Chapter 11: Special determinations

A corporation is a legal entity, separate and distinct from its owners, that is incorporated to do business under the laws of a particular state or country. Corporations have the rights, among others, to enter into contracts, sue and be sued, hire employees, own property, and pay taxes. A corporation is owned by its stockholders, of which it may have one or more. A corporation is managed by a board of directors, elected by some or all of the stockholders, and appointed officers. To do business in Massachusetts, a corporation must register with the Secretary of the Commonwealth.

A limited liability company (LLC) is an unincorporated association that provides limited liability to its owners (called members). Like a corporation, an LLC is created by filing a certificate of organization with the appropriate state authorities: in Massachusetts, the Secretary of the Commonwealth. An LLC may be treated as a corporation for federal income tax purposes.[1] If so, it also is treated as a corporation for unemployment insurance purposes. In this handbook, therefore, any reference to a "corporation" or a corporation's "stockholders" should be understood to include an LLC that is treated as a corporation for federal income tax purposes and its members.

When a claimant for unemployment insurance benefits is both an employee of a corporation and an owner or manager of the corporation, the question arises whether there is a separation. If so, the nature of the separation needs to be determined. See Chapter 6- Separations, Chapter 7- Voluntary leaving, and Chapter 8- Discharge, suspension and conviction. If there was no separation, then it must be determined whether the claimant is in partial unemployment. See Chapter 9- Total and partial unemployment.

A. Statutes

G. L. c. 151A, § 25(e)(1)(2)

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for—
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> ***
>
> (e) For the period of unemployment next ensuing and until the individual has had at least eight weeks of work and has earned an amount equivalent to or in excess of the individual's weekly benefit amount after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its

[1] Business entities use IRS form 8832 to elect how they will be classified for Federal tax purposes. If the corporation does not elect to be treated as a corporation, it is treated as a partnership.

agent, (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful 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 as a result of the employee's incompetence….

G. L. c. 151A, § 1(r)(1)

(1) "Partial unemployment", an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week….

G. L. c. 151A, § 1(r)(2)

(2) "Total unemployment", an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable of and available for work, he is unable to obtain any suitable work. …

G. L. c. 151A, § 29(a)

An individual in total unemployment and otherwise eligible for benefits whose average weekly wage in his base period is … shall be paid for each week of unemployment …

G. L. c. 151A, § 24(b)

An individual, in order to be eligible for benefits under this chapter, shall—

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(b) Be capable of, available, and actively seeking work in his usual occupation or any other occupation for which he is reasonably fitted….

G. L. c. 151A, § 28B

If an employee, who is a corporate officer, partner or owner of an employing unit, or is a person who has more than a 5 per cent equitable or debt interest in an employing unit or is an immediate family member of such individuals, receives an unemployment

benefit under this chapter and, during the same benefit year, resumes or returns to work for the same employing unit, then the division may determine that the employee's unemployment was due to circumstances within the employee's control and may seek repayment of any overpaid benefits.

B. Principles

If it appears that a claimant is seeking benefits based on an alleged separation from a corporation in which the claimant may have had an ownership interest or that may have employed the claimant in a senior managerial position, for example, as president, then the course of the determination depends on the answers to the following five questions. **The questions need to be answered in order, proceeding to the next only if each prior question is answered "Yes." If the answer to any of these questions is "No," then there is no corporations issue, and the claim should be analyzed like any other claim.[2]**

1. Was the employer a corporation or an LLC treated as a corporation for federal income tax purposes?

2. Is the corporation a base period employer, that is, are wages paid to the claimant by the corporation being used to qualify for benefits? If not, then the claim should be analyzed with respect to the interested party employers only, disregarding the corporate connection.

3. Did the claimant, at the time of the separation, either (1)(a) own all or a majority of the voting stock in the corporation or (b) belong to a controlling group that together owned all or a majority of the corporation's voting stock, or (2) hold a senior management position in the corporation?

4. Did the claimant influence, directly or indirectly, the decision that resulted in the alleged separation from the corporation?

5. Did the claimant's alleged separation result from the desires of the claimant rather than a decision regarding the needs of the business?

If the answer to each of the questions above is "Yes" and the evidence shows that the claimant is separated, the claimant is disqualified under § 25(e)(1), unless the separation was due to urgent, compelling and necessitous reasons or domestic violence, or was dictated by the needs of the business (such as lack of work). If you conclude that there was no separation, the claimant is ineligible under §§ 29(a) and 1(r).

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[2] See Chapter 6-Separations, Chapter 7-Voluntary leaving, and Chapter 8-Discharge, suspension and conviction. If the employer is a sole proprietorship, there may be a 'still employed' issue. See Chapter 9- Other pay and benefits.

C. Fact-finding

- **Was the employer a corporation?**
    - The Secretary of the Commonwealth's corporation database should provide the necessary information for Massachusetts corporations. If not, or if the employer is not a Massachusetts corporation, then the claimant or the employer should be asked to produce a recent certificate from the state in which a corporation was incorporated establishing its existence as a corporation. The claimant bears the burden of establishing that an LLC is treated as a corporation. The fact that the LLC may have paid UI contributions on the wages of a member-claimant is suggestive but does not, by itself, answer the question.
- **Is the corporation a base period employer, that is, are wages paid to the claimant by the corporation being used to qualify for benefits?**
- **Did the claimant, at the time of the separation, either (1)(a) own all or a majority of the voting stock in the corporation or (b) belong to a controlling group that together owned all or a majority of the corporation's voting stock, or (2) hold a senior management position in the corporation?**
    - The claimant or the employer should be able to produce documents establishing its ownership and managers. If the corporation's voting stock is owned by the claimant and one or more others, then, while documentation regarding the existence and membership of a controlling group is highly desirable, statements from the claimant and the employer may be all that is available. Because the initial burden of establishing eligibility is on the claimant, and because a stockholder should be able to provide evidence regarding a corporation's ownership and control, a claimant-stockholder has the burden of establishing that the employer is a corporation that the stockholder did not control, neither individually nor as part of a controlling group.
- **How was the separation decision made? Did the claimant influence, directly or indirectly, the decision that resulted in the alleged separation from the corporation?**

Because the initial burden of establishing eligibility is on the claimant, a claimant-stockholder must demonstrate that the employer's decision that resulted in the alleged separation was not influenced by the claimant, directly or indirectly. A claimant who owned or controlled all or a majority of the corporate employer's stock will be deemed to have at least indirectly influenced the decision.

Note that in a closely-held corporation,[3] the stockholders "owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another[,] … [namely,] the utmost good faith and loyalty."[4] Absent evidence to the contrary, a claimant-stockholder will be deemed to have influenced the separation decision. But the particular facts of a case may require a different result.

Example: The claimant, a founder of the corporation, owns one-third of its stock, served as one of three members of the board of directors and was a corporate vice president. One of the two other 1/3 owners, who also served as a director and president of the corporation, bought the remaining one-third interest, thereby becoming the majority stockholder, with 2/3 of the stock. At that point, the claimant and the president were the only two directors. Thereafter, the president elected her husband to the board of directors, and they then voted to terminate the claimant's employment. The termination vote was against the wishes of the claimant. On these facts, an adjudicator should conclude that the claimant did not influence the decision; the separation should be analyzed as a discharge under § 25(e)(2). See Chapter 8- Discharge, suspension and conviction.

- Did the claimant's separation result from a decision regarding the needs of the business, rather than the desires of the claimant?

The ultimate issue in corporate-connection claims is whether the separation of a corporation's owner or senior manager resulted simply from the claimant's voluntary choice or from a sound decision regarding the needs and circumstances of the business. Note, too, that a claimant with a significant ownership interest in a corporation ordinarily should be able to produce supporting documentary evidence, for example, financial statements and corporate tax returns for the three years preceding the decision that resulted in the separation.

More examples:

Corporate voluntary dissolution. If the claimant-owner-employee of a corporation establishes that the claimant decided to dissolve the corporation and wind up its affairs based on a reasonable conclusion that the business was failing, the fact that it was the claimant who made the decision is **not** disqualifying. The adjudicator may reach the same result if, for example, a business is abandoned or otherwise forced out of business by a natural disaster or loss of the lease for the corporation's business premises, if it is concluded that the decision to dissolve or abandon the corporation was a reasonable business decision not influenced by the

[3] A closely-held corporation is a corporation with only a limited number of stockholders in which shareholders are actively employed by the corporation in some capacity and receive what would ordinarily be corporate profits as compensation in their capacity as employees.

[4] *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 367 Mass. 578, 593 (1975) (fn., citation, and internal quotation marks omitted).

claimant's desire to leave work. In such a case, the business's circumstances constitute good cause attributable to the employer within the meaning of § 25(e)(1).

Corporate sale. The sale of a corporation does not necessarily require the separation of a corporation's owner-employee. The adjudicator must determine whether the claimant's separation was one of the conditions of the sale. If not, the separation should be analyzed like any other separation. If the claimant's separation was a condition of the sale, and the sale was not because the business was failing or for urgent, compelling, and necessitous reasons, the separation is disqualifying under § 25(e)(1).

Corporation in bankruptcy. A bankruptcy petition may be either a voluntary petition by the debtor corporation or an involuntary petition filed by creditors that meet certain requirements. There are two kinds of bankruptcy proceedings applicable to corporations:

- **Chapter 7.** A bankruptcy filing under Chapter 7 of Title 11 of the United States Code is intended to liquidate the corporation's assets and pay its debts. The assigned bankruptcy trustee gathers all of the corporation's assets, sells them, and distributes the proceeds among its creditors according to their legal priority. A claimant who is separated from employment by a corporation in Chapter 7 bankruptcy will not be disqualified on account of the corporate connection.

- **Chapter 11.** A bankruptcy filing under Chapter 11 of Title 11 of the United States Code is intended for commercial enterprises that desire to continue operating a business and repay creditors through a court-approved plan of reorganization. Ordinarily, the corporate debtor keeps possession and control of its assets as a "debtor in possession," unless either the case is converted to a Chapter 7 bankruptcy or a case trustee is elected or appointed. If the corporation is conducting business as a debtor in possession, then the claim should be analyzed without regard to the fact of the bankruptcy filing, but taking into account evidence from the bankruptcy that may bear on the existence of a sound business reason for the claimant's separation. If a trustee is conducting the corporation's business, then the claimant will not be disqualified on account of the corporate connection.

Assignment for the benefit of creditors. Another way for a corporation to go out of business is by making an assignment for the benefit of creditors. The corporation's assets are transferred to an independent trustee who liquidates them and distributes the proceeds in the same priority as they would be distributed in bankruptcy. A claimant who is separated from employment by a corporation in connection with an assignment for the benefit of creditors will not be disqualified on account of the corporate connection.

Claimant influences separation from corporation that remains active. Economic conditions may cause a reduction in force. The decision to lay off the claimant rather than another employee may be one the claimant influenced. If it is established that a business reason existed for laying off the claimant rather than the other employee, then the claimant, if otherwise eligible, is entitled to benefits.

A few issues unique to the claimant-owner or claimant-manager context are:

- The claimant is replaced by one or more other persons who perform the essential services previously performed by the claimant. The claimant will be disqualified under § 25(e)(1), unless it is established that the transfer of responsibility for performing the services had a sound business basis.

- For legitimate business reasons, a corporation decides to discharge or lay off some, but not all of its employees; the claimant is one of the separated employees; but the business reasonably could have decided to separate a different employee. So long as there was a sound business reason for the reduction in force, the separation will not be disqualifying, even though someone might have been let go in place of the claimant.

If the separation is determined to have been non-disqualifying, the claimant collects benefits, and is rehired within the benefit year, consideration may be given to redetermining the separation under § 28B. See below.

D. Corporate officer or owner returns to work for corporation following separation

Under § 28B, if a corporate officer or employee owning more than five percent of the corporate employer receives unemployment benefits and, during the benefit year, returns to work for the same employer, DUA may determine that the separation giving rise to the benefits was due to circumstances within the claimant's control and may seek repayment of any overpaid benefits. Generally, relevant information will come to the attention of an adjudicator only if the employer is a base period employer for a subsequent claim. A determination that the claimant was overpaid may be made only within one year from the date of the original determination that the claimant was entitled to benefits, unless it is determined that the original determination resulted from misrepresentation, in which case the time limit is four years. See Chapter 12- Reconsiderations and appeals.

E. Separation issues

If the corporate connection is not disqualifying, then, as noted above, the nature of the alleged separation must be determined. Was the separation permanent? If

not, is the claimant in total or partial unemployment under § 29(a) or § 29(b) and § 1(r)?

F. Total or partial unemployment

If the claimant was not permanently separated, the adjudicator must determine whether the claimant is in total or partial unemployment under § 29(a) or § 29(b) and § 1(r).

Note: If a corporate member who is subject to the direction and control of the Board of Directors performs no wage earning services **and** receives no remuneration in any week, and no work for the corporation is available to the claimant, then he or she is in total unemployment.

G. Fact-finding for corporate owners and senior managers

Determine whether or not the claimant is currently performing any services for the corporation. For example, compare the primary business of the corporation with the claimant's particular duties – are they directly or indirectly related to corporate activity duties?

- Has the claimant created his or her own unemployment by allowing someone else to perform services that the claimant is qualified to perform? If so, was there a good cause reason for such transfer of duties?
- How many employees did the corporation have? Are any still working?
- How many members did the corporation have? Are any still working?
- Who does the corporate accounting? Tax returns?
- Who solicits business for the company?
- Who maintains company equipment (in general)?
- Are any services being performed by the corporation? If so, by whom?
- Is the claimant receiving any remuneration?
- Is the claimant able and available, and actively seeking other work?

H. Examples

Inactive corporation – claimant performs services

A claimant continues to perform services for a corporation – whether or not they are his or her usual and customary services – even though the corporation is no longer actively engaged in business. These services may include soliciting new

business, advertising, repair of equipment, etc. Since the claimant is continuing to perform services for the corporation, the claimant is not in total unemployment pursuant to §29(a) and §1(r) of the law. (However, if the claimant is performing services only part of the time, the claimant may be in partial unemployment pursuant to §29(b) and 1(r). See Chapter 9- Total and partial unemployment.

Temporary cessation of business – active corporations

Certain businesses in the resort, landscaping, construction, and fishing industries cease operations during certain periods of the year. Determine whether during the cessation, the claimant performed any services for the corporation, received any remuneration from the corporation, and is currently available for and seeking work. If these businesses have not received "seasonal" designation from DUA, then the claimant may be eligible for benefits.

If services are being performed for the corporation, it will be necessary to determine the nature of the services and who is performing the services. For example, you may ask the following:

- Landscaping - Are you doing snowplow work?
- Swimming pool construction - Are you doing warranty work?
- Heavy equipment operation - Are you leasing equipment? Are you repairing equipment?
- Resort operation - Are you living on corporate property?
- Fishing vessels - Are you doing repairs on boats or fishing equipment?

Section 2. School employees (reasonable assurance)

A. Statute

G. L. c. 151A, § 28A

Benefits based on service in employment as defined in subsections (a) and (d) of section four A shall be payable in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to this chapter, except that:

(a) with respect to service performed in an instructional, research, or principal administrative capacity for an educational institution, benefits shall not be paid on the basis of such services for any week commencing during the period between two successive academic years or terms, or when an agreement provides instead for a similar period between two regular but not successive terms, or during a period of paid sabbatical leave provided for in the individual's contract, to any individual if such individual performs such services in the first of such academic years or terms and if there is a contract or a reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms;

(b) with respect to services performed in any other capacity for an educational institution, benefits shall not be paid on the basis of such services to any individual for any week commencing during a period between two successive academic years or terms if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms; provided that, if such individual was not offered an opportunity to perform such services for the educational institution for the second of such academic years or terms, such individual shall be entitled to a retroactive payment of benefits for each week for which the individual filed a timely claim for benefits and for which benefits were denied solely because of a finding that such individual had reasonable assurance of performing services in the second of such academic years or terms;

(c) with respect to services described in subsections (a) and (b), benefits shall not be paid to any individual on the basis of such services for any week commencing during an established and customary vacation period or holiday recess if such individual performs such services in the period immediately before such

vacation period or holiday recess, and there is a reasonable assurance that such individual will perform such services in the period immediately following such vacation period or holiday recess;

(d) with respect to any services described in subsections (a) and (b) benefits shall not be paid as specified in subsections (a), (b), and (c) to any individual who performed such services in an educational institution while in the employ of an educational service agency, and for the purpose of this clause the term "educational service agency" means a governmental agency or governmental entity, including an educational collaborative board established by section four E of chapter forty, which is established and operated exclusively for the purpose of providing such services to one or more educational institutions.

See also § 28A regulations : 430 Code Mass. Regs. §§ 4.91–4.98.

B. Educational institution

An educational institution offers students, participants, or trainees, guided by an instructor or teacher, an organized course of study to obtain knowledge, skills, information, doctrines, attitudes, or abilities. The curriculum may be academic, technical, trade, or other preparation for gainful employment in a recognized occupation. Other indicators of educational institutions may include operation of a course of study on a 180-day basis, teacher contracts that are substantially similar to public school teacher contracts, and recognition by other state or federal agencies that the institution is in fact "educational." Because § 28A only applies to services performed for governmental entities and nonprofit organizations, private schools operated for a profit are not educational institutions for purposes of § 28A.

According to this definition, the term "educational institution" includes private, religious nonprofit schools. Accordingly, such schools may give a reasonable assurance. But if such a school is "operated primarily for religious purposes" and "is operated, supervised, controlled, or principally supported by a church or convention or association of churches," then service performed in the school's employ is not included in "employment."[5] (Note that "support" "is not limited to financial support."[6]) Wages paid for such service, therefore, may not be used to establish monetary eligibility, regardless of whether the claimant has received a reasonable assurance.

[5] G. L. c. 151A, § 6(r).

[6] *Bleich v. Maimonides School*, 447 Mass. 38, 47 (2006).

Educational institutions include educational service agencies (ESAs),[7] but the only employees of an ESA that are covered are those that provide the types of services identified in § 28A(a) and (b) in an educational institution.

Educational institutions falling within the meaning of § 28A include:

- The Division of Inmate Training and Education within the Department of Corrections.
- A nursery school or preschool that admits children within a limited age range, is in session only during regular school hours, and provides some type of instruction to the children.
- A Head Start program operated by a municipal school committee, not by a Community Action Program.
- Specialized Title 1 programs funded by the federal government.
- Charter schools authorized by the Massachusetts 1993 Education Reform Act.

Some workers who may have training or educational functions are not considered to be employed by educational institutions and are therefore not subject to the provisions of § 28A. For example:

- Instructors at institutions that primarily provide custodial care rather than educational services (such as state hospitals).
- Researchers who are employed by private corporations owned by a university.
- Workers at a day care center providing custodial care rather than educational services.
- UCFE and UCX teachers employed at schools operated by the federal government in the United States or overseas (such as military post schools, Bureau of Indian Affairs schools, etc.).
- School crossing guards, if they are not on the school's payroll.

[7] Educational Service Agencies are defined in G. L. c. 151A, § 28A(d) as "A governmental agency or governmental entity, including an educational collaborative board established by G. L. c. 40, § 4E, which is established and operated exclusively for the purpose of providing such services to one or more educational institutions."

- Head Start workers in facilities operated by a Community Action Program, because it is not an educational institution.

- Secretaries and other clerical workers who are employed by, and provide services for, educational collaboratives established under G. L. c. 40 and do not perform any educational services for educational institutions.

- Bus drivers, if not employed by an educational institution, educational service agency or school committee.

C. Principles

1. General

In certain circumstances, base period wages for services by employees of educational institutions (school employees), who have received a reasonable assurance of reemployment (discussed below), may not be used to establish eligibility for benefits for weeks commencing during a period between academic years or terms,[8] or during a vacation period. Note that individuals employed by a private for-profit employer are **not** covered by § 28A, even if they perform services in an educational institution.

Base period wages are excluded in the following three instances:

- school employees who provide services for an educational institution in a professional capacity—that is, as an instructor, researcher, or in a principal administrative capacity— if the claimant performed services in the first academic year or term and has a reasonable assurance of performing services in a professional capacity the following academic year or term. This wage exclusion also applies when an agreement provides for a similar break between two regular but not successive terms or during a paid sabbatical.[9] Services by principals, teachers, substitute teachers, and coaches are considered professional.

- school employees who provide services for an educational institution in a non-professional capacity, if the claimant performed services in the first academic year or term and has a reasonable assurance of performing such services in the following academic year or term.[10] If, however, the claimant is

[8] "Academic year or term" means "the date that the majority of students begin academic classes, and such academic year or term shall end when the majority of students are no longer attending academic classes, taking examinations or engaged in other curricular activities required by the school." 430 Code Mass. Regs. § 4.93.

[9] G. L. c. 151A, § 28A(a); U.S. Department of Labor, Unemployment Insurance Program Letter No. 04–87 (Interpretation of "Reasonable Assurance"), p. 2, ¶ 4.

[10] G. L. c. 151A, § 28A(b).

not offered an opportunity to perform such services in the following academic year or term, then the claimant, if otherwise eligible, is entitled to a retroactive payment of benefits for each timely-claimed week. Services by cafeteria workers, teacher's aides, bus drivers, and crossing guards who are employees of educational institutions are considered non-professional.

- school employees who provide services for an educational institution, in either a professional or non-professional capacity, for any week commencing during an established and customary vacation period or holiday recess, if the claimant performed such services in the period immediately before the break and has a reasonable assurance of performing such services in the period immediately after the break.[11]

A claimant employed by an educational collaborative[12] who performs services in a professional or non-professional capacity in an educational institution is subject to the corresponding reasonable assurance provision. This includes school bus and van drivers. Other employees of an educational collaborative are not subject to § 28A.[13]

The provisions of § 28A only apply to services performed for educational institutions that are governmental entities or nonprofit organizations.

The provisions apply equally to both professionals and non-professionals, except that a non-professional who is denied benefits between two successive academic years or terms due to reasonable assurance, and then not given an opportunity to perform services in the second year or term, is eligible for retroactive benefits for the weeks denied.

Because § 28A only applies to weeks claimed during a period between two academic years or terms, and during vacation periods or holiday recesses, § 28A is never an issue when school is in session or for any week that does not commence

[11] G. L. c. 151A, § 28A(c).

[12] Educational Collaboratives are defined in G. L. c. 40, § 4E(b):

"Two or more school committees of cities, towns and regional school districts and boards of trustees of charter schools may enter into a written agreement to provide shared programs and services, including instructional, administrative, facility, community, or any other services; provided that a primary purpose of such programs and services shall be to complement the educational programs of member school committees and charter schools in a cost-effective manner. The association of school committees and charter school boards which is formed to deliver the programs and services shall be known as an education collaborative."

[13] G. L. c. 151A, § 28A(d).

during a vacation or holiday recess (see, below- *Reasonable Assurance Period; Notice Date*).

Generally, if the following questions are answered "Yes," the wage exclusion provisions of § 28A will apply:

- was the employer an "educational institution"? If so,
- did the week(s) claimed occur between two successive academic years or terms, or during a school vacation or holiday recess? If so,
- did the claimant receive a "reasonable assurance" of re-employment for the next academic year, term, or period? If so,
- were the economic conditions of the offered job not considerably less[14] than the economic conditions of the job performed during the pre-break period? If so,
- if the claimant is a non-professional employee of the educational institution, was the claimant given an actual "opportunity to perform service" during the second period?

2. Reasonable assurance

A reasonable assurance is a written, oral, or implied agreement that, in the second period, the employee will perform services in the same or similar capacity as in the first academic period, with economic conditions that are not considerably less as compared to the first academic period. "Academic period" refers to an academic year or term. The "second academic period" refers to the academic year or term immediately following the first academic period. The "same or similar capacity" refers to the type of services provided.

An individual working under an agreement has a reasonable assurance of reemployment for any vacation or other break during the term of the agreement.

Some school employees—usually teachers—are granted tenure, which promises them automatic reemployment. Tenure for public school employees is called "professional teacher status." School employees with tenure or professional teacher status automatically have reasonable assurance of re-employment in the following academic year unless they are officially notified

[14] The economic conditions of the job will be "considerably less" if the claimant will not earn at least 90% of the amount that the claimant earned in the first academic year or term. See U.S. Department of Labor, Unemployment Insurance Program Letter Number 05–17.

by the school system on or before June 15th of the academic year that they will not be returning to their position in the following September semester.[15]

The reasonable assurance need not come from the most recent school system or educational institution employer for which the claimant worked, or, indeed, from any educational institution for which the claimant worked. For example, a teacher who leaves a teaching job at the end of the academic term to take a new teaching position at another school district when the new academic term begins will have reasonable assurance, as long as the economic terms and conditions of the new position are not considerably less than those of the prior position.

If a claimant who has been initially determined to not have a reasonable assurance later receives a reasonable assurance, then the wage exclusion provisions of § 28A will apply from the date the reasonable assurance is given.

A disqualification under § 28A generally may not be removed because the disqualification ends when the next academic year or term begins or the vacation period ends. But a subsequent written notice from the educational institution rescinding a reasonable assurance ends the disqualification.

3. Bona fide offer

There must be a bona fide offer of employment to perform services in the second period for a reasonable assurance to exist. Although the offer need not be in writing, it must be made by an individual authorized to do so. A tentative offer or an offer made by an unauthorized individual is not a bona fide offer. Although the offer may have contingencies, if only a possibility of employment exists it is not bona fide. There is only a possibility of employment if the circumstances under which the claimant will be employed are not under the control of the educational institution (for example, funding or enrollment), *and* the educational institution cannot establish that similarly placed individuals normally perform services the following year or term.[16]

4. Economic terms and conditions

A reasonable assurance exists only if the economic terms and conditions of the job offered in the second period are not considerably less than the terms and conditions of the job in the first period. In most cases, a reduction in wages and/or fringe benefits of more than 10% would make the economic conditions of the job considerably less. The Department of Labor issued guidance that interprets “considerably less” to mean that the economic

[15] See UIPP Interoffice Memorandum dated May 25, 2017.

[16] U.S. Department of Labor, Unemployment Insurance Program Letters No. 04–87, 05-17.

conditions of the job will be considerably less if the claimant will not earn at least 90% of the amount that the claimant earned in the first academic year or term (a reduction of 10% or less), or in a corresponding term, if the claimant does not regularly work successive terms (for example, the claimant works the spring term each year).

D. Fact-finding

The following information should be considered to determine whether a reasonable assurance exists:

- Is this a break between academic terms or years, or a customarily established holiday break? If so, when did the year or term end and when will the next academic period begin?
- Does the employer meet the definition of an educational institution for purposes of § 28A?
- Is the claimant a professional, or a non-professional? What services did the claimant perform for all educational institutions listed in the base period?
- Has the claimant received a bona fide offer of re-employment for the next academic year or term from any educational institution?
    - Who made the offer? Does this individual have the authority to make an offer of employment? When was the offer extended?
- If the claimant is an adjunct instructor or professor, is the offer contingent upon factors outside the school's control? If so, has the school provided evidence establishing that individuals in the claimant's position normally perform services in the following academic year or term such that the claimant is likely to be reemployed? Does the position offered provide economic conditions not considerably less than those provided in the prior position?

E. Procedures

1. Exclusion of base-period wages

A claimant who has a reasonable assurance may not establish eligibility for benefits based on the services to which the reasonable assurance applies. Accordingly, the wages paid for such services are not used when determining monetary eligibility or calculating a weekly benefit amount. A claimant nevertheless may be eligible for benefits based either on educational services to which no reasonable assurance applies or other, non-educational covered employment during the base period, or a combination of both.

Note: Although it is possible that a claimant's wage distribution in the four base-period quarters may increase rather than reduce the weekly benefit amount, the total benefit credit is always lower.

Example: Claimant, who was laid off in June from a full-time teaching position, filed a claim and was approved for benefits. The following October, the employer placed the claimant on its substitute teacher list. The claimant worked as a substitute teacher for the remainder of the school year. At the end of the school year, the claimant received a reasonable assurance of reemployment as a substitute teacher for the following school year. After summer recess began, the claimant filed a new claim for benefits. Although the reasonable assurance barred the use of the claimant's wages as a substitute teacher to establish eligibility, the claimant's base period included wages earned as a full-time teacher between April and June of the prior school year. That service and those wages should be considered because they were unaffected by the later reasonable assurance regarding the claimant's service as a substitute teacher.

2. Employer's requirement to provide notice to DUA

Unless the claimant acknowledges receipt of a reasonable assurance, the educational institution must inform DUA, either in writing or by telephone, that the claimant has been given a bona fide offer of a specified job, for example, a teaching job, in the second academic period, including how the offer was conveyed and whether the person who made the offer was authorized to make it.

3. Method of notice to claimant

The claimant must receive notice (either orally or in writing) of the offer of re-employment. When the employer says that notice was given orally, the claimant may or may not agree. Notice of reasonable assurance is sometimes provided orally at a group meeting, after which members of the group are generally asked to sign a form or list verifying attendance and notification. In some smaller communities, local newspapers publish lists of the employees with reasonable assurance of school re-employment. All of these methods of notification are acceptable, as long as the employer establishes that the claimant received the notification.

4. Reasonable assurance period; notice date

The provisions of § 28A regarding reasonable assurance apply only to the weeks commencing between two academic years or terms, and holiday or vacation recesses during an academic term. A week is defined as seven consecutive days beginning on a Sunday. Therefore the time period for a reasonable assurance must be in whole weeks. For example, if the school year

ended on a Wednesday, the reasonable assurance period would begin on the following Sunday.

If written or oral notice of reasonable assurance is given directly or sent electronically to the claimant, the date this takes place is also the date of notification. If, however, the employer mails the notice, the date of receipt (not to exceed three days later) becomes the date of notification.

If a claimant who has been initially determined to not have a reasonable assurance of rehire is later given a bona fide offer of reasonable assurance, the date of the offer must be established. If the day of notification is a Monday, Tuesday, or Wednesday, disqualify the claimant effective that week. If the notification is received on a Thursday or Friday, apply a lost-time disqualification under § 29(b) and 1(r) for one or two days, whichever is appropriate.

Note: When the new academic year or term begins, the reasonable assurance provisions are no longer applicable because § 28A does not apply when school is in session. If otherwise eligible the claimant would be entitled to benefits for succeeding weeks.

5. Opportunity to perform service; retroactive pay for non-professionals

Section 28A(b) provides that an otherwise eligible **non-professional** school employee who has been denied unemployment benefits solely because of a reasonable assurance shall be entitled to retroactive payment of benefits if, in fact, the educational institution does not provide the claimant an opportunity to perform such services in the second academic year or term. This retroactive payment is limited to weeks for which the claimant filed a timely claim for benefits.

The employer that gave the reasonable assurance must make an offer in writing by the end of the second full week from the beginning of the academic year or term, unless the claimant already has returned to work for the educational institution. The offer must give the claimant the opportunity to start performing services before the end of the fourth full week from the beginning of the academic year or term.[17]

An offer of short-term employment — less than 20 working days — does not constitute an opportunity to perform services, unless the individual is a non-professional substitute employee, such as a substitute cafeteria worker. In this case, an opportunity to perform service is considered bona fide as long as the

[17] *See* 430 Code Mass. Regs. § 4.96(1).

offered economic conditions of employment are not considerably less than those in the most recent period.

To request retroactive payment of benefits, a claimant must apply for benefits no later than the sixth full week from the beginning of the academic year or term. When such a request is filed, the original wage-exclusion determination (the reasonable assurance issue) must be set to pending at the redetermination level in UI Online, and custom fact-finding should be sent to both parties regarding the opportunity to perform services. Also, the adjudicator should make requestable all the weeks that were subject to the reasonable assurance wage exclusion. The claimant's certification of these weeks constitutes the filing of a timely claim for the retroactive payment of benefits.

The effective week of the reopened claim may be pre-dated to the effective date of the period in issue, which is usually the effective date of the initial claim. After all the facts have been obtained, make a non-monetary determination on the claimant's eligibility for retroactive payment of benefits.

Do not disqualify the claimant under § 24(b) for being unavailable for work or not actively seeking work during the period to which the retroactive benefits apply.

If the adjudicator establishes before the next academic year or term starts that the claimant will not be offered an opportunity to perform service, the payment of retroactive benefits can begin at that point.

6. Other employment during summer recess

A claimant who finds other work during the summer recess is still subject to § 28A. If a claimant was employed by an educational institution during the most recent academic year, that educational institution is an interested-party employer, regardless of the claimant's subsequent summer employment.

F. Circumstances and policies

1. Separation from work during academic year or term

If a claimant is separated under § 25(e)(1) or (e)(2) from an educational institution during the academic year or term and any educational institution offers the claimant employment, § 28A does not apply, because the relationship with the first educational institution was completely severed. But if the claimant refuses the offer and at that time is otherwise eligible, the issue should be analyzed under § 25(c). See Chapter 5- Suitable work.

2. Refusal of offer

If during the period between academic years a claimant decides not to return in the next academic year or term, unless it is established that the claimant notified the employer, the claimant has not—for adjudication purposes—actually left work.

3. Failure to seek work

The availability and worksearch requirements apply to school employees. See Chapter 4- Able, available, and actively seeking work. If a claimant does not have a reasonable assurance under § 28A during the period between an academic year or terms and fails to look for another job, the claimant will be subject to disqualification under § 24(b). A claimant who has a reasonable assurance (and who has base period wages from other employment sufficient to establish monetary eligibility) is subject to the worksearch and availability requirements for the period between academic years or terms until four weeks prior to the recall date.

4. During school vacation

Vacation periods occurring within an academic term are treated like the period between successive academic years or terms. If an individual performed services in the same academic term within which the vacation falls and has a reasonable assurance of performing services within that term after the vacation, reasonable assurance principles apply. For purposes of an on-call substitute teacher, for example, "performing services" may mean as little as one day's service during the term within which the vacation falls. The § 28A(c) wage exclusion applies, however, only to a week that begins during a vacation. Since some vacation periods, such as the Thanksgiving break, start on a Tuesday or Wednesday, a § 28A wage exclusion for such periods does not apply.[18]

5. Beginning of next school year or term

If a claimant has been disqualified under § 28A, the wage exclusion ends when the next academic year or term begins.

Note: School vacation breaks for private, non-profit schools and institutions of higher education often differ from the more common February and April vacations of public schools. If the issue comes to the adjudicator as Still Employed, and if fact finding establishes school was not in session, the possibility of a § 28A issue must be considered.

[18] *Cape Cod Collective v. Director of Dep't of Unemployment Assistance,* 91 Mass. App. Ct. 436 (2017).

6. Adjunct instructors

The employer has the burden of proving that an adjunct professor had reasonable assurance.

Frequently, adjunct instructors teaching in one academic year or term are offered a similar position in the succeeding period conditioned on factors beyond the control of the educational institution, such as enrollment or program funding. In such circumstances, the adjudicator must determine whether there was a bona fide offer or only the possibility of employment. (See above-*Bona Fide Offer*.) Two key indicators are whether (1) the institution provides evidence that individuals in the claimant's position normally provide services in the following academic year or term and (2) the economic terms and conditions of the job offered in the second period are not considerably less than the terms and conditions of the job in the first period.

Adjudicators should document the number of courses and wages paid per course in the previous semester, term, or year, and compare it to the terms and conditions of the work offered in the second period.

Note: The reasonable assurance does not have to be from the most recent employer.

Example 1: An adjunct instructor is offered the same job in the second academic year in a special program funded from an outside source. This program has been funded for the past four years. At the beginning of summer recess, however, no notification of the following year's funding has been received. Other than this lack of notification, which usually arrives late in the summer, no reason exists to indicate that the program will be suspended or abolished. While the circumstances under which the instructor is employed are not within the school's control, the school can still establish a pattern showing that the program is likely to be funded in the second academic year. Therefore, the offer of work is bona fide and a reasonable assurance exists.

Example 2: The claimant works as an adjunct college instructor teaching a total of four courses, one at each of four different colleges. At the end of the academic year, or term, the claimant receives a reasonable assurance from only one of those colleges, the assurance being for only the one course the claimant had taught at that college (for the same salary as that college had paid). The wages from the other three colleges, but not from the college that gave the reasonable assurance, may be used to establish monetary eligibility.

7. Coaches (sports)

To have a reasonable assurance, a coach must be offered a similar position for the next academic year or term with conditions and benefits that are not less favorable.

- **Example:** The claimant was employed as a tennis coach from April through the end of the school year in June. The claimant received a bona fide offer of the same position on not considerably less favorable economic conditions for the next tennis season beginning April of the next academic year. Although the claimant may have a reasonable assurance of reemployment, § 28A does not bar use of the coach's wages because the offer was not for the immediately following academic term. Note, however, that the position may have been certified as seasonal. (See discussion of *Certified Seasonal Employment*, below.) The adjudicator should check FileNet Workplace XT to see whether a seasonal determination was made.

8. Substitute teachers

To have a reasonable assurance, substitute teachers must be offered a position for the next academic year or term with not considerably less favorable economic conditions and benefits. Consider the employment history of the claimant during the last academic period of the school year, normally either a term or semester. If a substitute teacher files a claim for partial benefits, see Chapter 9- Total and partial unemployment.

- **Example 1:** The claimant begins the school year in employment as a full-time public school teacher. During the second half of the school year, more than eight weeks before the end of the school year, the claimant's position changes to that of an on-call substitute teacher. Just before the end of the academic year, the claimant receives a reasonable assurance for the substitute teacher position. The reasonable assurance given excludes only the wages as a substitute teacher. The claimant's wages as a full-time teacher may be used.

- **Example 2:** The same facts as in Example1, except that the claimant's position changes to that of an on-call substitute teacher within the last eight weeks of the school year. An offer of reemployment as an on-call substitute teacher would not be a reasonable assurance. Therefore, all of the claimant's wages should be used.

G. Examples

Example 1: Refusal of a contract for the upcoming academic year

A principal refuses a contract for the upcoming academic year as a teacher, not as a principal. If it is determined that the economic terms and conditions are not considerably less than in the first academic year, a reasonable assurance exists. But if the economic terms and conditions will be considerably less in the second academic year, then a reasonable assurance does not exist. Note that if the position offered was not in a

professional capacity (and the first position was), no reasonable assurance exists, regardless of the economic terms and conditions.

Example 2: Offers of reduced employment

A teacher employed full-time in an academic year is offered a position teaching 3/5 of the week or less in the next academic year. Since the economic terms and conditions would be considerably less than the terms and conditions in the prior academic year, no reasonable assurance exists.

Example 3: Full-time teacher offered long-term substitute contract

A non-tenured teacher employed on a full-time basis during an academic year is offered a one-year contract as a "long-term" substitute. Unless the rate of pay is the same as that for a full-time teacher, daily employment is guaranteed for the length of the contract, and the long-term substitute position includes similar benefits, then the economic terms and conditions will be considerably less, and reasonable assurance does not exist.

Example 4: Full-time teacher or long-term substitute teacher placed on an on-call list

A non-tenured full-time teacher (or a long-term substitute teacher) during the first academic year is placed on the on-call substitute list for the next academic year. An on-call employee has a varying schedule of hours and works on an as-needed basis. Even if the educational institution indicates that former full-time teachers (or long-term substitute teachers) are placed on the top of the substitute list and are called to work before other substitute teachers and that those on the top of the list usually work four or five days each week, the economic terms and conditions are likely considerably less than those of the former position.

On-call substitute positions typically offer:

- No guarantee of full-time work
- No benefits (health insurance, retirement, etc.)
- No option to spread one's pay out over a 12-month period

Example 5: On-call substitute teacher retained on an on-call list

An on-call substitute is retained on the on-call list. If the educational institution establishes that the circumstances under which the teacher will be called are unchanged, then reasonable assurance exists. If for any

reason, the teacher will be called significantly less frequently than during the prior academic year (prior full-time teachers or long-term substitutes will be placed on top of the daily substitute list, non-certified teachers will be called last, etc.) then the economic conditions would be considerably less and reasonable assurance does not exist.

Example 6: Funding contingency

A claimant is offered reemployment contingent on funding being obtained for the program in which the claimant teaches. The employer establishes that in the last few years funding for the program has been confirmed in the late summer. The claimant provides one or more newspaper articles suggesting that the program will not be funded. If the adjudicator finds the newspaper article(s) to be sufficiently credible to expect a different result this year, then a reasonable assurance does not exist. The adjudicator must weigh all the evidence and the credibility of its sources.

Example 7: Enrollment contingency

During the past two academic years, a claimant has been employed by an educational institution as an untenured art teacher along with four more senior teachers. The employer states that the claimant has a reasonable assurance to perform service in the third academic year. The claimant responds that there were persistent rumors that reduced enrollment will lead to a reduction in the number of positions in the art department. The employer then states that, although current enrollment levels require only four art teachers for the coming year, the claimant will be the next art teacher hired (based on seniority) if the enrollment level increases. At this time, the claimant has been offered a possibility of work, rather than a reasonable assurance of work. The claimant's wages as an art teacher during the prior academic year should be used to determine monetary eligibility and the weekly benefit amount from the filing date of the claim until the employer removes the contingency.

Section 3. Professional athletics

A. Statute

G. L. c. 151A, § 25(g)

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for—
>
> ***
>
> (g) Any week which commences during the period between two successive sports seasons or similar periods if such individual performed services substantially all of which consisted of participating in sports or athletic events or training or preparing to so participate if such individual performed such services in the first of such seasons or similar periods and there is a reasonable assurance that such individual will perform such service in the later of such seasons or similar periods.

B. Definitions

Section 25(g) is intended to apply to individuals who participate in paid professional athletics, even though the word "professional" is not used.

A professional athlete is an individual whose occupation is participating in athletic or sporting events for wages. Whether a semi-professional—"semi-pro"—athlete is within the scope of § 25(g) depends upon whether the sports services are compensated in covered wages. The provision does not apply to services in self-employment or to prizes won in tournament play.

The term "participant" includes ancillary personnel involved with a professional team, league, or event, such as managers, coaches, trainers, referees, and umpires.[19]

The determination of the beginning and end of a "season" and the determination of the length of the period between two successive seasons may vary from sport to sport and for particular individuals within the same sport. For example, the season for a coach or player on a professional football team that does not make the play-offs ends at the conclusion of the regular season; for a coach or player on a team that makes the Super Bowl, the season does not end until the game ends.

[19] ET Handbook 301 (Revised July 2005), Guide Sheet 9 – Professional Athletes Between Seasons.

An individual is deemed to have performed "substantially all" services in sports or athletic events if the individual engaged in such sports or athletic events for 90 percent or more of the total time spent in the base period in the performance of all covered services.[20]

To determine whether a claimant had "reasonable assurance" in "between sports seasons," the questions are: Did the claimant perform services as a professional athlete or as ancillary personnel in professional athletics in the season that just ended? And, is there a reasonable assurance that the claimant will again do so in the next season? For the professional athlete, a mere indication of the athlete's intent to participate in the subsequent sports season without any verification from any sports organization will constitute "reasonable assurance" if there is some indication that employers are considering employing the athlete.[21]

C. Principles

The intent of § 25(g) is to deny benefits during the "off season"—that is, for any week beginning between two successive sports seasons (or similar periods)—based on services substantially all of which consist of participating in, training for, or preparing to participate in sports or athletic events, if the claimant performed the described services in the first season (or similar period) and there is a reasonable assurance of performing such services in the second season (or similar period). A professional athlete, coach, trainer, referee, or umpire may, if otherwise eligible, receive unemployment compensation during the regular playing season.

An individual with a multi-year contract has a reasonable assurance. Where at the completion of a season an individual's contract terminates or permits the individual to negotiate with others, there is a reasonable assurance that the individual will perform such service in the following season so long as the individual affirmatively offers services as an athlete to employers and there is some indication that employers are considering employing the individual. Put another way, a reasonable assurance is not present when the individual clearly withdraws from athletics.

When a professional athlete, manager, coach, trainer, referee, or umpire is denied benefits because there is a reasonable assurance of again performing services as a professional athlete or as ancillary personnel in the next ensuing season, but the assurance fails to materialize, the denial ends as of the date the assurance fails to materialize. Following that date, benefits are payable if the individual is otherwise eligible.[22]

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[20] U.S. Department of Labor, Unemployment Insurance Program Letter Number 18–98.

[21] *Id.*

[22] 1976 Draft Language, Supp. 1, Question 4, p. 23.

D. Procedures

To determine whether 90 percent or more of the services were athletically-related, all services (athletic and non-athletic) must be considered together. If "substantially all" of the services have been performed in professional athletics, and a reasonable assurance that the individual will participate in professional athletics in the next season exists, then none of the wages may be used to establish eligibility, and the claimant will be determined to be ineligible. Conversely, if the "substantially all" test has not been met, then the wages can be used to establish a monetary rate for benefits and the claimant will be eligible.

To determine if a reasonable assurance exists, any one of the following criteria must be met:

- there is a contract, written or oral;
- the employer expresses an interest in hiring the claimant for the next season or a similar period; or
- the claimant expresses a readiness and intent to participate in the sport for the next season and there is some indicator of employer interest.

Note: Reasonable assurance is only an issue between seasons.

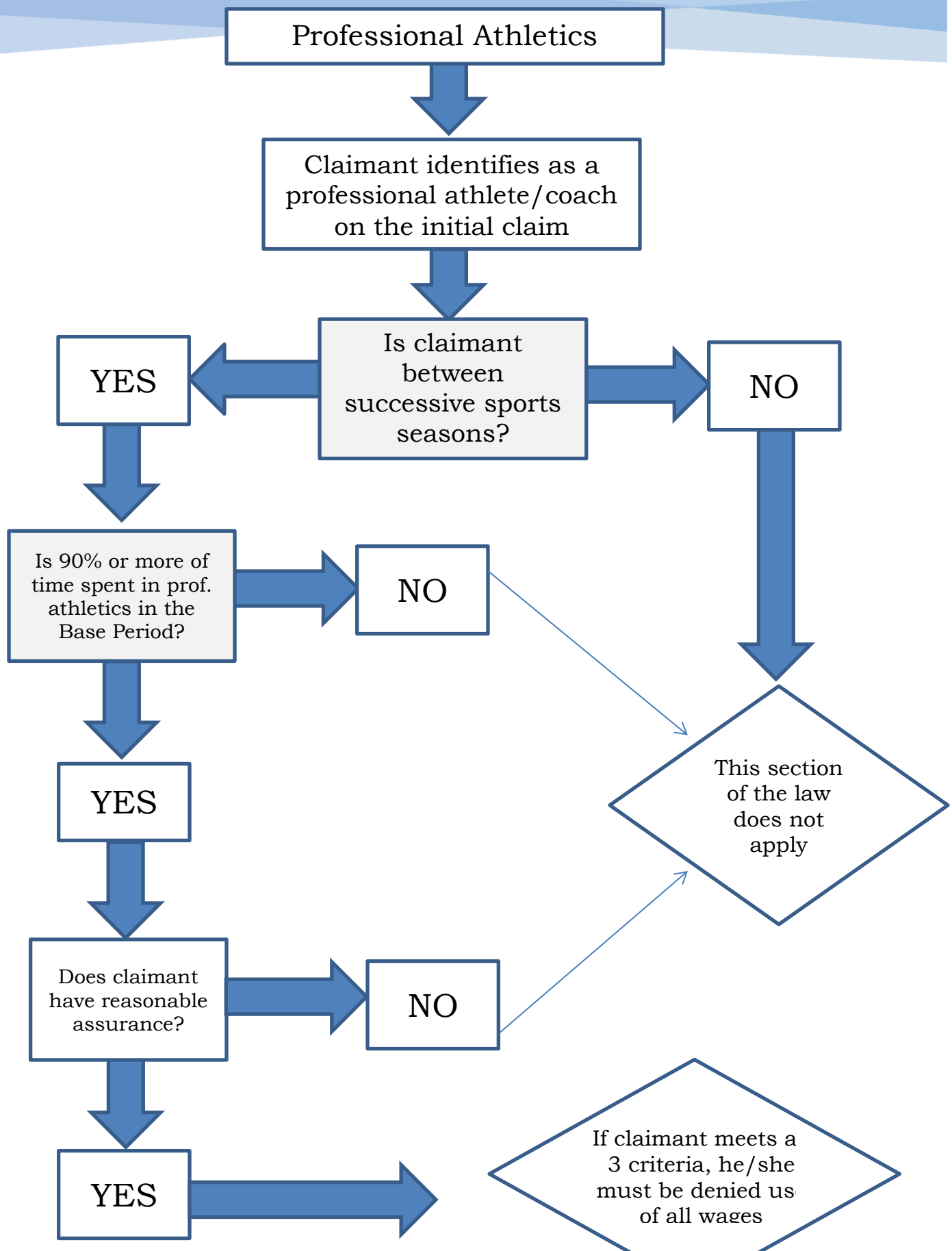
E. Examples

Example 1: A claimant is a "free agent" whose contract has not been renewed. The claimant is looking for employment with a different professional athletic team for the next season and some employer has indicated an interest in employing the claimant. If the claimant engaged in such sports or athletic events for 90 percent or more of the total time spent in the base period in the performance of all covered services, then the claimant is not eligible for UI benefits.

Example 2: A claimant has signed a new contract with a new employer between seasons. If the claimant engaged in such sports or athletic events for 90 percent or more of the total time spent in the base period in the performance of all covered services, then the claimant is not eligible for UI benefits.

Example 3: During the base period, the claimant worked 90% of the time as a professional athlete, 5% as an employee of a local radio station as a sports commentator, and 5% appearing in television commercials as an employee of an advertising agency. If during the off-season the claimant has a reasonable assurance of reemployment in the following season as a professional athlete and is disqualified, then no benefits are payable on the basis of the non-athletic wages.[23]

[23] 1976 Draft Language, Supplement 1, p. 22, Question 1.


Professional Athletics
Claimant identifies as a professional athlete/coach on the initial claim
Is claimant between successive sports seasons?
YES
NO
Is 90% or more of time spent in prof. athletics in the Base Period?
NO
YES
This section of the law does not apply
Does claimant have reasonable assurance?
NO
YES
If claimant meets a 3 criteria, he/she must be denied us of all wages

Section 4. Certified seasonal employment

A. Statutes

G. L. c. 151A, § 24A

(a) No waiting period shall be allowed and no benefits shall be paid to an individual on the basis of service performed in seasonal employment as defined by subsection (aa) of section one unless the claim is filed within the operating period of the seasonal employment. If the claim is filed outside the operating period of the seasonal employment, benefits may be paid on the basis of non-seasonal wages only.

(b) An employer shall provide the commissioner with such information necessary to make a seasonal determination defined by subsection (cc) of section one. Until the commissioner makes a seasonal determination, no employer or employee may be considered seasonal.

(c) Any employer notified of a seasonal determination may file an appeal regarding a seasonal determination and obtain review of the determination. Such appeal and review shall be in accordance with sections thirty-nine through forty-two, inclusive.

(d) Whenever an employer is determined to be a seasonal employer, the following provisions apply:

(1) The seasonal determination becomes effective the first day of the calendar quarter commencing after the date of the seasonal determination.

(2) The seasonal determination does not affect any benefit rights of seasonal workers with respect to employment before the effective date of the seasonal determination.

(e) If a seasonal employer, after the date of its seasonal determination, operates its business or its seasonal operation during a period or periods of 20 weeks or more in a calendar year, the employer shall be redetermined by the commissioner to have lost its seasonal status with respect to that business or operation effective at the end of the then current calendar quarter. The redetermination shall be reported in writing to the employer. An employer notified of a redetermination may file an appeal of the redetermination and obtain review of the redetermination in accordance with sections thirty-nine through forty-two, inclusive.

(f) Seasonal employers shall keep account of wages paid to seasonal workers within the seasonal period as determined by the commissioner, and shall report these wages on a special seasonal quarterly report form as prescribed by the commissioner.

G. L. c. 151A, § 1:

The following words and phrases as used in this chapter shall have the following meanings, unless the context clearly requires otherwise:—

z) "Seasonal employer", an employer that, because of climatic conditions or the nature of the product or service, customarily operates all or a functionally distinct occupation within its business only during a regularly recurring period or periods of less than 20 weeks for all seasonal periods during a calendar year and only includes an employer who voluntarily submits a written application to the commissioner. Such application shall be submitted at least sixty days prior to the beginning of the season.

(aa) "Seasonal employment", services performed for wages for a seasonal employer during the seasonal period in the employer's seasonal operations, after the effective date of a seasonal determination with respect to the seasonal employer.

(bb) "Seasonal employee", an individual who:

(1) has been employed by a seasonal employer in seasonal employment during a regularly recurring period or periods of less than 20 weeks in a calendar year for all seasonal periods, as determined by the commissioner, and

(2) has been hired for a specific temporary seasonal period as determined by the commissioner; and

(3) has been notified in writing at the time hired, or immediately following the seasonal determination by the department, whichever is later:

(A) that the individual is performing services in seasonal employment for a seasonal employer; and

(B) that the individual's employment is limited to the beginning and ending dates of the employer's seasonal period as determined by the department.

(cc) “Seasonal determination”, a determination made by the commissioner, as to the seasonal nature of the employer, the normal seasonal period or periods of the employer, and the seasonal operations of the employer covered by such determination.

B. Regulations

430 Code Mass. Regs. § 12.03:

“Functionally Distinct Occupation,” an occupation in which the assigned duties or tasks are identifiably distinct from the duties or tasks assigned to employees outside the seasonal period. Mere addition of staff to perform the same or similar duties as those performed outside the season would not be considered seasonal.

“Seasonal Employment,” service performed by an employee for wages for a certified seasonal employer during a period or periods of less than 20 weeks in a calendar year. Any such period(s) must be certified by the Commissioner and must include definite beginning and ending dates.

“Seasonal Unemployment,” an individual's unemployment during the seasonal period for which he was hired or during the next regularly recurring seasonal period following the seasonal period in which the individual earned his wage credits, provided that the individual is able and available for the seasonal employment and the unemployment is due to a qualifying separation or the unavailability of seasonal work for that individual. Any claim for seasonal unemployment must be filed within the operating period of the seasonal employment.

“Seasonal Employer,” an employer determined by the Commissioner to be seasonal because it customarily operates all or a functionally distinct occupation within its business only during a regularly recurring period or periods of less than 20 weeks in a calendar year due to climatic conditions or the nature of the product or service.

“Seasonal Employee,” an individual who has been employed by a seasonal employer in seasonal employment during a regularly recurring period or periods of less than 20 weeks in a calendar year for all seasonal periods, and has been notified in writing by the employer at the time hired, or immediately following the seasonal determination made by the Commissioner that the individual is performing services in seasonal employment for a seasonal employer and such employment is limited to the beginning and ending dates of the seasonal employment as certified by the Commissioner.

"Seasonal Claimant," an individual who was employed by a certified seasonal employer for less than 20 weeks in a calendar year and who has filed a claim for unemployment benefits.

"Seasonal Determination," a certification by the Commissioner that an employer operates all or a functionally distinct occupation within its business during a regularly recurring period(s) of less than 20 weeks in a calendar year because of the nature of the product or service or because of climatic conditions.

"Less than 20 weeks," a maximum of 19 calendar weeks as defined by G. L. c. 151A, § 1(t), plus any additional days of work totaling at least one work day less than the customary work week of the employer as specified on its seasonal application.

C. Principles

There are many jobs and some employers whose operation is dependent upon the season. Not many of those professions or employers will be eligible for DUA's certified seasonal status.

Certified seasonal status exempts the use of base period wages associated with seasonal work in establishment of a UI claim, provided certain steps are taken by the employer.

An employer or an occupation may be certified as seasonal by DUA's Revenue Department. An employer in operation for less than 20 weeks in a calendar year, such as one selling only holiday-specific merchandise in the weeks leading up to the holiday, such as Halloween, may be certified. For example, the Laughing Gull Convenience store in Manchester-by-the-Sea is a certified seasonal business. The dates of the certification are Saturday, May 4th through Saturday, September 14th. This is 19 full weeks and one day – Saturday, May 4th.

If an employer is certified, all employees who file a claim outside of the dates of the certified season are subject to the wage exclusion of § 24A(a). An employer who operates for more than 20 weeks may request that a functionally distinct occupation, such as a lifeguard, be certified. In this case, the claimant who performed a certified job will be subject to the wage exclusion if they file for UI benefits outside of the season.

DUA's Revenue department will certify either the employer or the occupation if the employer meets all of the following criteria:

- Less than 20 weeks:
    - The entire business will be in operation for less than 20 weeks in a calendar year; or

- The employer has a functionally distinct occupation within the business that is seasonal because the assigned duties or activities as a whole are identifiably distinct under the usual and customary practice of the industry and such duties or activities will be performed during a period of less than 20 weeks in a calendar year due to the climate or the nature of the product or services. Mere addition of staff to perform the same or similar duties as those performed outside the season would not be considered seasonal.

- Written application:

  - An employer seeking seasonal status must submit a written application annually on forms prescribed by the Department of Unemployment Assistance (DUA) at least 60 days prior to the beginning of the season. Such employer shall supply any additional information as may be deemed necessary by the DUA to make such determination. Applications submitted on a date which is less than 60 days from the beginning date of the season shall be denied.

DUA will make a separate determination for each distinct seasonal period and each functionally distinct occupation within that seasonal period. If the determination is a denial of any occupation or application, the employer has the right to appeal within 10 days of the mailing date.

D. Procedures

To determine the exclusion of wages staff must review the seasonal determination issued by DUA. If the employer does not provide this determination with the questionnaire, it can be viewed from FileNet Workplace XT searching by the EAN.

The wages are excluded if all of the following are answered in the affirmative:

- Was the employer or occupation approved for seasonal status?

- Did the claimant file outside of the dates listed on the seasonal determination?

- Is the claimant's job title included in the seasonal determination?

- Did the claimant perform all services for the employer in that job title within the dates of the certified season?

- Promptly after receiving certification, did the employer post notice of its seasonal status, using a form provided by DUA, conspicuously in a sufficient number of places to be viewable by affected seasonal employees?

- DUA provides the required notice to employers when their application is approved. It contains a place for the seasonal employee to sign, and is considered proof of notification if signed by the seasonal employee. Did the employer give the seasonal employee the required written notice prior to hire or immediately following the seasonal determination? The required notice states that:

    - the employee has been hired for a specific seasonal period as certified by DUA; and

    - the employee will be performing services in seasonal employment for a certified seasonal employer; and

    - the employment is limited to the dates of certification as approved by DUA; and

    - if a claim for unemployment benefits is filed and denied or the amount of benefits is reduced because of a seasonal determination, the affected employee may appeal the designation as a seasonal employee under G. L. c. 151A, §§ 39–42.

If any of these requirements for excluding wages is not met, the wages earned shall be used to establish a claim for UI benefits.

For employers who transfer employees from seasonal to non-seasonal work or vice versa the following criteria will apply:

- there must be a break in service between the seasonal and non-seasonal work; and

- the additional work cannot continue in, be part of or connected to the seasonal operation.

DUA will allow for modifications of seasonal certification applications if an employer is able to extend its season, beyond the time frame originally requested, still within the 20-week limitation.

Seasonal certifications do not relieve any employer from filing quarterly wage and employment details. Contributory employers must still pay quarterly contributions on seasonal wages.

Section 5. Receipt of Workers' Compensation

A. Statutes

G. L. c. 151A, § 25(d)

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for—
>
> ***
>
> (d) Any period with respect to which he is receiving or has received or is about to receive compensation for total disability under the workers' compensation law of any state or under any similar law of the United States, but not including payments for certain specified injuries under section thirty-six of chapter one hundred and fifty-two; or payments for similar specified injuries under workers' compensation laws of any state or under any similar law of the United States.

G. L. c. 151A, § 1(a)

> …[I]f a claimant received weekly compensation for temporary total disability under the provisions of chapter one hundred and fifty-two or under a similar law of the United States, not including payments for certain specified injuries under section thirty-six of said chapter one hundred and fifty-two or payments for similar specified injuries under workers' compensation laws of any other state or under any similar law of the United States, for more than seven weeks within the base period, as heretofore defined, his base period shall be lengthened by the number of such weeks, but not to exceed fifty-two weeks, for which he received such payments; and provided, further, that no extended base period shall include wages upon which benefits were established and paid with respect to a prior benefit year claim.

G. L. c. 152, § 36B(2)

> (2) Any employee claiming or receiving benefits under section thirty-five [of c.152] who may be entitled to unemployment compensation benefits shall upon written request from the insurer apply for such benefits. Failure to do so within sixty days after written request shall constitute grounds for suspension of benefits under said section thirty-five. Any unemployment compensation benefits received shall be credited against partial disability benefits payable for the same time period, or, if for a period of time for which partial disability

benefits have already been paid, shall be credited against any future partial disability benefits which are or may become payable.

B. Principles

Under the provisions of § 25(d), a claimant is ineligible for unemployment insurance while receiving total disability benefits for workplace injuries under the Workers' Compensation Act (or similar state or federal laws), with the exception of certain injuries settled by lump-sum payments under G. L. c. 152, § 36. The Workers' Compensation Act, G. L. c. 152, is administered by the Department of Industrial Accidents.

A partially disabled claimant, on the other hand, may collect unemployment benefits, but the UI benefits reduce the amount of partial workers' compensation disability benefits on a dollar-for-dollar basis. In other words, unemployment benefits are intended to be the primary insurance payment, while partial workers' compensation disability benefits provide supplementary coverage.

Workers' compensation benefits are not wages and are not taxable; therefore, they should not be reported as partial earnings for UI purposes.[24]

If during the base period, an individual received more than seven weeks of total disability benefits under workers' compensation or a similar statute, then files a UI claim, the base period will be lengthened by the number of weeks such benefits were received up to a maximum of 52 weeks. This allows a claimant who received total disability for more than seven and up to 52 weeks to capture base period wages from the period of employment preceding the injury. See Chapter 3-Monetary Determinations.

C. Procedures

1. Total disability

If a claimant is receiving payments for total disability, the following information is needed:

- The date the claimant began receiving total disability payments;
- The name of the Workers' Compensation Insurer, the insurance adjuster, and the insurance company's address and phone number. Adjudicators should ask claimants for a copy of the insurer's notification of payment (Form 103). Form 103 will say when the workers' compensation award starts and ends, and whether the award is for temporary or permanent total, or partial disability.

[24] Note: this is different than for UI benefits, which are considered taxable income.

2. Partial disability

If a claimant is receiving payments for partial disability, the following information is needed:

- The date the claimant began receiving partial disability payments.
- A statement that the claimant is able to work on at least a part-time basis (with a reasonable accommodation, if necessary). A statement from a health-care provider is unnecessary here because the Workers' Compensation Insurer has already determined that the claimant is able to perform some type of work. If the claimant alleges a complete inability to work, then the claimant is subject to disqualification under § 24(b) for not being capable of working.

D. Circumstances and polices

1. Disqualification for total disability payments

A claimant who receives workers' compensation for temporary or permanent total disability is disqualified under § 25(d) for the period covered by the payments, regardless of whether the payments are less than the benefit rate. A claimant who receives workers' compensation for total disability for four or more days in a seven-day week should be disqualified for that week under § 25(d).

2. UI benefits for part of week of total disability

When workers' compensation payments either begin or end during a week, and the claimant is otherwise eligible for the remainder of the week, deduct the dollar amount of 1/7th (14.3%) of the workers' compensation from the weekly benefit rate for each day of the week involved, including Saturday and Sunday. The weekly workers' compensation payments are applicable to a seven-day week. This is important to remember if the workers' compensation payments begin or end mid-week.

3. Specific compensation award

Lump sums may be paid under the Workers' Compensation Act in two different circumstances.

- **G. L. c. 152, § 36: Lump sums for specific injuries**

A claimant who receives a lump sum payment for a specific injury under G. L. c. 152, § 36 is not subject to disqualification for UI under § 25(d). But the adjudicator must investigate whether the injury also renders the claimant unable to look for and perform work. Note that a claimant with a disability

must be able to work on at least a part-time basis (with a reasonable accommodation where necessary), be available for such work, and be conducting an active search for suitable work.

- **Lump sum paid in settlement of claim**

A lump sum, or a portion of a lump sum, ordered by an administrative judge or agreed to by the parties, paid for specific weeks of total disability, past, current or future, will result in a disqualification for UI for those weeks.

A claimant who receives a lump-sum settlement for workers' compensation that does not apply to a specific period will not be subject to disqualification, including the week during which the payment was made.

Note: Under G. L. c. 152, § 48(4), the acceptance of lump sum workers' compensation settlement in return for the right to claim future weekly workers' compensation benefits creates a presumption that the employee is physically incapable of returning to work with the employer for a period of one month for each fifteen hundred dollar amount included in the settlement. No presumption exists regarding the employee's capability of working for any other employer. The adjudicator must engage in fact finding to determine whether the claimant is physically capable of working on at least a part-time basis (with a reasonable accommodation if necessary). If not, then the claimant is subject to disqualification under § 24(b).

4. Benefits payable during pending workers' compensation claim

For UI purposes, there is no workers' compensation issue during the pendency of an application for workers' compensation. But the pendency of a workers' compensation claim gives rise to a capability issue. If the claimant is paid UI benefits and is sent a Notice of Approval on the capability issue, the adjudicator must inform the claimant, in the '*Additional Notes to be Printed on the Claimant's Determination,*' of the claimant's obligations to:

- Notify DUA if and when the claimant receives a payment in settlement of the claim; and

- Reimburse DUA for the overpayment, if disability payments are subsequently approved retroactively.

Section 6. DUA training opportunities: Section 30

A. Statute and regulations

1. Statute

G. L. c. 151A, § 30(c)

(c) If in the opinion of the commissioner, it is necessary for an unemployed individual to obtain further industrial or vocational training to realize appropriate employment, the total benefits which such individual may receive shall be extended by up to 26 times the individual's benefit rate, if such individual is attending an industrial or vocational retraining course approved by the commissioner; provided, that such additional benefits shall be paid to the individual only when attending such course and only if such individual has exhausted all rights to regular and extended benefits under this chapter and has no rights to benefits or compensation under this chapter or any other state unemployment compensation law or under any federal law; provided, further, that such extension shall be available only to individuals who have applied to the commissioner for training no later than the twentieth week of a new or continued claim but the commissioner shall specify by regulation the circumstances in which the 20-week application period shall be tolled and the circumstances under which the application deadline may be waived for good cause; provided, however, that such circumstances shall include an individual's need to address the physical, psychological and legal effects of domestic violence, as well as any period in which economic circumstances permit the provision of extended benefits or any other emergency benefits funded in whole or in part by the federal government; provided, further, that the claimant shall begin training in the first available program which is a reasonable distance from the claimant's residence, as determined by the commissioner; provided, further, that the commissioner, in his discretion, may extend the period once for not more than two weeks for any applicant whose initial application is denied; provided further, that, if the claim for regular benefits was denied and the reversal of said denial did not occur until after the thirty-first week of the claimant's benefit year, the claimant shall not be barred from applying for and commencing training, even if the benefit year has expired, so long as the claimant applies for training within 21 weeks of the notice of reversal and commences training with the first available program; and provided, further, that any benefits paid to an individual under the provisions of this paragraph which would not be chargeable to the account of any particular

employer under the provisions of section fourteen shall be charged to the solvency account.

An individual eligible to receive a trade readjustment allowance under Chapter 2 of Title II of the Trade Act of 1974, as amended, shall not be eligible to receive additional benefits under this section for each week the individual receives such trade readjustment allowance.

An individual eligible to receive emergency unemployment compensation, so-called, under any federal law, shall not be eligible to receive additional benefits under this section for each week the individual receives such compensation.

The department shall provide each claimant with written information regarding eligibility for benefits under this section in the claimant's primary language, as required under section 62A, including a notification that a claimant shall submit any application for benefits under this section no later than the twentieth week of a new or continued claim unless the period is tolled by regulation or waived for good cause.

G. L. c. 151A, § 24(c)

…

An individual who is certified as attending an industrial retraining course or other vocational training course as provided under section thirty shall be deemed to be available for work under clause (b) of the first paragraph of this section.

…

2. Regulations

Applicable regulations can be found at 430 Code Massachusetts Regulations (Code Mass. Regs.) § 9.00 et. seq.

3. Principles

Chapter 151A, § 30(c) (Section 30, or § 30) allows eligible claimants to receive UI benefits while they are in approved training to obtain employment. Claimants who are approved for Section 30 training need not meet availability

requirements under § 24(b) of the law and are exempt from work search activities while attending approved training.[25]

A claimant may participate in only one § 30 training program in a benefit year. unless circumstances beyond the claimant's control make participation or continued participation in the original program impossible. If such circumstances cause the claimant to apply for a new program, the new application shall be deemed to have been filed on the date the original, complete application was filed.[26]

A basic skills training program, however, may be combined with another approved training program, and shall constitute one program.[27]

Claimants who are approved under § 30 for training that occurs while they are collecting regular UI benefits are not required to meet availability, worksearch, and suitable work requirements while attending training and collecting regular benefits.[28] This is called a "Section 30 waiver" because the worksearch and able and available requirements are waived.[29]

Under certain circumstances discussed in more detail below, some claimants may be approved under § 30 for up to 26 additional weeks of benefits after having exhausted regular UI benefits. These additional Section 30 benefits are also known as "RED" (retraining extended duration) benefits. Depending on the start date and duration of the training program, a Section 30 application may be approved for a Section 30 waiver only, or additional Section 30 (RED) benefits and a Section 30 waiver.

So, there are generally two categories of approvable § 30 applications, depending on the duration of the training course:

- Claimants seeking **only a waiver** of availability, work search, and suitable work requirements while collecting regular UI benefits and attending approved training; and

[25] G. L. c. 151A, § 24(c) and 430 Code Mass. Regs. § 9.06(2).

[26] 430 Code Mass. Regs. § 9.05(8).

[27] *Id.* Basic skills are defined in 430 Code Mass. Regs. § 9.02 as: ABE (adult basic education), ESOL (English for speakers of other languages), or High School Equivalency.

[28] Under 430 Code Mass. Regs. § 9.06(1), if a claimant finishes approved § 30 training or ceases to attend training, he or she will be entitled to any remaining regular UI benefit credit, if otherwise eligible.

[29] G. L. c. 151A, § 24(c).

- Claimants seeking **up to an additional 26 weeks** of state unemployment benefits, also referred to as RED benefits, if their training extends beyond their regular UI entitlement.

B. Waiver of availability, work search, and suitable work requirements only

Although claimants may apply for a waiver of worksearch, availability, and suitable work requirements in order to attend training at any time during their benefit year,[30] the training program must be approved and the claimant must begin attending the program before the end of the benefit year **unless:**

(a) Federal extended benefits are in effect; or
(b) A determination denying UI benefits is reversed, and UI benefits are awarded to a claimant by the Hearings Department, the Board of Review, or a court after the 31st week of the claimant's benefit year, in which case the claimant's application period begins the week after the notice of such reversal is sent to the claimant. In these circumstances, the claimant may apply for and commence training even if the benefit year has expired, as long as the claimant applies for training within 21 weeks of the notice of the decision awarding benefits and begins training in the first available program.

1. Eligibility of claimant– 430 CMR § 9.03

In order to receive approval to attend schooling/training while collecting state UI benefits, the following requirements must be met:

- The claimant must be otherwise eligible for and be receiving UI benefits because of a determination or a decision issued under G. L. c. 151A, §§ 39-42;

- The claimant must be permanently separated from the claimant's primary employment, which includes having been laid off with no or an indefinite recall date, but need not be separated from part-time employment, whether subsidiary or obtained in the lag period or benefit year;

[30] The application deadlines outlined in § 30(c) only applies when claimants are seeking up to 26 weeks of additional § 30 (RED) training benefits. Claimants may apply for and be approved for the § 30 waiver of worksearch, availability, and suitable work requirements at any point in the benefit year. If such claimants have not exhausted regular benefits and are otherwise eligible for § 30, they may get the benefit of the waiver under § 24(c) even if they have missed the deadline (including exceptions to the deadline) for applying for additional (up to 26 weeks of) training benefits.

- The claimant must be unlikely to obtain suitable employment based on the claimant's most recently utilized skills, or have been separated from a declining occupation, or have been separated due to a permanent reduction of operations; **except**

    - The claimant need not show that he or she will be unlikely to obtain suitable employment based on the claimant's most recently utilized skills if the claimant is:

        - participating in a Workforce Innovation and Opportunity Act (WIOA) approved program;

        - in need of basic skills training, or any other training in combination with basic skills;

        - separated from a declining occupation; has skills that have been rendered obsolete due to technological change or lack of demand for those skills in the work search area; or is unemployed as a result of a permanent reduction in force and is training for a demand occupation; or

        - disabled and has been rendered unable to perform the essential functions of the prior occupation.

- The claimant must possess sufficient aptitude and skill to successfully complete the program. (Individuals who do not speak English or who require remedial education must be approved for E.S.O.L. or A.B.E. or other basic skills courses to facilitate their participation in further training and employment. See 430 Code Mass. Regs. § 9.03(5).)

If all of the above requirements are met, the claimant may be eligible to receive a waiver of the availability, UI work search, and suitable work requirements while attending training that meets the training program approval criteria set forth in the next section.

2. Approval of training program– 430 CMR § 9.04

A training program may be approved if it:

- Prepares claimants for marketable skills in a demand occupation.

- Is full-time—at least 20 hours per week[31] of supervised class for vocational/industrial training or at least 12 credits for each semester of

[31] A claimant in need of English as a Second Language (ESOL) training may have the 20-hour requirement waived if there is no program consisting of at least 20 hours per week of classroom

a college program, or the equivalent. A winter or summer college session that is shorter than a traditional semester or term may be the equivalent of full-time even though it is less than 12 credits. If the number of credits is equal to or greater than the number of weeks in the session, the session can be considered full-time.

- Will be completed in two calendar years (with a three-year maximum limit if the program combines up to one year of basic skills plus two or more years vocational training) of the date the claimant's application is approved or the claimant starts training, whichever is later,[32] except:
    - if the program is an academic degree program and the claimant has already completed some of the required courses, consider only whether the claimant will complete all the remaining requirements within two years of the date the application is approved.
    - if the program combines basic skills with vocational or industrial training, the program must be completed in three years, unless a reasonable accommodation for disability requires a longer time frame.
    - if a claimant is approved for an apprentice training program which contains substantial periods of work that interrupt the classroom training. Note: the basis for the claimant's UI claim cannot be a lay-off from the employer with whom the claimant-apprentice is in training if the "layoff" is only for the purposes of attending classroom training. Rather, the claimant-apprentice must have an independent claim for UI benefits.
- Vocational training programs must meet applicable job placement rates in training related employment for graduates. The applicable job placement rate depends on the unemployment rate.
    - If the Massachusetts unemployment rate is 7.0% or lower, the course placement rate must be at least 70%.
    - If the Massachusetts unemployment rate is between 7.1% and 8.0%, the course placement rate must be at least 60%.
    - If the Massachusetts unemployment rate is 8.1% or higher, the Director shall determine a lower, appropriate placement rate.

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training within a reasonable distance of the claimant's residence. 430 Code Mass. Regs. § 9.04(2)(b)3.

[32] If the claimant's Section 30 application is ***not*** approved, the two years is counted from the date the application is denied, plus two weeks, because the claimant has two weeks after a denial to submit a revised application.

- The Director may approve a program with no placement rate if the program is needed to address an acute workforce need. The program will subsequently have to show that it meets the approval criteria in order to continue to be an approved program.

- The training provider has paid all contributions, payments in lieu of contributions and interest and penalty charges due DUA.

These placement rates may not apply to colleges, including community colleges. Where the claimant can complete a bachelor's or associate's degree within two years, colleges do not need to meet the placement requirements. Certificate and non-degree programs offered by colleges must still meet the placements requirements. Adjudicators should consult the DUA Integration Unit or UIPP as needed.

Also, *any* training approved under the Workforce Innovation and Opportunity Act (WIOA) will be deemed approved training under 430 Code Mass. Regs. § 9.04(2).

C. Additional training benefits- up to 26 weeks (RED benefits)

1. General

Claimants who are eligible for training under § 30 may be eligible for extended UI benefits. A claimant may be eligible for up to 26 additional weeks of benefits, known as retraining extended duration (RED) benefits, if the following conditions are met:

- The claimant applies for training benefits within the claimant's first twenty compensable weeks or within a tolled or extended period;

  Note: The regulations specify how the weeks are to be counted. Only weeks where the claimant is eligible, has certified, and has received a payment count toward the 20-week period. So, for example, the week in which the claimant is issued the initial check is counted as week one. If the claimant stops claiming, the count of the weeks ceases, and does not resume until the claimant is eligible, has certified, and has received a payment. But, regardless of the count of the weeks for the claimant to apply for RED, the claimant may not apply beyond the end of the benefit year, unless the claimant independently falls into one of the exceptions[33] relating to applying for or commencing training after the end of the benefit year.

[33] The exceptions are if there is a federal extension of benefits, or a denial of benefits has been reversed by Hearings, the Board of Review, or a court. See 430 Code Mass. Regs. § 9.05(6)(c) and (e).

- The claimant meets the criteria for § 30 training benefits;
- The training program is approved or approvable;
- The claimant begins training in the first available program that is affordable for the claimant or for which funding is available and that is located within a reasonable distance from claimant's residence.

The additional up to 26 weeks of RED benefits will be paid only while the claimant is attending approved training and after the exhaustion of all Extended Benefits, Emergency Unemployment Compensation or other federal extended unemployment benefits.

A claimant is not relieved of the work search and availability obligations until the claimant is (1) approved for training and (2) has commenced the training. So, a claimant who begins attending a training program prior to final approval must meet the requirements for work search and availability for the period of time between the starting date of the program and the date of final approval. The same rule applies to a claimant who has received approval for training but has not yet commenced the program.

To maintain continued eligibility for training benefits, the claimant must continue in enrollment, be in regular attendance, and make satisfactory progress in the approved program.

2. Tolling and waiver for good cause of the twenty week application period – 430 CMR § 9.05(6) and (7)

The twenty-compensable-week period during which a claimant may apply for an extension of up to 26 weeks of training benefits shall be **tolled** (extended) under the following conditions:

- If the training program is unable or refuses to reasonably accommodate a qualified individual with a disability under the ADA, the 20 compensable week period shall be tolled from the date the claimant filed a complete § 30 application until the date the claimant was notified of the refusal or failure by the training provider;[34]
- If the training program is denied and the claimant's 20-week application period for applying for training will expire in fewer than two weeks, or has expired, the claimant is entitled to one extension of two weeks from the date the denial of the program is sent to the claimant to re-apply for qualifying training;

[34] 430 Code Mass. Regs. § 9.05(6)(a).

- If the claimant receives a decision denying UI benefits, and that decision is later reversed by hearings, the Board of Review, or a court, the 20-week application period commences the week after the notice of the reversal is sent to the claimant. If the decision is made after the 31st week of the benefit year, the claimant shall have 21 weeks to apply after the notification of reversal is sent, even if the benefit year has expired. Once the benefit year has expired, and the claimant can no longer certify and receive payment for regular benefits, the 20-week period will be counted by calendar weeks.

- If DUA failed to provide written information about the training benefits program as required by law, including notification in the claimant's preferred language,[35] or DUA or its agents (including DCS), gave the claimant misinformation that caused the claimant to miss the 20-week deadline, the 20-week period shall be tolled until the date the claimant learns of the eligibility requirements, including application deadlines;

  Note: In the case of misinformation, the claimant must accurately identify the date and source of the information in order to obtain the benefit of tolling.

- During periods in which extended or emergency unemployment benefits funded in whole or in part by the federal government are in effect, the 20-week period shall be tolled;

- If the claimant is not permanently separated at the time of filing the unemployment claim but becomes permanently separated during the benefit year, the 20-week period shall commence on the date of the permanent separation;

- If a claimant is unable to seek, apply for, or attend training because of the need to address the physical, psychological, or legal effects of domestic violence, the 20-week period shall commence or resume on the date the claimant becomes able to seek, apply for, and attend training;

- If a claimant has been separated from a declining occupation, or has been involuntarily and indefinitely separated as the result of a permanent reduction in operations and is training for a high demand occupation, the 20–week period shall be tolled.

[35] 430 Code Mass. Regs. § 9.05(6)(d). This requirement is met when claimant have been sent "*A Guide to Benefits and Employment Services for Claimants*" in their primary language. The guide contains information about Section 30.

- DUA must provide information on § 30 to claimants in their primary language. This requirement is met when claimants have been sent "*A Guide to Benefits and Employment Services for Claimants*" in their primary language. The guide contains information about § 30.

The 20-week period may be **waived** for good cause if circumstances beyond the claimant's control prevented the application from being filed within the 20 week period.[36] In contrast to tolling, waiver allows for applications to be received and approved under certain circumstances, regardless of the expiration of the 20 week period. Examples of good cause reasons for missing the 20 week deadline include, but are not limited to:

- The claimant did not understand the deadline due to illiteracy, mental disability, or limited English proficiency in a language other than those DUA must give notice in by statute;
- Natural catastrophe, such as fire, flood, or hurricane;
- Death or serious illness of an immediate family or household member;
- The claimant's training provider failed to act in a reasonably prompt manner; and
- DUA or its agents (including DCS) discourages the claimant from applying for training.

A waiver for good cause may not be granted beyond the end of the benefit year, unless there is an independent basis for an extension of benefits beyond the end of the benefit year – for example, a federal extension of benefits, or a reversal of a denial of benefits by hearings, the Board of Review, or a court.

D. Procedures

DUA is required to provide each claimant with written information regarding eligibility for training benefits, including that, in order to be eligible for up to an additional 26 weeks of benefits, a § 30 application must be filed within the first 20 compensable weeks after receipt of such information or within an extended filing period. This requirement is met when claimants have been sent "*A Guide to Benefits and Employment Services for Claimants*" in their primary language. The guide contains information about § 30.

1. Complete Application For Course – 430 CMR § 9.05(5)

If a claimant indicated that they are in school or training during their initial claim, or if the claimant requests a § 30 application, a Section 30 application

[36] 430 Code. Mass. Regs. § 9.05(7).

(questionnaire) is sent to the claimant. The application will be sent via electronic mail or regular mail, depending on which method the claimant has chosen to receive communications from DUA. Or, a claimant can print a § 30 application at any time from their UI Online account. Claimants must complete their section of the application, and bring it to their school for completion of the school section. The return address is on the application.

Application for approved training under § 30(c) must be made in writing on a form provided by DUA.

An application will be deemed "complete" at the time it is filed with DUA and contains all the information the application asks the claimant to provide.[37]

Any training approved under the Workforce Innovation and Opportunity Act (WIOA) is deemed an approved training program.[38]

2. Application approval prior to start date of course – 430 CMR § 9.05(3)

Application approval shall be deemed preliminary prior to the start of a course. Final application approval occurs when the claimant attends the course and is otherwise eligible for benefits.

3. Attending training prior to approval of application – 430 CMR § 9.05(4)

A claimant who begins attending a training program before his or her participation in the program is approved, continues to be subject to the requirements of G. L. c. 151A, §§ 24(b) and 25(c) until the approval is given.

4. Claimant doesn't begin training (funding issues)

If a claimant has been approved for training but does not enter training on the original start date due to lack of anticipated funds, the claimant must re-apply for course approval when funding is available or choose another course or training program. A new application must be submitted within the first twenty compensable weeks of a claim (unless the 20-week period has been tolled or extended) for entitlement to an extension of benefits. If the subsequent application is submitted after the twentieth week, DUA will waive the § 24(b) and § 25(c) requirements while the claimant is in the course even though the 26 week extension will not apply.

5. Claimant doesn't begin training (other reasons)

[37] 430 Code Mass. Regs. § 9.05(5).

[38] 430 Code Mass. Regs. § 9.04(2)(f).

A claimant may participate in only one training program in a benefit year.[39] But if a claimant is approved for training and fails to begin the training program for a compelling reason beyond the claimant's control, the claimant may be approved for another program. For example, the course or program may be cancelled or the location changed so the course is no longer appropriate for the claimant, or the claimant may develop a serious sudden health problem that makes it impossible for the claimant to attend the training. Because the claimant never participated in the program, the claimant may be approved for another program. If the original application was timely filed, then the second application also will be considered timely filed.

6. Leaving part-time work to enter Section 30 training

This is a separation issue, not one of eligibility under Section 30. See Chapter 7- Voluntary Leaving.

7. Leave of absence from part-time work to enter Section 30 training.

This is a total unemployment issue, not one of eligibility under Section 30. See Chapter 9- Total and partial unemployment.

8. Leaving work obtained during program breaks

See Chapter 7- Voluntary leaving.

9. Training breaks of less than three weeks' duration – 430 CMR § 9.07

Claimants may be paid benefits during the following breaks if they were attending training immediately prior to the break and will be in attendance immediately after the break:

(1) Pre-scheduled breaks within a semester, or holidays or other purposes.
(2) Semester or other similar breaks that do not exceed three weeks.

10. Breaks of more than three weeks

A claimant who has not exhausted regular or extended benefits, who is attending an approved training program, may receive UI benefits from the original benefit credit during a break of more than three weeks, if otherwise eligible. A claimant who has exhausted all other benefits and is receiving Retraining Extended Duration (RED) benefits may not receive those benefits for any break period of more than three weeks.

11. Continued eligibility for regular UI benefits after course completion

[39] 430 CMR 9.05(8)

If an otherwise eligible claimant has a remaining regular UI benefit credit and the benefit year has not expired, the remaining benefits are potentially payable.

12. Absence from training program

Eligibility for benefits while in approved training is dependent upon continued attendance at the training course. A claimant who is absent from training due to illness or disability may receive approved illness for not more than three weeks within the benefit year, including any weeks of approved illness paid prior to entry into the training period. See Chapter 4- Able, available, and actively seeking work.

A claimant in approved training who is absent for three or more days in a week and is not eligible for a week of approved illness, is not eligible for benefits for the week and is subject to disqualification under § 30(c) and § 24(b).

13. Claimant discontinues school prior to course completion

The continued eligibility for benefits of a claimant who discontinues attendance at a previously approved Section 30 training program must be reviewed.

14. Resolution of pending separation issues

When a claimant has been denied benefits and has appealed the determination or decision, the separation issues must be resolved before the claimant's entitlement to training benefits can be considered. But if a claim is approved, the claimant is entitled to participate in a Section 30 approved training program even if there is an employer appeal pending on a separation or other eligibility issue.

E. Section 30 – Miscellaneous provisions

1. Employer charges

RED benefits are charged to the Solvency Account, if the employer is a contributory employer. Reimbursable employers will be liable for the full amount. If there are both contributory and reimbursable base period employers, the reimbursable employer will be liable for a portion of the RED benefits. See Chapter 3- Monetary determinations.

2. Residue payment

The residue of claimant's benefit credit can be combined with the first RED payment (not to exceed the claimant's weekly benefit amount).

3. EB benefits

When EB (state extended benefits) is "on," EB benefits will be payable before Section 30 Retraining Extended Duration benefits (RED).

4. UCFE And UCX claims

On unemployment compensation for Ex-service members (UCX) and unemployment compensation for Federal employees (UCFE) claims, RED benefits are charged to the federal employer. (See Chapter 10- Federal programs affecting UI eligibility.) Therefore, if payment on UCX and UCFE claims is ever stopped due to lack of federal funds, RED benefits would stop.

5. Trade Adjustment Assistance (TAA) eligible claimant

A trade adjustment assistance (TAA)[40] eligible claimant who is exhausting regular UI and wishes to apply for training may not apply for § 30 RED benefits. The claimant may receive TAA training approval and apply for basic Trade Readjustment Allowances (TRA). [41] If still in approved training after exhausting basic TRA, the claimant may apply for additional weeks of TRA benefits.

After exhausting any basic and additional TRA to which the claimant was entitled, the claimant may then apply for § 30 RED benefits if still in training and the benefit year has not expired. Very few claimants, however, are expected to qualify for Section 30 benefits after exhausting basic and additional weeks of TRA because their benefit year will usually have expired by then.

[40] TAA is a set of federal programs, one of which provides reemployment services for workers.

[41] Trade Readjustment Allowances are income support payments to individuals who have exhausted Unemployment Compensation and whose jobs were affected by foreign imports as determined by a certification of group coverage issued by the Department of Labor.