Chapter 9: Other pay and benefits

To be eligible for Unemployment Insurance (UI) benefits, a claimant must be in total or partial unemployment. A claimant who is totally employed during a week is not eligible for any benefits for that week. A claimant who is partially employed during a week may be eligible for partial benefits.

Section 1. Total unemployment

A. Statutes

G. L. c. 151A, § 1(r)(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. Services rendered in consideration of remuneration received for relief, support, or assistance, furnished or provided by any agency of the commonwealth, or of a political subdivision thereof, charged with the duty of furnishing aid or assistance, shall not be construed as wage-earning services. An individual who is not entitled to vacation pay from his employer shall be deemed to be in total unemployment during the entire period of any general closing of his employer's place of business for vacation purposes, notwithstanding his prior assent, direct or indirect, to the establishment of such vacation period by his employer.

G. L. c. 151A, § 29(a) specifies how the weekly benefit amount is calculated for "[a]ny individual in total unemployment and otherwise eligible for benefits[.]"

B. Principles

An individual is in total unemployment in any week in which the individual:

1. performs no wage-earning services, and
2. receives no remuneration, while being
3. capable of and available for work, and
4. unable to obtain suitable work.

C. Circumstances and policies

1. Self-employment – major portion of claimant's time

A claimant engaged in an independent business enterprise (such as an LLC, corporation, or a small business), sole proprietorship, or partnership that takes

a major portion of the claimant's time is deemed not to be in total unemployment. What constitutes a major portion of a claimant's time depends on the claimant's individual circumstances. For example, if the claimant is spending over twenty hours a week working in a self-employment venture during a shift typical for the claimant's occupation, the adjudicator should not automatically find that a "major portion" of the claimant's time is being spent in self-employment, but the adjudicator should consider this information in light of the rest of the claimant's circumstances. Thus, a claimant who customarily was employed 60–80 hours per week before being separated, and who now works 30–40 hours per week as a consultant, should not automatically be determined not to be in total unemployment, if the claimant establishes that he or she is actively searching for a full-time job and is attached to the labor market.

Note: The disqualification is in effect until circumstances change and the claimant meets the requirements of c. 151A.

2. Self-employment – minor portion of claimant's time

An otherwise eligible claimant who is engaged in self-employment taking a minor portion of the claimant's time is eligible for UI benefits, if the claimant is capable and available to work as an employee elsewhere. If such a claimant's only source of income for a week was from part-time self-employment, the claimant may qualify for benefits if the amount of net earnings in that week is less than the claimant's weekly benefit rate plus the amount disregarded under § 29(b).

3. Leave of absence

A claimant unable or unwilling to work because of medical or personal reasons may request a leave of absence or accept a leave of absence if offered. Adjudicators must determine whether claimants who are on a leave of absence are in total unemployment under § 29(a) and § 1(r). If work is actually available to the claimant that the claimant is capable of performing, but the claimant is unwilling to do the work and chooses instead to take a leave of absence, then the claimant is not in total unemployment. But the definition of "total unemployment" can, in some cases, include a claimant on a leave of absence. Under § 1(r)(2), a claimant is deemed to be in total unemployment in any week in which the claimant performs no wage-earning services, and in which, though capable of and available for work, is unable to obtain any suitable work. Note that the claimant must be available for and capable of some type of work, but not necessarily the work from which the claimant is on leave.

Example: A pregnant welder may not be able to perform her regular duties as a welder due to health concerns, but if she is capable of performing non-welding work, and requests a temporary transfer to non-welding work, but the employer does not or will not provide non-welding work and instead imposes a leave of

absence, the claimant may be in total unemployment within the meaning of the statute, "which is simply to allow benefits to an employee who is unwillingly out of work and without current earnings and unable to find work appropriate to his employment capacity."[1]

4. No entitlement to vacation pay for a vacation shut-down

A claimant employed at a business which has a regular shut down for vacation purposes files for benefits. The claimant is not entitled to vacation pay during this period. If otherwise eligible, the claimant is considered unemployed and is not subject to disqualification under § 29(a) and § 1(r)(2).

If the claimant is entitled to vacation pay for a portion of the shutdown, the claimant is ineligible for benefits while entitled to vacation pay but may be eligible for benefits for the portion of time the claimant is not entitled to vacation pay. *The primary factor is the entitlement to not the usage of vacation time.* If a claimant has accrued vacation time but chooses not to take the vacation pay, the claimant is not considered eligible for benefits. Note that the claimant need not be made aware of a regular shut-down in advance for this interpretation to apply under § 1(r)(2).

Example 1: A claimant is entitled to two weeks' vacation pay. The plant shutdown for vacation purposes is four weeks. The claimant is ineligible for the first two weeks and, if otherwise eligible, payable for the third and fourth week of the plant shutdown.

Example 2: A claimant is entitled to two weeks' vacation pay. The plant shutdown for vacation purposes is four weeks. The claimant chooses to take his two weeks of vacation at a different time. Regardless of whether the claimant knew about the plant shutdown, the claimant is ineligible for the first two weeks and, if otherwise eligible, payable for the third and fourth week of the plant shutdown.

Example 3: The employer institutes unexpected one-week furloughs due to a financial setback, and the claimant is entitled to two weeks of vacation time but chooses not to use it. The shut-down is not a regular vacation shut-down and the claimant is eligible for benefits due to lack of work.

[1] *Director of the Division of Employment Security v. Fitzgerald,* 382 Massachusetts 159, 164 (1980).

Section 2. Partial unemployment

A. Statutes

G. L. 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; provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded. For the purpose of this subsection, any loss of remuneration incurred by an individual during said week resulting from any cause other than failure of his employer to furnish full-time weekly schedule of work shall be considered as wages and the director may prescribe the manner in which the total amount of such wages thus lost shall be determined.

G. L. 151A, § 29(b)

> (b) An individual in partial unemployment and otherwise eligible for benefits shall be paid the difference between his aggregate remuneration with respect to each week of partial unemployment and the weekly benefit rate to which he would have been entitled if totally unemployed; provided, however, that earnings up to one-third of his weekly benefit rate shall be disregarded. In no case shall the amount of earnings so disregarded plus the weekly benefit rate equal or exceed the individual's average weekly wage. Such partial benefit amount shall be rounded to the next lower full dollar amount if it includes a fractional part of a dollar.

B. Principles

Chapter 151A provides partial unemployment insurance benefits to an otherwise eligible claimant who is available for and willing to work a full-time schedule, if the employer fails to furnish full-time work, or if the claimant worked full-time for an employer and these hours were subsequently reduced by the employer to less than full-time. But a claimant whose primary employment **during the base period** was as an on-call employee working on an "as needed" basis, with the understanding that the hours would be irregular and less than full-time, is not in partial unemployment if the claimant continues the on-call employment during the benefit year.[2] But the claimant is considered to be in total unemployment during any week

[2] *Mattapoisett v. Director of the Division of Employment Security*, 392 Massachusetts 546, 549 (1984)

in which the claimant does not receive any on-call hours. See *discussion of on-call employment*, below.

What constitutes full-time work varies among industries and employers. Adjudicators must consider the particular facts and circumstances of each case. In some cases, fewer than 40 hours per week of work may be considered full-time. It may be relevant to consider how many hours employees have to work to be eligible for full-time benefits from a particular employer. Regardless of the amount earned, an individual who works a full-time schedule is not in unemployment within the meaning of § 29(a) and § 1(r)(1) and may not receive benefits.

Also see the discussion of primary and subsidiary employment in Chapter 6-Separations.

1. Partial unemployment benefits; earnings disregard

A claimant who is partially unemployed and otherwise eligible may receive partial unemployment benefits. These benefits are calculated by comparing the claimant's wages from the partial employment to the claimant's weekly benefit amount and applying the earnings disregard.

A claimant in partial unemployment who is available for full-time work, but is working less than full-time hours during the benefit year, may earn up to one-third of the weekly benefit rate and still receive a full benefit payment. Each dollar of earnings above one-third of the weekly benefit rate reduces the weekly benefit amount on a dollar-for-dollar basis.

Example: A claimant establishes a benefit year with a weekly benefit rate of $250 based on an average weekly wage of $500. The partial earnings disregard is one-third of the benefit rate or $83.33. The claimant earns $200 per week working a reduced schedule of hours. Disregarding $83.33 of the claimant's gross earnings leaves $116.67 in deductible earnings. Subtracting the $116.67 in deductible earnings from the weekly benefit rate of $250 leaves a net benefit of $133.33, which is rounded down to the next lower full dollar amount or $133.

C. Determining whether a claimant is in partial unemployment

1. Employment agreement

The terms of a claimant's employment agreement help determine whether the claimant is or is not unemployed, and, if the claimant is unemployed, whether the claimant is totally or partially unemployed.

An employment agreement may be oral, written, or implied by the parties' conduct, and may be changed orally, in writing, or through conduct. It is important to obtain information on the agreement and any mutually-agreed-to

changes. An employment agreement may include a work schedule, payment rate, payment method, and how a work schedule is obtained. For example:

Did the agreement specify a fixed number of hours per week? Did the number of hours vary in any weeks worked? If so why?

- How did the claimant get work assignments or schedules for the week? Was it posted? Did the employer call? Was the claimant given an advance schedule?

The history of the claimant's employment during the base period of the claim – number of hours worked per week, number of days worked, entitlement to certain benefits – may indicate whether the claimant worked full, part-time, or on-call.

Staff also may need to determine whether the terms of the employment agreement changed during the claimant's base period employment. If an employment agreement was changed, and a new agreement was in place for at least the last eight weeks of employment, then the revised agreement is the relevant one for purposes of § 29(b) and § 1(r)(1).

2. Reduction of hours

a. Hours reduced by the employer

Example 1: A claimant accepted full-time work with an employer but these hours were subsequently reduced by the employer – not at the request of the claimant – to a part-time schedule. If the remuneration is less than the weekly benefit amount plus the earnings disregard, then the claimant is in partial unemployment during the weeks of part-time work. Be sure that the determination cites § 29(b) and § 1(r) to timely-protesting employers.

Example 2: A claimant who was available for and seeking full-time work, accepted work with a fixed schedule of part-time hours, but these part-time hours subsequently were further reduced by the employer, not at the request of the claimant. If the remuneration is less than the weekly benefit amount plus the earnings disregard, then the claimant is in partial unemployment during the weeks of further reduced part-time work. Be sure that the determination cites § 29(b) and § 1(r) to timely-protesting employers.

Example 3: A claimant has been working as a welder for 40 hours a week, but due to medical or disability-related reasons, can no longer work as a welder but can work 40 hours per week doing light duty work. The employer has only 20 hours per week of light duty work available. If the claimant works the 20 hours per week and is otherwise eligible, the claimant is in partial unemployment.

b. Hours reduced at the claimant's request

If a claimant's hours were reduced at the request of the claimant—not at the request of the employer—fact-finding is needed to determine the reason for the claimant's request. If the claimant had an urgent, compelling, and necessitous reason for the reduction in hours, or meets one of the conditions for limiting availability to part-time work listed in 430 Code Massachusetts Regulations § 4.45 (for example, the claimant is a qualified individual with a disability and is unable to continue working full-time due to the disability), the claimant may be considered to be in partial unemployment during any week in which the claimant, although able and available to work the reduced schedule, is not able to obtain work for the maximum number of hours the claimant is able to work with the restriction.

Example 1: A claimant, with the employer's approval, limits her availability for work from 40 hours per week to 20 hours per week. If the claimant's work schedule is reduced accordingly to 20 hours per week and the claimant works 20 hours per week, the claimant is not in partial or total unemployment. However, if the claimant is available for 20 hours a week but the employer can only offer 10 hours per week, and the claimant works the 10 hours per week offered, the claimant is in partial unemployment.

Example 2: The claimant, with the employer's approval, has reduced his hours to 20 hours per week. The employer provides the claimant with 20 hours, which the claimant works. The claimant is not in partial unemployment.

3. Continuing employment with subsidiary employer

A claimant who is separated from primary work under qualifying circumstances and who works all available hours from subsidiary employment may be eligible for benefits. The claimant must report remuneration from the subsidiary employment as partial earnings, and UI Online will apply the earnings disregard under § 29(b). Be sure that the timely-protesting subsidiary employer is notified of the approval, citing § 29(b) and § 1(r). (Use issue type "still employed" and sub-type "part-time employment." Use rationale eligible-subsidiary employment-accepting all available work.)

To identify primary employment, DUA uses the criteria for determining full-time work in 430 Code Mass. Regs. § 4.73.

Note: A contributory employer will be relieved of charges for the weeks of a claim, if it continues to employ the claimant to at least the same extent as it had before the claim.[3]

4. On-call employment

An individual is considered an "on-call" employee when hired to work on an as-needed basis. Depending on the employer's needs, an on-call employee may work more than full-time in some weeks and less than full-time, or even no hours at all, in other weeks. This "on-call" arrangement should not be confused with a variable schedule of work, as when an employer changes the hours or shifts worked by an employee on a week-to-week basis. An on-call employee may be called to report to work immediately to respond to an urgent need of the employer or an emergency situation; an employee with a variable schedule of work is scheduled to work particular hours or shifts ahead of time and is given some prior notice of the schedule.

As discussed below, a claimant who is an on-call employee may be eligible for UI benefits depending upon whether the on-call employment began during the base period, the benefit year, or the lag period, and whether the employer had work available for the claimant during the week claimed.

Note that the on-call rules described below do not apply to on-call employment that is subsidiary.

a. On-call employment established during the base period

"[T]he Legislature did not intend a part-time employee whose hours vary from week to week to be considered in partial unemployment for any week in which he does not work as many hours as a full-time employee."[4]

- If a claimant accepts work in the base period from a primary employer as an on-call employee, that is, being called to work only when needed by the employer, resulting in no work during some weeks, full-time work in some weeks, and less than full-time work during other weeks, and if this arrangement continues during the benefit year, then, for

[3] *See* 430 Code Mass. Regs. § 5.05(1):

> Benefits for partial unemployment shall be charged in the same manner as for benefits in total unemployment, except that no charge shall remain against the account of any subsidiary employer who shows to the satisfaction of the Commissioner that it has continued to employ a claimant during the weeks of his claim to the same extent that it previously employed him. In the event that the subsidiary employer is liable for payments in lieu of contributions then the principal employer will be charged to the extent possible as provided in § 14(d)(3) of the Massachusetts Unemployment Insurance Law, prior to any later charges to the account of the subsidiary employer.

[4] *Mattapoisett v. Director of the Division of Employment Security*, 392 Massachusetts at 549.

any week in which there is no work available, the claimant is considered to be in total unemployment under § 29(a) and § 1(r)(2). Send a notice of approval to a timely-protesting employer.

- For any week in which any suitable work is made available, the claimant is subject to disqualification under § 29(b) and § 1(r)(1), whether or not the claimant actually worked. (Note that while the work offered must be suitable for the disqualification to apply, this is a week by week issue, not to be decided under § 25(c).)

b. On-call employment established during the benefit year

If after a claim is filed, a claimant establishes on-call employment in the benefit year, for any week in which the claimant works less than a full-time schedule, the claimant is not subject to an on-call disqualification under § 29(a), § 29(b), and § 1(r) because the on-call employment was not established in the base period.

The claimant, however, must report any earnings and the earnings disregard will be applied. If the claimant doesn't work all hours offered, lost time should be investigated. See *Chapter 4- Suitable Work*.

c. On-call employment established during the lag period

If the on-call employment is established during the lag period (using the primary base period), the claimant is not subject to disqualification under § 29(a) and§ 29(b) and § 1(r). The lag period is "the period beginning with the day following the end of the last completed calendar quarter in the primary base period and ending with the day immediately preceding the first day of the benefit year."[5]

The claimant must report any earnings and the earnings disregard will be applied.

5. Continuing part-time employment for only one employer

A claimant who worked part-time for only one employer in the base period, who continues that employment relationship into the benefit year is in partial unemployment and may be entitled to partial benefits, so long as:

- the claimant is seeking full-time work;
- the claimant is accepting all work offered;

[5] 430 Code Massachusetts Regulations § 4.83

- and the remuneration earned does not exceed the weekly benefit amount plus the one-third earnings disregard.

6. Part-time employment obtained during the benefit year by a claimant with a good cause restriction to part-time availability

A claimant who has been approved for the § 24(b) part-time availability exception under 430 Code Massachusetts Regulations § 4.45(1)(b) who obtains part-time work for at least the number of hours to which they limited their availability under the exception during the benefit year is not in partial unemployment.

Example: If a claimant with a good cause restriction had been working 20 hours per week, then was separated under non-disqualifying circumstances, and is unable to find a 20-hour-per-week job but finds and accepts a 10-hour-per-week job, the claimant will be deemed to be in partial unemployment.

Section 3. Remuneration

A. Statutes

G. L. c. 151A, § 1(r)(3)

> For the purpose of this subsection, "Remuneration", any consideration, whether paid directly or indirectly, including salaries, commissions and bonuses, and reasonable cash value of board, rent, housing, lodging, payment in kind and all payments in any medium other than cash, received by an individual (1) from his employing unit for services rendered to such employing unit, (2) as net earnings from self-employment, and (3) as termination, severance or dismissal pay, or as payment in lieu of dismissal notice, whether or not notice is required, or as payment for vacation allowance during a period of regular employment; provided, however, that for the purposes of this chapter, "remuneration" shall not include any payments made pursuant to subsections (b) and (c) of section one hundred and eighty-three, and subsection (b) of section one hundred and eighty-four of chapter one hundred and forty-nine[6], nor shall it include payment for unused vacation or sick leave, or the payment of such termination, severance or dismissal pay, or payment in lieu of dismissal notice, made to the employee in a lump sum in connection with a plant closing, nor shall this clause affect the application of subsection (d) of section twenty-nine.
>
> For the purposes of this clause, "plant closing" shall mean a permanent cessation or reduction of business at a facility of at least fifty employees which results or will result as determined by the commissioner in the permanent separation of at least fifty percent of the employees of a facility or facilities….

G. L. c. 151A, § 1(c)

> "Benefit year", the period of fifty-two consecutive weeks beginning on the Sunday immediately preceding the date on which an individual files a claim for benefits; provided, however, that the benefit year shall be fifty-three weeks if filing a new claim would result in overlapping any quarter of the base period of a previously filed new claim where such extension of the benefit year will prevent such overlapping; provided, further that, with respect to the week in which such claim is filed, (1) the individual has no unexpired benefit year and (2) the individual meets the

[6] G. L. c. 149, § 183(b)–(c) and § 184(b), describe circumstances under which employees who are terminated following a transfer of control of the employer are entitled to one-time, lump-sum payments.

requirement of subsection (a) of section twenty-four; provided, further, that if the individual has been denied benefits during the period the individual is receiving termination, severance, or dismissal pay, or payment in lieu of dismissal notice under the provisions of clause (3) of subsection (r), the individual's benefit year shall be extended by the number of weeks for which the individual was disqualified but no more than fifty-two weeks.

B. Types of payments received during the benefit year

1. Remuneration table

Type of payment	Determination
Termination, severance or dismissal pay or payment in lieu of dismissal notice without release of claims	Disqualify/extend BYE
Termination, severance or dismissal pay or payment in lieu of dismissal notice in connection with a plant closing	Approve
Vacation or sick pay during a period of regular employment	Disqualify
Vacation or sick pay not in a period of regular employment	Approve
Stay or incentive bonus	Approve
Payment for general or specific release of claims	Approve

2. Remuneration from an employer for services rendered

Section 1(r)(3)(1) covers remuneration from an employing unit for services rendered to the employer.

If a claimant receives remuneration from an employer for services rendered to the employer, the claimant may be ineligible for UI benefits or only may be eligible for partial UI benefits for the period in which the remuneration was received.

A payment based on work performed during a prior period and not applicable to the week in which it is received, such as profit-sharing, or a gratuitous bonus, such as a holiday bonus, that is not considered to be payment for services rendered to the employer, is not considered remuneration within the statute and does not render the claimant ineligible.

Stipends are payments made to help defray expenses or in recognition of services that are not considered employment, such as volunteer services for

AmeriCorps, or service on a jury or a board—are not considered remuneration within the statute and do not render the claimant ineligible.

Back pay is a payment awarded to a claimant retroactively following an arbitrator's award, court judgment, or settlement agreement providing that wages, salary, or other remuneration not previously paid are due. An award of back pay may or may not have been reduced by the amount of unemployment insurance benefits paid. If not, the former employer generally will notify DUA, in which case the claimant will be determined to have been overpaid for the weeks to which the back pay award applies. If the back pay award has been reduced, then the former employer is required by G. L. c. 151A, § 69C, to notify DUA of the back pay award and to reimburse DUA for the amount of the benefits paid equal to the amount of the reduction. In these circumstances, the claimant is ***not*** liable for an overpayment caused by receipt of the back pay award. There is no statute of limitations for adjusting benefit entitlement based on back pay awards.

Note: In such cases, a manager must be notified so that the issue can be referred to UIPP.

3. Remuneration from self-employment

Section 1(r)(3)(2) covers remuneration from net earnings from self-employment. If a claimant receives remuneration from self-employment, the claimant may be ineligible for UI benefits or only maybe eligible for partial UI benefits for the period in which the income was earned.

"Net earnings" include all self-employment income less all business deductions allowed for income tax purposes. Earnings may be established through any credible evidence the claimant presents. The adjudicator may ask a claimant to submit tax forms, if other evidence the claimant presents is not credible. If the claimant has more than one trade or business, the net earnings from each business should be combined to determine net self-employment income. A loss incurred in one business will reduce the gain in another business. Calculate net earnings in accordance with the period of time during which the claimant was self-employed.

Example: A claimant who devotes a minor portion of time to self-employment has net earnings from self-employment of $500 over five weeks. The partial earnings should be reported as $100 for each of the five weeks, unless there is evidence of the actual amount of earnings in a particular week.

4. Payments from employers related to separation or unemployment

Section 1(r)(3)(3) covers remuneration related to a separation, including payments made as termination, severance, or dismissal pay, payment in lieu of dismissal notice, and payments for vacation allowance during a period of regular employment. Although these payments are considered remuneration,

and generally make the claimant ineligible for the applicable period, some other types of payments from employers related to a separation or unemployment are not considered remuneration under the statute and do not make the claimant ineligible.

a. Separation payments considered remuneration

The following types of employer payments are considered remuneration and make a claimant ineligible for the applicable time period.[7]

- **Dismissal pay:** A payment made as a result of separation.
- **Payment in lieu of dismissal notice:** A payment made when the employer, instead of giving advance notice of separation, pays an amount equal to the wages that could have been earned had the claimant been given notice and permitted to work during the notice period, most commonly, two weeks.
- **Severance pay:** A payment made in connection with the separation, in consideration of past services. (Payments for a release of claims against the employer are not severance pay. See below.) The amount of the payment is usually based on the length of service.
- **Termination pay:** Continued payment of an employee's wages following separation.

If a claimant is ineligible due to the receipt of one of these forms of separation pay, the claimant's benefit year will be extended by the number of weeks of such ineligibility, not to exceed 52 weeks. In many cases, if the claimant remains in unemployment, this extension of the benefit year will allow the claimant to collect any remaining UI balance.

b. Separation payments not considered remuneration

The following types of employer payments are not considered remuneration and do not make a claimant ineligible.

- **Payment for release of claims:** A payment made in exchange for an employee's release of potential legal claims against the employer. Such payments differ from severance payments because they are not given in exchange for services previously rendered, even if the amount of the payment may be based on length of service. The release may be limited to one or more specific claims, for example, a claim of age discrimination or sexual harassment, or may be broadly written to

[7] *See* 430 Code Massachusetts Regulations § 4.38.

cover multiple or all claims. The key is that the payment was contingent on the claimant releasing one or more claims against the employer.[8]

Example 1: The employer pays the claimant in exchange for a release of all claims arising out of the employment. The payment is non-disqualifying under § 1(r)(3) because the release was a condition of payment.

Example 2: Upon separation a claimant is entitled to severance pay for past services. (This payment is disqualifying. See, above.) The employer also pays an additional amount in exchange for a release of all claims arising out of the employment. Companies may refer to this additional payment as "enhanced" severance. If it is shown that the additional payment was contingent on the claimant releasing claims against the employer, then it is non-disqualifying under § 1(r)(3).

Example 3: Prior to separation, the claimant was pursuing a legal claim against the employer for a specific reason, for example, the employer's alleged violation of the Massachusetts Fair Employment Practices Act. Upon separation, the employer pays the claimant to release this claim. This payment is non-disqualifying under § 1(r)(3).

- **Stay bonus or incentive bonus:** A stay bonus or incentive bonus is generally recognized as a payment made by employers to employees to continue employment until a lay-off or separation date. In most cases, an agreement—oral or written—makes the payment contingent on the employee continuing to work until the separation date. Such payments are usually not based on past services (years of service) for the company. Rather, they typically represent payment based on the employer's demand for that particular employee's skills, job responsibilities, or job function until the agreed upon separation date. The payment is often a uniform payment for all individuals or job classifications. The amount may be a flat rate or may be based on a percentage of pay.

- **Supplemental unemployment benefits (SUB):** A benefit paid by an employer to help a claimant maintain an income during a period of unemployment. SUB pay is calculated using the claimant's

[8] *White v. Commissioner of Department of Employment and Training,* 40 Massachusetts Appeals Court 249 (1996).

established weekly benefit amount and the average weekly wage of the claimant prior to separation.

- **Unused vacation or sick pay (not in a period of regular employment):** A payment, resulting from separation, for earned but not used vacation or sick leave. This payment is received when the employment relationship has been severed.

5. Payments from employer during vacation or layoff

In some cases, a claimant may be filing a claim during a vacation or layoff. Under certain circumstances, the employer may make payments to employees during these periods. Some of these payments are considered remuneration and make a claimant ineligible; others are not considered remuneration and do not make a claimant ineligible.

- **Holiday pay:** A payment from an employer for a holiday (Labor Day, July 4th, etc.,) that occurs during a week when the employees are otherwise on unpaid layoff. This type of payment is treated as earnings and considered remuneration.

- **Vacation pay during a period of regular employment:** The receipt of vacation pay during a period of regular employment. Such pay is considered remuneration under § 1(r)(3) and makes the claimant ineligible.

Payments made by employers are not disqualifying in the following circumstances:

- **Retainer or stand-by pay:** Payments made for an employee's agreement to be **available**, if needed, for work during the vacation.

- **Seasonal or short-term layoff:** Payments made as an inducement to return to work when recalled.

- **Permanent layoff:** Payments made for an employee's agreement to be available, if **needed**.

None of the situations above results in an extension of the benefit year.

6. Lump sum payments related to a certified plant closing

Lump sum payments made under a certified plant closing are not remuneration under the statute and do not make a claimant ineligible.

A plant closing is a permanent cessation or reduction of business at a facility[9] or facilities,

- where such facilities are located at a single site of employment, as defined by 20 Code of Federal Regulations § 639.3(i),
- of at least fifty employees,
- which results or will result as determined by the Director, in the permanent separation[10] of at least fifty percent of the employees of the facility or facilities within a period of six months prior to the date of certification[11]
- or within such other period as the Director shall prescribe, provided, that such period falls within the six month period prior to the date of certification.

An official determination of whether a certified plant closing has occurred within the meaning of 151A is made by staff in the UI Policy and Performance Department. When fact-finding in a particular case identifies a possible plant closing, the UI Policy and Performance Department should be notified. UI Policy and Performance staff may contact the employer for additional information. A certification determination will be made and communicated to adjudicators, who will make determinations for individual claimants. Although the employer is not entitled to appeal the plant closing certification independently, it may be appealed as part of an appeal of the determination on the separation pay issue under § 1(r)(3). Determinations shall remain in effect from the date of the certification through the subsequent ninety calendar-day period or through the anticipated closing date scheduled by the employer, whichever occurs later, and may be extended if the closing is delayed.

If the UI Policy and Performance Department issues a plant closing memorandum pertaining to a determination, a copy of the memorandum must be uploaded into the case file.

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[9] A facility is a plant, factory, commercial business, hospital, institution or other place of employment located in the Commonwealth that had fifty or more employees during any month in the six-month period prior to the date of certification.

[10] "Permanent separation" means that the relationship between the separated employee and the former employer has been severed, i.e., there is no continuing or on-going employment relationship, there is no definite date of recall. For the purpose of determining whether a plant closing has occurred, an employee who has transferred to another facility owned or operated by the employer shall not be considered to be permanently separated.

[11] The date of certification is the actual or anticipated date of a plant closing as determined by the Director.

7. Picket pay

Picket pay is a payment made by a union to strikers who picket. This type of payment does not make a claimant ineligible because the payment is made by the union, not by the employer, and is not for services rendered.

Section 4. Retirement benefits

A claimant may receive retirement benefits during the benefit year. As discussed below, the claimant's UI benefits may be reduced based on the receipt of retirement benefits.

A. Statute

G. L. c. 151A, § 29(d)(5)

> (5) An unemployed individual who during the base period, performed services as a teacher as defined in section one of chapter thirty-two and who is receiving, or has received, or will receive payments in the form of retirement benefits under the provisions of said chapter thirty-two, shall have his weekly benefit rate reduced in accordance with the provisions of this subsection notwithstanding the fact that such payments are not financed in any part by a base period employer.

G. L. c. 151A, § 29(d)(6)

> (6) Notwithstanding any of the foregoing provisions of this subsection, the amount of benefits otherwise payable to an individual for any week which begins in a period with respect to which such individual is receiving governmental or other pension, retirement or retired pay, annuity or any other similar periodic payment which is based on the previous work of such individual, shall be reduced by an amount equal to the amount of such pension, retirement or retired pay, annuity or other payment, which is reasonably attributable to such week; provided, however, that such reduction shall apply only if then required by section 3304(a)(15) of the Internal Revenue Code of 1954; and provided, further, that any amendment of section 3304(a)(15) of the Internal Revenue Code of 1954 shall become part of this subsection on the effective date of such amendment; and provided, further, that if then allowed by section 3304(a)(15) of the Internal Revenue Code of 1954, such reduction shall apply only if a base period employer contributed to or maintained such pension, retirement or retired pay, annuity, or other payment plan, and in the case of a payment not made under the Railroad Retirement Act of 1974, or the corresponding provisions of prior law, services of the individual for such employer during the base period affected eligibility for

or increased the amount of such pension, retirement or retired pay, annuity, or other similar plan; and provided further, that if the individual contributed to such plan, the amount of benefits otherwise payable to such individual shall be reduced by fifty per cent of the amount of such pension, retirement or retired pay, annuity, or other payment, notwithstanding the amount contributed by the individual to such plan. Payments received under the Social Security Act shall not be subject to this paragraph.

B. Principles

Section 29(d)(6) requires that, in any week in which a claimant receives certain kinds of retirement payments, a deduction must be made from the claimant's weekly benefit rate on account of such a payment if all of the following three criteria are met:

1. The payment is a pension, retirement pay, annuity[12] or other similar periodic payment[13] based on the claimant's previous work. Hence survivor's benefits and Social Security disability payments do not trigger a deduction.

2. A base period employer contributed to or maintained[14] the plan under which the payment is made. Hence retirement payments from a non-base period employer do not trigger a deduction. If only the claimant contributed to or maintained the plan, it does not trigger a deduction.

3. Services of the individual during the base period affected eligibility for or increased the amount of the retirement payment. If the claimant's base period services had no such effect, then the deduction is not triggered.

Note that Social Security retirement benefits, IRA plans, Keogh Plans, and other plans listed in Social Security and Other Non-Deductible Pensions below in this chapter do not trigger a deduction.

When a deduction applies, the amount of the deduction is analyzed as follows:

If only a base period employer contributed to or maintained the plan under which the retirement payment was made, then the claimant's benefit rate for the week to which the payments are attributable must be reduced (but not below zero). But if the claimant contributed any amount to the plan, only one-half of the payment is

[12] Black's Law Dictionary defines annuity as "[a]n investment contract, generally purchased from an insurer through single or multiple tax deferred capital contributions, that guarantees fixed or variable payments to an annuitant starting at some future date, and lasting for a stated period of time."

[13] "Other similar periodic payments" include lump sum payments. See UIPL 10-09.

[14] If an employer pays another company to maintain the retirement plan, it is still considered to be maintained by the employer.

deducted. If both the employer and claimant made contributions, the percentage of contributions does not matter.

Pension deductions are only made if the pension becomes effective before the claimant has exhausted regular UI benefits. If the effective date of the pension is a Sunday, the pension deduction begins that same week. Otherwise, it begins on the first Sunday after the pension's effective date. A claimant may choose to postpone receipt of a pension benefit, making it non-deductible. But if a claimant subsequently receives the pension retroactively for weeks the claimant also collected unemployment benefits, there is likely an overpayment. If a pension begins after the benefit year has ended and the claimant is receiving extended benefits or RED benefits, there is no deduction.

The partial earnings disregard and maximum payable dependency allowance are calculated based on the benefit rate prior to the pension deduction. The maximum benefit credit balance is reduced by the amount of UI benefits paid to the claimant plus the deductible pension amount.

C. Fact-finding

If the claimant has received a retirement payment (or received one during the week in question) the adjudicator should review the information the claimant has provided. Use custom questionnaires as necessary to request information regarding all of the components of § 29(d)(6):

- Is the retirement payment based on the claimant's previous work?
- Who contributed to the retirement payment plan: employer, employee, or both?
- Was the retirement payment contributed to by a base period employer?
- Was the retirement payment maintained by a base period employer?
- Did base-period services affect eligibility for, or increase the amount of the retirement payment? (Not applicable to the types of pensions listed below Social Security and other non-deductible pensions)
- What is the amount of the retirement payment? If the claimant and a base period employer disagree, obtain documentation.
- How is the payment made weekly, monthly, annually, or lump sum?
- Is the payment based on a profit-sharing plan? (See *Profit-Sharing Plan Payments*)

To determine if a retirement payment should result in a reduction of benefits:

- Determine if the retirement payment is deductible or nondeductible by determining if it meets the criteria outlined in Principles, above.
- Obtain the monthly amount. UI Online will determine the weekly amount by dividing the monthly amount by 4.33. Verify information with employer.
- Determine how it was financed:
    - By both the employer and employee: divide in half.

(Note: The state and municipalities do contribute to their employee's pension funds)

    - By just the employer: deduct 100%.
    - By just the employee: no deduction.

D. Lump sum distribution

- Determine if the retirement payment is deductible or nondeductible by determining if it meets the criteria outlined in *Principles*, above.
- Determine if it is "received" or rolled over.

(If the payment has been moved from one retirement account into another and the claimant did not receive any portion of the payment as a distribution, it has been rolled over.)

    - If rolled over — no deduction required. Documentation is required unless both parties agree on the amount.
    - If NOT rolled over — deduction as follows:
        - Determine amount.
        - Determine date received.
        - Determine how financed:
            - ✓ By both the employer and employee: deduct 50%.
            - ✓ By just the employer: deduct 100%.
            - ✓ By just the employee: no deduction.

E. Circumstances and policies

1. Company/union pension deduction

A claimant, aged 60, retired from working at the ABC Company after 25 years of service. Under the ABC Company pension plan, the claimant's combined age plus years of service made the claimant eligible for a pension allowance. The ABC Company pension plan is funded by contributions from both the employer and the claimant. The claimant filed a claim for benefits four days after retiring and was determined to be monetarily eligible. The claimant's separation was determined to be non-disqualifying pursuant to § 25(e)(1) and the claimant meets the § 24(b) requirements.

Since the pension is based on the previous work of the claimant, ABC Company contributed to the pension plan during the base period, and the claimant's services during the base period increased the amount of his pension, a pension deduction under § 29(d)(6) must be made on the claim. Since the pension is funded by both the employer and the claimant, 50% of the payment amount due for the week will be deducted from the claimant's weekly benefit rate. The UI Online system will calculate the amount.

2. Two pensions

Claimants receiving retirement benefits from multiple sources may be subject to a cumulative reduction in the benefit amount of either 50% or 100% of the weekly retirement benefit due. Each retirement benefit must be reviewed separately and the appropriate amount of the reduction determined based on the criteria noted previously in this section. Some reductions may be calculated at the 50% rate based on joint employee/employer financing of the benefit, while others will be calculated at the 100% rate based on sole financing by the employer. The separately calculated reductions will then be totaled and applied to the claimant's benefit rate by UI Online.

If a claimant is receiving more than one pension, UI Online will generate separate determinations based on each pension.

3. Military pensions and veteran's administration disability payments

A military pension (whether based on a disability or a non-disability) is deductible from unemployment insurance because it is based on years of service. However, an individual receiving compensation for a military service-connected disability from the Veteran's Administration would not require a deduction. This is because it is based on the percentage of disability sustained by the individual, rather than on previous work performed by the individual, the level of prior remuneration, or the length of past service. (For more information on military pensions, see *Chapter 10 - Federal Programs Affecting UI Eligibility*.)

Note: Sometimes, the Veteran's Administration will convert a military pension into a non-deductible disability payment, and make it retroactive. This may result in the retroactive payment of UI benefits. The adjudicator must upload the award letter and issue a corrected-level determination ending the military pension deduction.

4. Profit-sharing plan payments

Some profit-sharing plans distribute payments annually and are considered a non-deductible form of wages or bonus. Other plans credit the profit-shares to employee accounts to be paid upon retirement. Even if they are paid out upon retirement, they are still considered to be profit-sharing plans and therefore nondeductible.

5. Union-maintained retirement plans

If an individual has worked for more than one union employer, the union will often act as the retirement program administrator collecting contributions from the various employers and sometimes from union members. If a base period employer has contributed to the pension plan, it should be analyzed as any other retirement payment.

6. Teacher pensions

Although most public school teachers in Massachusetts work for cities and towns, they contribute to the state retirement system and their retirement benefits are paid by the state fund. Under § 29(d)(5), 50% of the pension must be deducted.

7. State and other municipal worker's pensions

Because the state and municipalities contribute to their employees' pension funds, retirement benefits paid to state and municipal workers should be considered employer-employee funded, resulting in a 50% deduction.

8. Social Security and other non-deductible pensions

The following types of pension payments do not cause a reduction in the claimant's benefit rate:

- Social Security
- IRA plans
- Keogh plans
- Railroad retirement annuities
- Pension from a source other than a base period employer

- Lump sum pension payments made prior to the base period.

9. Pension rollovers

Lump sum pension monies, including 401(k) funds, "rolled over" into an IRA account, trustee account, or conduit account, are retirement funds not received by a claimant, and therefore such rolled over funds do not subject the claimant to a deduction from the weekly UI benefit amount. Any pension funds received by a claimant and not "rolled over" into an IRA, or transferred to a new "trustee," or placed in a conduit account, will be considered taxable wages and will be treated as a deductible pension in the normal manner.

When an individual indicates the receipt of lump sum pension or 401(k) funds, determine the manner of such "receipt." Unless the individual has received the pension funds in hand, either in a lump sum payment or in a periodic disbursement, no deduction will be made under § 29(d)(6). If the pension or 401(k) funds have been "rolled over" into an account which renders the funds non-taxable income, the claimant has not "received" any pension funds subject to a deduction under § 29(d)(6). It will be incumbent upon the claimant to establish that the funds have been transferred to one of the previously mentioned accounts. Since under IRS guidelines, an employer must notify an employee of the transfer of 401(k) funds, or the employee must authorize transfer to a new "trustee" account or placement in a conduit account, the claimant should be in receipt of such notice or authorization forms and should present the applicable forms for verification. If a claimant cannot present any verification of the distribution of the funds, it will be determined that the pension or 401(k) funds have been received and the appropriate deduction under § 29(d)(6) will be made.

Under the Internal Revenue Code, an individual has sixty days to "roll-over" the money from a pension distribution.

If the claimant has not rolled over the pension funds, investigate the claimant's intentions. If the claimant is not planning to roll over the funds, compute the deductible portion. If the claimant intends to roll over the pension, set up a flag issue using the benefit year-end date as the issue end date.

Section 5. Overpayments

Overpayments occur when a claimant receives UI benefits to which the claimant was not entitled. The question of entitlement can arise at any point during the claim for various reasons including the late detection of an eligibility issue.

Whenever a claimant is awarded benefits, those benefits continue to be paid, even when an employer appeals, unless and until the award is vacated by a higher authority. Note that, if an award of benefits is later reversed, an overpayment is created, but no collection or enforcement action will be taken unless and until there is a final or unappealed decision against the claimant.

Any decision that causes a reduction in the claimant's weekly benefit amount will result in an overpayment if the claimant has already been paid for past weeks. Overpayments could be caused by an oversight, misunderstanding, or error on the part of DUA staff, the claimant, or the employer, or by claimant fraud. The standards for determining whether an overpayment was the result of claimant fraud and the penalties imposed upon claimants who fraudulently collected UI benefits are the primary focus of this section.

A. Statutes and regulations

G. L. c. 151A, § 69(a)

> (a) The department may recover by a civil action any amounts paid to an individual through error, or, in the discretion of the commissioner, the amount erroneously paid may be deducted from any future payments of benefits accruing to an individual under the provisions of this chapter provided that there has been a final decision as defined in section 69D. Any civil action brought pursuant to this subsection shall be commenced within six years from the date of the erroneous payment.
>
> If any individual fails to pay when due any amount paid to said individual because of such individual's failure knowingly to furnish accurate information concerning any material fact, including amounts of remuneration received, as provided in subsection (c) of section twenty-four, such overdue amount shall carry interest at a per annum rate provided by subsection (a) of section fifteen from the due date until paid. The total amount of interest assessed shall not exceed fifty percent of the total amount due.

G. L. c. 151A, § 69(c)

> (c) The commissioner may waive recovery of an overpayment made to any individual, who, in the judgment of the commissioner, is without fault and where, in the judgment of the commissioner such recovery would

defeat the purpose of benefits otherwise authorized or would be against equity and good conscience.

G. L. c. 151A, § 69(e)

At the time the department determines that an erroneous payment from the Unemployment Compensation Fund was made to an individual due to the individual's misrepresentation of a material fact or failure to disclose a material fact that the individual knew, or reasonably should have known, was material, the individual shall be assessed a penalty equal to 15 per cent of the amount of the erroneous payment. Except as provided in subsection (b), recovery of the penalty shall not be waived. Any appeal of the penalty under subsection (c) shall be limited to whether the amount on which the penalty was assessed is correct. All assessments paid under this subsection shall be deposited immediately in the Unemployment Compensation Fund.

G. L. c. 151A, § 24(c)

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

***

(c) Have given notice of his unemployment, by registering either in a public employment office or in such other manner, and within such time or times, as the commissioner shall prescribe, and have given notice of the continuance of his unemployment and furnished information concerning any remuneration received by him during the period for which he claims benefits, in accordance with the procedures prescribed by the commissioner.

G. L. c. 151A, § 25(j)

(j) Any week in which the individual fraudulently collects benefits while not in total or partial unemployment. Whoever fraudulently collects benefits while not in total or partial unemployment, may be disqualified for each otherwise compensable week for each such week of erroneous payment; provided, however, that the amount in question shall be reduced by any earnings disregard in subsection (d) **[sic]**[15] of section 29; provided further, that in the discretion of the commissioner, an amount erroneously paid may be deducted first from any future payments of benefits accruing to the individual under this chapter; provided further, that the amount deducted each week shall not exceed 25 per cent of the individual's weekly unemployment benefit rate; and provided further,

[15] (b).

that the individual shall have had actual notice of the requirement to report his earnings and the notice shall have met the requirements of clause iii of subsection (d) of section 62A. Any individual subjected to a deduction under this section may file an appeal and obtain review in accordance with sections 39 to 42, inclusive, and section 71.

G. L. c. 151A, § 47

Any person who knowingly makes any false or misleading statement, representation or submission or knowingly assists, abets, solicits or conspires in the making of any false or misleading statement, representation or submission in order to maintain, obtain, or increase benefits under this chapter for himself or any other individual, or who knowingly conceals or fails to disclose a material fact in order to maintain, obtain or increase benefits under this chapter for himself or for any other individual shall be punished by imprisonment in the state prison for not more than five years or by imprisonment in jail for not less than six months nor more than two and one-half years or by a fine of not less than one thousand nor more than ten thousand dollars, or by both such fine and imprisonment. Each false or misleading statement, representation, or submission and each failure to disclose or concealment shall constitute a separate offense.

Any person who provides the department with a false identification or misrepresents his identity in connection with any claim or attempt to make a claim for benefits under this chapter for himself or any other individual shall be punished by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment for not more than six months, or both.

G. L. c. 151A, § 71

The commissioner may reconsider a determination whenever he finds that (1) an error has occurred in connection therewith; or (2) wages of the claimant pertinent to such determination but not considered in connection therewith have been newly discovered; or (3) benefits have been allowed or denied or the amount of benefits fixed on the basis of misrepresentation of fact; provided, however, that with respect to (1) and (2) no such redetermination shall be made after one year from the date of the original determination; and provided, further, that with respect to (3) no such redetermination shall be made after four years from the date of the original determination; and provided, further, that the time limitations specified above shall not apply with respect to an award of back pay received by an individual for any week in which unemployment benefits were paid to such individual.

430 Code Mass. Regs. § 6.03

> **Fault**, as used in the phrase "without fault", applies only to the fault of the overpaid claimant. Fault on the part of the Department in making the overpayment does not relieve the overpaid claimant of liability for repayment. In determining whether an individual is at fault, the Director, or the Director's authorized representative will consider the nature and cause of the overpayment and the capacity of the particular claimant to recognize the error resulting in the overpayment, such as the claimant's age and intelligence as well as any physical, mental, educational, or linguistic limitation, including lack of facility with the English language. A good faith mistake of fact by the claimant in the filing of a claim for benefits that results in an overpayment of benefits does not constitute fault. A claimant shall be at fault if the overpayment resulted from the claimant:
>
> a. furnishing information that the claimant knew, or reasonably should have known, to be incorrect; or
>
> b. failing to furnish information that the claimant knew or reasonably should have known to be material; or
>
> c. accepting [a] payment that the claimant knew, or reasonably should have known was incorrect.

B. Principles

DUA interprets fraud as used in § 25(j) to mean the same as fault as used in 430 Code Massachusetts Regulations § 6.03.

G. L. c. 151A, § 25(j), § 47, and § 69(a) provide for the assessment of penalties for fraud. Section 25(j) provides for the assessment of a compensable week disqualification of one week for each "week in which the individual fraudulently collects benefits while not in total or partial unemployment." (A compensable week penalty is a disqualification for a week in which the claimant would have otherwise been eligible to receive benefits.)

Section 47 provides for fines and imprisonment for "[a]ny person who knowingly makes any false or misleading statement, representation or submission or knowingly assists, abets, solicits or conspires in the making of any false or misleading statement, representation or submission in order to maintain, obtain, or increase benefits under this chapter [151A] for himself or any other individual, or who knowingly conceals or fails to disclose a material fact in order to maintain, obtain, or increase benefits under this chapter for himself or any other individual[.]"

Section 69(e) assesses a penalty equal to 15% of any "erroneous payment … made to an individual due to the individual's misrepresentation of a material fact or

failure to disclose a material fact that the individual knew, or reasonably should have known, was material[.]" Section 69(a) assesses an interest charge on the unpaid balance of any overpayments of Unemployment Insurance benefits, if it is established that the overpayment resulted from the individual recipient's "failure knowingly to furnish accurate information concerning any material fact, including amounts of remuneration received" as provided in § 24(c). That section makes eligibility for benefits contingent on the claimant providing information on remuneration received during the period for which benefits are claimed.

Because the law provides for the assessment of interest and the application of a compensable week disqualification, it is critical that all claims adjudicators clearly substantiate any determination resulting in a finding that benefits have been overpaid for a reason stated in Section 25(j) or Section 69(a). Appropriately detailed fact finding must be conducted to determine the cause of the overpayment and the extent to which the overpayment resulted from (1) agency or claimant error or (2) the claimant's failure to furnish accurate information that the claimant knew, or reasonably should have known, was pertinent to the determination of eligibility for benefits. If it is found that the claimant failed to furnish such information, then it must be determined to what extent the claimant may have knowingly misrepresented or withheld it.

In the context of filing a claim for Unemployment Insurance benefits, fraud occurs when substantial evidence exists that a claimant has provided false information or has failed to provide information that the claimant knows, or reasonably should know, could affect the outcome of an eligibility determination. Fraud encompasses a range of actions and failures to act that includes both intentional misrepresentation of the facts and intentional concealment of non-disclosure of pertinent facts

A compensable week penalty pursuant to Section 25(j) shall not be made unless the claimant had actual notice of the requirement to report earnings and the notice shall have met the requirements of G. L. c. 151A, § 62A(d)(iii).

C. Overpayments resulting from claimant fraud

An adjudicator has to do three things before a claimant is determined to have failed "to pay when due any amount paid to said individual because of such individual's failure knowingly to furnish accurate information concerning any material fact" under § 69(a). These three things are:

1. identify each such material fact;

2. state the basis for the determination that there was a failure knowingly to furnish accurate information concerning each such material fact; and

3. state the basis for concluding that the claimant knew, or reasonably should have known, of the failure.

These three numbered requirements are referred to collectively as the "§ 69(a) requirements."

It is critical that adjudicators clearly substantiate any determination resulting in a § 69(a) finding. Appropriately detailed fact-finding must be conducted to determine the cause of the overpayment and the extent to which the overpayment resulted from (1) agency, employer or claimant error or (2) the claimant's failure to furnish accurate information that the claimant knew, or reasonably should have known, was pertinent to the determination on eligibility for benefits.

A claimant shall be at fault if the overpayment resulted from the claimant:

- furnishing information that the claimant knew, or reasonably should have known, to be incorrect; or
- failing to furnish information that the claimant knew or should have known to be material; or
- accepting a payment that the claimant knew, or reasonably should have known, was incorrect.

If it is found that the claimant failed to furnish such information, then it must be determined to what extent the claimant may have knowingly misrepresented or withheld it. The adjudicator must consider the nature and cause of the overpayment and the capacity of the particular claimant to recognize the error resulting in the overpayment, including the claimant's age and intelligence as well as any physical, mental, educational, or linguistic limitation, including lack of facility with the English language. A good faith mistake of fact by the claimant in the filing of a claim for benefits that results in an overpayment of benefits does not constitute fault.

A § 69(a) finding may be made only when:

- the facts found make it more probable than not that the individual knew, or reasonably should have known, that the individual provided inaccurate information, or withheld accurate information, concerning a material fact;
- as a result, the individual erroneously received benefits; and
- the individual did not repay the resulting overpayment when due.

Before a determination that a claimant is at fault for an overpayment may be entered into UI Online as final, it must be reviewed by a supervisor for compliance with the § 69(a) requirements. The supervisor need review only for satisfaction of the § 69(a) requirements. The supervisor need not review the fact-

finding itself. If the supervisor finds a lack of compliance with the § 69(a) requirements, the adjudicator will be directed to comply with them, including conducting any necessary additional fact-finding and modifying the finding as needed.

If a final § 25(j) finding has been made (see the next section), and if it includes findings that satisfy the corresponding § 69(a) requirements, a § 69(a) finding also will be entered into UI Online as final.

After a § 69(a) finding is made that is determined to satisfy the § 69(a) requirements, the claimant shall be sent a notice that, among other things, specifies the reasons for the finding.

D. Compensable week disqualification – fraud

A compensable week disqualification will be imposed in certain cases in which unreported earnings result in an overpayment of benefits attributable to fraud. A compensable week disqualification will be applied whenever an overpayment is attributable to fraud and results from unreported earnings provided the claimant was not in partial unemployment (i.e., not entitled to a partial benefit payment). When the claimant has received a benefit payment (full or partial) and it is subsequently determined that no benefit would have been payable for the week but for the claimant's fraudulent failure to provide or to accurately provide a report of earnings for that week, a compensable week disqualification will be imposed. The claimant will be disqualified for one compensable week for each such overpaid week.

A determination that an individual has "fraudulently collect[ed] benefits while not in total or partial unemployment" (a § 25(j)) finding) must:

1. identify the specific facts on which the § 25(j) finding is based; and

2. state the basis for the determination that these facts establish the fraudulent collection of benefits while not in total or partial unemployment.

These two numbered requirements are referred to collectively as the "§ 25(j) requirements."

A § 25(j) finding may be made only when the facts found make it more probable than not that the claimant:

- knew, or reasonably should have known, that the individual provided inaccurate information, or withheld accurate information, concerning a material fact; or

- committed some other, specifically identified fraudulent act or acts; and

- as a result, the claimant erroneously received benefits.

Example 1: A claimant receiving a UI benefit in the amount of $300 weekly earned $500 from full or part-time employment during a week for which benefits were claimed. Although aware of the requirement to do so, the claimant failed to report the earnings and received payment of the full benefit for the week. The earnings were subsequently discovered. Even allowing for the $100 earnings exclusion, the claimant should not have received any benefit. The claimant will be assessed a compensable-week penalty.

Example 2: A claimant receiving a UI benefit in the amount of $300 weekly earned $150 from part-time employment during a week for which benefits were claimed. Although aware of the requirement to do so, the claimant failed to report the earnings and received payment of the full benefit for the week. The earnings were subsequently discovered. Allowing for the $100 earnings exclusion, the benefit payment for the week should have been reduced by $50 and a net payment of $250 issued to the claimant. No compensable week penalty applies because the claimant was in partial unemployment, entitled to a reduced benefit. Note, however, that the claimant is still considered to have been at fault in this case and is subject to the assessment of interest and penalties on the outstanding balance of the overpayment and an offset of any benefits until overpaid benefits are recovered. (See, below, *Repayment and Waiver of Recovery of Overpayments*.)

After a § 25(j) finding is made and determined to satisfy the § 25(j) requirements, the claimant shall be sent a notice that, among other things, specifies the reasons for the § 25(j) finding.

An overpayment may be attributed to fraud, if the claimant admits to failing to report wages and knew of the requirement to report them, even though the claimant needed the money.

If the adjudicator is persuaded that a Limited English Proficiency (LEP) claimant failed to report wages because the claimant did not understand the requirement due to limited English proficiency, then the overpayment should not be attributed to fraud. (See Chapter 1- Adjudicator responsibilities.)

E. Appeals

If applicable, claimants may appeal the determination that resulted in the overpayment, the fault determination, or both.

F. Overpayments resulting from receipt of back pay awards

In some cases, claimants may receive back pay during the benefit year. (See the definition of back pay above.) An award of back pay to a claimant who has received unemployment insurance benefits in any week results in an overpayment to the claimant for any week to which the award is attributable. If the back pay award

has been reduced to account for the claimant's receipt of benefits, then the claimant is not liable for the overpayment. In the event of such a reduction in a back pay award, the employer must notify DUA and reimburse the Unemployment Compensation Fund an amount equal to the amount by which the award was reduced, but not more than the amount by which the claimant was overpaid.[16]

In any back pay award situation the adjudicator should either obtain a copy of the back pay award or a statement from the employer and claimant detailing the terms of the award and the period it covers. The necessary adjustments to the employer or solvency account are required by § 69C(d). If an adjudicator encounters a case where the employer withheld the amount of UI benefits from the back pay award, the adjudicator should notify their manager.

G. Repayment and waiver of recovery of overpayments

Statute

G. L. c. 151A, § 69(c)

> The [director] may waive recovery of an overpayment made to any individual, who, in the judgment of the [director], is without fault and where, in the judgment of the [director] such recovery would defeat the purpose of benefits otherwise authorized or would be against equity and good conscience.

Regulations

430 Code Mass. Regs. § 6.05: Waiver of Recovery of Overpayments

(1) No overpayment shall be recovered when, in the judgment of the Commissioner or his authorized representative, the claimant is without fault on his or her part and where recovery of the overpayment would either defeat the purpose of benefits otherwise authorized or would be against equity and good conscience. Fault on the part of the Department in making the overpayment does not relieve the overpaid claimant from liability for repayment if such individual is not without fault.

(2) In any proceedings under these regulations, the overpaid claimant shall have the burden of proving entitlement to a waiver.

(3) Waiver requests shall be granted or denied in accordance with the following examples:

(a) The overpayment is found to be attributable to fault on the part of the claimant and recovery would be against "equity and good conscience" or would

[16] See G. L. c. 151A, § 69C.

"defeat the purpose of benefits otherwise authorized." The request for waiver is denied.

(b) An overpaid claimant is found to be without fault as regards the overpayment; and

1. Recovery would be "against equity and good conscience" but would not "defeat the purpose of benefits otherwise authorized." The request for waiver is granted.

2. Recovery would not be "against equity and good conscience," but would "defeat the purpose of benefits otherwise authorized." The request for waiver is granted. For the purpose of this provision, any claimant applying for a waiver who presents documentation of current receipt of Emergency Assistance to Elderly, Disabled and Children benefits, (EAEDC), Supplemental Security Income benefits (SSI) or Social Security Disability Insurance benefits (SSDI) combined with SSI shall be presumptively eligible for a waiver of overpayment pursuant to 430 CMR 6.05.

3. Recovery would not be "against equity and good conscience," nor would recovery "defeat the purpose of benefits otherwise authorized." The request for waiver is denied.

If an overpayment is established, it must be repaid, unless the recovery of the overpayment is waived. If an overpayment resulted from error, the claimant may apply for a waiver of recovery.[17] But if the overpayment resulted from the claimant's fault, the claimant is not eligible for a waiver of recovery of the overpayment, and in addition to repaying the overpayment, the claimant must pay a 15% penalty on the overpayment amount and 12% annual interest on any outstanding balance, up to 50% of the original overpayment amount.

A claimant has the right to request a waiver of repayment, but may elect to relinquish that right and have repayment begin immediately. The Collections Department may enter into a repayment agreement with the overpaid claimant.

DUA will recover overpayments that resulted from claimant fault through the offset process at a rate of 25% of current or future weekly benefit entitlement. Non-fault overpayments will be offset at a rate of 50%. The penalties and interest are not recoverable through offsets.

[17] A good faith mistake of fact by the claimant in the filing of a claim for benefits that results in an overpayment of benefits does not constitute fault. 430 CMR § 6.03 (excerpt of the definition of Fault).

Overpayments that are the result of fraud are subject to a 15% penalty. This penalty is based on the principal amount of the overpayment. Repayment is not waive-able and the amount is not appealable. (The determination of ineligibility that led to the overpayment may be appealed, as may the fault determination.)

A claimant who is not at fault may be eligible for a **waiver** of recovery of the overpayment. The waiver regulations at 430 Code Mass. Regs. § 6.00 *et. seq.* interpret the standards and establish the procedures for granting or denying waiver requests under G. L. c. 151A, § 69.

Under § 69(c) and the regulations, a claimant is eligible for a waiver if:

- the claimant is not at fault; and
- recovery of the overpayment would defeat the purposes of benefits otherwise authorized, which means that recovery of the overpayment would deprive the claimant, or the claimant's dependents, of income for ordinary and necessary living expenses, including
    - fixed living expenses, such as food, clothing, rent, mortgage payments, utilities, taxes, accident and health insurance, and work-related transportation expenses;
    - Medical and hospitalization expenses;
    - Expenses for the support of others for whom the claimant is legally responsible;
    - Other miscellaneous expenses which are reasonably considered as part of the individual's necessary and ordinary living expenses, including educational expenses; or
- Recovery of the overpayment would be against equity and good conscience.

"Against equity and good conscience" means that DUA will not attempt to recover overpayments when the claimant gave up a valuable right or changed position to their detriment because of the overpayment. For example, a claimant may have been eligible to receive transitional assistance benefits, had the claimant not received unemployment benefits. That claimant relinquished the right to welfare benefits, and cannot collect them retroactively if the claimant repays the UI overpayment.

In deciding whether to grant a waiver on this ground, the overpaid claimant's financial circumstances are irrelevant.[18] When an adjudicator determines, based on a preponderance of the evidence, that the claimant gave up a valuable right

[18] See 430 CMR § 6.03 (definition of Against Equity and Good Conscience).

or detrimentally changed position because of the overpaid benefits, the adjudicator should grant the waiver.

Note: under the regulations, "any claimant applying for a waiver who presents documentation of current receipt of Emergency Assistance to Elderly, Disabled, and Children benefits (EAEDC), Supplemental Security Income benefits (SSI) or Social Security Disability Insurance benefits (SSDI) combined with SSI shall be presumptively eligible for a waiver of overpayment[.]"[19]

The claimant may request more than one waiver (except if overpayment resulted from fault on the part of the claimant or if, in response to a prior waiver request, it has been determined with finality that recovery of the overpayment would **not** be against equity and good conscience), but may not file a subsequent request until the prior request is determined with finality, that is, the claimant has exhausted all levels of appeal or has failed to request an appeal within the time limits allowed. The allowance of repeated requests for a waiver addresses the changing financial situation of the claimant. While a waiver is pending, offset of an overpayment and any collections activities are suspended.

A claimant may file an application for a waiver at any time. But if no request for a waiver is filed within 15 days after a claimant is informed of the final overpayment, DUA may take action to collect the overpaid benefits. A claimant may request a waiver on the outstanding balance of any overpayment, even though a portion has already been repaid. If a waiver is granted, any amount already collected by offset or direct payment by the claimant will not be refunded.

Collection activity begins when the determination or decision on the waiver becomes final, i.e., the request is denied and the claimant does not appeal further. The collection action is suspended if a subsequent request is filed.

[19] 430 CMR § 6.05(3)(b)2 (revised 4/5/19).