Unemployment Insurance for NY Employers

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The New York Unemployment Insurance Law provides temporary income replacement to eligible workers who become unemployed through no fault of their own and who are ready, willing and able to work. To be eligible for UI benefits, employees must have sufficient work and wages in covered employment. Remember these overarching principles, because every unemployment claim is evaluated against these rules: the employee has a sufficient work history, the employee lost the job through no fault of their own, and the employee is able, willing, and ready to work.

Subject to very few exceptions, all New York employers are required to register and pay UI contributions to a statewide UI fund. The contribution amounts are based on the employers' payroll under an experience-weighted formula. (Nonprofit corporations can become self-insured by agreeing to reimburse the state for benefits paid to their former employees). Employers who have fewer employees receiving unemployment benefits are subject to lower rates. Therefore, it is to the employer's benefit to contest those claims that are without merit. Employers pay taxes only on the first $11,400 of employee compensation. Covered compensation includes not only salary or cash wages, but also commissions, bonuses, tips, vacation pay, the value of meals and lodging and other types of noncash compensation.

The money for unemployment insurance benefits comes solely from taxes paid by employers. No deductions are ever made from a worker's paycheck for unemployment insurance. Monies from this fund are used to pay unemployment benefits to eligible employees.

The costs of UI program administration are defrayed by federal employer taxes collected under the Federal Unemployment Tax Act (FUTA). Employers are required to submit annual FUTA tax payments in addition to their quarterly state UI tax payments. The FUTA tax rate is 6.0% and under normal conditions employers who pay their state UI taxes in a timely manner receive a credit of up to 5.4% toward their FUTA taxes, so they pay their FUTA tax at 0.6%.

The New York Industrial Commissioner is responsible for administering the UI program. The Unemployment Insurance Board determines whether an unemployed worker qualifies for unemployment benefits. The tax aspects of the UI program are overseen by 15 UI Employer Services District offices located throughout New York State.

EMPLOYER RESPONSIBILITIES UNDER THE UI LAW

As stated above, almost every employer doing business in the State of New York is subject to the provisions of the New York UI Law. However, not all employment is subject to the taxing or

benefit provisions of the law. Businesses that provide employment covered under the provisions of the UI Law must register for UI.

General business employers are liable to pay UI taxes on the first day of the calendar quarter in which they pay remuneration of $300 or more or on the day they acquire any or all of the business of a liable employer.

Nonprofit employers are liable on the first day of the calendar quarter in which they pay remuneration of $1,000 or more or as of the first day of the calendar year in which they employ four or more persons on at least one day in each of 20 different weeks during that year or the preceding calendar year.

Employers of household help are liable as of the first day of any calendar quarter in which they pay cash wages of $500 or more.

Employers of agricultural labor are liable as of the first day of the calendar year in which they employ 10 or more workers in agricultural labor on at least one day in each of 20 different weeks during that year or the preceding year or as of the first day of the calendar quarter in which they pay cash remuneration of $20,000 or more to workers employed in agricultural labor or as of the first day of the calendar quarter in which they pay any remuneration to workers employed in agricultural labor if they are liable under the Federal Unemployment Tax Act (FUTA) with respect to farm workers.

REGISTERING FOR UI

Employers are required to complete a registration form. General business and domestic employers can do so online, while other types of employers must submit written registration forms on the Department of Labor website. The Industrial Commissioner sends covered employers quarterly combined withholding, wage reporting and unemployment insurance returns for reporting wages paid to their employees.

RESPONDING TO NOTICES OF POTENTIAL UI CLAIMS

New York requires employers to respond within 10 calendar days to a notice of potential charges to the employer's account. If an employer fails to do so and there is an overpayment to a claimant due to the late response or the failure to respond at all, the employer is not entitled to a credit to its account for the overpayment. The only exception is that, for good cause shown, the

first occurrence of an untimely or insufficient response may be excused and the account relieved.

COVERED SERVICES

Tax liability under the UI is incurred when an employer pays the wages to persons in covered employment or engages in the actions described previously that provide for automatic coverage liability. However, the employee must also be working within a covered employment in order to be eligible for benefits.

Under the New York State Unemployment Insurance Law, "employment" means any service under contract of employment for hire, express or implied, written or oral. When an employee performs services in more than one state for a single employer, it is necessary to determine the state to which his employment should be reported for unemployment insurance purposes. Based on the principle that the employment of an individual, insofar as possible, should be allocated to one state and not fragmented among several states in which he might perform services, all states, including New York State, have adopted uniform provisions concerning coverage of services performed in more than one state.

The definitions of "employment" are fairly uniform under the UI laws of most states, but the administrators of the state agencies do not always interpret the term in a uniform way, resulting in many conflicts. In some cases, dual coverage has resulted in double taxation of the employer for the same service and in other cases some services that should have been covered have not been covered by the law of the proper state or of any other state. This confusion has resulted in a loss of benefit rights to the worker.

MULTI-STATE EMPLOYERS

First, it is necessary to determine whether the state service is localized in any state. Only if the service is not localized in any state is any other test necessary. If the service is not localized, it is necessary to determine in what state the individual's base for operations is located and whether the individual performs any service in that state.

If the individual has no base for operations or if no service is performed in the state in which the base for operations is located, then it is necessary to look to the state from which the individual's service is directed or controlled. It is only when coverage is not determined by any of these tests that residence becomes a factor.

In short, it may be necessary to apply **four tests** to determine the state of coverage for UI purposes. These are:

1. **Localization of service test.** Service is localized and covered in New York if it is performed entirely within New York. If it is performed both within and outside New York and the service performed outside New York is incidental to the service performed within New York, then it will be covered by the New York UI Law. Service is considered incidental, for example, if it is temporary or transitory in nature or consists of isolated transactions. In determining whether the service of an employee is incidental or transitory in nature, some of the factors to be considered are:

    - intention of the employer and employee as to whether the service is an isolated transaction or a regular part of the employee's work
    - intention as to whether the employee will return to the original state upon completion of the work in another state
    - length of service with the employer within the state is compared to the length of service outside the state.

    Because of the wide variation of facts in each particular situation, no fixed length of time can be used as a yardstick in determining whether or not the service is incidental. Examples of localized service are:

    - All services performed in one state. A salesperson for a New York firm lives in New York but performs all services in New Jersey. The individual is not subject to the New York UI Law because the service is localized in New Jersey even though the corporation is located in New York and residence is in New York. No other test is necessary.
    - Service performed within and without a state. Examples include:
        - A contractor has a place of business in New York where records are maintained and equipment is stored and from which the contractor directs its jobs, wherever located. All jobs had been in Vermont, but the contractor obtained a contract for a single job in Connecticut that took seven months to complete. During and after the completion of work in Connecticut, the contractor continued activities in New York.

- A resident of New York had been hired in New York to work on the Connecticut job. When the work in Connecticut ended, the individual was laid off and not rehired. The service in traveling from New York to Connecticut was incidental to service in Connecticut. Because service was localized in Connecticut, it was not subject to the New York Law. No other test is necessary.

- A resident of New York who had been on the employer's payroll for several years moved from a New York job to the New Jersey job. When service was completed on that job, the individual returned to New York for continued work with the employer. Although this employee was in New Jersey for seven months, the regular work was in New York and the New Jersey service was temporary in nature and thus incidental to the New York service. The service was localized in New York and service in New Jersey was subject to the New York Law. No other test is necessary.

- A resident of New Jersey was hired for the New Jersey job only. After several months the individual began to split time equally on another job in New York. While the employee was working in New Jersey, service was localized there. It was not covered by the New York Law because that was the only job the individual was hired for and the New Jersey contract was an isolated transaction of the employer, with no likelihood of future New Jersey employment for the individual. Because the move to New York was considered permanent, service in New York became localized there and thus subject to New York Law. No other test is necessary.

- A salesperson employed by a Pennsylvania company lives in New Jersey but is assigned a territory in New York. Services are directed and controlled from the Pennsylvania office and occasionally the salesperson returns to that office for supplies and instructions. On other occasions the individual calls upon customers in Pennsylvania. Since the regularly assigned territory is New York, the Pennsylvania service is treated as temporary in nature and thus incidental to the New York service. Service was localized in New York and service in Pennsylvania was subject to the New York Law. No other test is necessary.

2. **Base of operations test.** If an employee's service is not localized in any state, it is necessary to apply the second test: does the individual perform some services in the state in which the base of operations is located?

   A base for operations for the individual should not be confused with the place from which service is directed or controlled for the company. The base for operations is the place or fixed center, of a more or less permanent nature, from which the employee starts work and to which the employee customarily returns in order to receive instructions from the employer or communications from customers or other persons or to replenish stocks and materials, to repair equipment or to perform any other functions necessary to the exercise of trade or profession at some other point or points. The base for operations may be the employer's business office, which may be located at the employer's residence, or the contract of employment may specify a particular place at which the employee is to receive directions and instructions. This test is applicable principally to employees, such as salespersons, who constantly travel in several states.

   Examples of non-localized service, where coverage is decided by the base of operations test:

   - A New York resident sells products in New York, New Jersey and Pennsylvania, for a company located in Maryland. The salesperson operates from a home, where instructions from the employer, communications from customers, etc. are received. Annually, the employee attends a two-week sales meeting in Maryland. The base of operations is treated as in New York and some services are performed in New York. Thus, all of the service is covered by the New York Law.

   - An employee works for a company whose home office is in New York. The employee works mostly out of a branch office in Pennsylvania but spends considerable time in New York and New Jersey. The individual's base for operations is in Pennsylvania. Because some services are performed in Pennsylvania and the base for operations is in Pennsylvania, it is immaterial that the source of direction and control is in New York. None of the individual's service are subject to the New York UI Law.

3. **Place from which service is controlled test.** Some employees have no base for operations, while others may have such a base but do not perform any service in the state in which it is located. It is then necessary to find out whether any of

the individual's service is performed in the state from which service is directed and controlled. The place from which an individual's service is directed and controlled can be the place that is the source of basic authority over supervision, job assignments, instructions or personnel and payroll records. Examples of service not localized in any state, where coverage is decided by the place of direction and control test:

- A contractor with a main office in New York is regularly engaged in road construction work in New York and New Jersey. All operations are under direction of a superintendent whose office is in New York but work in each state is directly supervised by field supervisors working within the state where the work is being performed. Each field supervisor has hiring and firing authority, but requests to add additional workers must be cleared through the central office. Employees report for work at the field offices. Timecards are sent weekly to the main office in New York where the payrolls are prepared. Employees regularly perform services in both New York and New Jersey.

  It is determined that neither the localization nor the base for operations test applies. Since the basic authority of direction and control emanates from the central office in New York, the services of the employees are in employment in New York under the place of direction and control test.

- A salesperson residing in Cleveland, Ohio works for a company whose factory and main office are located in New York, with a sales office in Maryland. The salesperson's territory is Delaware, Maryland, West Virginia, New York and Pennsylvania. The individual does not use either the Maryland office or his or her home in Ohio as a base for operations. All service is covered by the New York law because: (a) work is not localized in any state; (b) here is no base for operations; (c) work is directed and controlled from the employer's New York office; and (d) some of the service is in New York.

4. **Place of residence test.** If coverage cannot be determined by any of the previous tests, it is necessary to apply the residence test. Residence is a factor in determining coverage only when the individual's service is not localized in any state and the individual performs no service in the state in which he/she has a base of operations (if there is such a base) and no service is performed in the state from which service is directed and controlled.

> If none of the tests apply, an individual's service in its entirety is covered in the state in which the individual lives, provided that some of the service is performed in that state. As an example, a salesperson employed by a Missouri company lives in New York and covers territory in Delaware, New Jersey and Pennsylvania. Service is thus not localized in any state. The individual uses the employer's Missouri office as a base for operations and service is directed from that office. The individual thus performs no service in the state in which the base for operations is located or in the state from which service is directed and controlled. Because the individual performs service in the state of residence, all service is subject to the New York law.

Coverage issues can be tricky, but there is one final step the employer can take: inform the coverage state of the employment being given and request a waiver so that an election form may be submitted to New York.

LABOR THAT DOES NOT COUNT FOR PURPOSES OF UNEMPLOYMENT INSURANCE

The services of some workers are excluded from coverage under the UI Law. The most important exclusion is for independent contractors.

Under the New York UI Law, employers are not obligated to pay unemployment taxes for independent contractors. Independent contractors are therefore not eligible for benefits when their services are discontinued. However, because of the potential for an employer to avoid payroll tax obligations for independent contractors, as well as unemployment obligations, New York State government agencies vigorously investigate claims of worker misclassification. Worker misclassification generally refers to a worker who is incorrectly classified as an independent contractor and should have been classified as an employee.

Independent contractors are persons who are actually in business for themselves and hold themselves available to the general public to perform services. They do not work for just company on a full-time basis, but rather offer their services generally to the broader public. The unemployment insurance law defines an employee, but not an independent contractor. The test of what is an independent contractor has evolved with time, and it is not a linear test but rather considers the totality of the parties' relationship. Thus, for companies that misclassify workers as independent contractors, it becomes critical to establish that the worker was a genuine contractor and not an employee. In such cases, the employers rely on the common law tests of

"master and servant" to determine whether, based on the totality of the relationship between the worker and the company, the worker was truly an independent contractor.

Here, we will examine some of the factors that are relevant in determining whether a worker is an employee for purposes of the UI Law. However, it is critical to emphasize that the test of who is an employee versus an independent contractor varies depending on the reason for the test. Thus, for example, when determining if a worker is an employee for purposes of wage and hour laws, a different test will apply.

In determining whether a worker is an employee for purposes of unemployment insurance law, the following are relevant considerations:

1. Whether the worker holds him/herself out as an independent contractor and available for hire by multiple companies, or whether the worker has limited him/herself to working for just one company.

2. Whether the worker has his/her own tools and equipment for the job, or if the worker is relying on the company to supply him/her with such tools and equipment.

3. Whether the worker has incurred costs associated with being in business for him/herself, such as advertising costs, the cost of establishing and maintaining a legal entity, liability insurance, etc.

4. Whether the worker performs services independently of direction or control, or if the worker is reliant on the company to direct his/her work.

5. Control over the individual's activities by such means as requiring full-time services, stipulating the hours of work, requiring attendance at meetings and requiring prior permission for absence from work.

6. Requiring the individual to comply with instruction as to when, where and how to do the job.

7. Direct supervision over the services performed.

8. The company sets the rate of pay, and the contractor does not negotiate the rate.

9. The company provides compensation in the form of a salary, an hourly rate of pay or a drawing account against future commissions with no requirement for repayment of unearned commission.

10. Providing reimbursement or allowance for business or travel expenses.
11. Whether the company is providing fringe benefits to the alleged contractor.
12. Whether the company provides training to the worker along with other employees, particularly if attendance at training sessions is required.
13. Requiring the contractor to render the services personally versus allowing the contractor to hire its own employees and delegate work to someone else.
14. Requiring the contractor to submit oral or written reports.
15. Are the services performed by the contractor an integral part of the business, particularly when performed on a continuing basis?
16. Does the contractor have a business card with the employer?
17. Restricting the contractor or its entity from performing services for competitive businesses.
18. Does the alleged employer have the right to terminate the services of the contractor on short notice, as this would be suggestive of at-will employment?
19. What is the nature of services — unskilled labor is usually supervised or considered to be subject to supervision.

Some of the factors the courts have found to be significant in establishing the existence of an independent contractor relationship include the following:

1. The individual is established in an independent business offering services to the public (an independent business is usually marked by such elements as media advertising, commercial telephone listing, business cards, business stationery and billheads, carrying business insurance, maintaining own establishment);
2. The individual has a significant investment in facilities (such items as hand tools and personal transportation are not considered significant)
3. Assumption of the risk for profit or loss in providing services.
4. Freedom to establish own hours of work and to schedule own activities.

5. No required attendance at meetings or training sessions; no required oral or written reports.

6. Freedom to provide services concurrently for other businesses, competitive or noncompetitive.

7. Note, neither issuance of a 1099 form nor language in a contract between the employer and worker characterizing the worker as an independent contractor is controlling. Rather, the primary concern is how the contract is actually performed, not what it states. It is not unusual for an individual to be deemed to be an employee for New York unemployment insurance purposes, while deemed to be an independent contractor under other statutes.

Employers should have sufficient documentation to support the reasons for classifying an individual as an independent contractor. Examples of relevant documentation that the Department of Labor will consider include copies of the individual's preprinted invoices, business forms and stationery, federal and state tax ID numbers, business telephone directory listings, public advertisements soliciting business, articles of incorporation and leases on business properties. The focus is whether the individuals are actually in business for themselves.

WORKERS WHO ARE EXCLUDED FROM UNEMPLOYMENT INSURANCE COVERAGE

Examples of employment and workers that are specifically excluded from the UI law:

- babysitters under the age of 18 who work in the home of their employer
- services by a person in employ of that person’s spouse
- services by a child under the age of 21 in the employ of a parent
- services as a golf caddy
- employment subject to the federal Railroad Unemployment Insurance Act
- services of a person under the age of 21 engaged in certain casual labor
- student service for certain educational institutions
- services of a licensed real estate broker or sales associate

- services performed by a full-time student in a seasonal camp
- services of a licensed insurance agent or broker
- services as an independent contractor

EMPLOYER CONTRIBUTION RATES

Employers who are liable to make contributions to the UI Fund generally do so by making quarterly payments based on their payroll and a percentage tax rate. This percentage is applied to taxable wages paid to each employee up to a maximum threshold that is adjusted each new year.

Starting January 1, 2019, the threshold is $11,400, with gradual and annual increases every January 1 until the threshold reaches $13,000 on January 1, 2026. For years after 2026, the threshold will never be decreased from the level of the previous year but may be increased to ensure it is equal to 16% of the state's average annual wage. The actual formula used to determine what rate employers pay is extraordinarily complicated, as the factors described in the following paragraphs will illustrate, but the tax rates run from 1.3% to 9.1% of the covered payroll. New employers have a normal contribution rate of 2.5%.

When a former employee files for unemployment insurance and is determined eligible to collect benefits, the Department of Labor sends the employer Form LO 400, Notice of Entitlement and Potential Charges. This gives the employer an early opportunity to verify that benefits are being paid correctly to former employees. Employers are required to respond to these notices within 10 calendar days. If an employer fails to respond or responds late and there is an overpayment to a claimant because of the lack of response, the employer will not be able to get a credit to its account. Most important to include in a response to Form LO 400 is any discrepancy in wage information or other disqualifying information. Employers should respond as soon as possible, even before the 10 calendar days mandated by state law, because information will affect payments only from the date it is received (in most cases).

There are several factors that combine to determine an employer's unemployment insurance costs. Tax rates are affected by benefits paid to former employees, the overall condition of the unemployment insurance fund and the employer's reporting history. Employers can take steps to manage these factors so that costs can be kept as low as possible.

ESTABLISHING AN EMPLOYER'S UI TAX

The normal tax rate is calculated annually and reflects the employer's individual experience in the unemployment insurance system. Normal tax rates range from 0% to 8.9%. Normal taxes paid timely are credited to the employer's experience rating account.

When a business starts to pay wages for the first time, it is taxed at a set rate on wages paid during the calendar year. The new employer normal tax rate is calculated each year based on the size of fund index and is equal to the rate for an employer with a positive account percentage of less than 1%, except that the rate will not exceed 3.4%. This rate does not include the subsidiary tax or the Re-employment Service Fund tax.

Employers are required to pay an additional or subsidiary tax, which varies depending on the balance in the General Account as well as the employer's individual experience rating history. Unlike normal taxes, subsidiary taxes paid are not credited to individual employer accounts but to the General Account. Some items that affect this account include interest earned on the Unemployment Insurance Fund, balances of employers' accounts that have lapsed, taxes paid late and negative account balances that exceed 21% of an employer's taxable payroll. The subsidiary tax rate ranges from 0% to .925%.

RE-EMPLOYMENT SERVICE FUND

All employers liable for unemployment taxes (this excludes nonprofit, governmental and Native-American tribe employers who have elected the benefit reimbursement option) are required to make an additional contribution to the Re-employment Service Fund each calendar quarter in the amount of 0.075% of their quarterly taxable payroll.

EXPERIENCE RATING

Experience rating is a procedure to allocate costs of the unemployment insurance program in relation to the employer's actual and potential risk to the unemployment compensation trust fund. New York State Unemployment Insurance Law provides for a system of experience rating under which employers' normal and subsidiary tax rates are determined annually based on various factors including taxable payroll and benefits paid to former employees. For every liable employer, an account is set up to record the employer's experience. All normal taxes received within 60 days of their due date are credited to the account and all benefits paid to former employees and chargeable to the account are debited. A late payment of taxes due may result in

an interest assessment and may also adversely affect an employer's future tax rate. Each employer's account balance is calculated on December 31 of each year (the computation date). The account balance is used to determine the account percentage that, in turn, is used to determine the employer's normal and subsidiary tax rates.

ACCOUNT BALANCE

When the taxes paid and credited to an employer's account exceed the benefits charged, the employer has a positive account balance and tax rates are based on the employer's positive account percentage. When benefits charged to an employer's account exceed the taxes paid and credited, the employer has a negative account balance and tax rates are based on the employer's negative account percentage. An employer with stable employment who has a negative account balance on December 31 will receive an improvement of four percentage points to the account percentage for the purpose of determining the next year's normal tax rate. An employer is considered to be stable if the total wages paid by the employer during the payroll year preceding the computation date is greater than or equal to 80% of the previous three years' average total wages.

However, the normal tax rate resulting from this adjustment may not be less than 6.1%.

ACCOUNT PERCENTAGE

The account percentage is the balance (positive or negative) in the employer's account on December 31 of any year divided by the average taxable payroll for the preceding five payroll years (October through September). If an employer has been liable for 21 or fewer calendar quarters, the average taxable payroll will be computed from the initial date of liability to the end of the last payroll year. If the employer has been liable for 21 or fewer consecutive completed calendar quarters and has a positive account percentage, that percentage is multiplied by a benefit equalization factor to establish an equalized account percentage that is used to determine the employer's tax rate. This is done in order to give new employers equal opportunity with established employers to earn rate reductions.

The benefit equalization factor does not apply to an employer with a negative account percentage because it would adversely affect the rate. If an employer with less than 21 quarters of liability becomes a successor to an employer with more than 21 quarters, the benefit factor does not apply.

SIZE OF FUND INDEX

To link the normal and subsidiary tax rates to the overall condition of the Unemployment Insurance Fund, the law establishes various series of rates for qualified employers. A size of fund index determines which of these series is to be used for a particular calendar year. This index is the ratio of the balance in the fund as of December 31 to whichever is the higher:

- total taxable payrolls for all employers in the last preceding payroll year
- the average of total taxable payrolls for all employers for the five preceding payroll years.

The size of fund index percentage is shown on the annual notice of tax rates sent to each employer. Employers are notified of their tax rates each year well before the April 30 due date for the first quarter report. Tax rates are also preprinted on the quarterly return forms sent to employers.

VOLUNTARY PAYMENTS

Employers are permitted to make voluntary contributions in addition to the regular tax payments for the purpose of obtaining a more favorable tax rate. Such payments are not refundable. To be considered as of the computation date, the payment must be made no later than the following March 31.

SPECIAL RULES FOR NON-PROFITS

Nonprofit employers operated exclusively for religious, charitable, scientific, literary or educational purposes (those exempt under Section 501(c) (3) of the Internal Revenue Code) and governmental entities have the option of reimbursing benefits paid to their former employees and charged to their accounts. Employers electing the benefit reimbursement option are not required to contribute to the Reemployment Service Fund. By self-funding their obligations, these employers can pay a slightly lower amount in unemployment taxes.

DOCUMENT RETENTION

All employers must maintain records for each person they employ. The records must show:

- the employee's name
- employee's Social Security number
- for each payroll period: (a) the beginning and ending dates; (b) the days the employee worked and the earnings for each day; and (c) all other payments made to the employee, including vacation pay, bonuses, dismissal pay, tips, the reasonable value of board and lodging and other forms of compensation.

Records must be retained for the current year and at least three preceding years and be available for inspection by the Department of Labor.

EMPLOYER REPORTING REQUIREMENTS

All liable employers are required to report their payroll and pay unemployment insurance tax each calendar quarter, using Form NYS 45, Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return and Form NYS 45 ATT, if applicable. This is true whether or not wages are subject to withholding of tax or payment of tax under the Personal Income Tax Law. Reporting forms are mailed to registered employers before the quarter ends and are due by the end of the month following the end of the quarter.

NOTICE TO EMPLOYEES LEAVING A JOB

An employer must give written notice to any employee who is terminated from employment, regardless of the reason for separation or whether it is a temporary or permanent separation. This notice must be provided on a form furnished or approved by the Department of Labor and must include all of the following:

- the employer's name
- the New York State Employer Registration Number
- the mailing address where payroll records are kept

- a statement instructing the employee to present the notice when filing a claim for benefits.

EMPLOYEE ELIGIBILITY REQUIREMENTS

Any individual who is unemployed may file a claim for UI benefits; however, both financial and nonfinancial eligibility requirements must be met before benefits can be paid.

FINANCIAL ELIGIBILITY

To be financially eligible for benefits, a claimant must meet wage and credited quarter requirements during a base year period. To qualify for benefits, a claimant must have worked and been paid wages for employment in at least two calendar quarters during the applicable base period. In addition, the individual must have been paid at least $2,400 in wages in one of the calendar quarters. The total wages paid in the claimant's base period must total at least one and one-half times the claimant's high quarter wages. If the high quarter wages equal $9,900 or more, then the claimant's earnings in the other base period quarters must total at least one-half of $9,900 or $4,950.

If the claimant does not meet the financial eligibility requirements in the basic base period, a determination will be made to see if the individual qualifies using an alternate base period. If the claimant qualifies using the alternate base period, that base period will be used to establish the claim. The basic base period is defined to be the first four of the last five completed calendar quarters prior to the calendar quarter in which the claim began. The alternate base period is defined to be the last four completed calendar quarters immediately prior to the calendar quarter in which the claim began. The benefit year is the one-year period beginning with the Monday following the week the claimant filed a valid original claim.

If a claimant receives, within 30 days of the termination of employment, severance or dismissal pay that is greater than the maximum weekly benefit rate, the claimant is not eligible for benefits during any week that such pay is being received. Dismissal pay includes any payment made by an employer to an employee due to his separation or termination of employment, even if the employer is legally bound by contract or by statute to make the payment; the term does not include payments for pensions, retirement, accrued leave and health insurance or payments for supplemental unemployment benefits. Dismissal pay that is given in a lump sum is allocated on a weekly basis according to the employee's weekly earnings or average weekly wage and the claimant is ineligible for any week where the dismissal pay is allocated. The exclusion will not

apply if the initial payment of dismissal pay is made more than 30 days after the termination of employment.

NON-FINANCIAL ELIGIBILITY

A self-employed individual is not eligible for unemployment insurance benefits. Also, a corporate officer of a small closely held corporation is not normally eligible for unemployment benefits unless the corporation has permanently ceased operations.

Before any benefits can be paid, an unpaid waiting period equivalent to one full week of unemployment must be served.

When an individual files a claim for benefits, the separating employer(s) will be asked to supply information regarding the separation. State law now requires employers to respond to that request within 10 calendar days. If an employer fails or refuses to respond to the separation inquiry, a determination will be based on available evidence under these circumstances. It is likely benefits will be paid and charges assessed to the base-year employer's reserve account. If the employer fails to respond or the information supplied is insufficient and the claimant is awarded excessive or erroneous benefits due in part to the lack of response, the law generally prohibits crediting the employer's account.

Information supplied by the employer is used to determine if the claimant meets all of the non-financial requirements of the law. Benefits may be denied if a claimant:

- voluntarily quit without good cause
- was fired for willful misconduct
- is unable to work or unavailable for work
- has failed to apply for or accept suitable work
- is involved in a labor dispute
- is receiving unemployment benefits from another state or the federal government
- has failed to file claims in a timely manner
- is convicted and incarcerated.

VOLUNTARY SEPARATION OF EMPLOYMENT

The UI Law requires that a claimant voluntarily separated from employment be disqualified if the separation is "without good cause" or due to the claimant's marriage. The term "voluntary separation" generally means leaving employment of one's own free will. It includes resignations other than those submitted at the employer's insistence and failure to return to work following a temporary layoff or leave of absence. A claimant discharged because of volitional acts that leave the employer no choice but to terminate the employee, according to law, governmental regulations or contract is also deemed to be voluntarily separated from employment. Once disqualified, a claimant must work in subsequent employment and earn remuneration at least equal to 10 times the weekly benefit rate to be eligible for benefits.

Good cause. A claimant who voluntarily quits a job may nevertheless be entitled to receive benefits if he or she can show that there was good cause for leaving. The claimant bears the burden of proof in establishing good cause for quitting and, that such cause was real and substantial, leaving the claimant no other alternative. The burden is on the claimant to show that, prior to quitting continuing employment, he or she made every reasonable effort to maintain the employer/employee relationship. Following are examples of some common voluntary quit situations (some good cause, others not).

1. **Health reasons.** Working conditions that adversely affect health may constitute good cause for voluntary leaving of employment. To be eligible, the claimant must inform the employer of any health limitations prior to quitting so that the employer can offer suitable work within the claimant's limitations. The claimant must also be able and available for suggested accommodations. If the employer fails to offer suitable work, the claimant may be eligible for UI benefits.

2. **Transportation problems.** A claimant who becomes unemployed because of an involuntary loss of regular transportation to the place of employment and for whom no alternative means of transportation is available is not subject to a disqualification for voluntary leaving of employment without good cause. To be eligible, the claimant must show that the loss of the transportation was through no fault of his or her own and rendered his or her problem virtually insurmountable. The claimant must attempt to secure alternate transportation prior to quitting.

3. **Spouse following spouse.** Claimants who leave their jobs to relocate to another locality must demonstrate they have good cause, aside from maintaining the marital relationship, to do so. Quitting a job to move with a previously unemployed spouse who

found work in a different locality is with good cause but doing so to move with a spouse who left the area for a personal, non-compelling reason (e.g., attendance at college), is without good cause. The existence of a marital relationship is not necessary for the claimant to show good cause to follow a domestic partner to another locality. Where it is shown that the partner had good cause to move, maintaining an emotionally and financially interdependent committed relationship with a partner constitutes good cause for voluntarily leaving one's employment to relocate.

4. **Childcare.** Voluntary leaving is deemed to be with good cause when the claimant is required to take care of an infant child at home. Likewise, good cause exists if the claimant is permanently assigned to a shift that precludes spending any time with the claimant's children. Yet, staying home to provide childcare is without good cause when the claimant fails to pursue available alternatives offered by the employer such as a change in hours or a leave of absence.

5. **To attend school.** Quitting a job to attend school is not considered good cause.

6. **Due to unsuitable work.** Initially accepting a particular job is an admission of the suitability of that position with respect to its wages and the conditions of employment. When a claimant quits because the job was unsuitable, the claimant must show there were changes in the conditions of employment, with which he or she did not agree, that made the job unsuitable or there was deception on the part of the employer with regard to the conditions of employment at the time of hire. Suitability of the work will be determined by considering factors such as:

    - the degree of risk involved to the claimant's health, safety and morals
    - the claimant's physical fitness
    - the claimant's prior training and experience
    - the distance of the available work from the claimant's residence
    - the prevailing condition of the labor market
    - the prevailing wage rates in the trade or occupation.

7. **Accepting temporary layoff.** A claimant will not be disqualified for benefits by exercising the option of accepting a temporary layoff from an available position under a labor-management contract agreement or under an established employer plan, program or policy.

DISCHARGE

Someone who is discharged from employment for reasons that are considered to be misconduct in connection with employment is not eligible to receive benefits. The employer must show that the employee's actions rose to the level of misconduct. Once disqualified, a claimant must work in subsequent employment and earn remuneration at least equal to 10 times the weekly benefit rate. In addition, any wages earned in employment that ended due to misconduct in connection with that employment cannot be used to establish a valid original claim for benefits.

MISCONDUCT

The term “misconduct” is not defined in the statute. However, the Court of Appeals has indicated that misconduct is any volitional act or omission that is detrimental to an employer's interests. Subsequent Appeal Board decisions have indicated that misconduct may include acts or omissions off the job as well as on the job, if adverse effect on the employer is demonstrated.

While it is the employer's prerogative to discharge an employee, an employee is still eligible for UI benefits if the discharge is due to mere inefficiency, inadequate performance as the result of inability or incapacity, inadvertence or ordinary negligence in isolated instances or good-faith errors in judgment or discretion. On the other hand, even inadequate performance may be misconduct if it can be shown that it resulted from gross negligence, indifference or recurrent carelessness.

To sustain a charge of misconduct, there must be clear proof that an act detrimental to employer's interests was indisputably committed by claimant. The employer must also prove that the misconduct was the direct cause of discharge.

New York's courts and the Appeals Board have provided guidance in determining an individual's eligibility in specific situations involving a discharge for misconduct. The following are examples of some common discharge situations.

1. **Absenteeism and tardiness.** Before being discharged for absenteeism or tardiness, the claimant must generally have been warned about such conduct. There have been cases, however, when one absence has been shown to be sufficient to show willful misconduct, such as where it shows insubordination. The reason for the last occurrence will be taken into consideration in determining if the claimant had a good reason for being tardy or absent. Absenteeism alone

may justify a discharge, but without a showing of wanton and willful disregard of the employer's interests, benefits cannot be denied. Generally, if an individual has good cause for missing work, such as being ill or having an ill child and reports off according to the employer's policy, that individual's conduct does not rise to the level of misconduct.

There can be additional factors that may affect the determination, such as whether the claimant violated the employer's rule for calling off, the method that the individual used in calling off, the reason for the last incident, the nature of the work, past attendance record and previous warnings for absenteeism or tardiness.

2. **Attitude.** An insolent and impertinent attitude on the part of an employee may constitute misconduct. Profanity addressed to a supervisor in the presence of coworkers may constitute misconduct.

3. **Dishonesty.** Intentional dishonesty toward the employer, such as falsification of application forms or timecard records, normally constitutes misconduct.

4. **Drug and alcohol abuse.** Possession or use of an illegal drug in violation of an employer's reasonable rule, known to the claimant, is not excused by claimant's addiction to that drug, since such possession or use is an illegal act. On the other hand, a claimant's refusal to submit to a urinalysis intended to determine drug use, when there was no reasonable suspicion of such use or specific advance notice that such testing would be a condition of employment, was found not to constitute misconduct.

5. **Rule violations.** Deliberate violation of an employer's rule that is known to the employee constitutes misconduct if the employer's rule is reasonable and the employee's conduct, in violating the rule, was not motivated by good cause. The employer must show the existence of the rule and that the rule was violated. The employer must also show that the claimant was aware or should have been aware, of the rule, If this is established, the claimant must show that the rule was not reasonable or that good cause existed for violating the rule.

6. **Unsatisfactory work performance.** Unsatisfactory work performance is not considered misconduct if the claimant is working to the best of his or her ability. However, it is willful misconduct where the employer shows that the claimant was capable of doing the work but was not performing up to standards despite

warnings and admonitions. This is conduct showing an intentional and substantial disregard of the employer's interests.

LABOR DISPUTES

Employees who lose their jobs because of a labor dispute (strike, lockout or other industrial controversy) in the establishment where they are employed are not eligible for unemployment insurance benefits for 49 days. They may become eligible sooner if either one of the following criteria is met: (1) the labor dispute ends and the employee is still unemployed or (2) the employer hires replacement workers.

MAINTAINING ELIGIBILITY FOR BENEFITS

A claimant becomes ineligible for compensation for any week in which unemployment is due to failure, without good cause, either to register for suitable work or to accept suitable work when offered by an employer. A claimant must be available for work and demonstrate that availability by actively seeking employment. Claimants are required to keep a written record of all efforts to find employment. Looking for self-employment only does not satisfy the search for work requirement. The New York Department of Labor specifies that an unemployed individual most perform at least three work search activities per week, on different days of the week, if the individual does not have a work search plan approved by the Department of Labor.

Claimants may be denied benefits if they fail to look for suitable work. Suitable work is generally defined as work for which the claimant is reasonably fitted by training and/or experience. This means that claimants will have to look for work in all their recent occupations, especially if the prospect of obtaining work in their primary skill area is not good. After 10 full weeks of benefits are claimed, suitable work will also include any work that a claimant is capable of performing whether or not the claimant has any experience or training in such work. Special rules exist for those who obtain employment through a union hiring hall or have a definite date to return to work. Such work must pay the prevailing wage for similar work in the locality and pay at least 80% of the claimant's high quarter wages. A claimant must also be willing to travel a reasonable distance to obtain employment. As a general rule, travel of one hour by private transportation or one-and one-half hours by public transportation is considered reasonable.

If it is established that an offer of employment has been made to a claimant, the local office must determine whether the position is a suitable one. This requires evaluating the job duties against the claimant's educational background and work history. The duties of the proffered job need

not conform exactly to the job that the claimant previously held, nor need the new job require utilization of all of claimant's skills or specialized training; but there must be a reasonable matching of the claimant's qualifications to the job requirements.

There are four conditions set forth in the UI Law that require a finding of good cause for a claimant to refuse a proffered job. They are:

1. Acceptance of such employment would require either the claimant to join a company union or would interfere with the claimant's joining or retaining membership in any labor organization.

2. There is a strike, lockout or other industrial controversy in the establishment in which the employment is offered.

3. The employment is at an unreasonable distance from the claimant's residence or travel to and from the place of employment involves expense substantially greater than that required in the former employment (unless the expense is paid/covered by the employer).

4. The wages, compensation, hours or conditions offered are substantially less favorable to the claimant than those prevailing for similar work in the locality, or are such that they will depress wages or working conditions.

As a practical matter, very few claimants are denied benefits based upon refusing to accept suitable work because subsequent employers have no incentive to report offers of employment and prior employers are unlikely to learn of them.

OTHER ELIGIBILITY ISSUES

Not all eligibility issues are related to the claimant's separation from employment. The following are considerations that may also result in rejection or denial of benefits.

1. **Able and Available.** Compensation is generally payable to any employee who becomes unemployed and is able to work and available for suitable work. The claimant must prove a realistic attachment to the local labor market as a whole, as indicated by the claimant's readiness, willingness and ability to accept some substantial and suitable work. The claimant must certify that he or she is able to accept and is available for suitable work during each week for which he or she files a claim for benefits. It is very difficult for an employer to fight a claim for

benefits on this basis unless there is evidence that the claimant has turned down suitable work or is physically unable to work.

Members of the State Army National Guard components or Reserve components of the Army, Navy, Air Force, Marine Corps or Coast Guard engaged in annual field training are not eligible to receive UI benefits because they are considered both unavailable for employment and not totally unemployed. However, participation in weekly or monthly drill sessions does not affect their eligibility for the full weekly benefit amount.

Claimants will not be denied unemployment insurance benefits if they are called to jury duty. Under the law, they are considered ready, willing and able to work while serving on jury duty.

2. **Self-Employment.** Someone who is self-employed, sets up a business or has an ownership interest in a business may not be eligible for benefits. Services performed in self-employment do not qualify as base year employment and will not be used to establish financial eligibility for benefits. The UI Law provides that a claimant will be ineligible for any week in which he or she is engaged in self-employment. Time spent during the day or evening or on weekends preparing to start or actually operating a business may be considered employment even though no sales are made, nor any compensation received.

   State and federal legislation has established the Self-Employment Assistance Program (SEAP), which provides certain eligible individuals the opportunity to start their own businesses while collecting unemployment insurance benefits. In order to be considered eligible for this program, you must first be identified by the state's profiling system as likely to exhaust benefits.

3. **Corporate Officers.** Officers of all corporations, including professional, Subchapter S and closely held corporations, who perform services for the corporation are employees. Any compensation for these services, including dividends or distributions, is taxable. Whenever an individual who is the officer of a corporation files a claim for benefits and the corporation is the last employer, an investigation must be performed to establish whether the individual is "unemployed" within the meaning of the UI Law. It must be established whether the claimant can control his or her own employment. The individual may be eligible for benefits if corporate operations have permanently ceased because of the impending dissolution of the corporation. However, even in such cases, a

corporate officer is considered employed if he or she performs substantial services related to winding up the affairs of the corporation. Similarly, a corporate officer is considered employed if he or she performs substantial services related to the formation and commencement of a new corporate enterprise.

CALCULATING BENEFITS

Weekly benefit amounts are calculated at 1/26th of the high quarter wages paid to the employee during the base period. An exception exists if the high quarter wages are $4,000 or less, in which case the weekly benefit rate is one twenty-fifth of the employee's high quarter wages. Wages are applied to the quarter in which they are paid.

LENGTH OF TIME TO COLLECT BENEFITS

New York State provides 26 weeks of regular unemployment insurance benefits. Although a claim lasts one year, during that time an individual can only receive no more than 26 times the full weekly rate. This rule does not apply when the unemployment rate in the state is high. Under federal law, states with unemployment rates at 8% are eligible for an extra 20 weeks of benefits, known as Extended Benefits (EB) or Emergency Unemployment Compensation (EUC).

BENEFIT OFFSETS BASED ON EARNINGS

To encourage unemployed individuals to accept new employment, the New York UI Law permits them to receive partial benefits when they work less than four days in a week and earn $504 or less, though this amount may change as the maximum weekly benefit rate is adjusted. Any amount that a claimant earns over the partial benefit credit each day or part of a day of work results in a payment of a partial benefit as follows:

- one day of work = 3/4 of the full rate
- two days of work = 1/2 of the full rate
- three days of work = 1/4 of the full rate
- four days of work = No benefits due.

SOCIAL SECURITY AND PENSIONS

A claimant who is receiving Social Security benefits will suffer no reduction in UI benefits provided the individual is available for and looking for work with no restrictions.

Employees who have actually retired and are not seeking employment are not eligible for unemployment insurance benefits. Individuals who are receiving retirement benefit but who are actively seeking work may be eligible for unemployment benefits under the same conditions as all other unemployed workers.

Individuals receiving retirement benefits may have their weekly unemployment benefit rate reduced if all of the following conditions are met:

- They receive a pension from an employer for whom they worked in their base period.
- That work made them eligible for or increased the amount of their pension.
- They contributed less than 50% toward their pension.

In such cases, the amount of the reduction is as follows:

- If they made no contribution to their pension, the reduction is the weekly equivalent of their pension.
- If they contributed to their pension, but less than 50%, the reduction is one-half the weekly equivalent of their pension.
- if they contributed 50% or more to their pension, there is no reduction.

WORKERS' COMPENSATION

A claimant who is receiving workers' compensation benefits, but who is available and physically able to perform work, may be eligible for unemployment insurance benefits. In such cases the weekly unemployment benefit rate may be reduced because the total weekly amount of workers' compensation and unemployment insurance benefits cannot exceed the employee's average weekly wage in the base period.

FILING A CLAIM

An individual may file a claim for benefits personally at a local One-Stop Career Center office or by phoning the NYSDOL's automated toll-free telephone service. Claims may also be made via the internet.

APPEAL TO AN ADMINISTRATIVE LAW JUDGE

The claimant, the last employer or any base period employer may request a hearing before an administrative law judge.

The administrative law judge will conduct a hearing where the parties and their witnesses can give testimony under oath. The parties should arrange for witnesses with firsthand knowledge of the facts to participate in the hearing. Firsthand knowledge means that witnesses directly observed, heard or participated in the matters they are testifying about. What witnesses learned secondhand might not, depending on the circumstances, be considered at the hearing. The employer and the claimant have rights at a hearing including:

- to be represented by a lawyer, agent or any other person who may be of assistance
- giving and objecting to evidence
- questioning witnesses of the opposing party and explaining or rebutting testimony.

Neither party is required to have a lawyer and non-lawyer advocates can represent the interests of corporations. Indigent claimants may qualify for free legal assistance from a legal services organization or a local bar association.

All testimony given at the hearing is recorded in the event of further appeal by either party. Due to the strict guidelines imposed by the US Department of Labor, continuances may not be granted without good reason. Administrative law judge decisions are generally issued within a week.

APPEAL TO THE APPEAL BOARD

Any party present at the hearing before the administrative law judge or Commissioner of Labor may appeal the administrative law judge's decision to the New York Unemployment Insurance

Appeal Board. The appeal must normally be filed with the Appeal Board within 20 days after the administrative law judge's decision is mailed. After an appeal has been filed, the parties will receive a notice explaining their rights and the time limits to inspect the file, submit a written statement and reply to statements submitted by other parties. These time limits will be strictly enforced.

APPEAL TO THE STATE COURTS

Any party may appeal from the decision of the Appeal Board to the Appellate Division of the Supreme Court, Third Department, within 30 days of the mailing date of the Board's decision. One further appeal can be filed to the Court of Appeals, New York's highest court, but that court rarely hears unemployment compensation cases.

SUGGESTIONS FOR CONTESTING CLAIMS

Because an employer's experience rating and corresponding tax rate is increased whenever a former employee receives benefits, it is to the employer's advantage to contest those claims that are without merit. In addition to contesting unsupported unemployment insurance claims, employers may take the following steps to control unemployment insurance costs, including:

- Document voluntary resignations and quits through signed statements by the employee.
- Document any misconduct that lead to the employee's termination.
- Challenge those unemployment claims that are without merit.
- Always check your Notice of Experience Rating Charges (Form IA 96) and file a timely protest if any charge of benefits to your account is incorrect.
- If you are in a position to re-employ the claimant, contact the claimant directly. If the claimant refuses the offer of rehire or fails to report to work, or if you are unable to contact the claimant, notify the Department of Labor office through which the claim was filed that you have work available for the claimant.

Notify the Department of Labor office through which the claim was filed if you believe the claimant is not entitled to benefits for any reason or if you believe the claimant may be working while collecting benefits.

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