

Cullen
Weston
Pines
& Bach

A Limited Liability
Partnership

Attorneys at Law

122 West Washington Avenue
Suite 900
Madison, Wisconsin 53703
(608) 251-0101
(608) 251-2883 Fax
www.cwpb.com

Lee Cullen
Lester A. Pines
Steven A. Bach
Alison TenBruggencate
Carol Grob
Linda L. Harfst
Curt F. Pawlisch
Jordan Loeb
Tamara B. Packard

Elise Clancy Ruoho
Nicholas E. Fairweather
Kira E. Loehr
Theresa R. Gabriel
Jeffrey L. Vercauteren

Of Counsel:
Cheryl Rosen Weston

June, 2009

**MTI LAYOFF MEETING - UNEMPLOYMENT INSURANCE BENEFITS
LAWS AND PROCEDURES**

TEACHER BARGAINING UNIT

- I. General Information.
 - A. Unemployment Compensation, now referred to as Unemployment Insurance (UI), is a program established during the Great Depression of the 1930's largely in response to union demands. UI is essentially an insurance program funded by employers.
 - B. The Unemployment Insurance law is administered by the State of Wisconsin Department of Workforce Development (DWD).
 - C. There are special rules for "School Year Employees." Laid off District employees are eligible to receive benefits unless they have a reasonable assurance of continued employment in a similar capacity.
 - D. An employee out of work for reasons beyond his or her control may be eligible for UI benefits. To receive benefits, an employee may apply by either telephone or by the internet. If you prefer to apply by telephone and you live in the Madison area, you may call (608) 232-0678 on Monday through Friday between 6:00 a.m. and 7:00 p.m. Claims specialists are available Monday through Friday, 7:45 a.m. to 4:30 p.m. As well, on Sundays, initial claims may be filed by telephone or on line from 9:00 a.m. to 5:00 p.m., and on Saturdays from 9:00 a.m. to 2:30 p.m. Mondays are the busiest

days. You may receive faster service if you select another day, particularly if your claim requires that you speak with a claims specialist. The application website is: <http://unemployment.wisconsin.gov>. The website now allows the applicant to file his or her initial application, weekly claim certifications and applications for reopening existing UI benefit claims. You need the following information and documents at the time that you make your initial claim:

- Your Social Security Number.
- A Personal Identification Number (PIN). Your PIN is a 4-digit number you make up before you apply and it helps to identify you.
- Your Wisconsin Driver's License Number, if you have one.
- The names of everyone for whom you worked in the past 18 months. For each employer you will also need a full address (including zip code), a telephone number, the reason you are no longer working there, and your first and last dates of work.

E. The DWD's eligibility determination may include telephone interviews of the employee and the employer. The Department sends out a notice called an "initial determination" which informs the employee whether or not the claimant is eligible.

II. The "Able and Available" to Work Requirement. In 2008, DWD changed its "able and available" methodology. A claimant is considered able to work if he or she has the physical and psychological ability to perform suitable work; a claimant is considered available for work if he or she maintains an attachment to the labor market, i.e., has not withdrawn from the labor market, and is ready to perform full-time suitable work in the claimant's labor market. Wis. Stat. §108.04(2)(a); Wis. Admin Code § DWD 128.01.

"A claimant is considered to have withdrawn from the labor market if he or she is not available for full-time suitable work during the standard hours in which work is performed in the occupations in which the claimant usually works or has prior training or experience. In determining the standard hours in which work is performed in the occupations, the

department shall include the hours and the shift that the claimant worked in an occupation in one or more previous jobs since the start of the claimant's base period. For purposes of this subdivision, a claimant whose availability is restricted by an immediate family member's medical or health condition or other infirmity requiring essential care that is uniquely and actually provided by the claimant is not considered to have withdrawn from the labor market, provided that the claimant remains available for full-time suitable work regardless of the shift or hours." Wis. Admin Code § DWD 128.01(4)(a)2.

Do not restrict your availability. Former rules required that claimants be able and available for a specific percentage of suitable jobs in the labor market.

- A. Call in every week after the week is over. The unemployment week starts on Sunday and ends on Saturday. A recorded voice will answer your call.
- B. Keep a good record of your work search.
- C. Student Benefit Eligibility: In order to claim benefits, a returning student must be able and available for work. Generally, enrolling as a student will restrict your availability for work even if you are able to arrange your class schedule. The vast majority of available jobs are first shift, Monday-Friday positions.
 - 1. UI benefits will not be reduced or denied to an "otherwise eligible individual" solely because the individual is enrolled in an approved full-time course of vocational training or basic education. Wis. Stat. §108.04(16).
 - 2. State statute provides that the course of vocational training or basic education may not "grant substantial credit leading to a bachelor's or higher degree." The course must be given by a school that is part of the Wisconsin Technical College System or some "other training institution approved by the DWD." The DWD has stated that "attendance at a college or university is not normally considered approved training."
- D. School attendance generally does not constitute good cause for restricting the employee's availability for work. "Available for work" means that a claimant maintains an attachment to the labor

market and is ready to perform full-time suitable work in the claimant's labor market. Wis. Admin. Code § DWD 128.01(4).

III. Amount and Duration of Benefits.

A. Base Period, Benefit Year and Benefit Rate.

To qualify to receive unemployment benefits in the benefit year, an employee must have earned sufficient wages in the base period.

1. The "benefit year," which is not the period of time for which benefits are received, begins with the first week of the claim and lasts for 52 weeks. Benefits not claimed during the benefit year are lost. To requalify for another benefit year, an employee must have earned at least eight times his or her weekly benefit rate in work covered by the UI laws of any state or federal government. Wis. Stat. §§ 108.02(5), 108.04(4)(c).
2. The "base period" is the first four calendar quarters of the previous five completed calendar quarters. The base period is established by reference to the date the first claim for benefits is filed, not on the date the employee becomes unemployed. So, it is imperative that a laid-off employee file his or her claim as soon as he or she becomes unemployed. The calendar quarters are: January, February and March; April, May and June; July, August and September; October, November and December.
3. Effective January 4, 2009, the maximum weekly benefit increased to \$363.00. Wis. Stat. § 108.05.
4. An employee is eligible for state Unemployment Insurance if the employee earned base period wages of at least 35 times his or her weekly benefit rate. Wis. Stat. § 108.04(4)(a).
5. Unemployment insurance benefits are taxable income for federal and state purposes.

6. Unemployment insurance benefits may now be directly deposited into your checking account. You can apply for direct deposit on-line at <http://unemployment.wisconsin.gov> and look for "Enter Your Direct Deposit" under "Worker Services."

B. An employee who is partially laid off or has obtained a part-time job may receive partial unemployment benefits. Wis. Stat. § 108.05(3).

IV. Appeals.

A. The "initial determination" will state why an employee is or is not eligible to receive benefits.

B. If an employee is ineligible, he or she may request a hearing. The request may be via a letter or a "request for a hearing" form which must be postmarked within 14 days of the date the initial determination was mailed to the parties. Wis. Stat. §108.09(2r).

C. If a hearing is requested by either the employee or the employer, a hearing will be held before an administrative law judge employed by DWD. The administrative law judge is a neutral fact-finder; he does not represent the agency. Sworn testimony will be received and recorded; this testimony and relevant documents are the only bases on which a claim is decided at this stage or later on appeal. Employees have access to documents in the unemployment insurance files. An employee may review his or her unemployment insurance file at the Madison Hearing Office.

D. A losing party can file a written petition for review by the three member Labor and Industry Review Commission (LIRC) in Madison. The petition for review must be received at the local unemployment insurance office or local hearing office within 21 days from the date the appeal tribunal decision was mailed to the parties.

V. "Reasonable Assurance" Standard.

A. Under the state UI statutes, an employee who works in an educational institution and has a "reasonable assurance" of performing similar work for the employer in the next academic

year is ineligible for UI benefits. Wis. Stat. §108.04(17)(a). "Reasonable assurance" means a written, verbal, or implied agreement that the employee will perform services in the same capacity during the ensuing academic year or term.

- B. The Wisconsin Supreme Court has held that an educational employee will not be considered to have reasonable assurance unless the terms and conditions of the employment for the following year are reasonably similar to those of his or her employment in the preceding year. *Leissring v. DILHR*, 115 Wis. 2d 475, 340 N.W.2d 533 (1983). Employment may be considered "reasonably similar" if, (1) hours worked per week are more than 80% of the average number of hours worked per week in the prior academic year or term; and (2) gross weekly wage is more than 80% of that during the preceding academic year or term; and (3) if the work involved involves substantially the same skill and knowledge levels. *See also* Wis. Adm. Code § DWD 132.04(2).
- C. In previous years, LIRC has ruled in several decisions in favor of MTI members that an employer cannot make a decision of "reasonable assurance" merely by inserting such notification in correspondence to an employee, without providing information as to what position the employee might be offered or how many hours he or she could be expected to work. "The question, after all," according to the LIRC decisions, "is not whether the *employer* had reasonable assurance that it would have similar work for the employes, but whether the *employes* had such assurance."
- D. A more senior school employee who has reasonable assurance but who voluntarily takes a lay-off in lieu of a less senior worker does not have reasonable assurance any longer, because the employer withdrew its reasonable assurance to the more senior employee who assumed the lay-off. The employee assuming the lay-off was found otherwise eligible and was entitled to benefits. *Gehri v. Royall School District*, Hearing No. 06002736BO (LIRC 12/8/06).

OTHER GUIDANCE FROM WISCONSIN CASES

- (1) Will my efforts to set up my own business count as being able and available to work for unemployment compensation purposes?

Answer: If your efforts to set up your new business and promote it interfere with working on a full-time first-shift basis, it is likely that you will be found not eligible for unemployment compensation benefits. *Drott v. Lumber & Hardware Inc.*, Hearing No. 99200397 EC (Appeals Tribunal Decision, 1999) *Joseph J. Hein, Jr. V. LIRC and ACME Sales, Inc.* Case 02-CV-474 (Wis. Cir. Ct. Milwaukee Co., Oct. 25, 2002).

(2) What if I move out of state after my layoff?

Answer: If the lay-off notice indicates that the lay-off is for an indefinite period of time without any indication that recall is intended, the employment relationship is severed and the employee may move out of state, in which case the distance to return becomes "good cause" to refuse recall. *See*, Case 73-A-3510, U.C. Digest SW 830.05, at 35; Case 60-A-56, UC Digest SW 830.05, and Case 61-C-408, U.C. Digest SW 845.01, at 65.

But if you did not move out of state, you are expected to keep your employer apprised of your whereabouts, including any change in your address, so that if there is a recall to work, you receive the recall notice and you report to work. If you live in Wisconsin, and fail to receive a recall notice when the employer sends it, you will be held responsible if your failure to receive the notice was because you failed to notify your employer of any address changes. A failure to report for work when recalled can effectively end unemployment compensation benefits.

(3) What if I am offered substitute or temporary work, but to accept it I have to turn down an opportunity for an interview for a full time teaching job?

Answer: Wis. Stat. Sec. 108.04(8)(a) allows an employee to remain eligible for benefits notwithstanding the refusal of an offer of work if the refusal is with good cause. "The employe in this case refused the offer of work because of a previously schedule[d] employment examination with a prospective employer. Few causes are better than this one, or more in keeping with the purposes of the Unemployment Compensation Law. The commission therefore finds that, in week 5 of 1990, the employe failed to accept an offer of suitable work, within the meaning of section 108.04(8)(a) of the Statutes, but that the failure was with good cause, within the meaning of that section. . . . Accordingly, the employe is eligible for benefits in week 5 of 1990, if he is otherwise qualified." *Teutsch*

v. Kenosha Public School, Hearing No. 90-601568KN (LIRC, July 26, 1990).

- (4) Can I refuse suitable work if I have responsibility for child care or care of an elderly or sick family member?

Answer: Generally, domestic responsibilities are not sufficient to be "good cause" for failure to accept work. Child care costs generally are not "good cause."

- (5) What if I get sick and am unable to start work in a job I am offered?

Answer: If you yourself are sick, you may be able to delay the start of proffered work, but the delay may raise the question of whether you are able and available for work during that week under Wis. Stat. sec. 108.04(2). The employee who delays starting a job while sick could be penalized by being ineligible for benefits during the week in which he or she was unavailable while sick. This penalty, however, is far less than a suspension of benefits for declining to accept work, which requires the worker to requalify. Wis. Stat. Sec. 108.04(8)(a).

- (5) What if the job I am offered requires a commute greater than the one that was necessary in my last job?

Answer: In an area such as Dane County, where the local labor market is fairly large, claimants probably will not need to expand the area in which they are willing to accept work, at least initially. However, DWD maintains no hard and fast rule about how far is too far to be required to commute. If you have a limited teaching license, or your license is unusual, you may be expected to expand your job search earlier than teachers who may have a broader or a more in-demand license. If the commute requires an automobile because public transportation is not available, you will either have to obtain an automobile or make other transportation arrangements, or risk being considered unavailable to work. *Owens v. Bemis Mfg.*, Hearing No. 82-40083 FS (LIRC 6/29/82); *Brumm v. CCPO & W*, Hearing No. 99003277 WR (LIRC 7/14/00).