reasonable measures to prevent such damage, and that such efforts have been unsuccessful. G.L. c. 151A, § 25 (b)(4).

42 Persons Receiving Workers' Compensation

Receipt of workers' compensation temporary *total* disability benefits renders one ineligible for UI because one who is completely disabled is not "able and available for work." G.L. c. 151A, § 25(d). However, a worker who is receiving partial disability workers' compensation benefits may still be able to work in some capacity and therefore would be able to collect UI if able to work on a part-time basis, with a reasonable accommodation if necessary. SRH § 1583(C).

In addition, a worker who has been on workers' compensation total disability for more than seven weeks may have his base period extended for the period of disability up to 12 months. G.L. c. 151A, § 1(a). This will allow the worker who has recovered enough to go back to work to collect benefits while engaged in a work search.

In a case where a seasonal worker attempted to have his off-season UI benefits included in his earnings for purposes of increasing a workers compensation award, the Appeals Court declined to permit him to do so. *In re Mike's Case*, 73 Mass. App. Ct. 44, 45, 895 N.E. 2d 512 (2008).

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

In order to qualify for UI benefits, an individual must be "capable of, available and actively seeking work." G.L. c. 151A, § 24(b). DUA takes the position that the receipt of Social Security Disability Income (SSDI) (as distinguished from Retirement) or Supplemental Security Income (SSI) payments creates a

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presumption that one is unable to work due to disability. See SRH § 1022. DUA provides that the presumption may be rebutted with evidence that, with or without a reasonable accommodation and/or the availability of part-time work, the person may still be able to work on either a full-time or part-time basis. If a SSI/SSDI recipient is able to work full-time or part-time with or without a reasonable accommodation, advocates are advised to immediately submit a physician's note to this effect or preferably a completed DUA Form 2047, *Health Care Provider/Physician Verification Form* or DUA Form 2048, *Health Care Provider's Statement of Capability*. See **Appendix Q**.

Note: DUA's position conflicts with that of the First Circuit, *DeCaro v. Hasbro, Inc.*, --- F.3d ----, 2009 WL 2767296 (C.A.1 (Mass.)), which follows the Supreme Court's decision in *Cleveland v. Policy Management Systems Corp.* 526 U.S. 795, 119 S. Ct. 1597 (1999). In *Cleveland*, the Supreme Court explicitly stated that claims brought under SSDI and the ADA "do not inherently conflict to the point where courts should apply a special negative presumption." 526 U.S. at 802. The *Hasbro* Court amplified the decision, stating that the "[SSDI] scheme does not create any presumption (conclusive or rebuttable) with respect to a parallel ADA claim. 2009 WL at *5. Both courts reiterated that a claimant may be asked to explain why she is eligible for both programs. This reasoning should be applied to the receipt of UI which is a program that is distinct from SSI/SSDI. See Memorandum of the Chief Judge of the Social Security Administration, November 15, 2006, explaining that the receipt of UI does not preclude the receipt of social security disability insurance, stating that "it is SSA's position that individuals need not choose between applying for UI and SS disability benefits."

As a result of a state statutory change in July 2006, receipt of Social Security Retirement benefits no longer causes any financial offset in UI benefits. St. 2006, c. 123, §§ 67, 68, amending G.L. c. 151A, § 29(d)(6). Form 3720-P has been amended to eliminate disqualifications resulting from receipt of Social Security Retirement benefits. SRH § 1720. Other non-deductible pensions include IRA Plans, Keough Plans, Railroad Retirement, and any withdrawal of Pension Contributions.

Receipt of pension or other retirement benefits from a base period employer may affect the amount of UI benefits, but does not affect UI eligibility. A claimant who receives a pension or retirement benefit which is financed wholly by a base period employer will have his or her weekly UI benefits reduced by 100%; whereas if the employee makes any contribution, the UI benefits are reduced by 50% of the weekly retirement benefit. No deduction is made if the pension is from a source other than the base period employer, the lump sum payment was made

prior to the base period, or the pension is solely funded by the employee. G.L. c. 151A, § 29(d).

44 Persons Receiving Severance Pay or Other Lump Sum Payments Upon Separation from Employment

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

In contrast, an agreement by an employee to take a lump sum payment upon separation in return for the employee’s release of claims against the employer will not constitute the kind of payment that disqualifies the employee from UI. *White v. Commissioner of Dept. of Employment and Training*, 40 Mass. App. Ct. 249, 662 N.E.2d 1048 (1996).

Additionally, lump sum payments where there has been a plant closing at a business of 50 or more employees or at least 50% of employees (see 20 CFR 639.3(I)) is not disqualifying. G.L. c. 151A, §1(r)(3).

45 Working and Leaving Multiple Jobs.

Multiple Employers During the Base Period

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

An “interested party (IP) employer” is an employer whose employment is relevant to the determination of a claimant’s UI eligibility. By a policy change (without benefit of statutory or regulatory authority), DUA determined in 1998 that IP employer status would be conferred to all separations within an employee’s most recent 8 weeks of employment. This means that all separations occurring within that last 8 weeks will be adjudicated before a claimant can be granted benefits. This change burdens claimants, increases the workload on the hearings department, and does nothing to protect employers’ interests. Whether or not an employer is an IP, all base period employers (except reimbursing employers) can still contest the charges if it show to DUA’s satisfaction that the employee left for disqualifying reasons.

Workers Who Work Concurrent Full-Time and Part-Time Jobs During the Base Period

When a worker works more than one job concurrently during the base period, DUA establishes which is the primary job and which is the subsidiary job based on a comparison of number of factors including hours, wages, employment history, whether the work is in other than the individual’s primary occupation. 430 CMR §§ 4.74, 4.75. This determination becomes relevant because although wages from all jobs during the base period are used to calculate monetary eligibility and the weekly benefit rate, an individual is unemployed, and hence eligible for UI, only upon the loss of a full-time primary job. If, however, both the primary and subsidiary employment are each less than full-time, then the claimant may be eligible to receive UI upon a loss of either job or a reduction in hours of either job. As long as a claimant works less than full-time in aggregate, then the claimant is “in unemployment.”

Once unemployed, earnings from the subsidiary job are deducted from the unemployment check, however gross earnings up to 1/3 of the individual's weekly benefit rate are disregarded. G.L. c. 151A, § 29 (b).

Loss of Part-Time/Subsidiary Job During the Base Period

An individual who loses a subsidiary job while continuing to work in a primary job is not eligible for UI. However, if the individual leaves this subsidiary job for a disqualifying reason during the most recent eight weeks of unemployment, DUA takes a "constructive deduction" from the unemployment check. 430 CMR 4.71-4.78 (9/1/93). Although the unemployment statute is silent on this issue, DUA promulgated these regulations to implement the court's decision in *Emerson v. Director of Div. of Employment Sec.*, 393 Mass. 351, 471 N.E. 2d 97 (1984). However, *Emerson* dealt with a claimant who left a part-time job during her *benefit year*, and therefore provides no authority for the constructive deduction regulations as applied in the *base period*.

Cautionary Note: The constructive deduction regulations apply to a separation from part-time subsidiary work during the last *four weeks* of unemployment prior to filing a claim. 430 CMR § 4.78 (1)(a). However, as stated above, according to DUA's policy, DUA looks at all separations during the last *eight weeks* of unemployment prior to filing a claim. DUA implements the policy by applying a *constructive deduction* to a disqualifying separation during the last four weeks and by applying a *full disqualification* if the disqualifying separation occurred during the last five to eight weeks of employment prior to filing a claim! SHR 1407(B).

46 Interstate Claims

The UI system has a set of rules for workers who have worked in more than one state, have worked in another state for an out-of state employer, or have moved to another state since they began collecting UI. Under federal law, states are required to set up an Interstate Benefit Plan, which allows a worker who lost his job in one state to collect UI in another state in which he resides. 26 U.S.C. §

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3304 (a)(9)(B). The Massachusetts law governing interstate claims appears at G.L. c. 151A § 66; 430 C.M.R. 4.05 and 4.09.

As a result of a change in federal regulations effective in January, 2009, an interstate benefit claimant may file a UI claim in any state in which he or she had wages during the base period and in which he or she qualifies for UI under that state's laws. (Under prior law, a claimant could file a claim in any state in which he or she had base period wages **or** in which he or she resided.)

The UI law of the state in which the UI claim is filed (paying state) controls in interstate claims. 20 C.F.R. 616.8 (a). That state investigates the claim, and, unless an issue has already been determined by the transferring state (any other state in which the claimant had covered employment and base period wages and which transfers those wages to the paying state) determines eligibility, and conducts redeterminations or appeals.

If a state denies a combined-wage claim, it must inform the claimant of the option to file in another state in which the claimant had covered employment and base period wages. 20 CFR 616.7(f); 430 CMR 4.09(7).

The DUA telephone number for questions about Interstate Claims is 617/626-6852.

Part 5

Receiving Benefits

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

When benefits commence, the claimant will receive a check every other week, so long as she or he continues to certify his or her continuing eligibility. See **Questions 6 and 8**. Below is a list of some of the obligations, benefits and services for claimants who are receiving UI benefits.

47 Is a Claimant Entitled to Additional Benefits For His or Her Children?

A claimant is entitled to a dependency allowance of \$25 per week for each dependent child up to age 18, not to exceed 50 percent of the claimant's weekly benefit rate. The allowance is also available for a dependent child over age 18 who is unable to work because of a physical or mental disability and for a dependent child between ages 18 and 24 who is a full-time student. G.L. c. 151A, § 29(c). Once the dependency allowance is established, it does not change during the benefit year, except that the allowance can be transferred from one spouse to another. A claimant whose child does not live with him or her is still eligible for the dependency benefit, so long as she or he provides more than 50% of the child's financial support. SRH § 1652(C). If both parents are unemployed, only one parent at a time can collect the dependency benefit for that child.

48 For How Long Can A Claimant Receive Unemployment Benefits?

A claimant is entitled to receive regular UI on a claim for up to 30 weeks during the individual's benefit year. G.L. c. 151A, § 30. During a period when DUA is paying extended benefits pursuant to Section 30A, the regular pay period is reduced to 26 weeks. However, the number of weeks of benefits may be far fewer than 30, depending on the number of weeks of earnings and whether earnings fluctuated between different quarters of the base period. See **Appendix C**.

Federal Extended Benefits

The federal extended benefits program is triggered during periods of high unemployment, through Congressional enactments and also through a permanent federal-state extended benefits program. See G.L. c. 151A, § 30A. most recently by the Emergency Unemployment Compensation Act of 2008 (EUC08), Pub. L. No. 110-252, which permits an individual to receive half of his or her regular benefits of up to an additional 13 weeks of benefits. Federal extensions under EUC08 are 100 percent federally financed.

In order to be eligible for extended benefits an individual must have earned 40 times the weekly benefit amount (20 weeks) in contrast to regular benefits that require earnings of 30 times the weekly benefit amount (15 weeks). The "20 week test" is satisfied by: (1) 20 weeks of insured earnings; or (2) 20 weeks of insured wages. "Insured wages" can be calculated as either 40 times the weekly benefit amount or one and a half times the individual's wages in her highest quarter in her base period. G.L. c. 151A, §30A(3)(a). Because claimants who receive dependency allowances may have a high WBA and therefore be unable to meet the eligibility test for federal extended UI, the alternative test of one and one-half times high quarter earnings may offer an easier route to eligibility.

Congress has recently passed 2 temporary emergency unemployment laws (EUC08) related to federally funded extended UI as well as the Recovery Act. Additional extended benefits are also available under a Massachusetts federal-state extended benefit program (EB). Under these laws, anyone who filed a regular UI claim after May 7, 2006 and remains unemployed is eligible for up to a total of **79 weeks** of UI when combined with state UI. (The total number of weeks may be less as it is based on a formula applied to the number of weeks of regular

UI.) Currently, the benefits under these emergency UI bills phase out on May 31, 2010; however, UI extended benefits may last longer depending on the state's unemployment rate. The \$25 extra weekly benefit funded by the federal government (see **Question 4**) applies to extended federal benefits as well.

Under state law, whenever there is a program of federal extended UI, regular UI is capped at 26 weeks (instead of the maximum of 30 weeks). Therefore, individuals will be able to collect up to 26 weeks of regular UI and up to 53 weeks of federal extended UI for a maximum total of 79 weeks. DUA's toll-free hotline # for federal extended benefits is **1-888-998-8418** (with Spanish and Portuguese prompts).

Additional information in English and Spanish on EUC08 benefits is included in **Appendix O**.

Section 30 Training Benefits

Under G.L. c. 151A, § 30, unemployed workers who are eligible for UI are entitled to an additional 26 times their weekly benefit rate if they are participating in a DUA-approved training program and had applied for training within the first 15 weeks of a new or continued claim for UI benefits. If an individual is participating in an approved training program, he or she is deemed to be meeting both the work search and availability requirements during the period of training. For further information about Section 30 benefits, see **Question 54**.

49 How do Part Time Earnings Affect UI Benefits During the Benefit Year?

The Partial Earnings Disregard

Claimants who are collecting UI and find some new employment have a duty to report these earnings in their weekly certification. Claimants are entitled to a disregard of a portion of their gross earnings, so that there is no reduction in the weekly UI benefit. The disregard is equal to one-third of their weekly benefit rate (weekly benefit allowance plus dependency allowance). Any weekly earnings above that one-third disregard cause a dollar for dollar reduction in the weekly UI

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benefit. The disregarded earnings, plus the individual's weekly benefit rate may not exceed the individual's average weekly wage. G.L. c. 151A, § 29(b).

Leaving Subsidiary Part-Time Work in the Base Period

A claimant who leaves subsidiary, part-time work for disqualifying reasons within eight weeks prior to the establishment of an eligible claim for UI, is subject to a constructive deduction. 430 C.M.R. § 4.76. A “constructive deduction” is a reduction of UI as if the claimant were still working at the job he or she left. However, an individual who quits a part-time job with an employer other than the most recent employer in order to participate in DUA-approved training is not disqualified under this provision. G.L. c. 151A, § 25(e), ¶10.

Example: *Sue works at Job A full-time for three years at the same time as she works part-time at Job B . At some point in the two month period before she leaves Job A, she quits her part-time job with B without good cause. She is then laid off from Job A and is found eligible for UI benefits. The wages from Job B will be “constructively deducted” from her UI. If her wages from Job B were less than or equal to one third of her weekly UI rate, her UI will not be reduced. The amount of her Job B gross wages that exceed one third of her benefit rate will cause a dollar for dollar reduction in her UI.*

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

A constructive deduction is also applied when a claimant is separated under disqualifying circumstances from part-time employment newly obtained during the benefit year. 430 C.M.R. § 4.76(1). In addition to the standard arguments about why the leaving should not be disqualifying, also consider whether the work was suitable under G.L. c. 151A, § 25(c)(2) (work is not suitable where remuneration, hours, or other conditions of work offered are substantially less favorable to the individual than those prevailing for similar work in the locality), or whether the job was “trial work.” See **Question 8**.

Requalifying on a Constructive Deduction and Effect on Benefit Credit

In order to requalify for benefits after a constructive deduction, the standard requalification rule applies, i.e., the individual must have had eight weeks of earnings and in each of those weeks earned an amount equal to or greater than the weekly benefit amount. 430 C.M.R. § 4.76 (2). Moreover, although the statute and regulations are silent on this point, the SRH states that an earnings disregard may only be applied once during the benefit year, i.e., if the claimant leaves a

part-time job for disqualifying reasons and secures another part-time job, the earnings disregard will not be applied to those earnings. SRH § 1407(E).

However, the benefit credit balance (the total amount of unemployment benefits payable on that particular claim) is reduced only by the amount of benefits actually paid, ignoring the constructive deduction. This allows the claimant to collect his or her entire benefit credit balance if he or she remains unemployed long enough and can exhaust all the benefits available on the claim. SRH § 1407(F).

50 What Is the Worker Profiling Program?

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

Recently Massachusetts has expanded worker profiling to include all UI claimants. Every UI claimant receives a notice informing them that they must attend an orientation seminar at a One-Stop Career Center. The orientation seminar is intended to assist claimants with job search and claimants should also be informed at these sessions about training opportunities such as Section 30 benefits.

DUA has promulgated a regulation on worker profiling, but it does not make reference to DUA's current practice of subjecting all UI applicants to "worker profiling." 430 C.M.R. § 401(8).

A claimant who fails to attend a Career Center Orientation may have his or her benefits suspended until attending a session. A claimant should not have her benefits suspended if she did not attend because she had "good cause." The circumstances that constitute "good cause" are set out in DUA regulations at 430 C.M.R. § 4.01(8)(b). **Note:** Because of the high volume of UI claims, DUA is at present not suspending benefits for failure to attend a Career Center seminar.

Claimants with Limited English Proficiency (LEP) have often been sent to orientations at Career Centers without any interpreter services and forced to

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attend a session which they can not understand. DUA has recently agreed that an LEP claimant cannot have his or her benefits suspended unless the orientation was provided in the claimant's primary language.

Worker profiling is conducted at one-stop career centers or in DUA offices in areas where there is no one-stop center. A list of the addresses and telephone numbers of existing one-stop centers is provided in **Appendix A**.

Further information about worker profiling is available in Department of Labor Unemployment Insurance Program Letters published in the Federal Register, 59 Fed. Reg. 11804 (March 14, 1994). *See also* 20 C.F.R., Part 662.

51 What are the Requirements for Non-citizens?

The Federal Unemployment Tax Act (FUTA) requires that states' laws provide that compensation shall not be payable on the basis of services performed by a non-citizen unless such non-citizen is an individual who (1) was lawfully admitted for permanent residence at the time such services were performed, (2) was lawfully present for purposes of performing such services, or (3) was permanently residing in the United States under color of law (PRUCOL) at the time such services were performed (including an alien who was lawfully present in the United States as a result of the application of the provisions of § 323(d)(5) of the Immigration and Nationality Act). 26 U.S.C. § 3304(a)(14)(A). These requirements are found in the Employment Security Law, G.L. c. 151A, § 25(h). The receipt of UI benefits does not pose a problem or potential public charge issue for an immigrant who later applies for citizenship.

Employers must verify the immigration status of all new employees, whether they are citizens or not. To prove both work eligibility and availability, a non-citizen can submit the document(s) of his or her choice which demonstrate identity and work authorization. For a list of acceptable documents for Employment Eligibility Verification, or the Form I-9, *see* <http://www.uscis.gov/files/form/i-9.pdf>. An employer's request for more documents than are required by law or refusal to honor facially genuine documents is an unfair immigration-related employment practice. Section 274B(a)(6) of the Immigration Act of 1990, 8 U.S.C. § 1324b(a)(6).

These requirements concerning verification of immigration status similarly apply to DUA.

Verification of Status

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

If the non-citizen does not have an A-number or if primary verification does not establish satisfactory status, "secondary verification" is instituted by sending photocopies of the claimant's documentation to the local immigration office. No denial of benefits should be made without secondary verification. Under both federal and Massachusetts law, no determination that UI cannot be paid to a claimant due to immigration status shall be made except upon a preponderance of the evidence. 26 U.S.C. § 3304(14)(C); G.L. c. 151A, § 25(h).

Claimants who are undergoing primary or secondary verification are to be paid benefits in the interim. If documentation is not verified following primary or secondary verification, the claimant must be allowed four weeks from the date of filing to present such verification, i.e., the claimant will receive one check for two weeks of benefits during this period. 42 U.S.C. §1320b.

Permanently Residing under Color of Law

If an individual has the necessary documents to demonstrate "availability for work" during the benefit year, but did not have work authorization while employed, he or she may still be eligible for unemployment benefits if the individual met the 3rd test of the unemployment law, "PRUCOL," during the base period. See SRH § 1512 (E). The term *permanently residing under color of law* or "PRUCOL" does not exist in immigration law but has been created under common law and included in numerous benefit statutes including the unemployment law. The majority of courts decisions construing PRUCOL and the legislative histories of statutes that include PRUCOL have interpreted the phrase expansively.

To demonstrate that a claimant is *permanently* residing in the United States, he or she must simply show *continuing* presence, even if her status is subject to renewal

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or revocation by the United States Citizenship and Immigration Service (CIS). While Massachusetts case law has not specifically addressed the question of PRUCOL as it relates to unemployment benefits, the Supreme Judicial Court has adopted the well-established definition of “PRUCOL” holding that an individual is *residing under color of law* and eligible for a variety of benefits if the INS (now CIS) knows about and thereby acquiesces in the individual’s continued presence in the country. *See Cruz v. Commissioner of Public Welfare*, 395 Mass. 107, 115, 478 N.E.2d 1262, 1266 (1985) (finding claimant PRUCOL and, therefore, eligible for Medicaid, because “INS ... acquiesced in the [claimant’s] continued presence in this country” by failing to take action to deport claimant).

Work Authorization

This is a complicated area of the law, and an immigration expert should be consulted to ensure that a claimant is not being erroneously denied unemployment benefits. CIS’ practices often cause individuals to have expired documents that do not correspond to their actual status—this is especially the case with Temporary Protected Status (TPS) designations and extensions. There is often a last minute extension of TPS and yet a delay in paperwork for individuals indicating that an extension has been granted (and with it, a corresponding delay in proving the extension of work authorization). Before assuming that a client does not have the requisite work authorization if he or she has TPS status, be sure and check the U.S. Citizenship and Immigration Services website.

<http://www.uscis.gov/portal/site/uscis>

52 What Is DUA’s Obligation to Claimants Who Don’t Speak English?

DUA and the Career Centers have a legal obligation to provide equal services to claimants who have limited English Proficiency (LEP). *See* 68 Fed. Reg. 32290 (May 29, 2003) codified at 28 C.F.R. §§ 42.101-42.412 (Department of Labor regulations implementing the Title VI prohibition against National Origin Discrimination Affecting Limited English Proficient Persons). However, the reality is that outside of the DUA hearing process, discussed below, the agencies have not sufficiently addressed services to LEP clients. We strongly encourage

advocates to monitor the treatment of LEP clients throughout the entire UI process.

During the past year, DUA modified its regulations concerning interpreters, 430 C.M.R. §§ 4.16-4.20. The regulation previously requiring individuals to bring their own interpreters to the career centers, § 4.19, has been deleted. Sections 4.16-4.20 are now silent on the use of interpreters at interviews and career centers, but make clear that DUA continues to bear the burden of providing an interpreter at hearings, and explaining a claimant's right to a stay of the hearing if the claimant needs an interpreter but does not have one.

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

Moreover, the UI statute specifically requires that DUA: "issue all notices and materials in English, Spanish, Chinese, Haitian Creole, Italian, Portuguese, Vietnamese, Laotian, Khmer, Russian and any other language that is the primary language of at least 10,000 or 1/2 of 1% of all residents of the commonwealth. If the division fails to issue a bilingual notice in the claimant's primary language and such omission results in the claimant's failure to meet a deadline or requirement, the division's omission shall constitute good cause for the claimant's failure." G.L. c. 151A, § 62A (d)(iii). A lawsuit challenging DUA's failure to provide claimants who are limited English proficient (LEP) notices in their primary language is currently pending before the Suffolk Superior Court. *Luciano v. Malmborg, Director of Div. of Unemployment Assistance*, CA No. 07-4285C. In September, 2008, the Court entered a preliminary injunction in that case requiring DUA to translate and send notices of federally extended unemployment insurance in all languages included in G.L. c. 151A, § 62A (d)(iii).

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

The DUA Hearing

DUA's Hearings Department automatically arranges for an interpreter when the local office has indicated that the individual has a language barrier; however,

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double-check with the Hearings Department at 617-626-5200. An interpreter-assisted hearing is automatically scheduled for two hours. A review examiner is required to ask, during the hearing, whether the claimant is able to understand the interpreter. The review examiner's obligations are set out in DUA regulations at 430 C.M.R. § 4.20. Any problems with the qualifications of the interpreter should be directed to the DUA's Office of Multilingual Services at 617-626-5471.

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

LEP Rights Outside of the Hearing

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

n at the claims level, and

n at the Career Centers (430 C.M.R. §§ 4.16–4.20).

DUA and the Department of Career Services (DCS) have agreed that services must be improved to LEP claimants. The following changes have been agreed to by DUA:

- 1 To provide interpreters at the initial claim determination.
2. To no longer sanction any LEP claimant for failure to attend a Worker Profiling orientation if the orientation is not provided in the claimant's primary language.

We urge advocates to make certain that these above changes have been implemented for their LEP clients, and to review the Department of Labor regulations for additional advocacy handles.

53 Is the Claimant Entitled to Health Insurance Coverage?

Individuals receiving unemployment benefits who meet financial eligibility criteria may be entitled to health insurance coverage for themselves and their families under the Medical Security Plan (MSP). This program is administered by Blue Cross Blue Shield of Massachusetts. The MSP Customer Service Number can be reached between 8:30 a.m. and 4:45 p.m. at 1-800-908-8801; however, the information line is in English, Spanish and Portuguese only. In order to be eligible, a claimant must meet the following requirements:

- n be a Massachusetts resident;
- n become unemployed from a Massachusetts employer;
- n receive unemployment insurance benefits; and
- n have an annualized family income (for 6 months prior to the application for MSP plus projected income for the next 6 months) that is less than or equal to 400% of the Federal Poverty Income Guidelines.

Even if a claimant does not initially meet these criteria, a claimant can reapply while receiving benefits if:

- n the family's income falls below the eligibility guidelines, or
- n the individual was initially disqualified and the disqualification was overturned or the individual requalified after interim earnings.

See: G.L. c. 151A, § 14G; 430 C.M.R. § 7.01 et seq.

COBRA Premiums Now More Affordable

A new federal subsidy for COBRA premiums combined with the state's Medical Security Program (MSP) for the unemployed makes health insurance much more affordable. Under the recent Recovery Act, the employer of a worker who was involuntarily terminated from employment between 9/1/08 and 12/31/09 for any reason other than gross misconduct, and who elects to continue your group health insurance, will be reimbursed through a tax credit for paying 65% of the full premium, leaving 35% for the worker to pay. This option is reduced for

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individuals with incomes over \$125,000 and not available to individuals with incomes over \$145,000 (or \$250,00 and \$290,000 for joint filers). ARRA also extended the time to elect COBRA (usually 60 days after termination) for individuals involuntarily terminated from 9/1/08 through 2/16/09 who did not previously enroll. This new election period began on 2/17/09 and ends 60 days after the plan gives notice. (Note: this election option applied only to companies of 20 or more; under state law (section 41 of Chapter 30 of the Acts of 2009), it now applies to all employers, regardless of size.)

If you are collecting UI and you are a Massachusetts resident whose family income is 400% or less of the federal poverty level, you will be reimbursed for up to 80% of the cost of the premium for continued health insurance under MSP (currently \$1,080 for a family plan and \$440 for an individual plan). This 80% reimbursement will also be applied to the 35% that workers need to pay under the new federal COBRA rules, thereby **reducing the cost to 7% of the COBRA premium**. If your opportunity to continue health insurance has passed, or the contribution remains unaffordable, you may be entitled to participate in a direct coverage plan that includes family members. Call **1-800-908-8801** and complete your MSP application now to get coverage as soon possible since coverage starts retroactive to the date that the application is received.

Two Plans for Health Insurance Coverage

There are two health insurance plans available for individuals eligible for unemployment benefits under the Medical Security Plan (MSP): the Premium Assistance Plan and the Direct Coverage Plan. The Premium Assistance Plan is available to individuals who have the option of continuing participation in their former employer's plan. Under this plan, DUA reimburses 80 percent of the actual premium paid up to a maximum of \$1080/month for a family plan and \$440/month for an individual plan. (This amount increases annually as annual plans increase).

Only those individuals who do not have the option of continuing participation, may participate in the Direct Coverage Plan. This includes individuals whose COBRA option has expired due to a delay in unemployment eligibility, individuals who had no prior health insurance, and individuals for whom participation would be financially difficult. A "presumptive hardship" exists under the regulations for individuals whose family income is at or below 200% of the federal poverty guidelines. 430 C.M.R. § 7.02.

The Direct Coverage program provides for enrollment in a Health Maintenance Organization that includes office visits, wellness visits for infants and children, hospital care, treatment for mental health and substance abuse and prescription drug coverage. There are no deductibles although some co-payments are required.

Eligibility for *premium assistance* begins when every member of the family (or the individual) meets the eligibility requirements or 30 days before DUA receives a completed application, whichever is later; and eligibility for *direct coverage* begins on the date a signed application is received by DUA or the date when every member of the family (or the individual) meets the eligibility requirements, whichever is later. 430 C.M.R. § 7.07(2)(a) & (b).

Note: Advocates should ensure that clients whose UI denial has been reversed apply for *retroactive coverage* in the Direct Coverage Plan to recoup any out of pocket medical costs. Claimants have up to 90 days after receiving notice of eligibility to apply for retroactive eligibility. 430 C.M.R. § 7.07(2)(c)(3).

More information on the Medical Security Plan is provided in **Appendix E**.

54 Is the Claimant Eligible for Training Benefits?

Unemployed workers who are eligible for UI are also eligible for DUA's Section 30 Training Opportunities Program, if they can show that they are in need of training to find new employment. G.L. c. 151A, § 30; 430 C.M.R. §§ 9.01 *et seq.* This valuable training opportunity is severely underutilized by unemployed workers, who are not aware of the program or are discouraged by the procedural hurdles necessary to get training approved.

As a result of recent changes in federal and state law and newly promulgated state regulations, benefits under this program have increased, and many barriers to participation have been removed. *See* T. II of Div. B, Assistance for Unemployed Workers and Struggling Families, ARRA, 2009 (providing incentive payments to states that choose 2 out of 4 options, one of which is the provision of up to 26 weeks of extended benefits for participation in training); An Act Mobilizing Economic Recovery in the Commonwealth, St. 2009, c. 30, §§ 1-3 (adopting the

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training option); 430 CMR §9.00 *et seq.* (implementing changes in federal and state law).

Workers who are participating in a DUA-approved training program are not subject to the worksearch or “able and available” requirements. 430 C.M.R. § 9.07(2). In addition, if they apply and are approved for training *by the 15th week of a new or continued claim for UI benefits*, they are eligible to receive an additional 26 times their weekly benefit amount if they have exhausted all other rights to benefits and are participating in the approved training program. The new regulations which take effect on October 2, 2009 provide many more grounds for tolling the 15 week application deadline. Notably, the 15 week application deadline is **currently tolled for all claimants** and will continue to be tolled while federal extended benefits are available to claimants. 430 CMR § 9.06(3)(d).

Claimants need to have first exhausted other rights to state or federal training. G.L. c. 151A, § 30(c). Note that extended benefits received by an individual under Section 30 are not charged to a contributory employer’s account but are drawn instead from the Solvency Account (unless the employer is self-insured).

Claimants are eligible for Section 30 extended UI benefits if they are permanently separated from work, unlikely to obtain suitable work based on their most recently utilized skills, and in need of training to become reemployed. 430 C.M.R. § 9.04 (1). A claimant will be deemed to be unable to obtain suitable work if any of the following conditions apply:

- n the claimant is participating in a course or training program authorized by the Workforce Investment Act (WIA)
- n the claimant requires training to become re-employed in a current occupation because present skills in that occupation are insufficient or technologically out of date;
- n the claimant requires training to realize suitable employment in a new occupation, because his or her existing skills are obsolete due to technological change or because there is currently no demand for these skills in the claimant’s labor market area (defined as an economically integrated geographic unit within reasonable traveling distance for job seeking and commuting).
- n the claimant has separated from a declining occupation or as a result of a permanent reduction of operations and the claimant is training for a high-demand occupation. **Note:** the term “separated from a declining occupation” has been interpreted by the federal Dept. of Labor to **include those**

individuals who voluntarily quit their job and are ordinarily not eligible for UI. *See:* Dept of Labor, Employment and Training Admin.'s Unemployment Insurance Program Letter (UIPL), No. 14-09, Change 1, p. 2, CH 1-5.

430 C.M.R. § 9.04(1)(b).

The training program must meet certain criteria as well. 430 C.M.R. § 9.05. The program must:

- n be vocational or a basic skills training program, e.g., English for Speakers of Other Languages (ESOL) combined with vocational training (**note:** under a new regulatory provision, a claimant may not be denied extended benefits solely due to participation in a stand-alone ESOL class and the Director may waive the 20 hour requirement if no program of 20 hours or more is available within a reasonable distance from the claimant's home, 430 CMR § 9.05(2)(b)(3.);
- n have certified to DUA that it has an average placement rate of 70 percent (however if the UI rate is greater than 7% this rate drops to 60% and is even lower when the UI rate is greater than 8%, 430 CMR 9.05(2)(a);
- n be a full-time course, meaning in most instances at least 20 hours of supervised classroom or 12 credits, 430 CMR § 9.05 (2) (b)(1.), (2.); and
- n be completed within two years, but if it combines basic skills with vocational training it can be three years. 430 CMR § 9.05(2)(c);

In order to qualify for up to 26 weeks extended UI, a claimant *must* apply for Section 30 extended benefits *prior to the fifteenth compensable week of his or her new or continued claim*. New tolling provisions are set out in the revised regulations. 430 CMR 9.06(3). The 15 week period is tolled if:

1. economic circumstances permit the provision of extended benefits or any other emergency UI funded in whole or in part by the federal government, 430 CMR § 9.06(3)(g);
2. the training program refuses to reasonably accommodate a qualified individual with a disability (under the Americans with Disabilities Act), 430 C.M.R. 9.06(3)(a);
3. DUA denies the application as not meeting the section 30 requirements, and if the time period is decreased by two weeks or more, the 15-week period is

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tolled from the date the claimant first applied until the date of DUA's denial, 430 C.M.R. 9.06 (3)(b);

4. DUA fails to inform the individual in writing of the fifteen week requirement, in violation of 430 CMR § 9.07(3), 430 C.M.R. § 9.06(3)(c);
5. a claimant who is not permanently separated at the time of the initial claim becomes permanently separated during the benefit year, 430 C.M.R. § 9.06(3)(e);
6. a claimant has delayed applying due to the need to deal with the effects of domestic violence. 430 C.M.R. 9.06(3)(f); or
7. a claimant receives erroneous information about the 15-week application period from the Department of Workforce Development (DWD) (which includes the "one stop center centers"), DUA or any of its agents and acts in detrimental reliance on this information, 430 CMR §9.06(3)(c). **Note:** in addition to these protections, the Board of Review has tolled the 15 week requirement where the delay was due to the school or training provider. *See* BR-10675-CTRM (5/18/09); BR-105065-CTRM (12/20/07).

Additionally, the 15 week limitation is suspended if a claimant was found ineligible for UI benefits and the denial was subsequently reversed.

Note: DUA limits its tolling provisions to require that a training program must start during the individual's benefit year (the period of 52 consecutive weeks beginning on the Sunday immediately preceding the date on which an individual files a claim for benefits) or during the period that a claimant is receiving Federal extended benefits beyond the benefit year. 430 C.M.R. § 9.06(4)(f); SRH § 1592(C); *Russo v. Commissioner of the Dep't of Employment & Training*, 39 Mass. App. Ct. 938, 659 N.E.2d 750 (1996) (holding that limitation of training benefits to the commencement of training within the benefit year should not apply to a claimant who was uninformed of this limitation and receiving federal extended benefits beyond the benefit year). Arguably, this limitation exceeds DUA's statutory authority as the legislature deleted this limitation, originally enacted in 1956 in a 1958 amendment. *See* St. 1956, c. 719, § 6 (providing in relevant part that "the total benefits which an individual *may receive during his benefit year* shall be extended ..."; St. 1958, c. 437, § 2 (providing that "the total benefits which an individual *may receive* shall be extended ...")

Advocacy tip: All too often, DUA not only denies an individual § 30 extended UI benefits, but stops UI benefits altogether. If the claimant is participating in

training that he/she started while working full-time, or if the training program otherwise does not interfere with work search for permanent employment (such as part time evening courses and the claimant never worked in the evening), contact customer services immediately. Numerous Board of Review decisions, while denying the § 30 extension, have reversed the determination of ineligibility for UI. *See* BR-108813(8/20/09); BR-107560 (4/14/09); BR-107331 (11/6/08); BR-106011(6/23/08).

Funding to pay for the actual job training may be available through the career centers. The Workforce Investment Act (WIA) is the principal source of federal monies allocated to states and localities for job training activities. One of the significant features of WIA for advocates for unemployed workers is that career centers are gatekeepers for access to job training and must “partner” with various programs including the UI program.

WIA establishes a three-tiered structure of service delivery through the one-stop career centers. First, core services are provided to all adults. Second, intensive services are provided to the unemployed who cannot find a job, and those who are employed but have not achieved “self-sufficiency,” a standard which can be locally determined. Third, only those individuals who, having passed through the first two tiers and are still unable to retain a job, are entitled to actual training services. Advocacy to ensure that services and/or training is often required, especially for LEP claimants. Training will primarily be provided through vouchers or “individual training accounts (ITA).” Assistance in finding an training programs funded under WIA is available from career centers. See **Appendix A. Note:** a training program approved under WIA is automatically approved under section 30. 430 CMR § 9.04(1)(b)(1.).

Claimants must make a written application for Section 30 benefits, either through their Career Center or through DUa TeleCert. More information on the Section 30 program is provided in **Appendix F**

Advocacy Tip: Advocates should look to federal guidelines for support for expanded opportunities for unemployed workers to participate in training. In a recent national address on the importance of job training, the President stated that “our unemployment system should be not just a safety net, but a stepping stone to a new future. It should offer folks educational opportunities they wouldn’t otherwise have giving them the measurable and differential skill they need...” The Employment and Training Administration followed up by sending out an advisory encouraging states to broaden their definition of approved training and to notify UI beneficiaries of their potential eligibility for Pell Grant through one-stop

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career centers. *See* U.S. Dept. of Labor, Employment and Training Administration, Training and Employment Guidance Letter (TEGL) No. 21-08 (5/8/09); *see also*, TEGL No. 27-09 (8/26/09)(offering additional suggestions to states to increase participation in training and to approve a wider array of training programs). Information on Pell Grants is provided in **Appendix P**.

Additionally, the Board of Review has issued numerous decisions overturning denials of section 30 benefits.

Trade Adjustment Assistance (TAA) and Trade Readjustment Allowance (TRA) Benefits

Trade Adjustment Assistance benefits are available to workers laid off (or at risk of being laid off) because of competition from imports or because the employer moves their jobs abroad. To qualify, the employer or employees must first petition for and be granted “certification” by the Department of Labor. After certification, individual employees must apply for and enroll in TAA-approved training within 26-weeks of employer certification or layoff, whichever is latest. Individuals apply for TAA benefits at Massachusetts’ One-Stop Career Services Centers (locations at: http://www.mass.gov/Elwd/docs/dcs/2066a_508.pdf). TAA supplements unemployment insurance by providing additional cash benefits (called Trade Readjustment Allowances) for up to 130 weeks for most workers. TAA also provides reimbursement for relocation and job search expenses, and a tax credit for health care insurance premiums. For workers in need of remedial skills training, such as help with reading and writing, TAA can also provide an additional 26 weeks of benefits.

The federal American Recovery and Reinvestment Act of 2009 (ARRA) includes significant improvements to the TAA program. These improvements, applicable to TAA petitions filed on or after May 18, 2009, include:

- n Expanded eligibility. TAA now applies to employees of service sector firms, and to workers whose firms shift production to non-FTA counties, like China, India and Europe;
- n Expanded health care coverage;
- n More money for training; and
- n Expanded training and support and extended training and enrollment deadlines.

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What Are the Penalties for Fraud?

Changes to the unemployment law in 2003 increased the penalties for fraud. Under these new provisions, a claimant found to have fraudulently collected benefits while not in total or partial unemployment must repay not only the amount of the overpayment but also one week of benefits for each week of benefits collected. If the Commissioner decides to deduct this amount owed by the claimant from future unemployment benefits, the deduction cannot exceed 25% of the unemployment check. *However, we have found that DUA ignores this statutory 25% limitation and imposes a 100% deduction.*

A claimant is entitled to a hearing on the issue of whether any overpayment in benefits is due to fraud. G.L. c.151A, § 25 (j), *as amended by* section 9 of chapter 142 of the Acts of 2003. Other procedural protections include: the claimant must have been provided notice of the requirement to report income and the notice must have been in the claimant's primary language (with some few possible exceptions). Most importantly, because a determination of fraud involves examination of intent, the claimant's knowledge of the reporting requirements and the extent to which that knowledge may have been adversely affected by the claimant's limited English proficiency must be evaluated. SRH § 1463. The Commissioner's decision to impose a deduction is subject to full review and appeal. G.L. c.151A, § 25 (j). . It is especially important to challenge accusations of fraud made against non-citizen workers, because a finding of fraud by an administrative agency could be harmful to efforts by a non-citizen to adjust his or her immigration status.

In addition, employers who fail to report wages to DUA for employees collecting UI will now be subject to both a fine and a penalty. The fine equals the amount of contributions and interest due on unreported wages. The employer must also pay a penalty equal to the amount of UI that the employee collects that he/she would not have been entitled to if the wages had been reported to DUA. *See* G.L. c. 151A, § 15 (a), *as amended by* section 7 of chapter 142 of the Acts of 2003.

Is there a Reward for Reporting Fraud?

The UI statute provides that, where a penalty is assessed against an employer, an individual who reported information to DUA concerning an employer's "false or fraudulent" contribution report may be entitled to up to 10% of the penalty

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collected as a “whistleblower payment.” G.L. c. 151A, § 58A *as amended by* section 13 of chapter 142 of the Acts of 2003.

The State Unemployment Tax Avoidance Act (SUTA), chapter 138 of the Acts of 2005, amended G.L. c. 151A, § 14N to prohibit the employer practice of reporting its payroll under another employer’s account to obtain a lower unemployment tax rate, known as “SUTA dumping”. In a recent decision, *Lincoln Pharmacy of Milford, Inc. v. Commissioner of the Div. of Unemployment Assistance*, 74 Mass. App. Ct. 248, 907 N.E. 2d 1128 (2009), the Massachusetts Appeals Court found that substantial evidence established that the employer intentionally shifted payroll between two corporations in order to avoid the higher contribution rate. The case raised some interesting collateral issues including the propriety of “witness coaching” by the board and the evidentiary requirements on DUA and the employer in this case.

What can be done about Employer Misconduct and Fraud?

There are numerous statutory obligations placed on employers that are rarely enforced by DUA. Examples include:

1. the employer fails to provide notice of the right to file a claim for unemployment benefits, *see* G.L. c. 151A, § 62A (g);
2. the employer fails to provide timely wage records, *see* G.L. c. 151A, §15 (a);
3. the employer or its agent knowingly makes a false statement or representation in order to avoid paying or to reduce the payment of benefits, *see* G.L. c. 151A, § 47, ¶3;
4. the employer attempts by threats or coercion to induce any individual to waive their rights under the UI law, *see* G.L. c. 151A, § 47, ¶4.

Since 2005, DUA has a fund which consists of fines and penalties collected when employers violate the provisions of owner transfers as they pertain to UI liability. G.L. c. 151A, §§ 14N, 14O. The purpose of this fund is to support DUA’s activities related to the detection, prevention and administration of employer fraud provisions of the UI statute.

Additionally, the Governor, by Executive Order No. 499, established a Joint Enforcement Task Force on the Underground Economy. This Task Force is charged with investigating employer fraud and a hotline has been announced for this purpose – 1-877-96-LABOR.

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Advocates should be aware that there are many instances of erroneous information provided to DUA by employer “agents” who handle an employer’s unemployment account. This misinformation resulting from carelessness and/or, lack of first hand information is provided to adjusters in employer-protested claims and all too often results in the delay and/or denial of UI to eligible claimants. Arguably, a claim may be available against these agencies under the Massachusetts Consumer Protection law, G.L. c. 93A as the agency is providing a service that directly affects the people of the Commonwealth and is injuring an employee. *See St. Paul Fire and Marine Ins. Co. v. Ellis & Ellis*, 262 F. 3d 53 (1st Cir. 2001); *Boos v. Abbott Laboratories*, 925 F. Supp. 49, 55 (D. Mass. 1996)(holding that the protections under c. 93A do not require privity of interest). Additionally, liability may exist under the False Claims Act, 31 USC § 3729 *et seq.*, and G.L. c. 151A, § 47.

Advocates who are representing claimants who have been victimized by employer fraud are encouraged to use the hotline and also to contact the Employment Rights Coalition.

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Part 6

Appeals Process

Within DUA, there is a two-tiered appeals process: the first tier is the Hearings Department, the second is the Board of Review. From there, the right of review lies with the District Court.

For discussion of legal standards and substantive issues, see **Eligibility, Part 2** and **Separation from Work, Part 3**. The most common issues and important sources of authority are

- n deliberate misconduct or knowing violation of a work rule, G.L. c. 151A, § 25(e)(2);
- n voluntary quit or leaving for such an urgent, compelling and necessitous reason as to make the separation involuntary, G.L. c. 151A, § 25(e)(1); and
- n DUA regulations, 430 C.M.R. §§ 1.00 *et seq.*

56 If Unemployment Benefits Are Denied, How Long Does A Claimant Have to Request a Hearing?

If the claimant is disqualified, generally he or she has **10 days** after the date of hand-delivery or the postmark date on the notice of disqualification in which to request a hearing. DUA uses the date it receives the hearing request or, the postmark date if received after the 10th day, to determine timeliness.

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Good Cause Extension

An appeal may be filed within *30 days* if the claimant can show good cause for the late filing. The regulations and SRH § 1643(E) set out a number of examples of good cause, including

- n serious illness,
- n death of a household member,
- n inability to comprehend English where no translator is available,
- n discouragement by a DUA employee,
- n domestic violence,
- n or any other circumstance beyond a party's control that prevented the filing of a timely appeal. 430 C.M.R. § 4.14(11).

The Appeals Court has taken a broad view of good cause for an employer's failure to submit wage information to DUA on time. *Khodaverdian v. Commissioner of the Dept. of Employment & Training*, 39 Mass. App. Ct. 414, 656 N.E.2d 1270 (1995). One can argue that the same liberal interpretation should be applied to good cause for filing a late appeal.

Beyond 30 Days: Tolling and Reconsideration

Under *very* limited circumstances an appeal may be filed after 30 days, if equitable tolling principles apply (e.g., discouragement by DUA or the employer or non-receipt of the notice). *See* 430 C.M.R. § 4.15.

If all appeal times have elapsed and you do not have grounds to assert equitable tolling, consider seeking relief by a request for reconsideration made to DUA. *See* G.L. c. 151A, § 71; 430 C.M.R. §§ 4.30 *et seq.* Generally speaking, a request for reconsideration must be made within one year from the original determination. G.L. c. 151A, § 71, ¶ 1.

57 As an Advocate, What Do You Need to Know About the Hearing Process?

Unemployment hearings are conducted by a review examiner in the Hearings Department. They are relatively informal and occur around a conference table in a small room. They are tape-recorded and usually last about an hour but may run longer or be continued. If an interpreter is required, the hearings are scheduled for two hours. If the hearing is to be continued, ask the review examiner to schedule a date for the continued hearing, and request adequate time to finish the hearing.

Most review examiners ask questions first of each party, followed by a redirect by the representative and cross-examination by the other party's representative. Some will allow the claimant's representative to ask questions first. In a voluntary quit case, the claimant testifies first and has the burden of proof; in a discharge case, the employer testifies first and has the burden of proof.

The hearing is conducted in accordance with the standards set forth in the Massachusetts Administrative Procedure Act, G.L. c. 30A, and Standard Adjudicatory Rules of Practice and Procedure, 801 C.M.R. § 1.02.

DUA occasionally conducts hearings by telephone, with the review examiner, claimant, and employer in separate locations. Under DUA's Telephone Hearing procedures, these hearings are supposed to be limited to situations where the parties must travel more than 75 miles, where an accommodation is necessary for an individual with a disability, where there are safety or security concerns, or to expedite single party hearings.

Because this is an administrative hearing, the hearsay rules of evidence do not apply. The Supreme Judicial Court has suggested that if the pertinent evidence before an administrative tribunal is exclusively hearsay, this cannot constitute substantial evidence sufficient to uphold the decision. *Sinclair v. Director of the Div. of Employment Sec.*, 331 Mass. 101, 103–04, 117 N.E.2d 164, 165–66 (1954). However, *Sinclair* was somewhat limited by *Embers of Salisbury, Inc. v. Alcoholic Beverage Control Commission*, 401 Mass. 526, 517 N.E.2d 830 (1988), in which the court found that in some circumstances hearsay could constitute substantial evidence. See also *Edward E. v. Department of Social Servs.*, 42 Mass.App.Ct. 478, 480, 678 N.E.2d 163 (1997) (“[t]he question before us is not whether the administrative decision was based exclusively upon

uncorroborated hearsay but whether the hearsay presented at the fair hearing was reliable.”); *accord*, *Costa v. Fall River Housing Authority*, 453 Mass. 614 (2009). One can argue that if the employer has the burden of proof, for example, in discharge cases, then their failure to bring available witnesses with first hand knowledge means they have not met their evidentiary burden.

58 How Should You Prepare for a Hearing?

If a hearing has already been scheduled, you may have to act quickly to prepare, as postponements are often difficult to obtain, especially if the time period stated on the notice of hearing for requesting a postponement has expired. DUA’s Hearings Department may reject postponements for some conflicting engagements of the claimant and her representative, although consideration is given if the failure to postpone will cause a hardship. DUA regulations require that Notice of Hearing be mailed to the claimant, and his or her authorized representative, at least ten days in advance of the hearing. 430 C.M.R. § 4.11.

The standard notice of hearing states almost every possible separation issue that could arise at the hearing, including voluntary quit, leaving for urgent and compelling personal reasons, deliberate misconduct and rule violation. It also states that able and available may be an issue to be determined at the hearing. If during your claimant’s hearing the issue is switched from a discharge to a quit, thereby shifting the burden of proof at the hearing, one can argue that the claimant has not received adequate notice. In addition, a due process notice issue is raised whenever the review examiner delves into issues other than the separation issue which is the subject of the appeal.

For proper representation, plan on at least three meetings with the claimant: the first to allow ample time to hear the story, the second to prepare the client’s direct examination and to do a mock cross-examination and a final meeting before the hearing to review the direct. See **Appendix H** for a checklist. Other initial actions include

- n getting the client’s Social Security number or DUA Docket No.;

- n obtaining all facts from the client about the separation, stressing the importance of knowing any harmful facts, prior warnings, witnesses to events and so forth;
- n getting the employer's and witnesses' names, addresses and phone numbers;
- n finding out everything about the place of work—the chain of command, the way information is communicated, the nature of working relationships and the details of the job;
- n obtaining and reviewing all relevant documents and materials your client may have from the job;
- n having the client sign releases for access to DUA case files, personnel files, medical documents if necessary and information in other forums; and
- n determining whether it is strategically wise to contact the employer to obtain the employee's personnel and other records, or alternatively to ask your client to retrieve his or her personnel and other records from the employer.

59 Have You Obtained All Documents?

Consider the documentary evidence you will want to present. Although difficult to enforce, discovery is available. *See* 801 C.M.R. § 1.02(8). In addition, you may want to issue a Subpoena Duces Tecum to obtain the needed documents. See below. It may be important to build a complete record for future appeal, if necessary.

Ask the claimant to bring all relevant documents in his or her possession—for example, notices from the DUA, any documents from the employer that could be related to the separation, such as relevant rules or policies, evaluations, warnings and/or a termination letter. Obtain any employment contracts, personnel manuals, information on grievance procedures, medical evidence of illness and treatment, claims filed against the employer in other forums, such as the Massachusetts Commission Against Discrimination (MCAD), and so forth.

Most importantly, review the DUA Hearings File, a right secured under G.L. c. 151A, § 39(b)(5), in order to review the employer's initial reason given for

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separation, the claimant and employer statements, the Notice of Disqualification on Form 3720, and any documents submitted by either party. Employers must keep personnel records for at least two years after the entry date of the record. G.L. c. 151, § 15.

Also, an employee has the right to obtain a copy of his or her personnel file. *See* G.L. c. 149, § 52C (and further discussion below).

DUA Hearings Case File

Even if the claimant may have copies of DUA forms, obtain a copy of the entire DUA file by contacting the DUA Hearings Department.

Always check to learn if the employer returned the UI Request for Information within the 10-day period; if the employer failed to do so without good cause, it no longer has party status—i.e., it has no right of cross-examination and may not appeal an adverse hearing decision, and the employer representative is present at proceedings only as a witness. G.L. c. 151A, § 38(a), (b).

Personnel Records

G.L. c. 149, § 52C has two functions. First, it allows employees and their counsel access to all “personnel records” kept by the employer; second, it allows the employee to submit a written statement explaining the employee’s position as to any adverse information contained in those records, thus making the employee’s explanation a part of the personnel records.

For purposes of representing an unemployment claimant, the first function is more significant, as it may be the only formal discovery tool available. However, on the rare occasion when the employee is seen before the separation from work occurs, it may be useful to have him or her obtain the file and place his or her explanations of adverse material in it.

The personnel file maintenance practices of employers vary greatly. Some keep only payroll, tax and benefit information in a personnel file and maintain other information elsewhere. No matter how an employer maintains the information, employees are entitled to all of their own personnel records.

The statute defines these functionally as any record that identifies the employee and “is used, or has been used, or may affect or be used” relative to the employee’s “qualification for employment, promotion, transfer, additional compensation or disciplinary action.” For those employers with 20 or more

employees, the file must contain a specific listing of documents to be included in the personnel file and the documents must be retained during the pendency of certain actions. If an employer with 20 or more employees has a written personnel policy, it must make it available for inspection.

For unemployment purposes, often the documents of most value are the employee's attendance record, evaluations, warnings and other records of disciplinary action or of any reasons given by the employer for termination. All these are within the scope of G.L. c. 149, § 52C, as is any document that the employer relied on in taking an action that led to the termination, as long as the document identifies the employee. Under G.L. c. 149, § 52C, any employer receiving a written request from an employee shall, within 5 business days, provide the employee both an opportunity to review his or her personnel record and a copy of the record. See sample Request for Personnel Records, **Appendix I**.

Using a Subpoena to Obtain Documents and Compel the Attendance of Witnesses

Another useful way for a party to acquire information needed for his or her case is to issue a subpoena. A party may issue a subpoena to order a witness to attend a hearing. A party may also issue a subpoena duces tecum which compels the attendance of a witness and also requires that he or she produce at the hearing specific documents that the issuing party requests.

Particularly for pro se claimants who need DUA's assistance, DUA advises that the Principal Review Examiner be contacted at least 4 days before the hearing. G.L. c. 30A, § 12; 801 CMR § 1.02 (10)(i). The party has the responsibility to serve the subpoena and pay the fees for travel and attendance in accordance with the rules for witnesses in civil cases. G.L. c. 30A, § 12(2). Similarly, petitions to vacate or modify the subpoena follow the procedures in G.L. c. 30A, § 12(3),(4).

Subpoenas are particularly useful when you believe that a witness whose attendance is necessary to prove the party's case is unlikely to be present voluntarily at the hearing. Similarly, a subpoena duces tecum is a valuable tool to ensure that certain documents be available at the hearing. Subpoenas may also be used in advance of the hearing for discovery purposes; advocates have been successful in using subpoenas to obtain documents prior to the hearing and then, depending on their content, deciding whether or not to introduce some or all of the documents as evidence. Some employers require ten days notice to any individual whose records are involved, so that they have an opportunity to quash, so it is important to serve the subpoena as early as possible.

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Subpoenas are enforceable in Superior Court. If the opposing party does not comply with the subpoena, be sure to bring the return of service and the subpoena listing the documents requested to the hearing.

A request can be made to continue a hearing if the subpoena is not complied with, but the request will not be granted without a showing that the evidence is relevant.

See **Appendix J** for a copy of the DUA subpoena form.

60

How Should You Present Your Case at a Hearing?

Be sure to prepare witnesses and determine whether any witness and/or documents have to be subpoenaed to the hearing. *See* G.L. c. 151A, § 43; G.L. c. 262, § 59. If necessary witnesses are unavailable for the hearing, obtain affidavits. You will generally be unable to obtain a continuance of the hearing date due to the unavailability of a non-party witness.

Prepare for direct examination of the claimant. This should include documents you wish to introduce into evidence. Bring three copies of each document—one for the review examiner, one for the other party and one for yourself. In addition to your direct, prepare the client to answer potential open-ended questions by the review examiner, e.g., “Were you fired or did you quit? Why?” You will also need to prepare your client for the employer’s cross-examination.

Also prepare for cross-examination of the employer and other potential witnesses.

The closing statement should be brief. When you incorporate analysis of the applicable law, remember that review examiners hear these cases five times a day. Concentrate on facts introduced into the record that compel a finding of eligibility.

Prepare a memorandum before the hearing, make the necessary revisions based on the testimony and exhibits produced at the hearing, and then seek permission to send it shortly after the hearing. Assist the review examiner by citing the relevant facts and applying these facts to case law or examples from the Service

Representatives Handbook. For an example of proposed findings of fact and rulings of law, see **Appendix K**.

61 When and How Is a Hearing Decision Made?

You should receive a hearing decision within two weeks. Federal law requires timely decisions, and under state law reasonable efforts must be made to render a decision within 45 days of the request for hearing. G.L. c. 151A, § 39(b).

The decision must meet the requirements of the Massachusetts Administrative Procedure Act, including that it must be based on “substantial evidence” and free from “error of law.” G.L. c. 30A, § 14.

“Substantial evidence” is evidence that “a reasonable mind might accept as adequate to support a conclusion, taking into account whatever in the record detracted from its weight.” G.L. c. 39A, § 1(6). An “error of law,” in the context of UI cases, is usually a misapplication of the statutory grounds for disqualification. See *Guarino v. Director of the Div. of Employment Sec.*, 393 Mass. 89, 92–94, 469 N.E.2d 802, 804–05 (1984). The decision must also contain adequate subsidiary findings of fact as to each critical issue. *McDonald v. Director of the Div. of Employment Sec.*, 396 Mass. 468, 487 N.E.2d 186 (1986).

62 Does the Claimant Receive Benefits While a Further Appeal Is Pending?

If the decision is positive at this or any subsequent stage of appeal, follow through to make sure that the claimant gets the benefits to which he or she is entitled. If the claimant wins at the hearing, he or she has the right to collect benefits, including retroactive benefits, pending the employer’s appeal. Also investigate potential eligibility for health insurance and extended training benefits. See **Questions 53 and 54 in Part 5**, above.

63 Can the Claimant Get An Overpayment of UI Benefits Waived?

If the hearing or other decision is adverse to the claimant, DUA may claim that UI benefits have been overpaid. Sometimes that claim results from a redetermination of eligibility under G.L. c. 151A, § 71. Other times an overpayment is assessed because an initially favorable eligibility decision is overturned on appeal. However, under G.L. c. 151A, § 69(c) repayment is not mandatory.

You should always investigate the possibility of a waiver of overpayment if you can demonstrate that the overpayment was not the claimant's fault and the recovery of payments "would defeat the purpose of benefits . . . or would be against equity and good conscience." This has been interpreted to mean that it would cause financial hardship, or that the claimant relied to his or her detriment on her entitlement to the benefits at issue. SRH § 1472(C). DUA notifies the claimant of his or her right to request a waiver at the time the determination regarding an overpayment is issued. If the request for waiver is denied, the claimant has the right to file an appeal and have a hearing on the matter. The hearing decision may then be appealed to the Board of Review and then to court. The time frame for filing overpayment appeals is the same as that for appeals of disqualification. DUA's regulations on waivers are at 430 C.M.R. §§ 6.01–6.10.

64 How Do You Request Review by the Board of Review?

The decision of the review examiner of the Hearings Department can be appealed administratively by either party to the Board of Review, a three-member independent appellate review board within the Department of Workforce Development. The current Chair of the Board is John A. King. This appeal, in the form of an application for further review, must be filed (postmarked) within 30 days of the date the review examiner's decision was mailed. G.L. c. 151A, § 40. The regulatory good cause provisions do not apply to Board appeals. You may obtain a copy of the tape of the hearing from the DUA Hearings Department for seven dollars (free for clients eligible for legal services).

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After receiving an application for review, the Board has 21 days to decide whether or not to accept review. G.L. c. 151A, § 41(a). Once an appeal is filed, the case is assigned to a review examiner who reviews the file, listens to the hearing tape, writes a summary and makes a recommendation to the Board of Review on whether to accept the application for review. The non-appealing party does not receive notice of a pending Board of Review appeal until the Board makes a decision on whether or not it has accepted the appeal.

Advocates for the claimant should submit a memorandum in support of or in opposition to the application for review along with the appeal. If the decision is not based on substantial evidence in the record or if the case presents an error of law or a novel issue of law, this should be pointed out to the Board.

Note: If there is no decision by the Board of Review within the 21-day period, the case is deemed denied on the twenty-first day after the date of appeal. The review examiner's decision is the final DUA decision, and this commences the appeal period for judicial review; the case must be filed in District Court within 30 days thereafter. G.L. c. 151A, § 41(a).

If the Board accepts review, it may

- n review the case on the record, and make a decision,
- n remand the case to the DUA Hearings Department for the taking of additional evidence, or the making of subsidiary findings, or
- n itself take evidence at a hearing and make a decision.

G.L. c. 151A, § 41(b).

The Board of Review is under a court order to decide cases, including those cases remanded to the DUA Hearings Department for additional evidence, within 45 days after the acceptance for review. *Burke v. Nordberg*, Suffolk C.A. 92-7030-C (Cratsley, J. 12/18/92) (requiring that most decisions of the Board of Review be made within 45 days of case acceptance) settled as a result of substantial compliance with the Court's order. Additionally, a claimant's advocate may call the Board to request an expedited decision where the claimant is facing a financial hardship.

In October, 2008, the Supreme Judicial Court upheld the Board's use of the "postmark rule" contained in 801 C.M.R. § 1.01(4) to govern the timeliness of applications to the Board under G.L. c. 151A, § 40. *Pavian, Inc. v. Hickey*, 452

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Mass. 490, 496, 895 N.E. 2d 480, 486 (2008). Therefore, applications for Board review must be postmarked within the 30-day period mandated by statute, but do not have to be received by the Board within that time.

A sample appeal letter to the Board is attached as **Appendix L**.

65 How Do You Appeal to the Court?

The Board's final decision -- whether it's a denial of the request for review, or a denial after acceptance of the decision -- must be appealed by filing a complaint for judicial review within 30 days of the Board's decision.

Either party may file a complaint or petition for judicial review within 30 days after the Board's decision has been mailed. Again, if there is no decision within the 21-day period, the application is deemed denied on the twenty-first day and an appeal must be taken within 30 days thereof (i.e., within 51 days of filing the application for review). The complaint or petition must be actually received by the Court before the expiration of the 30-day period, not simply postmarked within that time. *Garrett v. Director of the Div. of Employment Sec.*, 394 Mass. 417, 475 N.E.2d 1221 (1985).

An appeal lies in the District Court within the judicial district where a party lives, last worked or has a usual place of business. G.L. c. 151A, § 42. Judicial review is provided pursuant to the state Administrative Procedure Act, G.L. c. 30A, § 14.

The plaintiff must serve the complaint upon each defendant (DUA and the employer) by registered or certified mail, return receipt requested, within seven days after commencing the action for judicial review. The defendant's answer is due within 28 days. **Note:** The answer does not include the record of the proceedings including the transcript and DUA is simply required to make a "reasonable effort" to file it with the answer. Counsel is advised to call DUA counsel upon receipt of the answer to request an expedited transcript.

The court will review the administrative record but will not conduct an evidentiary hearing. The petitioner must mark up the case for a court hearing. Any new evidence will only be admitted after a motion to remand to DUA has been granted. It is important to request that the court retain jurisdiction pending remand

to avoid the necessity of filing a new petition if the claimant is again disqualified after the second DUA hearing. Any further appeal from the District Court is taken to the Appeals Court in accordance with the Massachusetts Rules of Appellate Procedure.

A sample complaint for judicial review is attached as **Appendix M**.

66 How Do You Recover Attorneys Fees in Unemployment Cases?

If DUA itself violates federal law or the U.S. Constitution, a claimant who successfully challenges that failure may be entitled to recover attorney fees against the agency under the federal Civil Rights Attorneys Fees Awards Act, 42 U.S.C. § 1988. For example, if DUA unreasonably delays making an eligibility decision or has a practice that unreasonably delays decisions in a class of cases, DUA may be violating the “when due” requirement of the federal unemployment law, 42 U.S.C. § 503(a)(1). If the agency denies procedural due process because of a defect in its hearing procedures, it may violate the federal requirement that an aggrieved unemployment claimant receive a “fair hearing before an impartial tribunal.” 42 U.S.C. § 503(a)(3).

DUA in a petition for a judicial review under G.L. c. 151A, § 42 will claim that the District Court has no jurisdiction to award attorney fees, and has prevailed on that point. Although there have been district court decisions to the contrary, any constitutional or federal law claim with an attorney fee claim under § 1988 may simply be filed in Superior Court, which does have jurisdiction over federal claims, and their attendant fee awards. The District Court petition for judicial review can then be consolidated with the Superior Court Action. The Supreme Judicial Court has held in another context that a proceeding for judicial review is an appropriate place to raise a federal attorney fees claim. *Stratos v. Department of Pub. Welfare*, 387 Mass. 312, 439 N.E.2d 778 (1982). The federal claim need not be decided by the court if the claimant prevails on nonfederal grounds in order to lay a basis for an attorney fees award. It is enough that the undecided federal claim is not frivolous and that it shares “a common nucleus of operative fact” with the other claims on which the claimant prevailed. *Draper v. Town of Greenfield*, 384 Mass. 444, 425 N.E.2d 333 (1981). Under the principles of 42 U.S.C. § 1988, reasonable attorney fees should reflect the objective market value for comparable

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legal services in the private sector. *Stratos v. Department of Pub. Welfare*, 387 Mass. 312, 439 N.E.2d 778 (1982).

In addition, a private attorney who has represented a UI claimant must petition DUA (either the Commissioner, or the Board of Review, as appropriate) for approval of its attorney's fees before collecting his or her fees from the claimant. G.L.c. 151A, § 37.