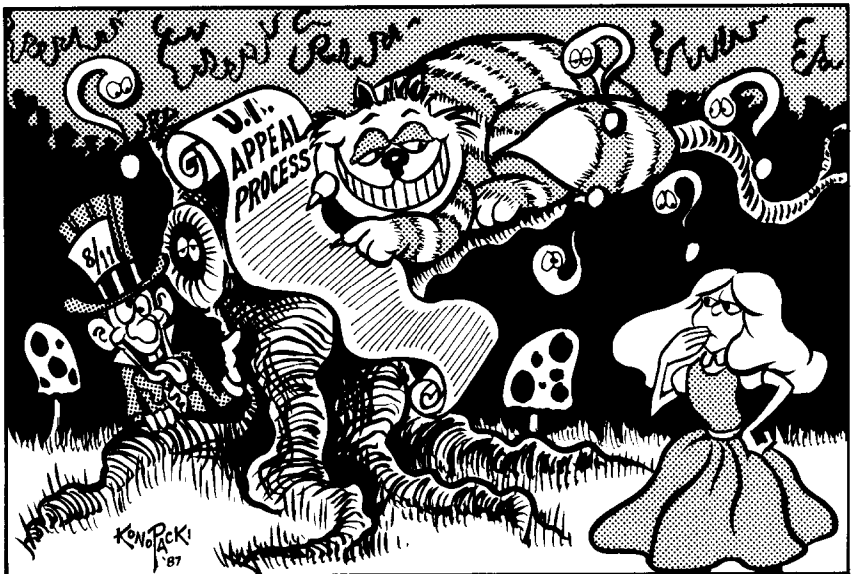
A Worker's Guide To Unemployment Insurance



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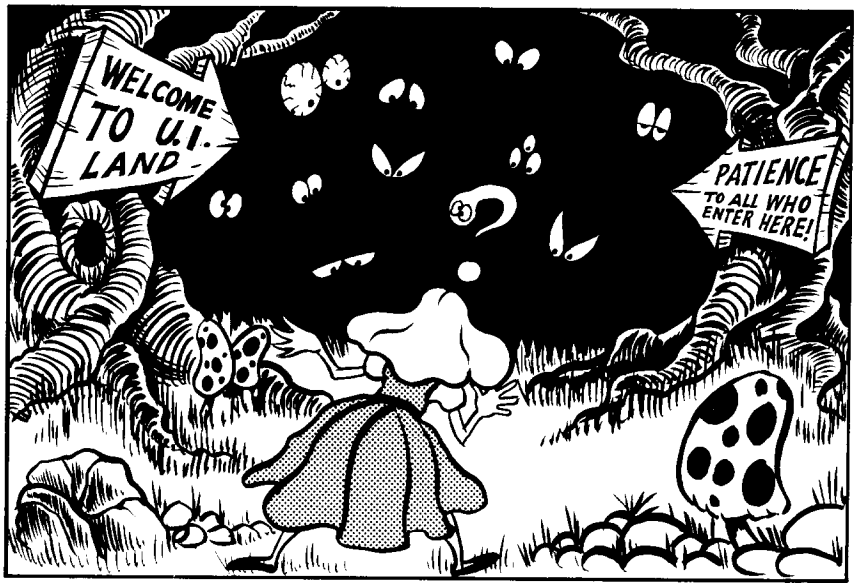


Have Patience and Document Everything

The unemployment insurance application process can be time consuming and difficult to navigate. You will have to fill out forms and answer lots of questions. Relax and follow instructions. *But, document what you say and what is told to you. And, keep records of everything that you receive in the mail or what is reported to you.*

Reading this Guide

Provisions that have been or will soon be removed will be ~~crossed out~~. New requirements will be marked with this symbol: 🕪. Items to be especially careful about are labeled with ⓘ because simple mistakes in these matters are easy to make.

If You Don't Know — Ask

Don't be afraid to ask for help in filling out these forms. If you do not understand what is being asked or do not know how you can answer a question, talk to someone who works at the office. It is far better to ask for help with an answer than to leave a form blank.

Do Not Restrict Your Availability

In order to qualify for unemployment insurance benefits you must be available for full-time (32+ hours a week), and generally for first shift work. Do not, for example, say that you will not take any work paying less than $15 per hour. If your previous job paid you $15 per hour you may be able to turn down jobs paying significantly less than that during your first few weeks of unemployment. But, after that, you will have to take whatever work is offered (with some exceptions).

Also, you may be denied benefits if you do not have transportation to get to a job. You need not have your own car but you must have access to reliable transportation such as

a city bus. If you live in a rural area and do not have transportation you may be denied benefits even if you were able to walk to work at your last employer.

You may be considered unavailable if you have full time responsibility for childcare and cannot make other arrangements. For example, if you are only available to work second shift because of child care responsibilities and there are few second shift jobs in your area, you may be found to be unavailable for work.

Review the Statements in Your Case File

You will be interviewed by telephone by an unemployment insurance investigator. The investigator will summarize what you say in a typed statement available in your case file once you appeal (a statement from the employer will also be in your case file.) You can request a copy of the case file from the hearing office. Before your hearing, review the statement, making sure that it is accurate as to how you believed it happened at the time events occurred (not later, after you learned additional information about what happened). At the hearing, you may be asked whether the typed statement is accurate, and you should have a chance to clarify or add to the statement. Make sure to correct any inaccuracies in the statement if it is introduced at the hearing.

Keep Filing Those Weekly Claims

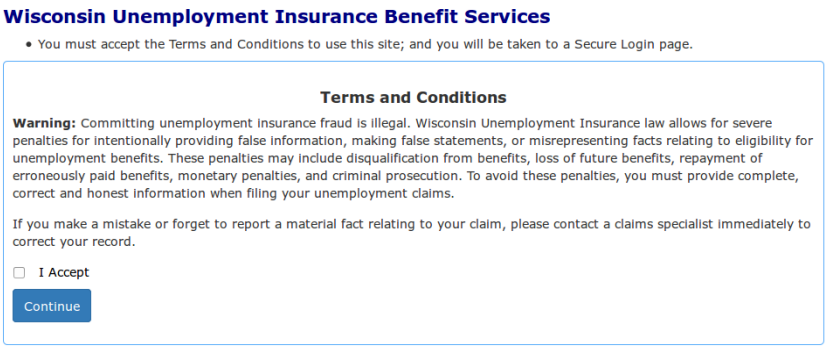
You must call in or file on the Internet for every week that you are unemployed or partially unemployed. Even if you have been denied benefits but are in the process of appealing that denial, you must keep filing.

Keep your PIN confidential ⓘ

The secret PIN and password that you use to file your weekly claim certifications or to access your unemployment account must by law be kept confidential. Do not even disclose that information to a spouse or other family member. If your secret PIN is disclosed, then you will automatically be liable for any and all over payments of unemployment benefits associated with your account — even in the situation of your identity being stolen and someone filing for your unemployment benefits without your knowledge.

On-line claim filing 📣

The Department is beginning to mandate on-line claim-filing for everyone, regardless of language barriers or problems in getting a good and reliable Internet connection. *You should avoid the on-line system as much as possible*, however, because the Department is also making you admit that any mistakes you might make when filing on-line represent intentional theft by you. For instance, the first thing you see even before you can create an on-line ID is:



This screen essentially means that you agree that any mistakes you make represent unemployment fraud. At your concealment hearing, the Department will use this screen as evidence that you knew that you can never make a mistake on your claim and so your accidental mistake must have been intentional.

Filing a timely appeal ⓘ

Because DWD is aggressively re-examining all weekly claims, you should assume that DWD will later challenge the legitimacy your claim a year or so after you filed your claim. For instance, DWD will eventually audit your work searches and look for mistakes, and any mistakes found will lead to a concealment charge. The Department will also re-examine all your separations to determine if they were correctly decided and may change its mind, leading to a disqualification and — you guessed right — a concealment charge.

So, initial determinations will likely arrive long after you stopped filing for unemployment benefits. If you get an initial determination in the mail, make sure to appeal it within the time line set forth in the lower right corner.

If you are no longer eligible for unemployment benefits and you do not know why, it is probably because you never received that initial determination denying your unemployment benefits. You can still appeal that initial determination even though it is late if you can show that your late appeal was because you never received the initial determination in the first place.

📣 Keep in mind that DWD will eventually phase out mailing of initial determinations and provide these notices via an on-line system. How that process will work is unknown at the moment. If at all possible, ask that you still receive any Department notices by regular mail so that you do not miss a notice (such as a charge of unemployment fraud) when you are no longer filing claims for unemployment benefits.

Disqualifications

Once you have gone through the initial intake there are several reasons why you may be disqualified from receiving unemployment insurance benefits. Some of them are

based on availability for future employment and some are based on the manner in which your former employment came to an end.

AVAILABILITY ISSUES

Unemployment Insurance is designed to help people who are out of work and who are actively seeking new work. It is not designed to help people who cannot or will not work. Therefore, there are requirements about your availability for new work.

1) General Availability

To receive benefits, you must be available for full-time work, and usually you must be available during daytime or first-shift hours or the hours in which your type of work is typically performed. For example, a bartender might be disqualified for restricting availability to first-shift work rather than nights and weekends, while a bank teller might be disqualified for restricting availability to nights and weekends.

2) Education

Students almost never qualify for benefits if their classes are during daytime hours or the hours in which their type of work is usually performed. Even if the student promises to drop out if he or she gets a job, he or she will likely be found to be unavailable. Only if the student is taking classes that will not lead to a degree and is not a full-time student can a person still be considered able and available for work.

3) Physical Limitations

The Department makes a distinction between temporary, short-term and long-term unavailability for work. If you are physically unable to do your work for a short term you will be ineligible for benefits as long as the work is available and you are not.

You are *not* required to be physically able to do any job that might be offered. But, you must be physically able to engage in some substantial employment. The Department has labor market analysts who determine what an individual's labor market is and what percentage of jobs in that market the person is likely to be available for by using a computer database program. If a labor market analysis report is generated in your case it may be considered as part of the record at your hearing.

4) Geographic/Transportation Limitations

You cannot overly restrict the geographic areas in which you are willing to work. Depending on your labor market and the type of work involved, most people can be expected to travel anywhere from 15 to 25 miles each way. Certain jobs, such as construction work, may require up to a 50-mile commute. Usually, you will need access to a car or public transportation. Limiting yourself to positions within walking distance will usually disqualify you unless there are a substantial number of jobs within that distance.

5) Restrictions on Wages and Type of Work That Will be Accepted

Claimants should not limit in any way the kinds of jobs or wages that they will accept. It is OK to say you prefer certain jobs, but refusing to accept whole categories of jobs may disqualify you for benefits. It may be found that you are unduly restricting your availability. The exception to this is during your canvassing period, discussed below.

6) Availability with "Current" Employer

You will be found to be ineligible for benefits in any week in which you are recalled with due notice to report for work with your current employer and you are unavailable. Your current employer is the employer you most recently worked for before filing your unem-

ployment claim. "Due notice" means notice that is reasonably calculated to inform an employee that there is work available for him or her. A vague comment that maybe there will be some work next week or a phone call in the afternoon to report to work in two hours is not due notice.

7) SSDI Benefits

While federal law prohibits any disqualification or reduction in unemployment benefits because a person is also receiving regular Social Security or SSI benefits, there is no such prohibition when receiving Social Security Disability Income or SSDI benefits. As a result, DWD has mandated that anyone receiving any SSDI benefits is now completely ineligible for unemployment benefits.

Most states do not see a problem with collecting both SSDI and unemployment benefits, because there are many state and federal programs that encourage the disabled to work. A few states apply an offset to unemployment benefits for the SSDI benefits that person receives. Only Wisconsin applies a complete ban on unemployment benefits because of SSDI benefits.

SEARCHING FOR WORK

1) Job Search Requirements ⓘ

Starting on July 7, 2013, the number of job searches you need to make each week was raised from two per week to *four per week*. Now, the Department requires you to provide documentation for those four job search actions for every week you claim benefits. When not filing on-line, you will need to mail or fax these job search records to DWD.

Get a copy of the UCB-12 form specifically designed for recording your job search efforts. Write down the date, where you looked (newspaper, Job Service Board, hiring hall, website, etc.), and where you applied (name and address of employer) and, if available, the name and position of the person with whom you spoke or wrote to. Make sure to track phone numbers, e-mail addresses, and website links as well. If you are not actively looking for work, then your benefits may be stopped. *And, make sure to keep your job search records for 52 weeks (mandated by DWD rules)*.

The following actions can count as a job search:

- Applying for work with employers *who have available openings* (a second application to the same employer within four weeks is not allowed, unless the application is to a new, different job, the employer's customary practices allow for multiple applications to the same job opening, or the employer is a temporary help employer).
- Taking examinations for suitable work, such as civil service or a similar kind of test, such as a WorkKeys exam.
- Registering for suitable work with a public or private placement facility, including a union.
- Mandatory Job Center of Wisconsin registration.
- Posting a resume on an employment website (only one posting per website is normally allowed).
- Following the recommendations of a public employment office or similar reemployment services, including participation in reemployment services.
- Attending non-mandatory re-employment services operated by DWD.
- Registering with placement facility or head hunter.
- Meeting with a career counselor.
- Participating in a job interview.

- Participating in weekly professional networking group connected to your profession.

2) Canvassing Period ⓘ

You may have *up to six weeks* from when you became unemployed in which you can turn down work which is a lower grade of skill or at a significantly lower rate of pay than you had on one or more recent jobs without losing your eligibility for benefits. During your canvassing period you will be able to turn down jobs that do not pay as well as your old job (less than 80% of your old wage) or require less skill but you may be found ineligible if you turn down a job offer for a position similar to your old job.

3) Job Offers

You may be disqualified from benefits if you are offered a job, and you turn it down. The only exceptions to this rule are if you are still in your canvassing period or if you turn down the job for what DWD considers "good cause."

The offer itself must meet certain standards before it will be considered a valid offer:

A. There must be a clear offer of work — something a reasonable person would understand to be a job offer.

B. The offer must be sufficiently specific as to type of work, the number of hours, starting date, and the rate of pay. If you have previously worked for this employer, however, it may be assumed that you were familiar with some of these factors, and they may not be required to be specifically stated for the offer to be valid.

C. The offer must be genuine. A former employer cannot make a job offer just to avoid paying your unemployment compensation.

D. The work offer cannot be in violation of a union contract.

4) Contacting Temporary Job Agencies ⓘ

Starting in 2014, you are required to contact a temp agency each week you claim unemployment benefits if that temporary job agency is your last employer. If you fail to contact that temp agency about available assignments each subsequent week you claim unemployment benefits, the temp agency can inform DWD of your lack of contact. You will then have to prove that: (a) either you actually did contact the temp agency by having phone logs or copies of e-mail messages and letters showing that contact, or (b) the temp agency failed to inform you of this requirement when you last worked for it.

This requirement to contact a temp agency each week as one of your four job searches kicks in every time an assignment through a temp agency ends.

5) Good Cause for Refusal of a Job Offer

Under some circumstances you may be able to turn down a job offer for good cause without losing your benefits.

A. **Canvassing Period** As previously mentioned, if you have only been unemployed for six weeks or less, you may be allowed to turn down a job at a significantly lower rate of pay than you earned or requiring a lesser degree of skill than you used on one or more recent jobs.

B. **Protection of Labor Standards** You may turn down a job under the following circumstances:

1. The position is vacant due directly to a strike or lockout; or

2. The wages, hours, or conditions of the work offered are substantially less favorable to you than those prevailing for similar work in the locality. (This does not mean you can turn down either work on a shift you prefer not to work or part-time work.) For example, if the average wage for certified electricians in your area is $15/hour you would not be required to take a job as a certified electrician at $8/hour; or

3. As a condition of employment, you were required to join a company union or were required to resign from or refrain from joining a labor organization (union).

6) Other Good Cause

Other possibilities exist for determining whether there is good cause for refusing a job offer. For example, if the distance to work or travel time is excessive — i.e., the distance between your home and the job site is too far — you may not be required to take the job. Usually excessiveness is determined on a case-by-case basis, and it is compared with the distance other people in your locality travel to their jobs to do similar work. The Department will use a market analysis for your locality and job type to determine what distance is reasonable or excessive.

7) Limits on Work Search Waivers

Prior to the new laws, many claimants had their work searches waived. The rules for granting these waivers as well as the length of the waivers were changed dramatically, however. Employees on seasonal layoff, for instance, will not be granted a waiver unless their employer specifically indicates a likelihood of recall (previously, a waiver was based on the history of layoffs and recalls for that employer).

The length of these waivers have also been reduced. Most waivers will not last longer than four weeks. Only in certain limited circumstances will employees be granted a work search waiver of eight or at most twelve weeks.

8) Registration and Testing Requirements

The Department requires claimants to attend DWD-sponsored seminars on job search strategies, to register at https://jobcenterofwisconsin.com/ by filling out basic information and uploading a resume, and now completing various skills surveys at the job center website.

So, be prepared to take tests and attend seminars whenever asked to by DWD and to do these tasks on computers via a web portal. Your unemployment benefits will not be paid until whatever requirements DWD sets forth are met.

9) Drug-testing

The Department has instituted new rules for employers to report to the Department *on a voluntary basis* drug test results or the failure to take a drug test of job applicants. As with any drug test, claimants have the right to challenge the results of a drug test, including the validity of the drug test and whether proper evidence controls to maintain the security of the sample were used for that drug test. As of the summer of 2017, no employer has actually made such a voluntary report.

A claimant who has refused a voluntarily reported test or tested positive will have the option to sign up for a drug treatment program at the Department's expense in order to keep receiving benefits. If a claimant declines this treatment program, then he or she is ineligible for unemployment benefits for the rest of his or her benefit year.

Actual drug testing of claimants by the Department itself is on hold for some time because Congress repealed the federal drug testing rules previously put into place. Without those federal rules, state drug testing for unemployment benefits is not possible.

QUITTING

Generally, if you quit your job you cannot collect unemployment insurance benefits. A quit or voluntary termination is defined for unemployment purposes as when an employee shows that he or she intends to leave his or her employment and indicates such intention by words (e.g., saying you quit) or actions inconsistent with the continuation of the employment relationship (e.g., absences without notice).

Whether you voluntarily quit or were discharged may determine whether or not you are eligible for benefits. If the situation is unclear at the time your employment ends, it is up to you, the employee, to clarify it. Did the employer intend to fire you or did you leave work (i.e., quit) because you were mad? Would it be reasonable to expect you back the next day? Did you set a date for your last day of work, or did the employer set that date for you (the latter is a discharge)? In other words, who perfected the quit, you or the employer? For instance, if your employer threatens to discharge you if you do not quit and you then quit to avoid being discharged, then you did not really quit. You were discharged, because the employer in these circumstances made the separation happen.

Still, if you do things that are "inconsistent with continuing the employment relationship" you may be found to have quit even though you never actually said you were quitting. If you are absent without notice, in jail and do not notify your employer, or refuse a reasonable transfer, you may be found to have quit your job. You may also be considered to have quit if you fail to meet a job requirement, such as acquiring a certain type of license or certification needed for the job.

The Quit Penalty

The penalty for quitting without good cause changed in 2014. In place of the four week waiting period and having to earn 4x your weekly benefit rate, there is now no waiting period but you need to earn 6x your weekly benefit rate.

1) Quit with Good Cause

You may be eligible for benefits if you can establish that you quit with good cause. Good cause requires that there be some fault on the part of the employer. Thus, if you quit for personal reasons that are not within the exceptions in the law — no matter how valid they are — you will not be eligible for benefits. Good cause also requires that the employer's fault be substantial. For example, if you quit your job because you believe your supervisor is incompetent, you are quitting because you disagree with how the employer should run its business. There is nothing in unemployment law, however, that requires an employer to be competent in managing its operations, and so you cannot qualify for benefits if you quit for this reason.

Quitting with good cause attributable to the employer requires that there be no reasonable alternatives. You are usually required to show that you informed your employer of

the problem and that the employer did not reasonably act to remedy it. (This requirement is not necessary where the employer wants you to do something illegal).

A. **Employer's Illegal Acts** You may be found to have quit with good cause if you quit because your employer wanted you to do something illegal. For example, if your employer wanted you to commit fraud or if your employer demanded that you work in violation of wage and hour laws, you should be found to have quit with good cause. A requirement by an employer that you do something unethical, however, may not allow you to quit for good cause unless the unethical action is also illegal.

B. **Sexual Harassment** If you quit because your employer made employment, compensation, promotion, or job assignments contingent upon your consent to sexual contact or intercourse, you should be found to have quit with good cause.

C. **Unilateral, Material Changes in Terms or Conditions of Employment by Employer** You may have good cause to quit if your pay is significantly reduced or if there are other changes in your employment such as a significant demotion, and you decide soon thereafter to quit because of those changes.

D. **Employer's Failure to Comply with Contract** You may have good cause to quit if your employer does not meet its obligations, for example, by not paying your wages as agreed.

2) Other Permissible Reasons for Quitting

In some situations you may be eligible for benefits after quitting even if your employer had no fault in the situation that led you to quit.

A. **Personal or Family Health** You may be able to quit with good cause if you are physically unable to do your job or if you have to take care of a sick family member. But, there are two important restrictions on this that you must meet in order to qualify for benefits:

1. You must explore all reasonable alternatives before quitting. Perhaps there is some other less strenuous job you can do for the employer or other accommodations can be made, such as a leave of absence. You **must** inform your employer of the problem and give the employer an opportunity to accommodate you **before** you quit.

2. Even if you meet the above requirements you still have to be generally able and available for work. See the previous discussion about availability. If you are too ill to continue working for your current employer, you may also be too ill to work for any employer.

B. **Shift Transfer** You are eligible for benefits if an employer, after hiring you for one shift, transfers you to another shift, and you cannot find childcare during the new shift.

~~C. **Compulsory Retirement** You are eligible for benefits if you are forced to quit because you reached the compulsory retirement age of your employer.~~

D. **Quit to Take a New Job** Starting in 2014, you can quit to take another job ~~provided you earn at least four times your weekly benefit rate in the new job~~, when the new job offers at least one of the following:

1. The average weekly wage in the new job is greater than or equal to the average in the old job.

2. The new job offers the same or a greater number of hours of work than the old job.

3. The new job offers the opportunity for significantly longer-term employment.

4. The new job offers the opportunity to work significantly closer to your home than the old job.

E. **Quit Certain Work Within Trial Period** You may be eligible for benefits after quitting work within the first ~~10 weeks~~ thirty days if the wages, hours or other conditions of the work are substantially less favorable than those of other similar work in your area, or if you have other good cause that existed when you first started the job and you quit for that same reason.

F. **Quit to Move with Spouse** You may be eligible for benefits if you quit to relocate with your spouse and your spouse changed his or her employment to a place where it is impractical for you to commute to your job. Since 2014, this provision only applies to claimants whose spouse is a member of the armed forces on active duty.

3) Quit Reasons That No Longer Allow Benefits

Besides the elimination of the compulsory retirement provision noted above, numerous other provisions for allowing unemployment benefits when leaving a job have been eliminated.

- Quitting a job to accept a recall to another job (note that the provision disqualifying you from benefits if you decline to accept a recall still remains in effect).

- Quitting a job connected to a temporary residence because the loss of other work makes the commute from that temporary residence no longer economically feasible.

- Quitting a part-time job because the loss of full-time work makes maintaining the part-time job no longer economically feasible.

- Quitting a part-time job *before* the loss of a full-time job that triggers a claim for unemployment benefits.

- The owner of a company or family business losing work because of the involuntary cessation of the business through bankruptcy, seizure of assets, or forced sale.

LOSS OF LICENSE

If your job requires that you have a certain type of license and that license is suspended, revoked, or not renewed due to your own fault, you will be disqualified from collecting benefits.

DISCHARGE

Unless you work under a collective bargaining agreement an employer has the right to fire you for any reason or no reason at any time under any circumstance (with a few exceptions such as sex or race discrimination or union activities). If you are discharged you are eligible to collect unemployment insurance unless you are fired for misconduct.

1) Labor Dispute

The law in this area is very complicated. Generally, if you are out of work because of a strike you are not eligible for benefits. But, if you are on strike and your employer fires you, you may become eligible for benefits as long as you are not fired for misconduct such as strike violence. If you are laid off because of a strike against another employer, you may be eligible for benefits. Again, there are exceptions, and it is best to talk to your union representative.

2) Misconduct

The term "misconduct" has a special meaning in unemployment insurance cases. "Misconduct" is defined as "conduct showing such willful or wanton disregard of an employer's interests as is found in a deliberate violation or disregard of the standards of behavior which an employer has a right to expect of his employees, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests." Misconduct is *not* "mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertence, or ordinary negligence in isolated instances, or good faith errors in judgment or discretion."

Specific statutory language to define misconduct has been added to unemployment law, and this new language as described below makes slight to substantial changes to the kinds of behavior that qualify as misconduct.

A. **Off-Duty Conduct** Generally your off-duty conduct is none of the employer's business unless it affects your work. If you get in a fight with a co-worker outside of work or you come to work hung over, your off-duty behavior could affect the employer and may therefore be misconduct.

B. **Criminal Acts** Misconduct now specifically means criminal convictions (but not arrests), including convictions for forfeitures/citations, if the conviction makes it impossible for you to perform your job duties. So, speeding tickets incurred while off-duty and which raise your employer's auto insurance rates can now be found to be misconduct. Still, employers who discharge employees because of criminal prosecutions are taking risks of their own, as Wisconsin law makes it illegal to discriminate against employees because of arrests or convictions. So, an employer who discharges you because of a conviction may be liable for discrimination if there is *no* substantial relationship between the conviction and your job duties.

C. **Threats and Violence** Usually, when you start a fight in the workplace you are guilty of misconduct. But, if you defend yourself against violence, especially

when you have no alternative, DWD has traditionally determined that no misconduct has occurred. The new law may make all acts or threats of violence, even when used in self-defense, to be considered as misconduct.

D. **Shirking** A general shift in case law has occurred over the last few years in which employers have warned employees about mistakes on the job and then dismissed those employees when those mistakes have not been corrected. There is now a clear line of cases labeling an employee's continued on-the-job mistakes as misconduct when there is evidence in the record that the employee could previously perform the job duties in question without making mistakes. No actual evidence that the employee is intentionally avoiding work, ignoring his or her job duties, or sabotaging work is needed.

E. **Negligent Conduct That Causes Substantial Damage** "Substantial" damage has been found to be when several hundred dollars of damage occurs. And, any accident where the costs are a thousand dollars or more is considered “substantial.” Once this threshold is reached, misconduct is established under this provision regardless of intent. In other words, misconduct applies under this provision for accidents and mistakes when the damages in question are "substantial."

F. **Absenteeism/Tardiness** Generally, absences for valid reasons, such as illness or emergencies, and with proper notice are usually not misconduct. But, the new law classifies as misconduct more than two absences in a 120-day period (employers can define an alternative period or number of absences if they give employees notice of that alternative). Excessive tardiness as defined by the employer and of which the employee has notice can also now qualify as misconduct. The only way to avoid a finding of misconduct is if you have both a valid reason for the absence or tardiness and you have given proper notice to the employer about that absence or tardiness. "Proper notice" usually means the notice that the employer requires. Possibly, you may defend against a misconduct change in this area if you can show that your employer condoned the behavior for a long time without complaint or warning or if the employer tolerates similar absenteeism or tardiness in other employees.

CAUTION: The Department has taken the position that a statutory quirk in unemployment law allows employers to set their own absenteeism misconduct standard, including a single absence for any reason and regardless of notice. So, an employer can have a policy that a single absence qualifies as grounds for discharge, and such a discharge will now count as misconduct under the Department's reading of the law. The Wisconsin Supreme Court should issue a decision on this question by June 2018.

D. **Work Rules/Insubordination** You may be found to be guilty of misconduct if you do not follow the employer's work rules. This can include a variety of things:

1. Failing to follow required safety procedures thus endangering yourself or others
2. Fighting with or harassment of co-workers
3. On-the-job horseplay
4. Using abusive or profane language
5. Altering time cards

6. Refusal to follow directions
7. Stealing or lying

E. **Drug and Alcohol Testing** You may be found guilty of misconduct if: (1) your employer has a reasonable substance abuse policy concerning the use of alcoholic beverages or controlled substances; (2) you have knowledge of that substance abuse policy; and either (3a) you admit to use, (3b) you refuse to take a test, or (3c) you test positive for use in accordance with DWD-approved testing methodology. Unlike controlled substances, an employer cannot proscribe off-duty use of alcohol since alcohol is generally legal.

F. **Knowing Violations of Law** The new law defines as misconduct a willful and deliberate violation of a federal, state, or tribal requirement, of which the employee is aware, and which would cause the employer to suffer some kind of sanction or loss of license or certification.

3) Defenses To A Misconduct Charge

A. **Single Isolated Incident** If overall you have a good work record and only messed up this one time, this incident may not be misconduct. This conclusion depends on the seriousness of the offense. If it was a relatively minor lapse in good behavior, this incident may not be misconduct. But, if the incident was especially bad or if you have had other problems in the past, there might be misconduct. Intentional dishonesty is usually misconduct even when it is a single isolated incident.

B. **Employer's Condonation** If the employer knew about and tolerated a behavior in the past, the behavior may not have been "misconduct." Still, an employer can begin enforcing a rule, which he or she previously ignored if he or she makes it known that the rule will now be enforced. If you have fair warning, your behavior may be considered "misconduct" even if you are the first victim of the new enforcement.

C. **Employer Fails To Follow Its Own Procedure** If you have a contract or an employee handbook, which sets out disciplinary procedure such as

1st step - oral warning
2nd step - written reprimand
3rd step - suspension
4th step - discharge

and the employer fails to follow this procedure, you may not be found guilty of misconduct. For example, if under the above procedure you were fired after only an oral warning, you may have a defense. Remember, this will only work if the employer has an established disciplinary procedure that he or she failed to follow. Keep in mind as well that a single warning for being late does not prevent a finding of misconduct for a second but serious offense, such as theft.

D. **Job Performance** If you are fired from a job because you are inefficient or incapable of doing the job, that is not misconduct. Misconduct requires "an intent to do something inconsistent with the employer's interests." The standard for misconduct says "mere inefficiency, unsatisfactory conduct, failure in good per-

formance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not deemed to be misconduct." But, keep in mind the discussion above regarding shirking.

4) Substantial Fault

In 2014, a new standard for discharging employees and denying them unemployment benefits called substantial fault took affect. Substantial fault includes those acts or omissions of an employee over which the employee exercises reasonable control and which violate reasonable requirements of the job. This substantial fault standard is not intended to include: (a) minor infractions of rules (unless such infractions are repeated after a warning), (b) inadvertent mistakes, or (c) failures to perform work because of insufficient skill, ability, or equipment. The Department intends to apply this disqualification standard very broadly.

To begin, this standard applies to an employer's "reasonable" job requirements, which are currently understood to be what is rational. Given the wide degree of discretion employers have in how they run their businesses, the only way a job requirement may not be rational is if that job requirement was impossible to do or illegal, such as forcing an employee to commit criminal acts or requiring an employee to drive from Madison to Milwaukee in 30 minutes.

Second, an employee's reasonable control is presumed if the action or omission at issue relates to a job duty or job requirement. So, to challenge this part of the substantial fault test, an employee will need to demonstrate that he or she really did not have any actual control over what is being alleged by the employer.

For instance, an employer can reasonably require you to be at work on time. But, you cannot be at substantial fault for the blizzard that closes the workplace down since you cannot reasonably be expected to control the weather. On the other hand, you will reasonably be expected to control the operation of your car. If you miss work because of a car accident that is your fault or because your car will not start when you failed to fix the alternator after being told about it by your mechanic, then it is very likely that you are guilty of substantial fault.

Accordingly, the burden of proof here shifts from employers — who traditionally have the burden of proof in these cases — to claimants who will then need to show that one of the three exceptions applies to their situation.

A. **Minor Infractions without prior warnings** Minor infractions that follow a warning of some kind presently count as substantial fault. But, if there are no prior warnings, the warnings are too remote (years prior), or the mistake is inconsequential to the employer (e.g., you ate day-old cake that was going to be thrown out anyway), then you should not be disqualified for benefits.

B. **Inadvertent errors** Thanks to a clinic case, Operton v. LIRC, that went all the way to the Wisconsin Supreme Court, unintentional job mistakes that occur because *of accidental carelessness or forgetfulness* count as inadvertent errors and mean substantial fault will not apply. Moreover, the mere fact that there are several errors of a general kind by the employee does not mean the employee's errors are more than inadvertent. To avoid a finding of inadvertent errors because of simple unintentional mistakes, an employer has to show that a

pattern to the mistakes exists that establishes the employee's mistakes are actually intentional in some way. See the discussion of shirking, above.

C. **Lack of skills, ability, or equipment** You cannot be disqualified under substantial fault because of your job mistakes if you can show that you lack the skills, ability, or equipment to do the job. For instance, a TV technician showed he was not disqualified when the employer switched the job to a new computerized work flow which he could not master and was not given the time and resources by the employer to learn.

Over-Payments and Collections

WHAT IS AN OVER-PAYMENT?

An over-payment occurs whenever DWD recalculates or re-determines your eligibility for unemployment benefits after you have been receiving those benefits. Traditionally, this amount has usually been one to five weeks of unemployment benefits.

But, since the 2008 recession and especially since 2014, the increasing amount of time taken by DWD to act on information it receives and the Department's eagerness to charge concealment against claimants for nothing more than simple filing mistakes have led to over-payment amounts, concealment penalties, and forfeiture of future unemployment benefits of $10,000 to $20,000 and even $30,000 or more for some individuals.

So, now over-payments involve large amounts of money. And, the issues leading to these over-payments have often taken place six to ten months at a minimum before the over-payment allegation is first raised by DWD. In many cases, DWD may be mistaken about why the over payment exists. Even if the reason for the over-payment is legitimate, there may be reasons for waiving recovery of that over-payment.

GETTING REPAYMENTS WAIVED

Whenever a potential over payment exists, the question of whether the repayment will be waived also needs to be examined. This examination has two parts, and both parts have to be met for an over-payment to be waived.

1) Claimant is Not at Fault for the Over Payment

Generally, In order to show that you are not at fault for the over-payment, you need to show that you are blameless in all of your interactions with DWD — that you made no mistakes and that you supplied all of the information DWD requested from you in a timely manner.

2) There is Departmental Error Responsible for the Over Payment

Departmental error is an error by DWD in computing or paying benefits arising from a mathematical mistake, miscalculation, misapplication or misinterpretation of the law or mistake of evidentiary fact, by commission or omission, or from misinformation provided to a claimant by DWD, on which the claimant relied. Departmental error often occurs because DWD lacks a procedure for handling the kind of issue your case raises, DWD fails to take action on the information you provide, or DWD mis-characterizes a key fact in your case (e.g., treating a temporary leave of absence as a quit).

The Department itself almost never admits to departmental error. Only when you are before an Administrative Law Judge will you have the chance to actually point out that departmental error has occurred in your case.

FRAUD AND CONCEALMENT ⓘ

The Department is often alleging concealment and fraud when a claimant makes any kind of mistake that leads to an over-payment. For instance, mistakes in completing weekly claim certifications, such as the hours worked or the amount earned in a week, are often subject to additional allegations of fraud and concealment ten months or even years later. These fraud and concealment allegations not only mean that all prior unemployment benefits from the date of concealment are forfeit, but also that unemployment benefits in the future are forfeit and additional financial penalties (40% of the amount due) must be paid as well.

The problem with most of the fraud and concealment allegations by DWD is that in many cases there is nothing more than a claimant's simple mistake at issue. Concealment consists of a suppression of a fact and implies a purpose and design. Accordingly, penalties and a forfeiture of benefits should not be imposed against a claimant who makes an honest mistake, but only against a person who engages in a willful act of concealment, not due to ignorance or lack of knowledge. So, there must be evidence in the record to show an intent to receive benefits to which the individual knows he or she is not entitled. The Department has been ignoring these requirements, however, and charging claimants with concealment by presuming that claimants have an illicit intent. Because DWD is presuming fraudulent intent, claimants *must* appeal their cases if they are to get a fair hearing.

Direct evidence of intent is not necessary for a finding of concealment. Intent may be inferred from acts, words and statements. Further, there is a rebuttable presumption that a person intends the natural and probable consequences of deliberate acts. Still, a concealment finding must be supported by clear and convincing evidence in the record that is more than mere mistake or confusion. So, if you are accused of fraud and concealment, you will need to show that the mistake at issue is something any reasonable per-

son could have made under the circumstances. When defending yourself against a concealment charge, see if any of the following applies to your situation:

- If unreported wages or hours at issue, do not accept Department allegations or employer records about the hours and wages as accurate.
- After DWD in October 2012 changed a weekly claim question from "Did you work?" to "During the week, did you work or did you or will you receive sick pay, bonus pay or commission?" you stopped answering yes to this question and so stopped reporting hours and wages from an employer.
- You answered the weekly claim questions based on what was being asked of you at the time and the questions in the hearing record do not match the questions you were actually asked and answered.
- You did not report wages from a part-time employer because you were not filing a claim for unemployment benefits from that employer and believed at the time that unemployment benefits were paid directly by an employer from whom you were discharged or laid off and had nothing to do with the part-time employer with whom you were still working.

Finally, note that *any admission* of a mistake at the time you were filing or an apology for making mistaken weekly claims will be treated as an admission of fraud.

COLLECTION TOOLS

Once an over-payment exists and repayment is not waived, DWD has several ways of collecting that over-payment.

Offsets

The main device for recovering over-payments is an offset against current and future unemployment benefits. As soon as DWD determines that an over-payment exists, DWD will stop all payments of unemployment benefits and offset those weekly amounts against the amount of unemployment benefits that you allegedly owe.

Because the over payments amounts at issue now are so much greater today, these offsets rarely retire the entire amount that is owed anymore. As a result, DWD has turned to other mechanisms available to it in recovering over payments.

Payment Plans

The Department is eager and willing to work out payment plans. Contact DWD Collections at 608-266-9701 to discuss payment plan options. If you are not collecting unemployment benefits and do not work out a payment plan, the Department will turn to the tax refund intercepts, wage garnishments, and bank account levies described below.

Tax Refunds

Starting in 2012, DWD began diverting state and federal tax refunds to recover over payments. Depending on the amount owed, you might receive a portion or even none of your tax refunds until your over-payment debt is retired.

Liens

If you own a home or car, DWD will immediately place liens on these items through court filings. The result is that if these items are sold, DWD has a right to the proceeds of the sale to repay the over-payment before you receive anything yourself.

Wage Garnishments

In the past few years, DWD has begun to aggressively use this power whenever an over-payment exists. These garnishments are limited to the amount over 80% of disposable earnings (except where an allegation of fraud/concealment has been proven). Moreover, a claimant may be completely exempt from a wage garnishment if wages are either below federal poverty guidelines established for the size of the claimant's household or the claimant can demonstrate financial hardship.

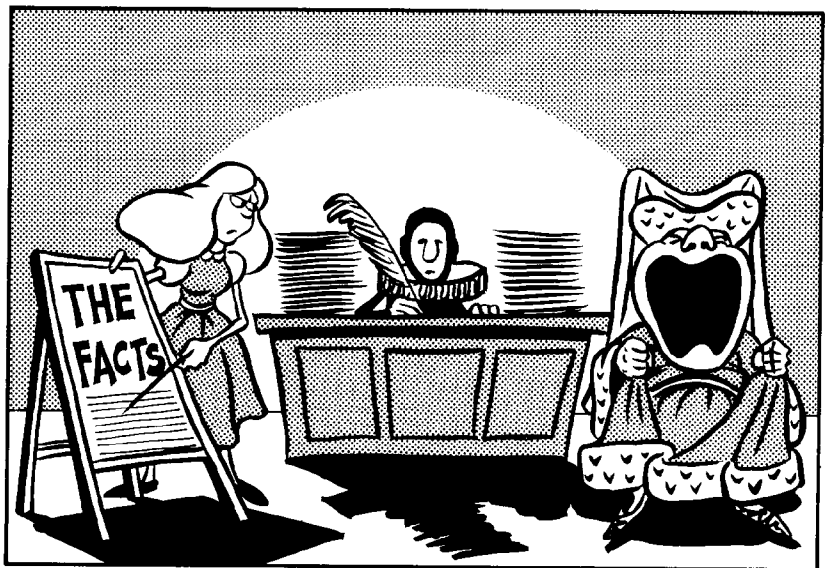
Other Collection Actions

The Department has the general authority to bring collection actions against anyone, including third parties, in possession of unemployment funds that are owed to DWD. It is still unclear how DWD will actually use this new collection action, however.

Bank Account Levies

The Department has the ability to levy the bank accounts of claimants who owe money to DWD. By law, DWD must still leave at least $1,000 in any account it attempts to levy. In other words, DWD cannot institute a levy of a bank account that has less than a $1,000 and can only take the amount in the account that is greater than $1,000. Keep in mind that the Department will go after any bank account connected to your social security number, including accounts of children or parents that are shared with you.

Appeal Procedure



PRELIMINARY STEPS

Follow These Procedures

A) The initial determination was against you and you have appealed to DWD (the easiest way to file an appeal yourself is to make a copy of the initial determination, write "I appeal," date and sign your name, and then mail this form to the

local hearing office by the appeal deadline in the lower right corner of the form), or

B) The initial determination was in your favor and you receive notice that your employer has appealed.

You need to begin preparing for your hearing right away. There are several steps necessary for adequate preparation:

1) Get Your Unemployment Insurance Case File

To obtain copies of the information in your file, call or stop by your local DWD Hearing Office. In Madison, the Hearing Office is located on the third floor the Wisconsin Broadcasting System Building at 3319 West Beltline Road, Madison WI 53707. The phone number is 608-266-8010. It's a good idea to call before visiting the office.

When calling, explain that you would like copies of everything in your file and provide your hearing number to the staffer on the phone. He or she will mail copies of what is in your case file to you at the address in your file so be sure that address is current. You can also ask that your file be faxed to you. Or, you can visit the hearing office and examine the file yourself. A staffer will provide copies of any documents in the case file you indicate that you need.

After you have a copy of the papers in your file, read them over carefully. Some of them you will have seen before. Others, such as the employer's statement, may be new to you. Read the employer's statement carefully so that you have an idea of what the employer is alleging and will help you prepare your case.

PLEASE NOTE: the papers in your file are not a part of the hearing record unless they are introduced and marked as exhibits during the hearing.

2) Get Your Employee/Personnel File

Most employers keep files on each of their employees. This file often contains things that may be important in an unemployment compensation hearing, such as

A. Letters of reprimand or written notes about oral warnings
B. Letters praising you for your performance
C. Job evaluations
D. Records of raises, promotions, or demotions

Under Wisconsin Statutes § 103.13, you have the right to see your personnel file. If your employer will not give you copies of the things in your file, ask to examine it and write down what is in your file and what it says. If there is something in your file that you feel is very important to proving your side of the case and the employer refuses to give you a copy, you may need to get a *subpoena* for documents. This will require the employer to bring the file to the hearing. For more information on this issue, read the section on getting a *subpoena* or a *subpoena duces tecum*.

3) Get Your Medical Records

If it appears that your physical condition is relevant to the case, the hearing office will, generally, send you a form for your doctor to fill out (called a UCB-474 form). Your physical condition is relevant to your case if there is a question about your physical ability to work or if you quit or were fired from your job because of a health condition.

If you receive one of these 474 forms or if you believe your health condition is important to your case make sure your doctor fills one of these out. If you did not receive such a form but believe it is important to your case, call the Madison hearing office at 608-266-8010 to request the form. It is better to have your doctor fill out one of these forms than to just have him or her write a letter on your behalf. Take the form to your doctor's office and wait while he or she fills it out. Explain to the doctor that this form is completely different from a workers' compensation form and that any restrictions on your ability to work can jeopardize your unemployment.

If your doctor will not complete the 474 form immediately, *make sure* your doctor knows when the form must be returned, how important it is that he/she fills out the form, that the form is for unemployment insurance, and that it is to your benefit to be able to do at least some work. If you mail it to your doctor you may not get it back in time for your hearing. Make sure your doctor — not you — fills it out and signs it. If the doctor is instructed to return the form to the hearing office, call to make sure the form has been received well before your hearing.

If you cannot obtain a completed UCB-474 form from your doctor, present any other medical documentation you may have that relates to your case and make sure to explain at the hearing what you did to try to get the 474 form completed.

4) Plan Your Case

Sit down with a pen and paper and think about your case. What points do you want to make? What is the employer likely to say? Be careful not to let your emotions control you. Administrative Law Judges are concerned with the facts, and their job is to apply the law to the facts. They must follow the law, which does not always mean they reach a result that you think is fair. They do not want to hear about how much you need the money or how much you deserve it because of all the taxes you have paid over the years. You only get unemployment benefits if you meet certain requirements. It is not an automatic benefit.

Think about the points you want to make that have to do with the "issue" in your case. Jot down things you think are important but do not write them out word for word. Writing it out exactly will only confuse you later if you try to memorize your answers, and it may give the impression that you are saying what you think you should say regardless of what the truth is.

The Administrative Law Judge usually does not want and may not accept a written report of your side of the story. The Administrative Law Judge must rely on what is testified to during the hearing. This means you must also decide if you need to bring any witnesses to the hearing. Witnesses must appear in person. It is not acceptable to bring in a written statement from a witness instead of the witness, and the new witness form (described below) does not change this requirement. The only exception to this is the written UCB-474 form from a doctor.

5) Who is a Witness?

Witnesses should be people who have first-hand knowledge of the events. This means people who were actually there and saw or heard what happened. A witness is NOT someone that you told all about it later. Family members should not be brought in as witnesses unless they were actually present at the particular event. In fact, it may not be a good idea to bring any of your family members to the hearing as their presence can create a more emotionally charged atmosphere and possible disruptions.

When deciding whether or not you want to call a witness, make sure the person's testimony will help your case. This does not mean telling the person what to say. It does mean talking to the person and finding out if he/she remembers the same things that you do. **Do not bring character witnesses.** A character witness is someone who testifies about your reputation. The Administrative Law Judge presumes you are a good person.

In most cases, you should avoid bringing a witness that still works for your employer. Since the employer will probably appear at the hearing, a witness who works for the employer may not want to say things that might conflict with the employer's position or that might upset the employer. It is okay if you don't have any witnesses to support your testimony; most employees do not bring witnesses to their hearing.

6) What Witnesses Do You Need To *Subpoena*?

A *subpoena* is a legal document issued by DWD or the hearing office that requires a person to appear at a hearing. Unless the person you want to testify is your best friend and you are absolutely certain that he or she will show up at the hearing you will want to *subpoena* this person. Even if your witness is a good friend, you will want to *subpoena* him or her if one of the following applies:

A. The person still works for the employer**.** If there is a *subpoena* it is easier for the witness to say that he or she has to appear at the hearing and he or she has to testify to what happened. It is against the law for an employer to discipline or fire an employee for testifying, and being *subpoenaed* helps protect your friend.

B. The person has to take time off from work to attend the hearing**.** Most employers want to see a *subpoena* before they let an employee take time off from work.

C**.** The person is reluctant to testify. A *subpoena* will ensure that he/she does not back out at the last minute.

7) How to Get a *Subpoena*.

As soon as you are notified of a hearing date, you should ask for a *subpoena* for each witness you determine you will need at the hearing. You can get a *subpoena* by taking the following actions.

A. Contact the Hearing Office as soon as possible and no more than three days before the hearing. The Hearing Office will want to know the name and address of the witness and briefly what the witness is going to testify about. They can refuse the *subpoena* if it appears the testimony will not be relevant to your case.

B. You can pick up the *subpoena* or have it mailed or faxed to you. You are responsible for delivering it to the witness. You must either give it to the witness in person or leave it at the witness's house with an adult (someone 14 years old or older).

C. Along with the *subpoena* you must give the witness a $16 witness fee plus 20 cents a mile for each mile to and from the Hearing Office. You are required to

pay the person when you serve the *subpoena* or when he/she arrives at the unemployment hearing. If you pay in cash, make sure to get a receipt.

D. Give the witness the *subpoena* as far in advance of the hearing as possible. It should never be served/delivered less than 24 hours before the hearing.

E. There is a provision in unemployment insurance law which allows you to be reimbursed by the state for the money you spend on witness fees. In order to get this money back, you have to ask the Administrative Law Judge for reimbursement at the end of the hearing. The Administrative Law Judge has a choice to reimburse you or not. If the witness you *subpoenaed* is not called to testify or if the testimony was not useful to the case, the Administrative Law Judge may refuse to allow reimbursement. If the Administrative Law Judge agrees to reimbursement, he or she will fill out a form and have you sign it. This form has to be processed and you will receive the check for reimbursement in about 3 or 4 weeks after the hearing. In order to make it more likely to remember to ask for reimbursement, put the request in writing and give it to the Administrative Law Judge at the end of the hearing.

8) Preparing Exhibits

If there are any written documents you want to show at the hearing, you should organize them ahead of time. This may include such things as:

A. Employee handbook
B. Written evaluations
C. Other documents from your employee file
D. Medical reports
E. Copy of your work schedule

When in doubt about whether something will be helpful, bring it to the hearing with you. A document's importance may only become apparent to you as the hearing proceeds. The Administrative Law Judge, however, will not usually allow you to send it to him/her later. Accordingly, it is important that you take everything related to your case to the hearing.

Once you have collected the documents you think are important, stop and consider why each one is important. How does it fit in with what you want to show? It is a good idea to jot a little note at the top of the exhibit or perhaps on a paper attached to it to remind you why it is important. When you get to the hearing, spread your exhibits out in front of you so you see them and can remember what part of the case they are meant to back up.

You should make two extra copies of the exhibits, one for the opposing side and one for yourself. Give the Administrative Law Judge the original if possible (see more about offering exhibits later).

9) DWD witness forms

DWD has standardized witness forms available as sworn affidavits that can be submitted at unemployment hearings. The purpose of this form is to allow employers to present documentation about an incident at the unemployment hearing.

These forms cannot replace needed witness testimony, however. DWD itself has observed that these witness forms do not allow an employer to avoid having its witnesses

actually testify at the hearing. If a witness is available (i.e., the witness is not dead or so ill such that the witness is unlikely to be available even after the hearing is postponed for a time) and the testimony is relevant to the allegations at the heart of the unemployment claim, then that person needs to testify regardless of anything on a witness form or statement. Furthermore, an employer who presents such a form at the hearing needs to make the form's author available for cross-examination (see below) by you.

10) *Subpoena Duces Tecum (A Subpoena* To Get Documents)

If the employer refuses to give you a copy of your personnel file, or perhaps an employee handbook, or any other document that the employer has that is important to your case, you can *subpoena* it. This means you will have to go through the same procedures as you do to get a *subpoena* for a witness (see previous section about *subpoenas*) including paying the witness and mileage fees. A *subpoena duces tecum* requires the employer to bring the document to the hearing. Usually the employer will give you the document before the hearing starts. If the employer refuses or you need more time to look the documents over, ask the Administrative Law Judge at the beginning of the hearing to order the employer to give you the document and ask the Administrative Law Judge for five minutes (or less if it's only a one page document) to look it over. The Administrative Law Judge should give you the time, but he/she does not have to.

PREPARATION BEFORE THE HEARING

Once you have gathered the written documents and figured out who, if anyone beside yourself, is going to testify for you, you have to decide how you are going to present this information. At hearings, information is gathered through a question and answer format. The Administrative Law Judge, the employer's representative, or you will ask a question and the witness will respond. Before the hearing you should think about what questions you want to ask of the employer and of your witnesses and what you want to say yourself to bring out the information you want to show. You should also think about what questions the employer is likely to ask of you and your witnesses. It may be useful to write out the questions you want to ask or write down key words or phrases that help you remember the points you want to make.

1) Preparing For Direct Examination

Direct examination is that part of the hearing where you will be asking questions of your own witnesses. These questions should be straightforward and should not suggest an answer. But, you should not ask a question at the hearing without being reasonably sure what the answer is going to be. If you ask questions without knowing how the witness is going to respond, you may hurt your case more than if you never asked the question.

Some examples of direct questions:

Example 1: Were you there when the supervisor talked to me after lunch? What did the supervisor say?

Example 2: Did you take the phone call from me on my last day of work? What did I tell you?

2) Preparing For Testifying

When you testify, you obviously cannot ask yourself questions. Instead, the Administrative Law Judge will ask you most of the questions. Then the Administrative Law Judge will offer you a chance to add anything you think is important. After, the employer's representative will have a chance to ask questions. After they are both done the Adminis-

trative Law Judge will ask you if there is anything else you would like to add. This is your opportunity to get in any testimony that you think is important and has not already been covered. Take your time and try not to leave anything out. Check your notes and make sure you have said everything that was on the notes or list you prepared.

3) Cross-Examination

After direct examination of a witness, cross-examination is allowed. In your case you may cross-examine the employer's representative and any of the employer's witnesses. You and your witnesses will be subject to cross-examination by the employer's representative. You do not have to cross-examine a witness. If the witness's testimony has not done your case any harm, or if you think asking the witness more questions will only result in greater damage to your case, do not ask any questions. If, on the other hand, the witness left something out that would tend to make your position look better or if he or she misstates a fact, then you will want to cross-examine the witness.

During cross-examination you may ask leading questions. Leading questions suggest an answer and usually lead to a yes or no answer. The easiest way to ask them is to put the words you want in the witness' mouth.

Example 1: Isn't it true that you said that if I didn't quit you would fire me?

Example 2: Other employees often did the same thing I did but you never yelled at them for it, did you?

4) Review With Your Witnesses

Review with your witnesses with a rough draft of the exact questions you will ask each witness, making sure your questions will result in their saying everything you want them to say. As you ask these questions at the hearing check them off so you can make sure you have covered everything. You might want to meet with and question all your own witnesses before the hearing to practice. Treat this as if it were the hearing itself. The point is not to sound like you have rehearsed, but to know what you can expect from your witnesses.

After you have reviewed the questions and the information, you may want to add some questions, remove some questions you had planned, or just change your questions so that they help your witnesses say everything you hope they will say.

5) Instructions For Witnesses

A. Tell the truth. Do not exaggerate.

B. Speak slowly and carefully. Do not nod your head; the Administrative Law Judge's audio recorder does not pick up a nod.

C. Listen carefully to the question that was asked and then answer only that question. Nothing irritates the Administrative Law Judge more than people who want to tell their life story when asked what their name is.

D. Never volunteer any information. Wait until the question is asked, answer it and stop. If you can answer "yes" or "no," do so and stop.

E. If you do not understand the question being asked, say so. The person asking the question will try to ask it in another way.

F. Do not argue with the person asking you questions. If the question does not make sense to you, simply say you do not understand the question.

G. ⓘ If you do not know the answer to a question, say so. If you do not remember a detail, say so. *You should only testify about what you know to be true*. But, do not use these answers as excuses to avoid testimony that is unfavorable to you. It will soon become apparent that you are answering questions to serve an agenda rather than to explain what happened. As a result, you will not appear to be credible, and you will have hurt your case.

H. ⓘ Do not guess or accept a suggestion by a judge or the employer about what they say happened *unless you know yourself what they are saying is true*.

6) The Day Of The Hearing

A. Make sure you have all your exhibits with you. You cannot offer to send something in later after the hearing.

B. Bring along a pen and paper. This way you can jot down things that you think of while someone else is testifying. Perhaps they will say something that you will later need to clarify or put in a more favorable light. Do not get too carried away with writing things down, however, because you may miss some important testimony.

C. Dress neatly and conservatively. The best idea is to dress as if you were going to a job interview.

THE HEARING ITSELF

1) Where

Hearings are held at the hearing offices in Madison, Milwaukee, Eau Claire, and Appleton. Usually the Administrative Law Judge sits at a desk and the employer and claimant each sit at separate tables. The Administrative Law Judge records the hearing. He/she will also take notes throughout the hearing.

2) The Start of the Hearing

The Administrative Law Judge will start the hearing by finding out who everyone is and explain basic hearing procedures. Then, he/she will try to clarify the "issue." He/She will ask each party what his or her contention is. These initial questions usually refer to the "Issue" that was stated on your hearing notice. Your contention may be, for example, "I quit for good cause because . . . " or "I was discharged but I was not guilty of misconduct or substantial fault." If the employer attempts to change the issue from what you understood it to be (a discharge for poor performance becomes a discharge for insubordination), bring this sudden change to the Administrative Law Judge's attention immediately. If the issues are similar, the Administrative Law Judge is likely to proceed with the hearing. In an extreme case where the issues are different, the Administrative Law Judge may postpone the hearing to allow you time to prepare your case for these new facts.

3) Order of Questioning

Who goes first? You or the Employer? Generally, the party with the "burden of proof" testifies first. In oversimplified terms this means: if you were discharged, the employer has the "burden" of showing why you should not be eligible and will go first. If you quit,

you have the "burden" of showing good cause for your quitting. But, the Administrative Law Judge has the final say over who testifies first.

4) The Questioning of Witnesses

At the hearing, the Administrative Law Judge will do most of the questioning. After swearing in a witness, the Administrative Law Judge will ask basic questions about the person's name, job position, and familiarity with the events to be discussed. The Administrative Law Judge will ask whatever questions he/she feels are necessary to issue a fair decision. Then the representative of the party whose witness is testifying has an opportunity to ask questions (direct examination). After that, the opposing party has an opportunity to ask questions (cross-examination). After all the questioning of a particular witness is done, that side will call its next witness. When one side has called all its witnesses, that side is done presenting its case. Then, the other side will begin presenting its case, and the examination process is repeated for those witnesses.

5) Introducing Exhibits And Evidence

Exhibits are usually documents, photos, models, or other objects accepted for consideration by the Administrative Law Judge. The process of having the exhibit identified and accepted for consideration in the decision is called "introducing the exhibit into evidence." The four basic steps in introducing an exhibit into evidence include:

A. **Marking Exhibits for Identification** When presenting your case or testifying, hand the exhibit to the Administrative Law Judge. Ask him/her to mark it for identification. He/She will probably mark it with a number. This number will be used to identify the exhibit from then on. The number is a shorthand way of referring to the exhibit without describing what it is.

B. **Showing the Evidence** Give a copy of the exhibit to the employer's representative and give the original to the Administrative Law Judge. Keep a copy for yourself. If you do not have the original it is okay to give the Administrative Law Judge a copy. The employer must follow this rule as he/she introduces exhibits. If the employer does not have a copy for you and you would like a copy, ask the Administrative Law Judge to have one made for you at the end of the hearing.

C. **Laying the Foundation** The heart of the process of introducing exhibits into evidence is producing the testimony of a witness capable of explaining from his or her own direct personal knowledge what the exhibit is. After the Administrative Law Judge has marked the exhibit for identification, hand it to the witness. Ask the witness to explain what it is and how he/she knows that it is what it is. If there is some part of the document that is very important, you may want to ask the witness to read it out loud or tell in his or her own words what it says. Unless it is a very short document, a paragraph or two, do not ask the witness to read the whole thing aloud, because the Administrative Law Judge probably will not allow it in the interest of saving time. If you are testifying when you introduce an exhibit into evidence, the Administrative Law Judge will question you about the document, and you will have a chance to explain why it is important.

D. **Making a motion to have the exhibit received into evidence.** A motion is simply a request. Ask the Administrative Law Judge to allow the exhibit to be received into evidence. You can do this after each exhibit has been dealt with in the testimony, you can wait until the witness is done testifying and then ask

that all exhibits discussed during that person's testimony be accepted into evidence, or you can ask that the exhibits be entered into the record after all testimony from both sides is complete. The Administrative Law Judge will usually deal with the admission of exhibits without being asked.

6) Objections

Sometimes the rules of evidence require that certain testimony or exhibits be excluded. The usual reasons for leaving evidence out are either a) that it is not trustworthy or b) it is not relevant to the issue in the case. This evidence can only be kept out if the Administrative Law Judge or one party objects to it being entered by the other party. During the course of your hearing you may want to object to the questions being asked by the other side, or to the testimony that is being given or to the exhibits the other side is offering. Only do this if the testimony or exhibit is objectionable for a reason you can identify. The employer's representative may make these objections to your evidence or questions too. You usually do not object to an Administrative Law Judge's question.

A. **What is Objectionable?** There are three main reasons you are likely to object to evidence: relevancy, leading question, and hearsay. There are several other more technical objections, which are not covered in these materials. If one of these other objections is present, the Administrative Law Judge is likely to exclude the evidence on his or her own initiative. If you do not understand such an action, ask the Administrative Law Judge to briefly explain.

B. **Relevancy** You may object on the grounds of relevancy to questions, exhibits, or testimony that do not relate to the issue at hand. In other words, you may object to evidence that is not relevant. Relevant evidence is evidence that tends to make the existence of any fact that is important to the determination of the case more probable or less probable than it would be without the evidence. More simply, does the evidence add to or subtract from an understanding of the events in question? Examples of testimony that are irrelevant:

1. The issue in your case is whether you were "discharged for misconduct" and the witness testifies that three weeks prior to your termination you talked about quitting.

2. The issue in your case is "refusal of a bona fide job offer" and the witness is testifying about you calling in sick three days in a row at your previous employment.

If the issue in example one was whether you quit or were fired, the testimony may be relevant. Similarly, in example two, if the issue was whether you were physically unable to do your work, the testimony might be relevant.

C. **Leading Questions** The only leading questions you are going to be objecting to are those asked by the employer's representative of his or her own witness. It is not objectionable for him or her to ask leading questions of you or your witnesses. As mentioned earlier a leading question is one that suggests an answer that is desired by the questioner. One way to look at it is that the person doing the questioning is providing most of the testimony and is only asking the witness to say yes or no. Leading questions often end in "isn't that true?" or "didn't you?" Example: You told the supervisor that you refused to do that job, didn't you? You didn't care if he fired you, didn't you?"

D. **Hearsay** One of the most complicated objections to evidence is also one of the most common: hearsay. Evidence is objectionable on the grounds of hearsay if the person testifying has no firsthand knowledge of the events about which he or she is testifying. For instance, it's hearsay if the witness testified about a conversation or event which the witness did not observe but only heard about from someone else. Written statements made outside the hearing and offered in the hearing without the presence of the person who wrote the statement can also be hearsay. Example: If the employer brings a statement written by your former supervisor about what you allegedly did and the supervisor is not at the hearing, then that statement is hearsay, even on an approved DWD witness form.

The difficulties with objecting on the grounds of hearsay at an unemployment compensation hearing are twofold. First there are many exceptions to the hearsay rule. Second, hearsay evidence can be let in at administrative hearings, although the Administrative Law Judge cannot base findings on hearsay evidence alone. Examples of objectionable hearsay:

1. Employee testifying on behalf of employer: "After the boss suspended the employee the boss told me that the employee said 'Go to hell!'"

2. Documents from the personnel file that were not made at the same time as the incidents they are about; i.e., lists of the employee's faults or mistakes written after the fact from memory especially for the hearing.

3. A witness testifies about what another individual was thinking or feeling without having actually been told by that individual what his or her thoughts or feelings actually were.

4. A Human Resources director testifies about why the supervisor warned an employee about being late to work and why that supervisor later fired that employee when again late to work.

Keep in mind that things told to you by someone in a supervisory capacity may be used at the hearing, even when that person is not at the hearing. Such statements are allowed because they are considered to be adverse admissions — statements made against the presumed interest of the party allegedly making those statements.

Do object to hearsay if you feel you should. If you're wrong, or if an exception applies, the Administrative Law Judge will say so.

E. **When To Object** Do not object too often. In many cases you may not need to object during the hearing at all. As mentioned earlier, you will usually only object when the employer's representative is asking questions or attempting to enter exhibits. You should limit your objections to things that are objectionable and are likely to hurt your case. For example, you may want to object to irrelevant testimony that damages your character, but not object to irrelevant testimony about what the witness had for breakfast. It slows the hearing down and the Administrative Law Judge will not like the interruptions, especially if there are no grounds for objection.

F. **How To Object** If the employer's representative is asking a question you think is objectionable, you should say "Objection" before the witness answers the question. If you object to an exhibit, object when the employer is attempting to have the exhibit entered into the record. If you object to the witness's testimony you can interrupt the witness by saying you object. The Administrative Law Judge will probably ask you on what grounds you are objecting. Tell the Administrative Law Judge why and the Administrative Law Judge will decide whether to sustain the objection (agree with you) or overrule the objection (the other party can proceed with what they were doing).

G. **Objections by the Other Party** If the other side makes an objection to what your witness is saying on the grounds that it is irrelevant, make an "offer of proof." An "offer of proof" means you tell the Administrative Law Judge what the witness is going to say and why that is relevant.

If the other side objects to you asking a leading question, there is no need to make an offer of proof. It is up to the Administrative Law Judge to decide whether a question is leading or not. If the Administrative Law Judge finds that your question is leading, she may ask you to rephrase it. Then you should ask the same question in a more neutral way. The Administrative Law Judge often will help you phrase your question if you are having trouble. If the other side objects to your questions or your witness's testimony on the grounds that it is hearsay, stop and wait for the Administrative Law Judge to rule. The Administrative Law Judge will decide whether the hearsay fits one of the exceptions to the hearsay rule or whether he/she will allow the testimony for what it is worth.

THE END OF THE HEARING

After both sides have presented all their evidence, the Administrative Law Judge will usually ask each side if they have anything else to add. This is a good time for you to state anything further that you thought of that has not already been covered or that needs to be clarified. You might also want to sum up your position in a minute or two. It is also the time to make sure that you have asked that your documents be admitted into evidence. The Administrative Law Judge will then close the hearing, and you will be free to go. Remember to submit your request for *subpoena* reimbursement at this time if you *subpoenaed* a witness. IMPORTANT: Once the hearing is closed, you cannot submit additional documents or evidence.

The Administrative Law Judge will not issue a decision at the end of the hearing but instead within a week to ten days mail a written decision to you. If you have not received the decision after ten days, call the hearing office and ask if the decision has been issued.

When you get the decision, read it carefully. It will tell you whether or not you are entitled to collect benefits. If you are confused about the decision, you should call a claims specialist or make an appointment with the Unemployment Compensation Appeals Clinic for help understanding it. If you are denied benefits you should consider whether or not you want to appeal this decision. Did the Administrative Law Judge get some of the important facts wrong? If so, you may want to appeal. Did the Administrative Law Judge decide that the employer's witnesses were more believable than yours? If so, this is credibility finding and it may be difficult to win on appeal. If you wish to appeal this decision, see the discussion below about further appeals.

TELEPHONE HEARINGS

Telephone hearings are a different animal and require extra preparation in advance. If it is the employer who will be there by phone, then you can prepare as described elsewhere in this booklet with the exception of the handling of documents. You will have to *subpoena* documents as far in advance as possible so the employer can send them to the hearing office. Whether you or the employer are at the the hearing by telephone, if you have documents you want to submit you must submit them in advance so the employer and the hearing office have a copy by the time a hearing is held.

If you are going to be the one on the phone, you have to follow these pre-hearing steps:

1) Prepare any exhibits you want entered ahead of time and send copies to both the hearing office and the employer so that they will have them in time for the hearing.

2) Make sure the hearing office has the correct phone number where you can be reached at the scheduled time. Do not assume that it is somewhere in your file and that they will find it.

3) Have a quiet place where you can take the phone call for the hearing. During the hearing it is difficult to hear what is going on and you do not want to be interrupted by children or barking dogs. Additionally, make sure that the radio and television are turned off so that you can hear well.

FURTHER APPEALS

If the Administrative Law Judge's decision (also referred to as an Appeal Tribunal decision) is unfavorable to you, you may want to appeal to the Labor and Industry Review Commission (LIRC). LIRC will review the exhibits and testimony from the Appeal Tribunal hearing. You can file a petition for review on-line at http://dwd.wisconsin.gov/lirc/ and click on the link for filing an appeal with LIRC. Or, you can simply write a letter to LIRC. There is no fee to file this appeal with LIRC.

In your appeal, you must state why you think the decision was wrong. This appeal will be based on the exhibits and testimony from the hearing before the Administrative Law Judge. There is no further hearing.

You may want to submit a legal brief supporting your position, but it is not necessary. If you want to submit a brief, you can request that LIRC issue a briefing schedule and give you a synopsis (typed summary) of the hearing testimony when that synopsis is finished. LIRC will then send you that synopsis and a due date for when your brief is due.

The appeal letter to LIRC must be postmarked within 21 days of the day the decision was mailed (not when you received it). LIRC usually upholds the Appeal Tribunal decision unless the Appeal Tribunal misapplied the law or failed to account for facts that were in the hearing record. It takes a few weeks to several months for LIRC to issue a decision on the appeal.

RECORDS REQUESTS

To request a copy of your hearing case file, call or stop by your local hearing office (for Madison, the third floor at 3319 West Beltline Rd, Madison, WI 53707 and the local phone number is 608-266-8010). Ask the Hearing Office for a copy of your file. If you al-

ready had a hearing and are appealing the hearing decision to LIRC, you may want to ask for a copy of the recording of your hearing by calling 608-266-3174.

If you want to see what general records information DWD has about you, such as when and what you said on your weekly claims, what benefits you received and when, or what prior initial determinations DWD has issued concerning you, call 608-267-7374. Written information requests can be sent via facsimile to 608-327-6142.

Unemployment Compensation Appeals Clinic, Inc.

To make an appointment: Simply dial 211 toll-free or call 608-246-4357.

http://wisconsinuac.blogspot.com/