

# Is Your Client Eligible for Unemployment Benefits? Ten Key Issues to Consider While Advising New York Employees

By Delyanne D. Barros

When faced with sudden unemployment, many claimants are often unaware of what may affect their eligibility for unemployment insurance (“UI”) benefits. Deciding whether or not to accept a severance package or a part-time job may impact a claimant’s qualification for UI benefits. To receive UI benefits, claimants must be unemployed through no fault of their own, have sufficient past earnings, remain “ready, willing and able” to work, and actively seek work during their unemployment period.<sup>1</sup> Attorneys that assist claimants with their application for UI benefits should become familiar with the various factors that may result in the reduction or disqualification of their clients’ UI claim. This article outlines ten key issues that may arise when advising clients about their qualification for UI benefits.

## 1. A claimant may be eligible for UI benefits if the claimant was constructively discharged from his or her employment (i.e., forced to quit)

Generally, under the New York Labor Law (“NYLL”), a claimant is ineligible for UI benefits if he or she voluntarily leaves a suitable employment without good cause. If the claimant alleges that he or she was forced to quit, then the claimant carries the burden of proof. The Unemployment Insurance Board (“UI Board”) and New York courts have recognized various instances that qualify as a voluntary quit for good cause. For instance, if the claimant’s employer gives him or her a choice of resigning or being terminated, then the UI Board will construe the claimant’s subsequent resignation as involuntary.<sup>2</sup>

New York courts have also recognized other instances where the claimant will be eligible for UI benefits because he or she was constructively discharged.<sup>3</sup> For instance, the UI Board found that a claimant voluntarily quit with good cause when he left his job due to his employer’s discriminatory enforcement of the company’s tardiness policy.<sup>4</sup> The UI Board has also found that a claimant who left his job was entitled to UI benefits because his employer failed to respect the claimant’s seniority rights as they applied to promotions.<sup>5</sup> However, not all proffered justifications in support of this claim will be accepted. For instance, the UI Board has held that a claimant voluntarily quit without good cause where she left her job after her manager warned her that she would be terminated the following week if she did not improve her performance.<sup>6</sup>

## 2. A claimant who is terminated for misconduct is ineligible for UI benefits

To be eligible for UI benefits, the claimant must not have contributed to his or her termination (i.e., miscon-

duct). The employer has the burden to show that the claimant’s misconduct was the actual reason for the termination.<sup>7</sup> The employer must also show that the claimant acted in willful and wanton disregard of its interest.<sup>8</sup> In order words, “for a claimant’s conduct to rise to the level of disqualifying misconduct for unemployment insurance purposes, the misconduct must either be detrimental to the employer’s interest or a violation of a reasonable work condition.”<sup>9</sup> The employer must show that the claimant was terminated because his or her conduct was not merely negligent, but was damaging to its economic interest.<sup>10</sup> For instance, a claimant’s record of excessive absences for a non-compelling reason may be considered misconduct.<sup>11</sup> If the employer meets this burden of proof, the claimant will likely be disqualified from receiving UI benefits.

## 3. Acceptance of a severance agreement may affect a claimant’s eligibility for UI benefits

A claimant is generally eligible for UI benefits even while he or she is receiving separation-related payments such as severance pay. However, a claimant will be disqualified from receiving UI benefits if the following qualifications are met: the severance pay represents the full salary and benefits the claimant received during his or her employment and the agreement provides that the severance payments will cease if the claimant obtains new employment.<sup>12</sup> While the claimant is receiving these severance payments, he or she cannot obtain new employment, therefore, the claimant is considered to not be “ready, willing, and able” to work as required by the NYLL.<sup>13</sup>

A claimant may also be considered ineligible for benefits if the severance agreement provides that the reason for the termination of employment is a “voluntary separation” without good cause.<sup>14</sup> To avoid this problem, attorneys should negotiate appropriate language regarding the claimant’s departure and a clause providing that the employer will not contest his or her UI benefits claims.

## 4. A claimant may be eligible for UI benefits if domestic violence was the reason for his or her voluntary separation from employment

In relevant part, NYLL § 593(1)(a) provides that “a claimant shall not be disqualified from receiving benefits for separation from employment due to any compelling family reason.”<sup>15</sup> Domestic violence is specifically recognized as a “compelling family reason.”<sup>16</sup> For a claimant to invoke domestic violence as the reason for voluntarily quitting his or her job, the alleged domestic violence must be authenticated by “reasonable and confidential

documentation which causes the individual reasonably to believe that such individual's continued employment would jeopardize his or her safety or the safety of any member of his or her immediate family."<sup>17</sup> For this finding, the UI Board and New York courts generally evaluate the totality of the circumstances to determine whether the voluntary separation from employment was the direct result of the claimant being a victim of domestic violence.<sup>18</sup> For instance, the UI Board has found that a claimant had a compelling family reason to quit her employment where she reasonably feared for her safety after her former husband, who previously abused her and her children, stalked her near her workplace.<sup>19</sup> The Third Department has also held that a claimant voluntarily quit with good cause "due to her husband's escalating verbal and mental abuse [and] claimant, who was pregnant and suffering from poor weight gain and sleeplessness, resigned from her employment and relocated with her five-year old son to a domestic violence shelter, a decision supported by claimant's obstetrician."<sup>20</sup>

#### **5. A claimant classified as an independent contractor may still be eligible for UI benefits**

Generally, independent contractors are not eligible for UI benefits. However, if the employer misclassified a claimant as an independent contractor, the claimant may be eligible for UI benefits. To determine whether a claimant is an independent contractor or an employee, the UI Board will evaluate whether there was an employer-employee relationship between the two parties.<sup>21</sup> To determine the existence of such a relationship, the UI Board and New York courts often apply the fact-intensive common-law test, which evaluates how much supervision, direction, and control the claimant's employer exerted over the claimant's work.<sup>22</sup> The UI Board also considers how the employer compensated the claimant and the nature of the claimant's work. If an employee-employer relationship is established, the claimant will be eligible for UI benefits.

#### **6. A claimant may work part-time while receiving partial UI benefits**

If a claimant works part-time during his or her period of unemployment, the claimant may still qualify for partial UI benefits.<sup>23</sup> To receive the partial benefits, the claimant must work less than four days a week and earn no more than \$405 of gross income per week. Each day a claimant works reduces the claimant's weekly benefit rate by one-quarter. Therefore, even if a claimant works only one hour on any given day, then his or her benefits will be reduced by one quarter for each day worked. If the claimant's weekly wage is above \$405, he or she will not receive the UI benefit payment for that week.

One of the advantages of receiving partial benefits while working part-time is that it extends the length of time the claimant may collect benefits. As provided in NYLL §590 (3)-(4), the duration of UI benefits is calculat-

ed in "effective days" not weeks.<sup>24</sup> A claimant is eligible to receive UI benefits for up to 104 effective days within the benefit year. When a claimant is considered partially unemployed for purposes of receiving partial benefits, days on which he or she is not totally unemployed are "saved" and can be used for benefits later on.<sup>25</sup> For example, if the claimant works two days a week, he or she may receive 52 weeks UI benefits at a 50% rate simply by using up to two instead of four effective days per week.<sup>26</sup>

#### **7. Self-employment may affect a claimant's eligibility for UI benefits**

Generally, for purposes of determining a claimant's eligibility for UI benefits, the UI Board and New York Courts have interpreted self-employment as having the same effect as other forms of full-time and part-time employment. That is, self-employment will render a claimant ineligible for UI benefits on the days he or she performs such work because the claimant is not "totally unemployed" as required by the statute.<sup>27</sup> Any "activity that brings in or may bring in income at any time" can be considered self-employment.<sup>28</sup> If these conditions are met, the claimant will be disqualified from receiving UI benefits for the days worked on his or her business.<sup>29</sup>

However, if a claimant is pre-approved under the Self-Employment Assistance Program, the claimant may receive an allowance for establishing his or her own business.<sup>30</sup> To participate in this program the claimant must first qualify for regular UI benefits.<sup>31</sup>

#### **8. Volunteer work during the unemployment period may result in the reduction and/or disqualification of UI benefits**

Similar to performing self-employment or part-time work, a claimant may also become ineligible for UI benefits while volunteering during the unemployment period. To remain eligible for UI benefits the volunteer work must satisfy certain conditions. First, the volunteer work must be for either a charitable, religious, or a cultural organization.<sup>32</sup> Second, the claimant must not be paid in any form for such work.<sup>33</sup> Third, the volunteer work cannot be a precondition to being hired or rehired into a paid position.<sup>34</sup> Fourth, the claimant's volunteer responsibilities must not impede his or her continued job search.<sup>35</sup> Finally, the volunteer work must not affect or limit the number of day and hours the claimant is willing to work.<sup>36</sup> In essence, prior to doing volunteer work, the claimant must understand that he or she has to remain ready, willing, and able for future employment opportunities.<sup>37</sup>

#### **9. Receiving workers' compensation may affect a claimant's eligibility for UI benefits**

When a claimant is receiving workers' compensation, he or she may still be eligible for UI benefits. The claimant's eligibility will depend on whether he or she is available and physically able to work. While receiv-

ing workers' compensation will not disqualify a claimant from collecting UI benefits, it may decrease his or her weekly UI benefits rate. When the claimant files for UI benefits, he or she must inform the Telephone Claim Center about the workers' compensation benefits. At that point, the Telephone Claim Center will determine if it should reduce the claimant's UI benefits based on his or her receipt of workers' compensation benefits.<sup>38</sup> Note, however, a claimant's weekly workers' compensation and UI benefits cannot exceed his or her weekly wage in the base period.<sup>39</sup>

#### 10. The Department of Labor has the power to recoup a claimant's UI benefit payments if it finds that the claimant was overpaid

In a recent decision, the Third Department confirmed that pursuant to NYLL §597(4), the Department of Labor ("DOL") has the power to recover previously awarded UI benefit payments as overpayment if the claimant received a back pay award for the period he or she was receiving UI benefits.<sup>40</sup> Specifically, the Court noted that when a claimant received a back pay award covering the period he or she was unemployed, the back pay award for that period renders him or her not "totally unemployed" as required by the NYLL. In this context, the Court construed the award of back pay as wages and found that previously awarded UI benefits were recoverable as overpayment. In most cases, the DOL is unlikely to seek recoupment in the absence of fraud or willful misrepresentation and its right to do so is subject to certain time limits. In relevant part, NYLL § 597(3) provides "any determination regarding a benefit claim may, in the absence of fraud or willful misrepresentation, be reviewed only within one year from the date it is issued because of new or corrected information, or, if the review is based thereon, within six months from a retroactive payment...."<sup>41</sup>

#### Endnotes

1. For a detailed description of UI benefit requirements, see *Before You Apply for Unemployment: Frequently Asked Questions*, at <http://www.labor.state.ny.us/ui/claimantinfo/beforeyouapplyfaq.shtm#0>.
2. A.B. 8963-43 (claimant involuntarily separated from his employment because he was given the option to resign or be discharged after a disagreement with a foreman); but see also A.B. 388, 505 (noting "a claimant's choice to leave employment due to a change in claimant's school schedule which the employer is unable or unwilling to accommodate, while continuing work is available in the claimant's usual schedule, is tantamount to a voluntary leaving of employment without good cause").
3. A.B. 13, 297-46 (recognizing that "false accusations or constant insinuation made by the employer that claimant is dishonest" may constitute good cause for voluntary separation from employment).
4. A.B. 6849-42, A-750-323.
5. A.B. 1965-42.
6. A-750-893.
7. *Matter of James*, 358 N.Y.S.2d 411, 414 (1974) ("[T]here is no question that valid cause for discharge must rise to the level of

misconduct before an employee becomes ineligible to receive benefit. The division's regulations unequivocally expressed, in classifying, among other things, inefficiency, negligence, and bad judgment, as valid causes for discharge which do not render the employee ineligible.").

8. *Matter of Waszkiewicz*, 684 N.Y.S.2d 52 (3d Dep't 1999) (claimant did not act in willful and wanton disregard of his employer's interest when he refused to sign a Conflict of Interest and Confidentiality Agreement and therefore was not terminated due to misconduct).
9. *Matter Marten*, 680 N.Y.S.2d 28, 28-29 (3d Dep't 1998) (claimant's conduct constituted misconduct because it was damaging to the employer's interest).
10. See *Matter Marten*, 680 N.Y.S.2d. at 29.
11. See A-750-1777 (claimant's employment was terminated because of his excessive absence record).
12. See note 1.
13. However, a claimant's receipt of unused accrued vacation time will not render him or her ineligible for UI benefits. See note 1.
14. *In re Cammissa*, 834 N.Y.S.2d 337 (3d Dep't 2007) ("quitting one's job to accept a severance or early retirement package when continued work is available has been held not to constitute good cause for leaving employment").
15. NYLL § 593(1).
16. NYLL § 593(1)(b) (i).
17. *Id.*
18. A 750-2120.
19. A 750-2121.
20. *Matter of Loney*, 731 N.Y.S 2d 279 (3d Dep't 2001) (Reversing Appeal Board).
21. For a detailed description of an independent contractor and an employee, see *UI and Independent Contractors* at <http://www.labor.state.ny.us/ui/claimantinfo/ui%20and%20independent%20contractors.shtm> (last visited Dec. 1, 2011).
22. *Matter of Watz*, 60 A.D.2d 259, 261, 400 N.Y.S.2d 889, 891 (3d Dep't 1977), *aff'd*, 387 N.E. 611, 414 N.Y.S. 2d 680 (1979) ("although the existence of an employment relationship is not determined by any single circumstances and all must be weighted, a particularly significant factor to be considered is control").
23. NYLL § 596(5).
24. NYLL § 590(3)-(4).
25. Blum, Richard, Overview of New York Unemployment Insurance Law & Procedure Training Outline, LEGAL AID SOCIETY (October 23, 2009).
26. *Id.*
27. A-750-1417; see also A.B. 44, 313 (claimant who spent his evening hours running his gift shop is self-employed and therefore ineligible for benefits).
28. For a detailed description of the conditions, see *Before You Apply for Unemployment: Frequently Asked Questions*, at <http://www.labor.state.ny.us/ui/claimantinfo/beforeyouapplyfaq.shtm>.
29. *Matter of Huller*, 376 N.Y.S 2d 677(3d Dep't 1975) ("A claimant devoting one hour per day to a real estate brokerage in which he is a corporate officer is not totally unemployed even though there were no sales.").
30. NYLL § 591(a)(1)-(2).
31. A-750-2084 (a claimant must be eligible for regular unemployment insurance benefits to be enrolled in the Self Employment Program).
32. See *Before You Apply for Unemployment: Frequently Asked Questions*, at <http://www.labor.state.ny.us/ui/claimantinfo/beforeyouapplyfaq.shtm>.

33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. See *After You Apply for Unemployment: Frequently Asked Questions*, at <http://www.labor.ny.gov/ui/claimantinfo/onceyouhaveappliedfaq.shtm#10>.
38. See *Before You Apply for Unemployment: Frequently Asked Questions*, at <http://www.labor.state.ny.us/ui/claimantinfo/beforeyouapplyfaq.shtm>.
39. *Id.*
40. *Matter of Glick*, 909 N.Y.S. 2d 160 (3d Dep't 2010) (claimant charged with an overpayment of \$10,165 after receiving a back pay award for the period of time he was collecting UI benefits).
41. NYLL § 597(3)(1).

**Delyanne D. Barros is an associate at Outten & Golden LLP. She represents employees in litigation and negotiation in all areas of employment law, including sexual harassment, individual discrimination cases,**

**and wage and hour class actions. Ms. Barros regularly lectures to non-profit organizations regarding sexual harassment in the workplace and has published legal articles addressing teen sexual harassment and English-only policies. She is also a Chapter Author for the *Employment At Will, State-By-State Survey*, a BNA published treatise by the ABA, Section of Labor & Employment Law. Ms. Barros is the Chair of the O&G Public Interest Award which yearly honors a non-profit organization with a \$10,000 grant for its work advocating for workers' rights. Ms. Barros is also the Co-Chair of the NELA/NY New Lawyers Committee and a member of its National affiliate, the New York State Bar Association, its City affiliate, and the Puerto Rican Bar Association. Ms. Barros is a 2011 recipient of the NYSBA Diversity Fellowship Award. Ms. Barros is fluent in both Portuguese and Spanish. She received her B.S., *magna cum laude*, in psychology from Barry University in 2005 and her J.D., *cum laude*, from Pace University School of Law in 2008.**

Like what you're reading? To regularly receive issues of the *Labor and Employment Law Journal*, join NYSBA's Labor and Employment Law Section (attorneys only).