Chapter 6: Separations

Section 1. Determining whether a separation is a discharge or a quit.

Sometimes, the claimant and the employer disagree about the nature of the separation or, even though there is no dispute, the facts raise a question whether what appears to be a quit is really a discharge or vice versa. The adjudicator must find the facts needed to determine the nature of the separation and then adjudicate the claim using the applicable standard.

If the parties disagree about the nature of the separation, the burden of proof on that issue is on the employer. For example, if the employer says that the claimant quit and the claimant alleges a discharge, the employer has the burden of establishing that the claimant quit. Otherwise, the separation must be treated as a discharge. If it is concluded that the claimant quit, then the claimant has the burden of establishing that the quit was not disqualifying. If it is concluded that the separation was a discharge, then the employer has the burden to show that the discharge was for disqualifying reasons. For a more detailed discussion of the burden of proof, see Chapter 1 - Adjudicator responsibilities.

A. Circumstances and policies

1. Coerced resignation

When an employer gives an employee the choice between resigning and being discharged, the employee's decision to resign should be treated as a discharge.

2. Discharge prior to effective date of resignation

If an employee gives the employer notice of leaving work as of a future date, and as a result, the employer discharges the employee before the employee's intended last day of work, the adjudicator must issue two determinations if the effective date of the claim falls before the intended last day of work:

- The first determination, covering the period between the discharge and the effective date of the resignation, should be adjudicated as a discharge under § 25(e)(2).
- The second determination, covering the period beginning on the effective date of the resignation, should be decided as a quit issue under § 25(e)(1).

Note: if the claimant is discharged during the notice period for any reason other than having given notice, then the separation should be adjudicated as a discharge under § 25(e)(2) with only one determination.

3. Separation from work – continued employment beyond effective date of resignation

After the claimant informs the employer of an intention to leave employment, if the claimant accepts an offer by the employer to continue employment for a definite

period beyond the claimant's originally-intended separation date, and if the claimant leaves work at the agreed-upon later date, then the separation should be analyzed as a quit under § 25(e)(1).

4. Failure to exercise right to bump

A claimant employed under a union contract that includes the right, in the event of a layoff, to "bump" a worker with less seniority, who chooses to take a layoff, or remain laid off, rather than exercise this bumping right, is considered to have quit under § 25(e)(1). Consider whether the position that the claimant had a right to bump into was suitable. (See Chapter 5 - Suitable work.)

5. Failure to return from leave or suspension

If at the end of a leave of absence or suspension a claimant fails to return to work, the separation should be adjudicated as a quit under § 25(e)(1). But if the claimant is not allowed to return, the separation should adjudicated as a discharge under § 25(e)(2). (See Chapter 8 – Discharge, suspension, and conviction.)

6. Leaving in anticipation of discharge

If a claimant leaves work believing that a discharge is imminent, then it must first be determined whether the claimant's belief was reasonable and accurate.

If the claimant's belief that discharge was imminent was unreasonable, then the claimant is deemed to have initiated the separation, and it should be analyzed as a quit under § 25(e)(1) to determine good cause and whether the claimant took reasonable steps to preserve employment.

If the claimant's belief that discharge was imminent was reasonable, analyze whether the discharge would have been disqualifying. If the discharge would have been disqualifying, the claimant left without good cause attributable to the employer. But if the discharge would have been non-disqualifying, then the claimant quit with good cause attributable to the employer.

7. Employer invites volunteers for layoff

Sometimes an employer decides to reduce its workforce and invites volunteers to agree to be laid off. If the adjudicator finds that the claimant was one of those asked to volunteer, did volunteer, and was not offered a financial incentive, then it should be determined that the claimant was laid off for lack of work, which is a non-disqualifying separation under § 25(e)(2). (Note: an employee who must sign a release of claims to receive severance is not considered to have received a financial incentive.)

8. Leaving in anticipation of layoff; financial incentive

Employers sometimes offer financial incentives to induce workers to accept a layoff or to retire. If the claimant accepted a financial incentive believing that the alternative was being laid off and the adjudicator determines that the claimant's belief was reasonable or that the employer created and failed to dispel uncertainty regarding the claimant's job security,[1] then the separation is a non-disqualifying voluntary leaving for good cause attributable to the employer under § 25(e)(1).[2] To make this determination, the adjudicator needs to consider:

- The terms of the employer's voluntary incentive program.
- The employer's announced criteria for laying off workers if there were not enough volunteers. Examples of possible criteria include length of service, job title, performance evaluations, location, and productivity of job units.
- The claimant's situation in relation to the employer's criteria.
- Any other facts determined to have caused the claimant to accept the offer.

Example 1: The employer announces voluntary lay-off incentives, to be followed by involuntary lay-offs, as needed, by seniority, until the workforce is reduced by 1,000 jobs. The claimant, who has the most seniority in her unit, accepts the voluntary lay-off incentive. The claimant's leaving was not for good cause attributable to the employer because the claimant, who had more seniority than anyone else in her unit, did not reasonably believe that she would be laid off. She is subject to disqualification under § 25(e)(1).

Example 2: The employer announces voluntary lay-off incentives, to be followed by involuntary lay-offs, as needed, until the workforce is reduced by 1,000 jobs. The employer does not disclose what, if any, criteria it will use if involuntary lay-offs are necessary. The claimant is unsure whether his job is in jeopardy, and his attempts to gather information are unsuccessful. When his supervisor volunteers to be laid off, the claimant suspects that his entire unit will be eliminated. The claimant takes the voluntary lay-off with the financial incentive. He is not subject to disqualification under § 25(e)(1) because the employer created and failed to dispel uncertainty regarding the claimant's job security.

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[1] *See State Street Bank & Trust Co. v. Deputy Dir. of the Div. of Employment & Training*, 66 Mass. App. Ct. 1, 11 (2006).

[2] *White v. Director of the Division of Employment Sec*., 382 Massachusetts 596, 597–98 (1981). Accord, *Connolly v. Director of the Division of Unemployment Assistance*, 460 Mass. 24, 25 (2011)

9. Loss of license required for work

"Voluntary," as used in § 25(e)(1), must be understood in light of c. 151A's purpose to provide compensation for those who become unemployed through no fault of their own. So, if a claimant, who engaged in conduct that resulted in the loss of a license required to hold the claimant's job, is fired for that reason, the separation will be treated as a voluntary quit under § 25(e)(1) rather than as a discharge under § 25(e)(2). An example would be the suspension of an individual's driver's license for refusing to take a breathalyzer test where the individual is employed in a job that requires a driver's license.

10. Time-limited employment

If a claimant's job ends because the length of employment was limited by the employer, for example, because the position was only for a set time or for the duration of a particular project, the separation should be considered a lay-off for lack of work under § 25(e)(2). If the time period of the employment was limited by the claimant, it should be determined under § 25(e)(1).

If the claimant voluntarily leaves before the agreed-upon end date, the claimant will be found ineligible under § 25(e)(1) for the remaining weeks in the agreed-upon period. If the claimant left four weeks or less before the agreed upon end date, the claimant is subject to disqualification under § 29(a) and 1(r). Note: to process a disqualification of four weeks or less, choose "suitable work" as the issue type and "refusal of suitable work" as the sub-type.

Note that certified seasonal employment is covered by § 24A. (See Chapter 11 - Special determinations.)

11. No response to recall

Union:

If a claimant employed under a union contract that includes a recall provision fails to return to work when recalled, the separation should be determined under § 25(e)(1), taking into consideration the suitability of the position to which the claimant was recalled. (See Chapter 5 - Suitable work.) If a disqualification results, it is effective as of the date set in the recall for a return to work.

Non-union:

If a non-union member who has been laid off fails to return to work when recalled, the adjudicator must determine whether:

(1) at the time of the layoff, a definite or approximate date of recall had been given; or

(2) the layoff was a seasonal or customary one and the claimant had returned to work following a similar layoff period in the past. If so, then the claim should be determined under § 25(e)(1), taking into account the suitability of the position to which the claimant was recalled.

A recall date can be express, given either in writing or orally, or implied, for example, customary or seasonal. Communications and past practice should be analyzed for whatever light they shed on the understanding of the parties as to recall. If the claimant is disqualified under § 25(e)(1), the disqualification is effective as of the return date set in the recall or by past practice or custom.

Note: If no definite or approximate recall date was given at the time of the layoff, then the claimant was completely separated from employment. The claimant's refusal of a new job offer from the same employer should be determined under the suitability provisions of § 25(c). (See Chapter 5 - Suitable work.) An "offer to apply" does not constitute a job offer.

Note: Where a claimant's Section 30 training application has been approved prior to recall following a seasonal layoff, the claimant is not subject to disqualification for refusing a recall while attending the Section 30-approved training.

Note: The employer must notify DUA in accordance with § 38(c) when the claimant fails to return to work. But this notice—via an employer charge protest, letter, email, or telephone call—does not constitute a "protest" for adjudication purposes. It will be necessary to create a suitable work issue under § 25(c).

12. No call/no show

When the claimant fails to report to work and fails to give notice to an appropriate person the separation determination will be made under § 25(e)(1). This is true even if the employer discharges the claimant under the employer's attendance policy.[3]

13. Injury on the job - regular work not available

After an absence due to an injury on the job, a claimant reports back to work. Although the claimant is now physically able to perform the regular duties of the job, the employer is unwilling to return the claimant to the job because of the previous injury and is unable to furnish other suitable work. Separation under these circumstances is a non-disqualifying discharge for lack of work.

But if the claimant refused to provide the employer with requested medical documentation establishing the claimant's ability to return to work or the need for any accommodations, the separation should be analyzed as a quit. Note: this only applies if

[3] See *Olechnicky v. Director of the Div. of Employment Sec.*, 325 Mass. 660 (1950); see also *Scannevin v. Director of the Div. of Employment Sec.*, 396 Mass. 1010 (1986).

the employer requested medical documentation. The claimant is not required to have produced documentation if the employer did not request it.

14. Change of ownership

If a claimant leaves work because the employer has been acquired by a new owner, it must first be decided whether the separation should be analyzed as a voluntary leaving or as a layoff. If the claimant was given assurances that no changes would be made to the claimant's position, department, or the management team, and the claimant refuses to work for the new ownership, the claimant is considered to have left work voluntarily, and it must be determined whether the claimant established good cause attributable to the employer for voluntarily leaving under § 25(e)(1).

But if the sale or transfer involved a material change to the terms and conditions of the claimant's employment (salary, benefits, responsibilities, location, etc.), the claimant is considered to have been laid off and is not subject to disqualification.

If claimant was offered and accepted a separation package in connection with the change of ownership, see above (Employer Invites Volunteers for Layoff) and (Leaving in Anticipation of Layoff; Financial Incentive).

Section 2. Constructive deduction

The constructive deduction applies when a claimant has had a disqualifying separation from part-time employment following a non-disqualifying separation from contemporaneous, full-time employment.[4]

The constructive deduction is governed by 430 Code Mass. Regs. §§ 4.71–4.78. Where they apply, the regulations reduce, rather than eliminate, the benefits of an otherwise eligible claimant who also has a disqualifying separation from subsidiary, part-time work in the base period or from newly-obtained part-time work in the benefit year. This reduction in benefits—called a constructive deduction—is calculated in accordance with 430 Code Mass. Regs. § 4.78 based on the claimant's average earnings while working for the part-time employer. (See Chapter 9 - Other pay and benefits.)

Note that although the re-qualifying requirement for disqualifications imposed under § 25(e) was increased in 1992 from four to eight weeks with earnings equal to or exceeding the benefit rate on the claim, and interested party employers were similarly redefined as a matter of policy to include employment occurring during the last eight weeks of work, by regulation, constructive deductions are imposed for disqualifying separations occurring during the last **four** weeks of work prior to the filing of the claim.

The reduction in benefits remains in effect until the claimant has earned an amount equal to or greater than eight times the claimant's weekly benefit amount and worked for eight weeks.

If the part-time work was for a fixed period of time, the reduction in benefits remains in effect only until the last week of the fixed period of work.[5]

If a claimant subject to a constructive deduction obtains part-time work or returns to the former part-time work that resulted in the constructive deduction, the constructive deduction is suppressed and the claimant shall be subject only to the earnings disregard (one-third of the weekly benefit amount) while so employed.[6]

A. Definitions[7]

Full-time work is the claimant's most recent primary or principal work.

Part-time work is all work other than the claimant's primary or principal work.

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[4] The constructive deduction was created by case law rather than a statutory change. See *Emerson v. Director of the Div. of Employment Sec*. 393 Mass. 351 (1984). The court held that denying benefits to claimants in such situations discouraged them from seeking part-time work.

[5] 430 Code Massachusetts Regulations § 4.76(2).

[6] 430 Code Massachusetts Regulations § 4.76(3).

[7] These definitions are from the regulations at 430 Code Massachusetts Regulations § 4.73.

Subsidiary, part-time work is employment worked contemporaneously with full-time work.

Newly-obtained, part-time work is employment obtained during the benefit year with an employer other than the one who employed the claimant for the primary employment.

Primary v. subsidiary employment. In some cases, the primary employment will be a full-time job and the subsidiary employment will be a part-time job. Where the claimant does not have a full-time job, however, several criteria must be considered to determine which job is primary and which subsidiary. The number of hours worked, the amount of wages earned, the duration of employment, and the occupation in which the claimant was employed all must be considered.

Full-time v. part-time employment. In determining whether the claimant's most recent work was full-time or part-time, the following factors to be considered in order of their priority are:

- The number of hours spent on the work.
- The wages earned for the week.
- The duration of the claimant's employment with the employer.
- The occupation of the claimant.[8]

This priority list creates a strong presumption that the factors be considered in the order listed. But this is not an inflexible rule. For example, if the claimant earned substantially more from a job at which the claimant worked fewer hours than another job, it may be appropriate to conclude that the higher-earning job was primary.[9]

B. Procedures to determine constructive deduction

A constructive deduction is imposed in any of the following three circumstances:

- The claimant separates from subsidiary, part-time work during the last four weeks of work prior to the filing of the claim, and at the time of the separation knew or had reason to know of the impending separation from the claimant's primary or principal work; or

[8] 430 Code Mass. Regs. § 4.74.

[9] 430 Code Mass. Regs. § 4.74.

- After a non-disqualifying separation from primary or principal work during the last four weeks of work prior to the filing of the claim, the claimant separated for a disqualifying reason from subsidiary, part-time work and then files a claim; or

- The disqualifying separation from part-time work occurs during the benefit year.

Before imposing a constructive deduction on a claimant for having separated from work while knowing, or having reason to know, of an impending separation from the claimant's primary or principal work, the fact-finding must include how the claimant came to be aware of, or reasonably should have been aware of, the impending separation.

Note that if the claimant's subsidiary job is not covered employment under G. L. c. 151A, § 6 (such as work for religious organizations, as a real estate broker, as a poll taker, etc.,) then the claimant is not subject to a constructive deduction for having left the non-covered employment. See Chapter 3 – Monetary determinations.

C. Circumstances and policies

1. Separation from subsidiary job four weeks or less prior to initial claim

Example: A claimant worked for two employers at the same time. He is separated from the primary employment under non-disqualifying circumstances and then from the subsidiary employment under disqualifying circumstances during the last four weeks of employment prior to filing a claim. The claimant is eligible for benefits based on the separation from the primary employment. But the weekly benefit amount will be reduced by the average gross weekly earnings received from the subsidiary employer.

Average earnings will be calculated by dividing gross earnings reported for the most recent completed quarter of the base period by the number of weeks the claimant worked in the quarter. The partial earnings disregard will then be applied to this amount when making the deduction.

2. Separations during the benefit year from subsidiary, part-time work, or newly-obtained part-time work

When the claimant is separated during the benefit year under disqualifying circumstances from either subsidiary base period employment, or newly-obtained part-time employment, earnings reported during the benefit year are used to calculate the amount of the constructive deduction.

The gross earnings paid during the benefit year shall be divided by the number of weeks worked for the subsidiary, part-time employer after the filing of the claim to determine the average part-time earnings.[10]

Example: A claimant worked for two employers at the same time. She left the primary employment under non-disqualifying circumstances and files a claim. Assume the claimant's weekly benefit amount was $240. During the benefit year, the claimant separated from the subsidiary, part-time job under disqualifying circumstances. During the benefit year, the claimant earned $1,000 in 10 weeks at the subsidiary job.

The constructive deduction is calculated accordingly: $1,000 divided by 10 (the number of weeks worked) = $100. Since the claimant's weekly benefit amount was $240, the earnings disregard would be $80 (1/3 of $240). Therefore, $20 (which is $100 - $80) would be deducted from the claimant's weekly benefit amount.

D. Circumstances under which a constructive deduction may permanently or temporarily cease to be imposed

If a claimant subject to a constructive deduction obtains new part-time work or returns to the former part-time work that resulted in the constructive deduction, the constructive deduction is suspended and the claimant shall be subject only to the earnings disregard (one-third of the weekly benefit amount) while so employed.[11] Also, a constructive deduction may permanently or temporarily cease to be imposed when:

- The subsidiary, part-time job was for a fixed period of time, and the time period of the job ends;
- The claimant earns requalifying wages; or
- The claimant files a new claim after separating from an employer subsequent to the constructive deduction employer.

[10] 430 Code Mass. Regs. § 4.78.

[11] 430 Code Mass. Regs. § 4.76(3).

CONSTRUCTIVE DEDUCTION SCENARIOS

	Week 7 BC	Week 6 BC	Week 5 BC	Week 4 BC	Week 3 BC	Week 2 BC	Week 1 BC	Week 1 AC	Week 2 AC	Week 3 AC	RESULT
CASE 1							Separates from primary		Starts new part-time job	Separates from part-time job, disqualifying reason	**Constructive Deduction –** New Emp. in Benefit Year
CASE 2	Works part-time job and primary job						Separates from primary			Separates from subsidiary, disqualifying reason	**Constructive Deduction –** Separated from Subsidiary in Benefit Year
CASE 3		Separates subsidiary – disqualifying reason, knew primary ending					Separates from primary				**No disqualification** - not within last 4 weeks of work
CASE 4				Separates subsidiary, disqualifying reason, didn't know primary ending			Separates from primary				**No disqualification –** didn't know primary ending
CASE 5				Separates subsidiary, disqualifying reason, knew primary ending			Separates from primary				**Constructive Deduction –** knew primary ending, within last 4 weeks of work
CASE 6	Separates primary		Separates subsidiary, disqualifying reason	Claimant performs no work							**Constructive Deduction**
CASE 7		Separates subsidiary, disqualifying reason, knew primary ending	Claimant performed no wage-earning services				Separates from primary				**Constructive Deduction –** knew primary ending, within last 4 weeks of work
CASE 8				Separates subsidiary, disqualifying reason, knew primary ending					Separates primary job – predated to week before		**Constructive Deduction –** knew primary ending, within 4 weeks of effective date of claim

Note: BC = Before Effective Date of Claim; AC = After Effective Date of Claim

Unless otherwise noted, there is a presumption the claimant worked each week.

Section 3. Domestic violence

A. Overview

Benefits should not be denied to claimants separated from work because they or their dependent children were the victims of domestic violence or because of a need to deal with the physical, psychological, or legal effects of domestic violence. Note that this applies only to victims. A claimant who is unemployed as a result of having been accused or convicted of domestic violence was not separated from work for reasons "attributable to domestic violence" within the meaning of c. 151A.

To ensure maximum claimant privacy, confidentiality, and safety, DUA procedure requires that **cases involving domestic violence, once identified, must be referred to the UI Policy and Performance Department**. If during fact-finding, staff obtains information suggesting that the claimant's separation involved domestic violence, the case should be discussed with a supervisor and the issue sub-type changed to "domestic violence." UI Online will transfer the issue to a confidential queue. Staff should also send an e-mail to the UIPP email box, with a copy to the Director of UIPP, containing the claimant ID number, the issue type and sub-type, and a short message explaining the reason the issue sub-type was changed so UIPP staff will know to look for the issue. UIPP staff will finish collecting fact-finding and will issue a determination to the interested parties.

B. Statutes

G. L. c. 151A, § 1(g½)

> (g½) "Domestic violence", abuse committed against an employee or the employee's dependent child by: (1) a current or former spouse of the employee; (2) a person with whom the employee shares a child in common; (3) a person who is cohabitating with or has cohabitated with the employee; (4) a person who is related by blood or marriage; or (5) a person with whom the employee has or had a dating or engagement relationship.
>
> For the purposes of this chapter, abuse shall include (1) attempting to cause or causing physical harm; (2) placing another in fear of imminent serious physical harm; (3) causing another to engage involuntarily in sexual relations by force, threat or duress or engaging or threatening to engage in sexual activity with a dependent child; (4) engaging in mental abuse, which includes threats, intimidation or acts designed to induce terror; (5) depriving another of medical care, housing, food or other necessities of life; and (6) restraining the liberty of another.
>
> For the purposes of this chapter, an individual may demonstrate the existence of domestic violence by providing 1 of the following: (1) a

restraining order or other documentation of equitable relief issued by a court of competent jurisdiction; (2) a police record documenting the abuse; (3) documentation that the perpetrator of the abuse has been convicted of 1 or more of the offenses enumerated in chapter 265 where the victim was a family or household member; (4) medical documentation of the abuse; (5) a statement provided by a counselor, social worker, health worker, member of the clergy, shelter worker, legal advocate or other professional who has assisted the individual in addressing the effects of the abuse on the individual or the individual's family; or (6) a sworn statement from the individual attesting to the abuse. All evidence of domestic violence experienced by an individual, including the individual's statement and corroborating evidence, shall not be disclosed by the department unless consent for disclosure is given by the individual.

G. L. c. 151A, § 14(d)(3)

… Benefits which, in accordance with the provisions of this paragraph, would be charged to an employer's account shall not be so charged but shall be charged to the solvency account in any case where no disqualification is imposed under the provisions of clause (1) of subsection (e) of section twenty-five because the individual's leaving of work with such employer, although without good cause attributable to the employer … was due to domestic violence.

G. L. c. 151A, § 25(e)

No disqualification shall be imposed if the individual establishes to the satisfaction of the commission that the reason for the individual's discharge was due to circumstances resulting from domestic violence, including the individual's need to address the physical, psychological and legal effects of domestic violence.

* * *

An individual shall not be disqualified from receiving benefits under this clause [§ 25(e)] if the individual establishes to the satisfaction of the commissioner that the reason for the individual's leaving work was due to domestic violence, including:

(1) the individual's reasonable fear of future domestic violence at or on route to or from the individual's place of employment;

(2) the individual's need to relocate to another geographic area in order to avoid future domestic violence;

(3) the individual's need to address the physical, psychological and legal effects of domestic violence;

(4) the individual's need to leave employment as a condition of receiving services or shelter from an agency which provides support services or shelter to victims of domestic violence;

(5) any other respect in which domestic violence causes the individual to reasonably believe that termination of employment is necessary for the future safety of the individual or the individual's family.

C. Definitions

1. Domestic violence

The key to identifying violence as domestic violence is the relationship between the perpetrator and the victim. Domestic violence is defined in § 1(g½) as abuse committed against an **employee** or **the employee's dependent child** by:

- a current or former spouse of the employee;
- a person with whom the employee shares a child in common;
- a person who is cohabitating with or has cohabitated with the employee;
- a person who is related by blood or marriage; or
- a person with whom the employee has or had a dating or engagement relationship.

In cases involving domestic violence, the claimant may become separated from employment due to circumstances in which the claimant is the direct victim of domestic violence and must leave work to deal with the physical, psychological, or legal effects of domestic violence, or due to circumstances in which a dependent child is the victim of domestic violence and the claimant must leave work to deal with the effects of domestic violence on the child-victim. (If the relationship does not meet the definition required to find domestic violence, then the separation should be analyzed under § 25(e)(1) or § 25(e)(2), as appropriate, without regard to the domestic violence provisions.)

Fact-finding in these cases will include the gathering of information regarding the nature of the relationship between the claimant and the perpetrator of domestic violence. The claimant's statement must show that one of the five relationships specified above existed between the claimant and the abuser. The extent or duration of the claimant's "cohabitation" or "dating relationship" with the abuser is not a determining factor in these cases. Such relationships may be minimal in some cases. A "dating relationship," for example, may be established with a single date.

2. Abuse

The abuse or effects of the abuse experienced by the claimant or the dependent child can be physical or psychological. As defined by § 1(g½), "abuse" includes:

- attempting to cause or causing physical harm;
- placing another in fear of imminent serious physical harm;
- causing another to engage involuntarily in sexual relations by force, threat, or duress or engaging or threatening to engage in sexual activity with a dependent child;
- engaging in mental abuse, which includes threats, intimidation, or acts designed to induce terror;
- depriving another of medical care, housing, food, or other necessities of life; and
- restraining the liberty of another.

Staff must be aware of the various forms that domestic violence can take, gather relevant information, and contact a supervisor when a separation related to domestic violence is suspected. In some cases, claimants themselves will not necessarily recognize that they are victims of domestic violence or may be reluctant to characterize their situation as such. Whether the claimant's separation from work is attributable to domestic violence must be determined by UIPP staff based on an examination of the facts regarding the separation.

D. Claimant fact-finding

DUA employees must treat with the utmost confidentiality all information provided by the claimant during the fact-finding process. Although UI Policy and Performance will contact the former employer for a statement regarding the circumstances of the separation, information obtained from the claimant relating to incidents of abuse will not be shared with the employer at this time. If either the employer or the claimant appeals a determination, the claimant must be told that the review examiner will not consider an allegation or evidence of domestic abuse unless the claimant agrees to allow DUA to disclose all relevant information to the employer. This agreement may take the form of a signed release or the claimant testifying or introducing evidence regarding domestic abuse, after being appropriately advised, on the record, at the hearing. Once the claimant consents, the employer becomes entitled to copies of all written information and documents to which the employer ordinarily is entitled under § 39(b).

A claimant may provide a statement that contains sufficient information establish that domestic abuse occurred and that one or more incidents of abuse or the physical,

psychological, or legal effects of the abuse caused the claimant to leave work or to be discharged from work. Once facts have been obtained that are sufficient to meet these requirements, further information is not necessary.

Staff should be aware that abuse takes many forms. Factors to be considered when obtaining the claimant's statement of facts:

- The claimant may have been subjected to physical abuse or threats of physical abuse. Others, for example, children, friends, relatives, or even pets, may have been subjected to physical abuse or threats of abuse as a means of intimidating the claimant. In some cases the abuse may be sufficient to cause injury but in others may involve pushing, shoving, restraining, dousing with liquids, or other actions that, while not necessarily causing injury, nevertheless are physically abusive.

- The claimant may have been the subject of intimidating or threatening behavior. Such behavior can involve a wide variety of actions by the abuser, for example:

    - threatening looks or gestures;

    - destruction of property;

    - the display of a gun or other weapon;

    - placing the claimant in danger, for example, reckless driving, abandonment in dangerous or unfamiliar surroundings, etc.; or

    - threats by the abuser to self-harm.

- The claimant may have been subjected to emotional abuse. This can involve humiliating or embarrassing treatment by the abuser, name-calling, or the denigration of friends or relatives.

- The abuser may have attempted to exercise physical or economic control over the claimant by confining the claimant to the home, controlling financial assets, or prohibiting the claimant from going to work, driving a car, using a telephone, or contacting friends and family.

- The abuser may have used the claimant's children to control the claimant's behavior by threatening harm to the children or damage to the claimant's relationship with the children.

E. Documentation not required

Section § 1(g½) provides that individuals may demonstrate the existence of domestic violence by providing:

- a restraining order or other documentation of equitable relief issued by a court of competent jurisdiction;
- a police record documenting the abuse;
- documentation that the perpetrator of the abuse has been convicted of one or more of the offenses enumerated in G. L. c. 265 where the victim was a family or household member;
- medical documentation of the abuse;
- a statement provided by a counselor, social worker, health worker, member of the clergy, shelter worker, legal advocate, or other professional who has assisted the individual in addressing the effects of the abuse on the individual or the individual's family; or
- a sworn statement from the individual attesting to the abuse.

Although the claimant, or even the employer, may present such documentation, it is not required to establish the existence of domestic violence and should be requested only when necessary to rebut other statements or seemingly contradictory facts. Victims of domestic violence often will not have such documentation, or may find it difficult or dangerous to obtain. If readily available, they may be included, along with the claimant's statement, and may help to support the claimant's contention that separation was attributable to domestic violence. Claimants who do not possess such documents should not be asked to obtain them.

F. Benefit charging

If it has been established that a claimant left work due to domestic violence, § 14(d)(3) instructs that benefits otherwise chargeable to a contributing employer's account should instead be charged to the UI solvency account. Similar charge relief is unavailable if the claimant was discharged from work.

Staff should be mindful of this distinction when obtaining the claimant's statement of facts. In some cases, the claimant and employer may have differing perceptions as to the circumstances of the separation from work. The claimant, for example, may attribute the separation to a discharge by the employer while the employer maintains that the claimant left work. This is frequently the case when an absence from work has triggered the separation from employment. See, above (No Call/No Show).

Section 4. Interested party employers

Not all base period employers are interested party (IP) employers. DUA only adjudicates separations from IP employers. For purposes of making an initial determination of eligibility, an IP employer is any employer for whom a claimant worked during the last eight weeks of employment before the effective date of the claim. These eight weeks of work need not be eight consecutive calendar weeks. Nor does the claimant need to have worked full-time in any of the weeks, nor does it have to have been eight weeks of work for the same employer.

All IP employers should be indicated as such in UI Online. For all new and reopened claims, the adjudicator must review the claim to verify that all employers for whom the claimant worked during the last eight weeks of employment are listed as IP employers. All separation issues in the claimant's last eight weeks of employment must have been adjudicated as non-disqualifying separations before any benefits can be paid to the claimant.

The following are exceptions to the eight-week rule:

- If a claimant is on a leave of absence from a base period or re-open employer on an additional claim,[12] that employer is considered an IP employer.
- If a claimant has been suspended from a base period or re-open employer on an additional claim, that employer is considered an IP employer.
- If the claimant is on strike against, or has been locked out by, a previous employer in a still active labor dispute, that employer shall be considered an interested party employer, even though no work may have been performed during the claimant's last eight weeks of work and the claimant may have had subsequent employment.
- A claimant works for an educational institution. During the break between two academic years or terms the claimant works for an employer other than a school system. If the non-school employment ends during the school break and the

[12] The *UI Reports Handbook No. 401*, ETA 5159 defines "additional claim" as "a subsequent initial claim filed during an existing benefit year due to new unemployment and when a break of one week or more has occurred in the claim series due to intervening employment." It also says, "Report these claims only when there has been intervening employment since the last claim was filed. Do not report as additional claims, claims following breaks in series due to illness, disqualification, unavailability, or failure to report for any reason other than job attachment. For each reported additional claim, a record must be maintained of the separating employer, the last day worked, and the reason for separation or unemployment. […] An additional claim is not reportable for the same separation as a previously taken initial claim."

claimant files a new or additional claim, the educational institution may be an IP employer.

- If a claimant is an officer and employee of a corporation, that corporation may still be an IP employer even though no work may have been performed during the claimant's last eight weeks of employment and the claimant may have had subsequent employment.

An IP employer must be an employer with whom there was an employer-employee relationship under G. L. c. 151A, § 2. (See the section on independent contractors in Chapter 3 - Monetary determinations.) Self-employment or employment not covered by c. 151A is **not** considered IP employment. (See the section on services excluded from covered employment in Chapter 3 - Monetary determinations.)

Section 5. Effects of disqualifying separation on new claim

For most issues, UI Online does not confine an eligibility issue to a specific claim. When an issue is resolved, the effects of the determination span the period of time from the issue start date through the issue end date, which may include multiple claim sequences. If the eligibility issue is disqualifying and does not have an end date, the claimant would not be entitled to benefits until the claimant requalified for benefits or circumstances changed.

If there is a disqualifying separation issue, the adjudicator should check the base period of the new claim to see if the employer is listed. If the employer is listed, the claimant will need to have earned requalifying wages in order to end the disqualification. If the employer is not listed, the disqualification should be ended on the Saturday prior to the effective date of the new initial claim.

When a new issue has been created with the same details as an issue that had previously been adjudicated, such as start date, employer ID number, and the facts of the separation, it should be dealt with as a duplicate issue.

When a claimant has earned requalifying wages sufficient to end an indefinite disqualification on a separation issue, follow the procedures outlined in the Policy Memorandum dated February 19, 2020, Reference Number: UIPP 2020.04.

Section 6. Leaves of absence

Leaves of absence become an eligibility issue because it must be determined whether the claimant is in total unemployment within the meaning of § 29(a) and § 1(r). To be in total unemployment a claimant must

- perform no wage-earning services,
- receive no remuneration, and
- be unable to obtain suitable work, even though capable of and available for work.

Leaves of absence may be paid or unpaid, implied or explicit, covered by a leave policy or not, chosen by the claimant, or imposed by the employer; they may be authorized by statute, for example, under the federal Family and Medical Leave Act (FMLA) or the Massachusetts Parental Leave Act (MPLA) or not.

Although a claimant on a leave of absence often may be unavailable or not capable of doing any work for the employer, sometimes the claimant is willing and able to do other suitable work for the employer. If the leave of absence results from the employer being unable to offer or not offering other suitable work that the claimant was able and willing to perform, then the claimant is in unemployment within the meaning of § 29(a) and § 1(r).[13]

An employer may give a leave of absence to a worker who is unable to perform the duties of the job or not available to work for personal or medical reasons. During the leave, the claimant is generally not in unemployment within the meaning of § 29(a) and § 1(r)(2).[14] But the claimant's situation may change: while on a leave of absence, a claimant, at times, may be unable to do any work; at other times, the claimant may be able to do some work, but not the duties of the job from which the claimant is on leave. A claimant who is unable to do any work is not capable of and available for work, as required by § 1(r), and, therefore, is disqualified.

If a claimant is separated from work for reasons not involving misconduct, and if the employer also places the claimant on an unpaid leave of absence to protect the claimant's insurance benefits, seniority rights, or tenure, then the claimant is unemployed within the meaning of § 29(a) and § 1(r).

A. Claimant does not return at end of leave

At the end of the leave, if the claimant is able to return to work and attempts to do so, but the employer does not reemploy the claimant, the separation should be determined as a discharge under § 25(e)(2). If the claimant chooses not to return to work, then the

[13] *Director of the Div. of Employment Sec. v. Fitzgerald*, 382 Mass. 159 (1980).

[14] Claimants who are victims of domestic violence — see, above — or whose dependent children are victims of domestic violence may be an exception to this general rule. **Claims involving domestic violence should be referred to UI Policy and Performance.**

separation is a quit to be determined under § 25(e)(1). For claimants who are ex-service members, see Chapter 10 (Federal Programs Affecting UI Eligibility).

B. Temporary shut-down during leave

A claimant may not collect benefits based on a lay-off or temporary shut-down that occurred while the claimant was already on a disqualifying leave of absence.

Example: The claimant, who was granted a leave of absence from January 1 to August 30, files a claim in July during a temporary plant shut-down. Unless the claimant had unsuccessfully attempted to end the leave of absence and return to work before the shut-down, the claimant is still considered to be on a leave of absence in July and, therefore, disqualified under § 29(a) and § 1(r)(2).

C. Leaves covered by FMLA or MPLA

Leaves covered by the federal Family Medical Leave Act (FMLA)[15] or the Massachusetts Parental Leave Act (MPLA)[16] are determined just like any other leave. These are often unpaid leaves, unless the claimant is able to use vacation leave or sick leave. During the paid portion of the leave, an individual is not eligible for UI benefits.

An eligible employee who takes FMLA or MPLA leave must be restored to the same or an equivalent position upon returning to work, if one is available. To be equivalent, a position must have the same status, pay, length of service credit, and seniority, and terms and conditions of employment as the job the employee held upon taking leave. An employer need not restore an employee to an equivalent position if none is available. Job protected leave may not be used against an employee under a "no fault" attendance policy. Failure to restore an employee to the same or equivalent position held before leave may constitute good cause for leaving.

1. FMLA leave

The FMLA entitles an eligible employee to take up to 12 workweeks of job-protected, unpaid leave during a 12-month period for certain family and medical reasons, including the birth or placement of a child, to care for an immediate family member—child, spouse, or parent—with a serious health condition, or for medical leave when the employee is unable to work because of a serious health condition. In some cases, the employee may use accrued paid leave, such as vacation or sick leave. Twenty-six workweeks of leave during a single 12-month period are available to an eligible employee to care for a covered service member with a serious injury or illness, if the

[15] 29 U.S.C. § 2601 and following.

[16] G. L. c. 149 § 105D, as amended by St. 2014, c. 484 (formerly the Massachusetts Maternity Leave Act, amended to be gender neutral).

employee is the spouse, son, daughter, parent, or next of kin of the service member (Military Caregiver Leave).

The FMLA applies to:

- all public—state and local government—employers;
- the federal government, although not all federal employees are eligible;
- local education agencies, that is, schools, whether public or private; and
- any employer in the private sector engaging in commerce, or in any industry or activity affecting commerce, with 50 or more employees each of whom worked one or more days during at least 20 calendar weeks in the current or preceding calendar year.

To be eligible for FMLA benefits, an employee must:

- be employed by a covered employer;
- be employed at a worksite within 75 miles of which the employer has at least 50 employees;
- have worked for the employer for at least a total of 12 months, which need not be consecutive; and
- have worked at least 1,250 hours during the 12 months immediately before the date FMLA leave begins.

When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee in writing of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances.[17] The leave may be taken intermittently or consecutively.

2. MPLA leave

The MPLA applies to most Massachusetts employers having six or more employees. A qualified employee may take up to eight weeks of unpaid leave for the purpose of:

- giving birth; or

[17] 29 C.F.R. § 825.300(b)(1).

- adopting a child under the age of 18; or
- adopting a child under the age of 23, if the child is physically or mentally disabled.

To be eligible for parental leave under the MPLA, an employee must:

- have completed the probationary period,[18] if any, set by the terms of employment; or have worked full-time for the employer for at least three consecutive months; and
- have given the employer at least two weeks' notice of the anticipated dates of departure and intention to return.

[18] If the probationary period is more than three months, the employee is only required to complete three months to be eligible for parental leave under the MPLA.