



BENEFITS LAW PROJECT

UNEMPLOYMENT INSURANCE BENEFITS TRAINING MANUAL 2025

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I. THE NEW YORK UNEMPLOYMENT INSURANCE BENEFITS SYSTEM

A. Overview of the Unemployment Insurance System

The New York State Department of Labor (DOL) administers the unemployment insurance (UI) benefits system for the state of New York. The system is funded by a variable tax on employers and is designed to alleviate economic insecurity caused by unemployment by sustaining income for individuals who find themselves temporarily out of work.

Under the federal statute, UI benefits are granted to those who earn sufficient income, and who become unemployed through no fault of their own.¹ Candidates for UI benefits must comply with registration, reporting, and certification requirements.² Claimants receive a Notice of Determination indicating whether they are eligible for benefits and what their Weekly Benefit Rate (WBR) is. A claimant who is dissatisfied with an initial determination may request a hearing before an Administrative Law Judge (ALJ), within 30 days after the mailing or personal delivery of the notice of the initial determination. (12 N.Y.C.R.R. § 460.1) When there is a dispute about an individual's eligibility for benefits, the issue will go to a hearing conducted by an ALJ. The ALJ's rulings may be appealed, in writing, to the Appeals Section of the Unemployment Insurance Appeal Board, which has the power to review any ALJ findings of fact or conclusion of law.

i. Basic Purposes

The UI system is designed with two major purposes in mind 1) insurance against job loss and 2) economic stimulus. As insurance against job loss, the program is intended as partial income replacement to meet the needs of the short-term unemployed. As an economic stimulus, the system is also intended to stabilize and stimulate the economy by maintaining the purchasing power of workers who have suffered job loss.

ii. Legal Framework

Both state and federal law govern the New York UI system. Federal law defines the broad requirements of the system and state law establishes the eligibility requirements.

Federal Unemployment Tax Act ("FUTA"): FUTA, 26 U.S.C.A. Sec. 3301 et seq. was enacted by Congress as part of the Social Security Act of 1935 to meet the needs of workers unemployed due to the Great Depression. It is designed to encourage states to enact unemployment insurance (UI) systems by creating a system of federal monetary incentives for doing so.

States that enact programs that meet federal guidelines receive tax breaks for employers and money to administer the UI system in their state (every state, the District of Columbia, Puerto Rico and the U.S. Virgin Islands have enacted UI programs).

¹ Generally, for claims filed in 2020, in a statutorily described yearlong "base period," a claimant must have earned an amount over \$2,600 in her most gainful quarter, plus at least one and one-half of that amount in the other three quarters. The claimant must also be ready, willing, and able to work; available for work; and mentally and physically capable of working. For detailed description of eligibility requirements, *see Unemployment Insurance: A Bridge to Your Next Career* at 2-3, 10 at <https://labor.ny.gov/formsdocs/ui/TC318.3e.pdf>.

² Even if a claimant is denied benefits, she must continue to report weekly and search for a job – otherwise, even if she wins her hearing, she will not be eligible to collect benefits. It is very important to advise claimants that they must continue to report to the DOL while their cases are pending. For more information, *see Unemployment Insurance: A Bridge to Your Next Career* at 35, at <https://labor.ny.gov/formsdocs/ui/TC318.3e.pdf>.

Sections 3301 - 3311 set out the basic features of the unemployment program, including the financing scheme and selected requirements that govern state participation in the program.

42 U.S.C. §§ 501-04: Sets out process under which the U.S. Department of Labor will provide grants to the states for administration of their UI systems.

The Coronavirus Aid, Relief and Economic Security Act: Sets out the rules and regulations for PUA.

New York UI statute, NY Labor Law, Article 18, §§ 500-643: Establishes most features of the New York UI program, including § 527 defining valid original claim, § 590 defining rights to benefits, § 591 defining eligibility for benefits, and § 593 defining disqualification for benefits.

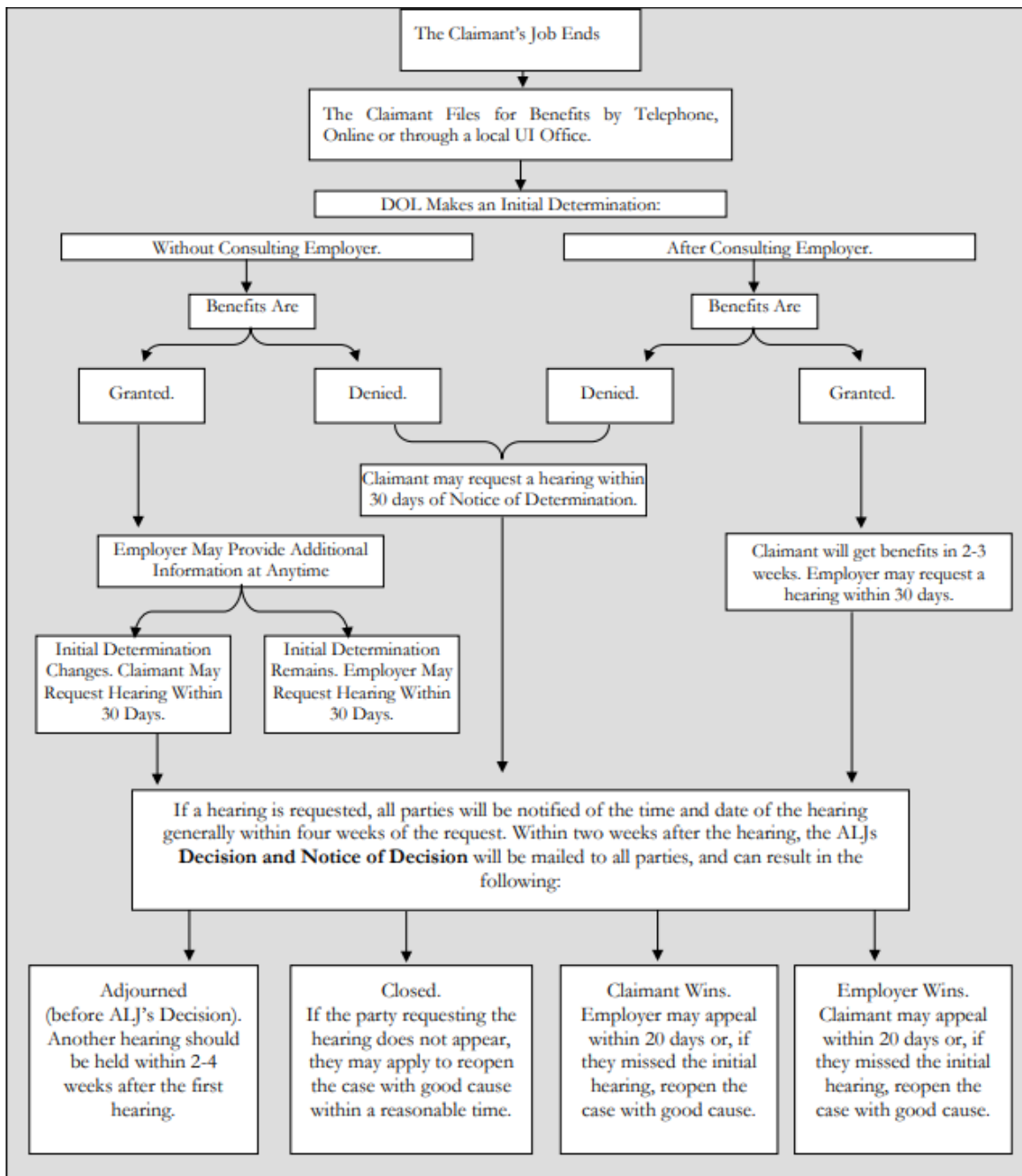
New York UI Regulations, 12 NYCRR §§ 460.1 – 490.7: Detail various aspects of New York UI law.

iii. Eligibility for Benefits

To be eligible for Unemployment Insurance, a claimant must have been a qualified employee who had been in an employer-employee relationship, was “separated” from employment, and must meet the qualifications (at the time they apply and for each week they certify thereafter):

- 1) Be unemployed “through no fault of their own;” and
- 2) Have adequate past earnings; and
- 3) Be currently (and “totally”) unemployed for any day they are claiming benefits; and
- 4) Be actively seeking, and able to accept, reemployment.

B. The Path of an Unemployment Insurance Case (Chart)



C. Chronology of a Typical Unemployment Case

When an employee's job ends, she will file for UI benefits either online or over the telephone. During the application process she will have to specify how her job ended based on five multiple choice options as outlined below:

What is the reason you are no longer working for your most recent employer?
Choose one.

- ☒ **Lack of work:**
You lost the job due to lack of work, reduction in force, downsizing, company shutdown, job elimination, company restructuring/reorganization, or lack of company funds/orders.
- ☐ **Quit:**
You voluntarily left your job.
- ☐ **Discharged/Let Go:**
You were discharged because you were unable to meet employer performance or production standards, or you were unable to meet employer's qualifications for the job.
- ☐ **Fired:**
You were fired for a violation of company policy, such as absenteeism, theft, insubordination, drug or alcohol use or a criminal act.
- ☐ **Strike/Lockout:**
You are unemployed because of a work stoppage conducted in violation of an existing collective bargaining agreement in the establishment in which you were employed. It is not necessary that you are actually participating in the strike, but only that you are not working because of the strike in the facility in which you worked.

If you have a definite date to _____

i. If the Employer Is Consulted

When the employer is consulted, the LSR (Legal Service Representative, also called claims adjudicator) will reach out to the employer.³ After speaking with the employer, the LSR will make an initial determination of eligibility/ineligibility and will send both the employer and the employee a Notice of Determination, which will state the specific reason for the decision.

If the claimant is found ineligible, she may request a hearing before an Administrative Law Judge (ALJ).⁴

If the claimant is found eligible, she will begin receiving benefits through either direct deposit or a Way2Go card within a few weeks. The employer may also request a hearing before an ALJ and they have time limitations on those requests.⁵ The request for a hearing from a claimant must be sent within 30 days from the date the determination was mailed by the Department of Labor.⁶

ii. If the Employer Is Not Consulted

If the employer is not consulted, the LSR will award benefits simply based on the information provided by the claimant without contacting the employer. The claimant will begin to receive benefits, and the DOL will send the employers whose accounts might be affected by a Notice of Potential Charges and a Notice of Protest form. The employer can challenge the benefits by sending in this Notice of Protest or requesting a redetermination either by telephone or in writing. This redetermination is generally conducted by the same LSR, who then speaks to both parties.

If the LSR finds the claimant ineligible upon re-determination, the claimant's benefits will stop, and the claimant will receive a Notice of Determination stating the reasons why. The claimant's request for a hearing must be made in writing within 30 days from the date the notice was mailed.

³ The employer (and the claimant) may be contacted by phone, through a mailed questionnaire, or both.

⁴ Claimants can request an Unemployment Insurance hearing online or by mail/fax.

⁵ Each employer's UI tax rate is based on how many of its ex-employees collect benefits, so employers have an economic incentive to challenge a claimants' eligibility. For more information on the employer's perspective, see Unemployment Insurance Employer Guides at https://dol.ny.gov/forms-and-publications?f%5B0%5D=filter_term%3A286

⁶ See Labor Law § 620 (1)

If the LSR still finds the claimant eligible, the claimant will continue to receive benefits, and the employer has a right to request a hearing.

Once a hearing has been requested by either party, a Notice of Hearing is sent to both parties.⁷ The notice is usually sent between 10-14 days prior to the hearing date.

II. THRESHOLD ISSUES

Threshold issues may disqualify a claimant from benefits even if she otherwise might have had a valid claim. The DOL should list any threshold issues on the Notice of Hearing. Prepare for them as carefully as any argument on the merits. If an issue comes up which is not on the Notice, ask the judge for adjournment to prepare. Employers are also subject to certain threshold issues – always see if you can use one against them.

A. Timeliness

A party must request a hearing within 30 days after receiving the Notice of Determination. If the employer did not request the hearing in time, a claimant may be able to win on this issue alone and should be prepared to address it at the hearing. If the claimant did not request a hearing in time, they must address this issue with the ALJ at the hearing before addressing any other issues of the hearing.

For both parties, there is a very limited “good cause” exception to the 30-day deadline. If it is shown that there was “good cause” for the lateness, then the ALJ will rule on the main issue. *See* 12 NYCRR 473.1(h); Claim of Bashe, 504 N.Y.S.2d 812 (1986). “Good cause” could include hospitalization or credible evidence of mailing issues (reports to Post Office, demonstrate lack of other important notices, etc.).

B. Employer-Employee Relationship

When initially determining if an individual is eligible to receive unemployment insurance benefits, the DOL assesses whether the individuals would be considered an *employee* terminated from delineated forms of *employment* in a qualifying *employer-employee relationship*.

i. Employee

An employee is an individual who performs services for compensation for an employer. However, not every individual performing services qualifies as an employee for the purposes of unemployment insurance benefits. The distinction relies mainly on the level of **supervision, direction, and control** that the employer exercises over the person providing services. NY Labor Law does not define the employer-employee relationship and courts have not strictly defined it by any single factor or group of factors. Instead, courts examine the surrounding facts of the employment and have found certain factors establish such relationship, including if the employer:

⁷ A claimant may request a hearing on any determination affecting their right to benefits online, by fax, or by writing a letter to NYS Department of Labor, P.O. Box 15131, Albany, NY 12212-5131. (See Unemployment Insurance: A Bridge to Your Next Career, at 34 at <https://labor.ny.gov/formsdocs/ui/TC318.3e.pdf>.) Any request must be postmarked or otherwise proven to have been filed within 30 days after the mailing or personal delivery of the determination. Absent proof to the contrary, a determination shall be deemed to have been mailed on the date recited on it and received by a party to whom it is addressed no later than five business days after the date on which it is mailed. Make sure you include the last four digits of the claimant's Social Security number on the hearing request and a detailed explanation of why the claimant disagrees with the determination. You will be notified of the date, time and place of the hearing by the Administrative Law Judge section after the request has been processed if there has been no change in the initial determination.

- Chooses when, where and how the claimant performs services
- Provides facilities, equipment, tools and supplies
- Directly supervises the services
- Sets the hours of work and rate of pay
- Requires exclusive services and attendance at meetings and/or trainings
- Asks for oral or written reports
- Evaluates job performance
- Requires prior permission for absences
- Reserves the right to hire and fire

Courts also examine how the claimant's services were compensated. A worker's status can often be determined by pay where an employee usually earns a salary, hourly pay rate, or a draw against a future commission. Compensation includes:

- Salaries
- Commissions
- Bonuses
- Reasonable value of board, rent, housing, lodging, or a similar advantage received

ii. Form of Employment

Courts also then assess whether the individual is engaged in an eligible form of employment. New York Labor Law § 511 outlines various categories of employment defined by profession and the nature of the work, including work within and outside the state of New York. The New York DOL has created a chart of statutorily covered or excluded employment to more easily figure out if an individual's work qualifies them for New York unemployment benefits. This chart can be found here: <https://dol.ny.gov/covered-or-excluded-employment>.

iii. Excluded Workers

Other types of workers who perform their duties free from supervision, direction, or control of another entity or are never totally unemployed if they work for themselves are not entitled to benefits. Such workers include independent contractors and self-employed workers.

Independent Contractors: Generally, independent contractors are not eligible for unemployment benefits. Independent contractors often perform their duties free from supervision, direction, or control. Signs of independent contractor status include:

- An established business
- Advertises in the electronic and/or print media
- Uses business cards, stationery and invoices
- Carries insurance
- Keeps a place of business and invests in facilities, equipment and supplies
- Pays their own expenses
- Assumes risk for profit or loss

- Sets their own schedule
- Sets or negotiates their own pay rate
- Offers services to other businesses (competitive or non-competitive)
- Is free to refuse work offers

However, a claimant may still be considered an employee under the law even if:

- An employer provides a 1099 form rather than a W-2
- An employer requires that the claimant sign a statement that she is an independent contractor
- A claimant waived any rights as an employee
- An employer requires a claimant to obtain a DBA to work for them
- An employee chooses to hire help

Additionally, factors of an employer-employee relationship, as detailed above, contribute to the analysis of an independent contractor being considered an employee in the unemployment insurance context.

Self-employed people: The DOL takes a different approach when assessing the eligibility of self-employed workers for New York unemployment insurance benefits. Since a basic requirement for unemployment benefits is that the claimant has lost her job through no fault, self-employed persons do not fall under this category because they are never considered totally unemployed. New York Labor Law § 522 total unemployment is defined as “the total lack of any employment during any week.” Even if services are performed on a sporadic basis or if the business is not making a profit, a self-employed individual is not totally unemployed since they are positioned to financially gain from the businesses’ continued operation. Thus, generally, a claimant who is self-employed is not eligible for unemployment insurance benefits.

During the COVID-19 pandemic period from March 2020 until September 2021, unemployed workers who were not eligible for traditional NYS UI benefits may be eligible for Pandemic Unemployment Assistance (PUA). These programs have ended. It is extremely unlikely that your case will deal with these benefits. If you are concerned about a federal benefits issue, please reach out to VOLS.

C. Dismissal Pay

Many employees receive dismissal pay, commonly called severance, upon termination in either a lump sum or in installments. Such payment often disqualifies a claimant from unemployment insurance benefits. This is typically a very complicated analysis for advocates and requires some math.

The DOL considers dismissal pay on a week-by-week basis. Under Labor Law § 591 (6)(a), a claimant is ineligible to receive benefits during any week during a dismissal period in which he or she receives dismissal pay from an employer that exceeds the maximum statutory unemployment benefit rate.

Identifying dismissal pay: In assessing dismissal pay, the DOL first evaluates whether a claimant received a payment that a) could actually be considered dismissal pay and b) was made within 30 days of the last day of employment.

Labor Law § 591 (6)(a) defines dismissal pay as payment “made by an employer to an employee due to separation from employment.” It does not include remaining vacation or sick leave payouts, health insurance payments, retirement, or pensions. Thus, if a claimant received a payment consisting of a payout of those

benefits, and nothing else, they did not receive dismissal pay. The distinguishing factor is whether the claimant received the payment solely due to the separation and otherwise would not have been entitled to it. It is considered more of a “parting gift.” Be aware that employers do not always identify a payment as dismissal pay and may even ask employees to sign agreements to claim a payment is not dismissal pay, but the DOL will still consider it as such if it meets its definition.

In addition, under Labor Law §591(6)(d), to qualify as dismissal pay, the initial payment to the employee must have been made within 30 days of the last day of employment. The last day of employment is not only the last day of physical labor; it can also include the day of the last final payment or wage installment.⁸ The date of payment means the date that the employer made the payment, and if there were multiple payments made, it is the date of the first payment.⁹

Dismissal period: The DOL next determines the “dismissal period.” Labor Law §591(6)(c) generally defines the dismissal period as the number of weeks an employee is receiving the dismissal pay based on their gross weekly salary.¹⁰ An employer may have delineated the dismissal period by stating the number of payments in a certain amount of time in a separation agreement or contract. If the dismissal period was not defined by the employer and payment was issued in a lump sum, the DOL will establish the dismissal period by dividing the total amount severance paid out by the employee’s weekly salary, and the resulting figure is the number of weeks of the period. The first day of the period is the day following the period, and it will continue for that number of weeks.¹¹

Dismissal pay math: Once a dismissal period is established, the DOL then evaluates whether the dismissal pay “salary” for each week within that period would exceed the maximum statutory unemployment benefit rate. Through September 2025, that rate is \$504.00; as of October 2025, that rate will be \$869.00. If the dismissal pay “salary” for a given week exceeds that rate, a claimant is ineligible for that week. If at any time a weekly “salary” does not exceed the rate, then the claimant is eligible.

In New York, the maximum period for benefits is 26 weeks, or approximately six months. If the dismissal period is less than 26 weeks, a claimant may be eligible for any week following the dismissal period before the 26 weeks expires. However, at that point, the DOL will then consider whether a claimant has sufficient wages within the base period. Depending on the length of the dismissal period, a claimant may not have earned sufficient wages within the base period anymore and thus will be disqualified on that basis.

⁸ Appeal Board No. 593060 (Board held that claimant’s last day of employment was September 30, 2016 where the claimant’s last physical day of work was September 12, 2016, the separation agreement specified the claimant’s separation date was September 30, 2016 and claimant was paid his full salary and benefits until the later date); Appeal Board Nos. 591311 (Board determined that claimant’s last day of employment was May 20 where claimant last physically worked on April 20 but received his regular pay through May 20); Appeal Board No. 581056 (last day of employment determined to be January 15 where claimant last physically worked on December 27 but continued to receive his regular pay through January 15); Appeal Board No. 590709 (Board held that claimant’s last day of employment was March 20 since although she had last physically worked on December 14, she was paid her regular salary and benefits through March 20).

⁹ See, e.g., Appeal Board No. 580740 (583552A adherence on relevant issue) (payment was determined to be within thirty days where delivery of the check was attempted on the 30th day, but the claimant did not receive the check until the 31st day); Appeal Board No. 590887 (Board found that payment was made within thirty days where claimant’s last day of employment was January 18, her first installment of dismissal pay was paid on January 29 and second installment was paid on February 19).

¹⁰ See Labor Law §591 (6)(c); Appeal Board Nos. 589557 (Board determined average weekly wage for highest calendar quarter since actual weekly remuneration could not be determined where claimant testified only to his base weekly pay and that he sometimes worked overtime); see also, Appeal Board Nos. 589460 and 590471 (same).

¹¹ Labor Law § 591 (6) c).

It is easier to break down by example: a claimant is terminated, her last day of work is June 1, and she is paid \$100,000 as compensation for the termination on June 2. Her weekly salary was \$1,000.00.

- Does the payment qualify as dismissal pay? Yes, this payment qualifies as dismissal pay as it was made within 30 days of her last day of work for compensation for her termination.
- What is the dismissal period? Dismissal pay divided by weekly salary = number of weeks of dismissal period. $\$100,000 / \$1,000 = 100$ weeks.
- Does her weekly dismissal pay exceed \$504? Yes ($\$1,000 > \504)
- Will 100 weeks exceed 26? Yes
- Thus, there is no week she would ever be eligible.

In another example, a claimant is terminated, her last day of work is June 1, and she is paid \$100,000 as compensation for the termination on June 2. Her weekly salary was \$5,000.00.

- Does the payment qualify as dismissal pay? Yes, this payment qualifies as dismissal pay as it was made within 30 days of her last day of work for compensation for her termination.
- What is the dismissal period? Dismissal pay divided by weekly salary = number of weeks of dismissal period. $\$100,000 / \$5,000 = 20$ weeks.
- Does her weekly dismissal pay exceed \$504? Yes ($\$5,000 > \504)
- Will 20 weeks exceed 26? No
- Thus, in the 21st week after her termination date, she no longer had any dismissal pay and would be eligible (assuming that she would have enough earnings in her base period).

D. Remote Work – Where Was the Work Located?

The COVID-19 pandemic greatly increased the prevalence of remote work across most workplaces, and employers have been able to hire individuals residing in different states and expand their talent pool. However, this shift raises complex legal questions, particularly regarding which state is responsible for providing unemployment insurance benefits when an employee works remotely from a state different from their employer's location.

Under New York Labor Law § 511, as well as relevant case law and Appeal Board decisions, determining whether an employee's work is localized in New York, or evaluating out-of-state employment requires a very fact specific inquiry. Generally, physical presence is a critical factor in determining a telecommuter's eligibility for unemployment insurance in New York. However, the law allows for some nuance.

LAB § 511 classifies employment in two categories: (1) work localized in the state and (2) work within and without the state:

Localized in the state is whether a person's entire service is either (a) performed entirely within New York or (b) performed both within and outside the state, but the out-of-state work is incidental, temporary, or transitory in nature, or consists of isolated transactions. An employee's physical presence is one determining factor in determining whether work is considered localized within the state.¹² If a claimant's work was localized primarily in New York, then they are eligible for unemployment benefits in New York.

¹² *In Re Allen*, 100 N.Y.2d 282 (2003).

Within and outside of the state is employment that is not localized in any particular state, but some of the work is performed in New York, and:

- The individual's base of operations is in New York; or
- If there is no base of operations in a state where some portion of the service is performed, the work is directed or controlled from New York; or
- If the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, the person's residence is in New York.

The DOL applies the above tests one-by-one, in that order.¹³ It moves to the next only if the former one is unclear.¹⁴

i. Base of Operations

An employee's "base of operations" refers to the location where she begins her work, receives instructions or communications from her employer or other person, replenishes supplies and materials, repairs equipment, and carries out other functions of her profession.¹⁵ Not just any action will qualify as a base of operations, however. The Court in *Claim of Normyle* provided that a base of operations "must involve more than the place where an employee starts and finishes a business trip and receives occasional telephone calls from his employer which falls within the definition of 'residence.' If mere indicia of residence will satisfy the base of operations test, then the remaining statutory factors will never be reached and are thus rendered useless."¹⁶

ii. Directed and Controlled

The term "directed and controlled" is where an employer directs and controls the activities of its employees and it need not be the employer's main or principal office. It is the place where basic authority over supervision, job assignments, instructions, and personnel and payroll records are carried out.¹⁷ For example, when an employer provides employees with a schedule of calls and sales trips to conduct from their New York office, the employee's services are being directed and controlled from that location. In *Claim of Normyle*, the court found that out-of-state sales representatives were eligible for New York unemployment benefits as their activities were directed and controlled from New York offices, despite that all of their work was outside of New York. The court highlighted several key factors such that the employees did not have offices or business materials in their homes, their sales orders were processed in the New York office, and they were required to attend meetings and training programs in New York throughout the year.

E. Capable and Available

In order to receive benefits, a claimant must be capable of and available for work. NY Labor Law § 591(2). For example, someone whose job makes them ill has good cause to quit. If after quitting, however, she remains too sick to do any other work, she is ineligible for UI benefits while she is sick because her sickness makes her incapable of work. A claimant need not be capable of doing *any* type of work, but she must be

¹³ 76 Am. Jur. 2d Unemployment Compensation § 61.

¹⁴ 107 N.Y. Jur. 2d Unemployment Insurance § 49; *Claim of Mallia*, 299 N.Y. 232 (1949).

¹⁵ Unemployment Insurance Appeal Board, *Work in Multiple States*, Bench Manual 2.17.5 - Footnote 41.

¹⁶ *Claim of Normyle*, 556 N.Y.S.2d 785, 787 (1990).

¹⁷ Department of Labor Form IA 116.3; *In re Boettcher*, 79 A.D.2d 740 (3d Dep't 1980).

capable of doing *some* type of work.¹⁸ Other workers may be disqualified if they are legally barred from work.

i. Disability and Medical Limitations

Some workers may be unable to work due to medical limitations or disability. The assessment hinges on whether a claimant cannot perform any work at all due to a medical condition or whether he can perform some job duties even if not all due to the condition. If a claimant has a medical restriction on how much time he can sit or stand, for example, he may not be able to perform all work but could perform some. If a claimant is pregnant, she may be still able to perform some work.

In evaluating whether a disability or medical condition renders a claimant fully unable to work, the DOL assesses claimant testimony and medical documentation. Such documentation must say more than that the claimant is incapable of work and must provide some insight as to how the injury or illness affects the claimant's ability to perform specific work or any work.¹⁹

A claimant who receives worker's compensation based on disability or federal or state disability benefits may still be found capable of work, such as a claimant who receives SSDI who cannot perform her past type of work but now can perform sedentary work²⁰, or a claimant who is hearing impaired receiving SSDI can perform some work.²¹ In the case of worker's compensation, unemployment benefits will be limited to the difference between the amount of worker's compensation benefits and 100% of the claimant's average weekly wage.²²

ii. Non-citizen Workers and Visas

Non-citizen individuals lawfully employed in the United States may be ineligible for unemployment insurance benefits. Eligibility hinges on whether the claimant can file a valid original claim under Labor Law § 527 and whether the claimant is ready, willing, and able to work, as required under Labor Law § 591. An advocate must evaluate on what basis the claimant had been employed in the United States.

Claimants who were not legally authorized to work in the United States during their base period never established lawful wages, thus rendering them ineligible.²³ Those who had work authorization during their base period but lose their work authorization at any point are no longer available for employment, and thus are ineligible.²⁴ Being married to a United States citizen alone does not render a claimant available for employment.²⁵ However, some claimants without work authorization documents including refugees, asylees,

¹⁸ In re Claim of Pluckhan, 256 A.D.2d 1024 (1998)

¹⁹ Appeal Board No. 592307 (claimant's doctor filled out documentation specifying the claimant was unable to work as a bus driver and stating claimant was temporarily totally disabled; Board stated the note needed to be viewed in its proper context as it was in response only to the claimant's ability to perform the duties of a bus driver).

²⁰ Appeal Board No. 577448 (claimant's receipt of SSDI benefits did not render her incapable of work where evidence established claimant had ability to perform sedentary and light work for the period at issue); Appeal Board No. 568046A (claimant eligible for unemployment benefits where, despite receipt of SSDI, evidence established she was able to perform sedentary work)

²¹ Appeal Board No. 540271 (claimant, who was legally blind and received SSDI benefits was found capable of work where he could use a computer with the use of a magnifier, had some vision, had no trouble getting to work and was seeking employment in the kitchen and health industry)

²² Labor Law §591(5)

²³ Labor Law § 590 (9)

²⁴ Matter of Diamond, 201 A.D.2d 835 (3d Dep't 1994); Matter of Enrique, 13 A.D.3d 967 (3d Dep't 2004); Appeal Board No. 547761 (claimant's work authorization was valid through February 28, 2009; he did not obtain a new work authorization until March 25, 2009 and was not available for employment from March 1 to March 24, 2009).

²⁵ Appeal Board No. 528174 (marriage to a United States citizen does not establish that the individual is legally authorized to work in the United States).

and parolees may be able to establish entitlement to benefits if the claimant is residing in the United States under color of law.²⁶

Claimants who had worked in the United States pursuant to a valid visa may no longer be eligible for employment if the visa becomes invalid. Assessing the continuing validity of a visa depends on the type of visa and its requirements. For example, the H-1B visa is obtained through an employer and is only valid for a designated period of time while the employee works for the employer. It is no longer valid once the employment ends, and the individual is no longer eligible to work until he obtains a new visa.²⁷ In contrast, an O-1B visa is obtained through an employer itself or agent of the employer or visa holder, initially just for that employer, but a new employer may be added if new employment is obtained (so long as the agent notifies USCIS).²⁸

If you are working with a non-citizen claimant with a complex immigration or lawful employment issue, please discuss with VOLS.

III. SEPARATION ISSUES: “UNEMPLOYMENT THROUGH NO FAULT OF THEIR OWN”

Most UI hearings center on the circumstances of the claimant’s separation from employment and whether the loss of the claimant’s job was “through no fault of their own.” New York Labor Law § 501. Generally, these cases turn on: (1) whether a claimant, if fired, was fired for acts which constitute misconduct or (2) whether, if a claimant voluntarily quit her job, she had good cause to do so.

A. Misconduct Cases

While an employer may discharge an employee for any legal reason, not every reason for discharge will constitute misconduct under unemployment insurance law. Misconduct occurs when an employee voluntarily behaves in a manner that both damages the employer’s interests and reasonably could have been avoided. In cases where your client was fired, your theory should show that even if she was fired for a stated reason, that reason does not amount to misconduct.

In Matter of James, 34 N.Y.2d 491 (1974), the New York Court of Appeals first suggested that valid cause for discharge was not equivalent to misconduct.²⁹ The Appellate Division subsequently defined misconduct as a volitional act or omission, which is detrimental to an employer’s interests. Mere inefficiency, or inadequate performance due to inability or incapacity is not misconduct. Neither is ordinary negligence, isolated bad judgment, or an intemperate outburst in the heat of the moment.³⁰

²⁶ 26 USC § 3304 (a) (14) (A).

²⁷ Appeal Board No. 540523 (claimant, a citizen of Syria, possessed an H-1B visa authorizing her to work for a financial company; she could seek new employment but would not be authorized to work until the new employer obtained a new visa); see, also, Appeal Board No. 544761.

²⁸ 9 Appeal Board Nos. 568028-568032 and 568034 (claimant, a French national, was a choreographer and her activities while in the US included performances of her own work, teaching as an adjunct professor at two universities, collaborating on a book, and serving as liaison between the Metropolitan Opera Guild and the L’Opéra de Paris. Her visa was regularly extended, most recently (at the time of the hearing) through January 2013. She filed claims on several occasions between 2002 and 2011; the Board found her available for employment as her visa was valid and she did not require a new visa to obtain new employment); see also, the “except” clause in Appeal Board No. 565271.

²⁹ “There is no question that ‘valid cause’ for discharge must rise to the level of misconduct before an employee becomes ineligible to receive benefits. This, 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.” Id.

³⁰ Donlon v. Ross, 406 N.Y.S.2d 393; Matter of Choute, 367 N.Y.S.2d 617; In re Claim of Francis, 56 N.Y.2d 600 (1982)

The burden of proof is on the employer to show that the conduct rose to the level of misconduct.³¹ Therefore, the employer will generally testify first in a misconduct hearing.

i. Key Considerations of Misconduct

Notice: Aside from the most extreme acts, an employer must give the claimant explicit notice that a particular behavior can lead to their termination before their violation of that rule or policy qualifies as misconduct.³² Notice may entail a written or verbal warning. If it were not a first offense, an employer may have condoned or tacitly consented to the behavior and a violation of its own rules.

Often times the employer may have a specific policy addressing the behavior at issue. This policy may have been written in an employee handbook or posted sign regarding policies and procedures. If there is no written policy, or no indication the claimant was made aware she might be violating a policy and engaging in misconduct to merit termination, then she has a stronger claim against termination based on misconduct. Even if she were aware, not every technical violation of an employer's policy rises to the level of misconduct. Matter of Vasallo, 125 AD2d 771 (3rd Dept 1986).

Detrimental to employer's interests: It is insufficient for the employer to establish that it had a rule, and the claimant violated that rule; rather, the employer must show the violation was harmful to the employer's interests. See Appeal Board Decision No. 537581 (no misconduct where claimant was discharged for driving on side roads instead of highways in course of employment, in violation of employer's stated policy, because no evidence that claimant had been previously informed of the rule and "no indication that the claimant acted in a manner that was contrary to the interests of the employer").

Volitional behavior: Involuntary behavior often does not qualify as misconduct. For example, lateness due to a medical condition, childcare problems, or unforeseeable transportation delays should not constitute misconduct, even after the claimant had been repeatedly warned regarding the issue. An intemperate outburst against a supervisor in the midst of a heated conversation may not constitute misconduct even if in hindsight the claimant knew such behavior was inappropriate.³³

Causation: There must be a direct causal connection between the alleged misconduct and the claimant's discharge. Even if the claimant's alleged act amounted to misconduct, that act must have been the cause of their discharge in order to justify a disqualification from UI benefits. Situations where there is a long delay between the claimant's alleged act and her actual discharge may give rise to the question of whether the claimant was discharged due to that act.

³¹ See Appeal Board Decision No. 542802 (no misconduct where employer alleged claimant had failed to clock out for lunch break but did not produce video surveillance footage of event despite claimant's failure to recall whether he had clocked out).

³² See Appeal Board Decision No. 556177 (no misconduct where claimant, a client coordinator for a mental health provider, mistakenly directed client to take medication once a day instead of twice a day because claimant's mistake was honest and she "had never received a warning for transcription errors and could not have known her job would be in jeopardy"); Appeal Board Decision No. 552676 (no misconduct where claimant rented storage unit without checking photo identification of renter, in violation of employer's policy, because claimant attempted to fix error, had not previously been warned for violating the policy, and did not intend to harm employer's interests).

³³ See, e.g., Appeal Board Case No. 553544 (The claimant was fired "for continuing to disagree with the decision regarding his schedule and being loud and disruptive." The Appeal Board found this was not misconduct, noting that "although he raised his voice, he did not use any profanity or vulgarity" when disagreeing; it took place after the claimant had clocked out for the day; "emotions were running high"; the claimant did not receive an entirely satisfactory answer from his manager; and "he did not have a meaningful opportunity to disengage from the conversation and reflect on the possible consequences of his conduct."); Appeal Board Case No. 548361 ("The Court has held that employees owe a duty of respect and loyalty toward employers, neither are they required to always be servile and docile towards employers (See Matter of Raven, 40 AD2d 128 [3d Dept 1972]; see also Appeal Board Case No. 543118). While we certainly do not condone the claimant's actions, we also judge them in the context of the entire argument in which the supervisor also used profanity. We further find that the claimant did not provoke the encounter with his supervisor").

B. Voluntary Separation Cases

New York does not provide UI benefits to workers who voluntarily quit their jobs without good cause. NY Labor Law § 593(1). If the claimant quit, the burden of proof is on her to show good cause for doing so. Therefore, the claimant generally presents first in a voluntary separation hearing. It is important to focus on the last day of work or the final incident (if there was one) that triggered the separation.

i. Assessing Whether Voluntary or Not

The term “voluntary separation” as used in the statute means leaving employment of one’s own free will. It includes resignations (other than those submitted at the employer’s insistence) and failure to return to work following a temporary layoff or leave of absence. In many cases the employer will claim that the claimant quit their job or were discharged after they stopped showing up to work and the claimant will state she was laid off, discharged or simply never called in for another shift.³⁴

For this reason, it is critical to determine the circumstances in which the job ended, including who initiated the final separation, if there was formal documentation surrounding the separation or other actions were taken to indicate separation, such as returning work equipment or receiving unused vacation pay.

ii. If Voluntary, Separation Must Be with Good Cause

Once it is established that a claimant’s separation is voluntary, it must be determined whether the claimant’s choice to separate was “without good cause.” Voluntary separation shall not be reason to disqualify a claimant if “circumstances have developed in the course of such employment that would have justified the claimant in refusing such employment in the first instance.” NY Labor Law § 593(1).

A claimant who voluntarily leaves employment must have had a compelling reason and must have made a reasonably prudent attempt to resolve the problem and protect her employment. Generally, if there is a compelling reason for the employee to quit, the employee must notify the employer of the problem. If the employer does nothing to remedy the situation, then the claimant usually has good cause to leave, provided that the reason was compelling in the eyes of the judge.

Examples of “good cause” to voluntarily quit employment include:

- Changes in the “terms and conditions of employment” that would have justified refusing the job initially.³⁵
- Work conditions which harmed the claimant’s physical or mental health in a way that can be demonstrated through evidence. A.B. 6275-41.

³⁴ See, e.g., Appeal Board Case No. 541727 (The employer placed the claimant on an involuntary, unpaid leave of absence with no certainty of return. Afterwards, the claimant sent by mail her building keys and passes but expressed no intention to quit. The Board found that “employer’s conduct of placing the claimant on an unrequested (and therefore involuntary) unpaid leave of absence, with no definite return to work date, and no certain return to work at all, is tantamount to a discharge.”)

³⁵ See Matter of Sellers, 13 A.D.2d 204, A-750-1550. This includes a change in hours, reduction in hours or pay, or a relocation of the job site.

- Abuse from management or other employees.³⁶
- Fear for her personal safety on the job.³⁷
- Medical reasons prevented the client from continuing to work. Notably, this is only considered to be good reason to quit if the employer could not provide the claimant with a reasonable accommodation or other solution to this medical issue such as temporary leave. Ideally, the client should provide medical documentation. However, if there is no medical documentation, the client's testimony is also considered legitimate evidence of the medical condition.
- Violation of employment laws at the workplace, whether or not this was the claimant's primary reason for quitting.³⁸
- Separation was for a "compelling family reason" under NY Labor Law § 593(1)(b).
- "Compelling reasons" where the claimant tried to resolve the issue with the employer before quitting.

IV. OTHER DIMENSIONS OF UNEMPLOYMENT INSURANCE CASES

A. Roadblocks to UI

i. No Show at Hearing

If a claimant failed to attend previous hearings on this case, she has the right to reopen and request a second hearing date. However, at the start of the hearing the ALJ will address the absence and the claimant must demonstrate she had good cause to miss the previous hearing. If a claimant appeared at an initial hearing but did not proceed because she wanted time to seek representation, that reason alone should constitute good cause.

If an employer requests the hearing and then fails to appear, your client should win by default³⁹. The employer, just as the claimant, may reopen if it has a good cause reason for not being present. If the employer reopens the case but does not have a good reason for its absence, a claimant can object to the reopening of the case at the hearing when the ALJ addresses the issue.

If the employer does not appear at a hearing and the claimant requested the hearing, the claimant will still have to proceed with the hearing and establish that the Commissioner of Labor's determination was incorrect in order for the claimant's benefits to be restored. If the claimant prevails, the employer will have the right to reopen that hearing within a reasonable time upon a showing of good cause.

ii. Willful Misrepresentations, Factually False Statements, and Overpayments

A determination that a claimant gave materially false information to the DOL in the application or certification process can result in the recovery of already paid benefits, a civil penalty or fine, and a penalty

³⁶ Courts have consistently found that a claimant left their job without good cause where the claimant did not give their employer notice of the alleged abuse prior to voluntarily quitting, where the claimant did not exhaust all their employers' internal mechanisms for resolving such disputes. Matter of Baxter (Commissioner of Labor), 162 A.D.3d 1451 (2018)

³⁷ Stark v. Ross, 411 N.Y.S.2d 433.

³⁸ Appeal Board Decision No. 546389 (claimant had good cause to quit where employer's treatment worsened in retaliation for her filing an OSHA complaint); Appeal Board Decision No. 545382 (claimant had good cause to quit where employer's failure to pay her overtime violated FLSA and NYLL); Appeal Board Decision No. 538428 (claimant had good cause to quit where he was subjected to a hostile work environment on the basis of his sexual orientation in violation of NYS HRL).

³⁹ It is not an abuse of discretion for the Board to deny an application to reopen where the party making it has not demonstrated a reasonable excuse for failing to appear at a hearing. See Matter of Cedeño [Commissioner of Labor], 83 AD3d 1350, 1351, 920 NYS2d 921 [2011]; Matter of Monroe [Commissioner of Labor], 59 AD3d at 837; see also 12 NYCRR 461.8).

towards collecting future benefits. This type of determination most often arises based on the answer the claimant selects to describe how she lost her job in her initial application for benefits. When a claimant files an initial application for benefits, she must choose among five multiple choice options to describe how her last job ended, even if she never knew the reason her job ended or her job ended under ambiguous circumstances.

If the DOL subsequently comes to a different conclusion regarding the separation, a recoverable overpayment and willful misrepresentation finding can result. For example, if a claimant receives benefits after selecting in her initial application that her job ended due to “lack of work” and the DOL subsequently concludes the claimant actually lost her job due to a “quit,” the DOL will generally make a finding that there has been a “willful misrepresentation” by the claimant. If the DOL determines that the “quit” was under disqualifying circumstances they will also make a determination that she must repay any benefits she received based on this statement in her application. Such cases generally involve two separate sections of UI law that are often treated interchangeably.

Willful misrepresentations: NY Labor Law § 594 outlines three general consequences for a claimant who is found to have “wilfully (sic) made a false statement or representation to obtain any benefit”:

- 1) The recovery of benefits that were already paid based on that misrepresentation.⁴⁰ § 594(4).
- 2) Penalties towards the collection of future benefits. § 594(1).
- 3) And civil penalties in an amount equal to the greater of one hundred dollars or fifteen percent of the total overpaid benefits. § 594(4).

Confusion, poor language skills (either in interpreting a question or giving the answer), mistakes of memory, or the misinterpretation of legal concepts often give rise to findings of willful misrepresentation by the DOL. However, case law requires that a determination that a claimant made a willful false statement requires that the claimant acted knowingly, purposely, intentionally or deliberately. *In re Barbera*, 28 A.D.3d 973, 974 (N.Y. App. Div., 3d Dep’t 2006); *In re Schulman*, 9 A.D.3d 647, 648 (N.Y. App. Div., 3d Dep’t 2004). Good faith mistakes, faulty memory, a showing that the claimant tried to convey the correct information to the DOL or had an incorrect understanding of the Labor Law should negate a determination of “willfulness.”⁴¹

If the ALJ sustains a DOL determination that the claimant made a willful misrepresentation in their application but that the claimant is still entitled to benefits, the claimant will have to forfeit some of her future benefits (generally 4 effective days), but she can still otherwise collect benefits on her claim.

Factually false statements: Recoupment for benefits paid in error, even without finding a willful false statement, is based on NY Labor Law § 597(4), which explains that if the DOL determines after the fact that an award of benefits was erroneous, the claimant keeps the benefits:

“provided they were accepted by the claimant in good faith and the claimant did not make any false statement or representation and did not willfully conceal any pertinent fact.” NY Labor Law § 597(4).

For a recovery of benefits based on a “factually false statement” no willfulness is required. This includes a finding that the facts obviously fit the meaning of a technical term. Mistakes of law should not be penalized.

⁴⁰ In addition, § 594(5) allows the Commissioner of Labor to attempt to collect any benefits that have not been repaid via civil action or judgment.

⁴¹ See Department of Labor, Unemployment Insurance Division, UIPL 1-2012.

Claim of Valvo, 454 N.Y.S.2d 695 (N.Y. 1982). Many supposedly make “false statements of fact,” however, can be characterized as misunderstanding of legal concepts such as the distinction between “discharged” and “fired” or the definition of “employment” under UI law.

B. Calculating payments and Continuing Requirements

i. Determining the Benefit Rate and Handling Cash Wages

The claimant’s entitlement to benefits is calculated using a Base Period. This base period is the first four out of the last five completed calendar quarters prior to the filing of the claim for benefits. The claimant must have wages in at least two calendar quarters of the base period, and for claims filed in 2025, a claimant must have been paid at least \$3,400 in one calendar quarter (an increase from \$3,300 for 2024 claims). Additionally, the claimant must have been paid, in the entire Base Period, at least 1.5 times the highest quarter wages. A claimant who has insufficient wages under her Base Period may qualify under the Alternate Base Period, which is based on wages paid during the last four completed calendar quarters. The maximum weekly benefit rate is \$504 and will be \$869.00 effective October 2025.

STANDARD BASE PERIOD					Filing Quarter
July August September 2024	October November December 2024	January February March 2025	April May June 2025	July August September 2025	October November December 2025
ALTERNATE BASE PERIOD					

Sometimes a claimant receives a Monetary Benefit Determination that states a benefit rate lower than that to which the claimant is entitled.⁴² All wages in covered employment should be included in calculating the claimant’s benefit rate whether or not the wages were paid in cash or “off the books.” Additionally, a claimant may want her benefit rate to be calculated using the Alternate Base Period because it will result in a higher benefit rate.

A claimant who wishes to use the Alternate Base Period or have non-reported wages counted towards their benefit rate should apply to the Department of Labor in writing within 10 days of the Monetary Determination and provide any proof of wages paid during the base period. This additional form, called a “Request for Reconsideration” allows a claimant to request a recalculation of their benefits. The Department of Labor then notifies the claimant if their benefit rate has been revised. If a claimant is still not satisfied with his or her benefit rate, he or she should request a hearing no later than 30 days after the date of the Monetary Determination with any papers or evidence that show wages. The Department of Labor will recheck the claim against the evidence submitted. If the Monetary Determination changes based on the evidence the claimant submits, he or she will be notified that a hearing will not be necessary. If the determination does not change, a hearing will be held as per the claimant’s request.

⁴² A monetary benefit determination may be lower because some wages may not be reported. Sometimes unreported wages can affect the benefit rate in the base period. A claimant’s benefit rate is computed according to the employer’s statement to the wage reporting file maintained by the New York State Department of Taxation and Finance. Where the employer has not properly reported the claimant’s wages to the wage reporting file (including any cash or “off the books” wages), the Department of Labor is required to accept the claimant’s assessment of earnings to determine the claimant’s entitlement to benefits and weekly benefit amount. If the claimant cannot provide sufficient proof of earnings, the Department of Labor should send an individual wage request to the employer.

If a claimant is receiving a pension, she may have her benefit rate reduced. See NY Labor Law § 600. It is also quite possible that she may have collected all the benefits to which she is entitled.²⁸

ii. Weekly Certification Requirements

Every claimant is required to certify benefits online or via telephone once per week for each week they remain eligible for and are seeking benefits. For each weekly certification, the claimant must answer a series of questions establishing their eligibility for that particular week such as whether they worked on any day in that week; whether they were ready, willing and able to work on any day that week and whether they refused any job offer without good cause. Claimants are not eligible to receive benefits for the weeks they failed to certify.⁴³ The DOL has become stricter about submission of backdated certifications and claimants should not expect to receive benefits for any week they failed to certify.

However, if a claimant applied for benefits weeks after they lost their employment or were otherwise not completely paid during their claim, claimants may request backpay. The DOL will allow New Yorkers to submit backdated certifications online, via a secure form that can be emailed directly to those with missing certifications. Claimants who are missing weeks of payments should contact the DOL and request a backpay form to indicate which weeks are missing and why these weeks are missing.

If your client has been denied benefits she should continue to certify while her hearing is pending and she remains eligible so that, in the event she prevails, she will receive retroactive payments for the weeks she had been certifying.

iii. Total and Partial Unemployment

New York measures the duration and eligibility for UI benefits in terms of “effective days,” not weeks.⁴⁴ Benefits are available on a daily basis only to someone who is “totally unemployed” on that day. Total unemployment is defined as a total lack of employment on any day, where employment means any employment, even work for an hour or less, regardless of when or whether that person is paid.⁴⁵ Employment includes self-employment, freelance work, commission-based work, assisting a family member in their business, or certain “volunteer work,” whether or not remuneration is received.

Claimants may be able to collect benefits if they are only partially unemployed in any given week and earn less than the maximum benefit rate⁴⁶ in that week, but they lose approximately one-fourth benefits for each day worked. The NYDOL calculates partial benefits based upon hours worked as follows:

⁴³ If your client has failed to certify during any given week, she was eligible for benefits, she must write a letter to New York State Department of Labor, Central Support Unit, PO Box 15130, Albany, NY 12212. The letter should include her name, address, telephone number, her Social Security number, the period for which credit is being requested, and the reason why she did not claim benefits for that period of time. She should also include any evidence that supports her reason for failing to claim benefits. The circumstances will be investigated, and a determination will be made regarding her eligibility for benefits for those weeks. If your client failed to file a claim when she first lost her job and is looking to receive credit for weeks before she filed her claim, generally she will have to show her mistake was due to either incorrect advice from the Department of Labor or incorrect factual information from her employer about the status of her employment.

⁴⁴ NY Labor Law § 590(3)-(4).

⁴⁵ NY Labor Law §§ 522, 591(1).

⁴⁶ As of April 2020, the Maximum Weekly Benefit Rate is \$504/week.



WORKFORCE FORWARD
PARTIAL UNEMPLOYMENT UPDATE

HOURS WORKED PER WEEK	NUMBER OF DAYS TO REPORT TO UI	% REDUCTION IN UI
0 - 4	0 DAYS	0
5 - 10	1 DAY	25%
11 - 20	2 DAYS	50%
21 - 30	3 DAYS	75%
31+	4 DAYS	100%

When calculating your hours worked, round up to the nearest whole hour.

WE ARE YOUR DOL
NEW YORK DEPARTMENT OF LABOR

Therefore, claimants who work more than 31 hours a week are precluded from claiming benefits, even if these hours are worked within 3 days. This hourly calculation benefits claimants who work partial hours but work multiple days per week, for example, workers who are employed 5 days per week, but only four hours each day, who were previously unable to claim benefits.

Claimants may claim partial benefits if their work hours were reduced by the employer. If the claimant voluntarily works part time and there is the opportunity to work more hours, those claimants are ineligible for benefits. The \$504 earning cap still applies and claimants who earn more than \$504 weekly are still ineligible for benefits, no matter how many hours worked.

iv. “Ready and Willing to Work:” Searching for Work and Refusing Job Offers

A claimant must be ready and willing to accept “suitable work” while collecting benefits. In addition, until a claimant has received 10 full weeks of employment, a claimant must accept any job if it 1) will pay at least the DOL “cutoff wage” defined as 90% of the UI prevailing wage for that occupation⁴⁷ and 2) is in line with all her most recent occupations. After 10 weeks, a claimant must accept any job 1) that will pay the cutoff wage, 2) that will pay at least 80% of the wages in the high quarter of your base period, and 3) of which the claimant is capable. A claimant who “without good cause, refuses to accept an offer of employment” is disqualified from further benefits until she has earned ten times her weekly benefit rate. NY Labor Law § 593(2).

A specific and unconditional offer of part-time employment from someone other than the former employer will be subject to the analysis set forth in *Matter of Scranton*, 12 NY2d 983. Refusal of such an offer is non-disqualifying if acceptance would cause a loss of income relative to full benefits for total unemployment on account of 1) a complete loss of eligibility due to acceptance (e.g. due to a partial schedule on each of four or five days) or 2) a partial loss of eligibility such that earnings plus remaining partial benefits would total less than the claimant’s benefit rate for total unemployment (e.g. due to hours worked three or less days a week). An offer from the previous employer to rehire, but not to restore to the same job with the same conditions, may also be refused without disqualification. AB 555041, 575557, 542048. In addition, a claimant has good cause to refuse an offer for a position if she has genuine and reasonable fears, based on specific facts such as the employer’s refusal to commit to necessary safety measures, that the employment would be harmful to her health.

Search requirements: All UI claimants must complete the work search requirements in order to receive benefits. Claimants must complete three work search activities per week, unless you have developed a Work Search Plan that was approved by the DOL. At least one of the work search activities must fall

⁴⁷ <https://www.labor.ny.gov/stats/uiwages.shtml>),

under the following categories:

1. Using employment resources provided by the local Career Center, including meeting with Career Center advisors or participating in instructional workshops.
2. Visiting a job site and filling out an employment application on site with employers who may reasonably have an opening.
3. Submitting a job application or resume to employers or organizations who indicate they have openings available.
4. Attending job search seminars, job fairs or workshops that provide tools to becoming re-employed.
5. Interviewing with possible employers.

Claimants must do another two activities, one or both of which can be selected from this list:

1. Applying for employment with former employers
2. Registering with and checking in with private employment agencies, placement services, universities or other organizations to network for employment opportunities
3. Using the internet or telephone to search for jobs, find leads on new job opportunities, or making appointments for job interviews.
4. Applying for and taking Civil Service exams such that you are qualified to perform government work.

Claimants must “actively” seek new work, i.e., meet the work search criteria on a weekly basis. This does not mean claimants need to complete an activity every single day, rather, claimants must follow the work search guidelines and complete three activities every week. Generally, you do not have to search for work if your employer told you that you will be called back to work when the business reopens or if you were laid off in light of closed or reduced operations because of the pandemic.

Mandatory Suitable Work: During the first ten weeks of collecting benefits, suitable work is work that the claimant can reasonably do, through past training and experience. This means that she should look for work in all her most recent occupations, especially if the chance of getting work in her primary skill area is not good. Such work must meet conditions (including wages and hours) that are not “substantially less favorable than those prevailing for similar work in the locality.” NY Labor Law 593(2)(d).

A Valid Offer: A job offer is only disqualifying if it is “an unconditional offer of a specified job starting on a definite date.” Appeal Board Decision No. 549816. A general discussion of job duties, working conditions, etc. does not constitute an offer of employment. However, “[w]hen a claimant fails to contact a former employer after receiving a mailed notice from the employer offering him employment, the claimant's failure to respond to the offer prevents the employer from providing further information and is tantamount to a refusal of employment.” (A-750-2113).

Good Cause for Refusal: A claimant would have statutory good cause to refuse an offer of employment if such employment is not suitable work (as discussed above); would interfere with union membership, a collective bargaining agreement, or a labor controversy at the place of offered employment; or would involve travelling an unreasonable distance or expense (generally over 1.5 hours by public transit in New York City). Additionally, the Appeal Board has established other good cause refusals such as where the employment would interfere with the claimant’s childcare obligations, physical or mental health needs, or is reasonably likely to subject the claimant to other intolerable conditions at work.

v. Vocational Training/Section 599

Section 599 of the Labor Law allows a claimant to attend an approved vocational training course full time while still receiving benefits. It provides that:

A claimant shall not become ineligible for benefits because of the claimant's regular attendance in a program of training which the commissioner has approved. The commissioner shall give due consideration to existing and prospective conditions of the labor market in the state, taking into account present and anticipated supply and demand regarding the occupation or skill to which the training relates, and to any other relevant factor.

A vocational training course generally includes any training given under public or private auspices designed to develop an occupational skill. Special courses for training in a specific occupation given by colleges and comparable institutions may be considered vocational training approvable under § 599. For example, an eight-week course at a state university, designed to provide the trainee with certain prerequisites that he needed to obtain a teacher's license, was approved under § 599. A claimant should submit your application to the 599 program as soon as he is enrolled in a school or training program. If he indicates at the time he files his claim that he is already enrolled or accepted into a course of study or training program, he will be asked for information about the training program as part of his claim. By answering these questions completely, he will complete the application. He must apply for training approval within the first 13 weeks of the claim to receive the maximum amount of benefits he is entitled to.

If § 599 cannot be applied because one or more of its conditions are not met, participation in a training course will not render the claimant ineligible if she is ready willing and able to work, prepared to discontinue the training course if a suitable job opportunity is offered, and is making reasonable efforts to secure employment.

vi. Preclusion and Other Potential Claims

Determinations made while litigating UI eligibility, even if upheld in the courts, have no preclusive effect on future litigation, except litigation concerning the UI claim in question. NY Labor Law § 623(2). Of course, witnesses' sworn hearing testimony will still be available for future cross examination.

Factual findings made by arbitrators or hearing officers under a collective bargaining agreement or civil service process do have preclusive effect in subsequent UI hearings.²⁶ However, the ALJ is free to find additional facts that are consistent with those findings. Moreover, whether the circumstances of the separation constitute a voluntary quit or misconduct for purposes of unemployment law remain issues of law to be decided by the UI Appeal Board.²⁷

Your client may have potential legal claims related to her employment, such as discrimination or harassment. While you may not be able to represent her in such matters, remind her that some of these claims may be waived if not promptly asserted.

V. PREPARATION FOR REPRESENTATION

A. Taking a Case

VOLS will regularly circulate emails with a list of claimants in need of representation to all Project Volunteers. The list will contain the name of each claimant, type of employer, a hearing date (if a date has already been set), and a brief description of each case.

If you are interested in taking one of the listed cases, contact VOLS. If the case is still available, then VOLS will hold the case for you while you run a conflict check with your firm and open a new matter. Once the conflict check is complete, notify VOLS. VOLS will send you the client's contact information and any other relevant materials. Contact your client immediately to introduce yourself as a pro bono attorney through Volunteers of Legal Service and explain that you will be representing them in their unemployment insurance hearing.⁴⁸

B. Review and Prepare Your Case Opening Documents

When you take a case, you should make sure that you have the following items, all of which are available from VOLS, from your client, or from hearing packet.

i. Case Profile

This is the initial information about the case, including client contact information, former employment history, and a brief case description.

ii. Retainer

Your firm should have a standard pro bono retainer agreement that your client must sign prior to the start of your representation. Be sure to speak with your pro bono coordinator to obtain this form. If you are not affiliated with a firm or do not have a pro bono retainer agreement, contact the VOLS Unemployed Workers Project for a sample form.

iii. Notice of Appearance

This form will be provided to you by VOLS. You must fill it out and be sure to include any dates on which you are unavailable in the next 45 days to appear at a hearing. The Department of Labor will consider this document when it schedules the claimant's hearing. The form should state that you are representing the claimant through the Volunteers of Legal Service Unemployed Workers Project, a part of the Department of Labor's Pro Bono Initiative. It should be **emailed** as early as possible to the hearing site fax number – most of our claimants are in Brooklyn: (Brooklynhearings@uiab.ny.gov), or, if the site is unknown, to Albany at Menandshearings@uiab.ny.gov. These notices can also be faxed – fax numbers are also listed on the Notice of Hearing.

⁴⁸ Even if you are not able to meet with your client right away, it is important that you contact your client as soon as possible so they can keep you updated when they receive notice that their hearing has been scheduled or any other new communication from the Department of Labor. Claimants often receive notice of a scheduled hearing date soon after they are referred for representation through VOLS.

C. Adjournments

Your client's hearing date may be scheduled before you've had adequate time to prepare her case. Request ALJs to grant your client an **adjournment** of the hearing to a later date if your client can show "good cause" for such an adjournment. For example, a claimant who needs more time to obtain proper legal representation has good cause.⁴⁹

The ALJ should grant such good cause adjournment requests. However, most judges will instead "close the case with leave to reopen" if you are unable to proceed at the scheduled date. The Appeal Board encourages the ALJs to close cases with leave to reopen because the Board is required to complete cases within certain timeliness guidelines. A "closed" case appears in the records as a completed case, whereas an adjourned case does not. Your client will still be able to get another hearing if they can show they had a good cause reason for missing the first one.⁵⁰ Since many of our clients need their benefits as soon as possible, you want to avoid having your client's case closed in this manner.

Note that adjournments can be requested in advance for other reasons (e.g., if you, the claimant, or an essential witness cannot appear for a compelling reason, if the claimant is legitimately ill with documentation). Requests can be made in writing via email or by fax, or by calling the hearing office between 8:45 a.m. and 4:45 p.m.

Because your client's case will be delayed, you should not request an adjournment unless it is impossible for you to prepare the case in the time available. You should also be aware that **if your client has obtained an adjournment previously, the ALJ probably will close the case, forcing your client to reapply for a new hearing.** However, if you need to obtain a crucial document for evidence or to contact a witness, it is better to try to adjourn than to risk losing the case. Evidence that is not submitted at the hearing may not be submitted on appeal and the odds of winning on appeal are considerably lower.

If the claimant is requesting an adjournment when the employer is the party that has requested the hearing, some ALJs will choose to proceed with the hearing by taking testimony from the employer and will make their decision based on that testimony alone. If the ALJ makes a decision adverse to the claimant without taking the claimant's testimony, the claimant can request the case be reopened but her benefits will be stopped while the new hearing is pending. Requests can be made in writing, by fax, or calling the hearing office. It can also be made by stating you need an adjournment to the judge at the time the hearing is scheduled for.

If more than 2.5 months have passed since your claimant either requested a hearing or a hearing is rescheduled, follow up with VOLS.

D. Withdrawal

If you decide to withdraw from a case after discussing the matter with your supervisor and with VOLS, you must send the DOL and your client a withdrawal letter stating that you will no longer represent the claimant and that your withdrawal does not reflect upon the merits of the case.

⁴⁹ <https://uiappeals.ny.gov/postpone-hearing>

⁵⁰ Any party that does not attend a hearing after receiving notification may request one reopening within a reasonable time. Any further requests to reopen will be referred to the Appeal Board. Administrative Law Judges will no longer grant a second leave to apply to reopen.

VOLS volunteers should not withdraw from a case without consulting with VOLS. Examples of valid reasons for withdrawing from a case include harassment by a claimant, intent to commit perjury, or frivolousness of a case.

VI. MEETING WITH THE CLIENT

A. Planning for the First Interview

i. Getting Started and Requesting Case File

Contact your client within 48 hours of assignment to set up a time to discuss the case. If a hearing date is already scheduled, request the client's case file immediately. Your client may have it, however, if not, you should request a copy of the case file from the DOL location where the hearing will take place. You may make this request in your cover letter for your Notice of Appearance or call the relevant court and make the request over the phone. The file may be sent to an email address electronically or faxed to the relevant location for you to review.

In addition, instruct your client to bring or send you all documentation related to her UI claim, including any communications with her previous employer.

Review the Notice of Hearing and Notice of Determination to get a general idea of what the case is about, including threshold issues.

ii. Earn Your Client's Trust

It is important that you learn the claimant's entire story. You want to be aware of what hurts her claim just as much as you want to know what will help her claim. Do not assume that you will automatically receive your client's trust. Remember, by the time you meet the claimant, she has lost her job, has been passed through an impersonal unemployment bureaucracy, and has just been told that her benefits are being denied or challenged by her employer. You should express sympathy, ask follow-up questions, and stay calm. It is important to have a dialogue rather than a monologue. If you start by doing all the talking, the client may become passive and not open up later on.

iii. Provide Your Client with Basic Information About the Service You Will Provide.

When you meet with your client, explain how the UI hearing process works and what you will do to help your client win. Keep your explanation brief, and make sure to answer your client's questions or comments. You should explain the following information:

- This is a free legal service.
- We help secure unemployment benefits, but do not help with other employment issues.
- A second meeting (at least!) will be necessary before the hearing to prepare for actually testifying at the hearing.
- The client must keep you informed as to any developments involving her case.
- The client must continue to certify for benefits to the Department of Labor as usual.

- Ask to see her Notice of Determination, and tell her very generally what the issue of the case is (misconduct, good cause to quit, etc.)
- Ask if she is comfortable having you represent her as you have described.
- Remind her that this is confidential.

After this explanation, review your retainer form with the client and have her sign. You should provide her with a signed copy. If your client has no further questions or concerns, begin the interview.

B. Conducting the Interview

i. How to Ask Questions

Structure your conversation chronologically and ask consecutive, temporal questions to continue along the client's line of logic, such as "What happened next?" Consecutive questions elicit more complete information as they walk the client step-by-step through her story without interrupting her train of thought. In contrast, non-consecutive questions often depart from the logic of the client and may cause the client to skip important parts of her story that may in fact be relevant.

Make sure to ask your client open-ended questions in layman's terms such as "Why did your job end?" as opposed to closed, conclusory questions, such as "Did you quit or were you fired?" Open questions encourage clients to think and talk freely. Avoid leading questions like, "Your boss harassed you, didn't she?" They are the ultimate closed questions, often limiting the answer to "yes" or "no."

Similarly, aim to ask indirect questions rather than direct questions. Indirect questions let you probe potentially difficult subjects without direct confrontation. Closed questions specifically ask for information and request a response: "Did you violate the company's policy?" Indirect questions invite a response, but do not require one: "That sounds like a difficult policy to obey."

However, when you are seeking more specific information to understand the case, you may use closed and direct questions. They can help a claimant focus on specific facts. They can also suggest to the client a new way to view a situation or verbalize her thoughts: "So what she was really doing was..."

Finally, use silence as a tool to gather information. Silence is a powerful questioning technique because people feel compelled to "fill the void" and often blurt out the first thing that comes to mind. When your client stops talking, non-verbally indicate that you're still listening and pause. Try nodding instead of responding verbally to your client or, if you must say something, try "Is there anything else?" It will likely elicit more information from your client instead of a specific follow-up question. Try not to interrupt your client or talk too much. Emphasize your interest by maintaining eye contact and avoid signs of impatience.

ii. Specific Questions to Ask

Within your conversation, listen for answers to the following questions. If your client does not share then, you will need to ask directly using the above techniques.

- Are you currently employed?
- Who was your last employer?

- Where was your last employer located?⁵¹
- When did you start there?
- What was your job when you started?
- What was your job when it ended?
- Was it full-time?
- What were your primary duties?
- Were you a union member? Do you have a copy of your contract?
- When did you lose your job?
- What happened on the day you lost your job?
- (If fired) What reason(s) did the employer give for the loss of your job?
- Do you agree with these reasons?
- Why or why not?
- Did the employer ever give you any written warnings? Verbal warnings?
- Are there witnesses, documents, or other evidence to support your story?
- What are the names and addresses of any witnesses? Would they testify?
- What papers relating to your claim did you bring?
- Do you have a written employee manual or other work rules?
- Have you participated in any other legal proceedings concerning your employment (hearing, arbitration, union grievance, etc.)?
- What do you expect the employer to say at the hearing?
- Is there anything else you want to tell me about?

iii. Listen to Your Client

Pay attention to how your client organizes her story, any gaps in the story, or changes in how many details your client provides or her point of view. In addition, repetition may signify her uncertainty or efforts to persuade herself. Also be aware of patterns and changes in tone of voice or body language, which could indicate feelings or ideas she may not be fully expressing.

iv. Ask Your Client to View Her Situation from the Employer's Perspective

To discover information that your client may be hesitant to admit, ask your client to describe things from her employer's perspective: Why does your employer say you shouldn't get benefits? Why do you think your supervisor would say he believed someone else rather than you? Is there anything else your boss or other witnesses might say at the hearing?

Such questions are better at eliciting harmful or embarrassing information, because they let your client "save face" – she can acknowledge opposing facts or arguments without crediting their truth. Make such questions a standard part of your repertoire and repeat them at your second interview as well.

⁵¹ This is important because hearings requested by the claimant are generally held at the DOL office closest to the employer, which may be Brooklyn, Manhattan, Garden City, Hempstead, Hauppauge or White Plains. VOLS will generally only refer claimants for pro bono representation where their hearings will be in Brooklyn or Manhattan. Hearings may be held by telephone. If so, claimants will receive a notice in the mail letting them know the date and time when the judge will call them for their hearing.

v. Question Your Client's Story

You need to know the whole story to be prepared, but many clients do not trust you enough to tell you the whole story at your first interview. Even when they do trust you, they frequently omit important facts. The trick is to probe for more information while retaining your client's confidence.

One way to bring out inconsistencies in your client's story is to ask the same question in a different form, or you can make a statement that contradicts what she said and observe her reaction.

Don't hesitate to ask your client about difficult subjects, such as inconsistencies in her story, but make sure you explain why you need to know. Remind your client that ALJs are unpredictable and the employer will use anything they can against her. Explain that "unpleasant" facts are likely to come out. Let her know she does not need to be a perfect employee to collect benefits, and although you can't change facts or lie, if she tells you "bad facts" in advance, you will be better prepared to respond at the hearing.

vi. Dishonest Clients

Most clients have legitimate claims for benefits. If, however, you encounter a claimant who is clearly lying or wants you to help her deceive the DOL, explain to her that making false statements in a hearing to obtain benefits is a crime and that you cannot assist her unless she promises to stick to the truth. If this does not resolve the situation, contact VOLS as you may need to withdraw from the case. Explain to your client that you will be unable to represent her if she lies under oath.⁵²

vii. Other Witnesses and Evidence

Ask your client what other witnesses or evidence might support her story. Clients often do not realize that they will be limited on appeal to facts found at the hearing, and consequently decide not to get documents and witnesses because they think they will be able to bring them in later. Explain to your client that her chances of success are much greater at the hearing level than on appeal, and it is very important that the two of you get (or diligently try to get) every piece of evidence reasonably available as of the hearing date.

When you have learned all you can from the first interview, arrange a second, preparatory interview and tell the client that you may also call her with questions. Before she leaves, copy all potentially relevant documents for your file, even those you do not plan to present as evidence. You should make two extra copies of anything you plan to introduce as evidence to give to the employer and the ALJ.

⁵² If you have reason to believe that a client is lying while under oath you must stop asking questions on the subject matter. If you have an opportunity where there is a break or an adjournment, explain to your client again that you cannot ethically represent her if she is intentionally deceiving the DOL. Remind her of this, point out the suspect testimony, and ask her to explain. Remember that it is possible that she has recalled something during the hearing that she did not tell you previously. Generally, you should give your client the benefit of the doubt; human memory is imperfect, you were not a witness to the events, and in any event it is the ALJ's job to determine her credibility. If you are still dissatisfied as to your client's honesty and cannot persuade her to testify truthfully, you have the option to discontinue direct examination when you return to the hearing. (Notify the ALJ that you will no longer participate in direct examination. She will continue to ask questions.) You should still cross-examine the other party and make a closing statement. If this happens in a hearing, please make a special note of it on your ALJ review form and inform VOLS.

viii. Claimant's Rights

Review with your client the list of Claimant's Rights set out in the Quality Assurance Plan which is based on the MLC Consent Decree located in the "Reference Materials" Part C of this manual. It is a checklist of due process rights and standards of conduct which the ALJ and the Appeal Board must follow.⁹

VII. IMPORTANT FACT FINDING AND LEGAL RESEARCH

A. Review Initial Documents

i. Notice of Hearing

The Notice of Hearing states the following important information⁵³:

- the date, time, and location of the hearing
- the case number and the name of the ALJ chosen to preside
- the parties informed of the hearing
- which party requested the hearing
- whether it will be a phone hearing
- witnesses or paperwork a party may be required to present
- the issues to be determined at the hearing

It is possible that when you arrive at the hearing, the ALJ may change or add issues provided there is good cause to do so. If this is done, the ALJ must offer an adjournment. If the issues change during the hearing, ask immediately for a recess to see if you can clarify the issues with your claimant in a matter of a few moments. If you cannot, ask the ALJ for an adjournment to prepare your case on this new issue, and ask the judge to clarify the issue in the new notice. You also have the right to object to the new issue.

ii. Notice of Determination

This document states the reason for the claimant's disqualification. Most often, this is based on information provided to the DOL by the employer. The stated reasons for disqualification become the main issue of the hearing. The ALJ will not allow the scope of the hearing to extend too far beyond the notice of determination. Keep this information in mind when asking questions, but keep your mind open when your client describes the situation – the reasons in the determination are often inaccurate, and the ALJ can change the issues during the hearing (provided there is good cause and an adjournment is offered).

iii. Summary of Interview Form

If the claimant spoke to an LSR (Labor Services Representative), you will find the client's Summary of Interview Form in the client's file. This document summarizes what she told the LSR in the interview. This document may be admitted to impeach her, so be careful to check it. Note that there could be discrepancies between what your client is telling you and what the interview form reflects. Make sure the client is prepared

⁵³ Some of this information may be on the back side or separate pages of the notice.

to explain all past statements made to the DOL, in the event that those statements are used to impeach the client during the hearing.

iv. UI Division Fact Finding Record for Discharge/Voluntary Separation

Both your client and the employer may have completed or received one of two versions of this form. If there is any discrepancy between what these documents say and what your client has told you during the interview, be sure to discuss it with your client and realize the ALJ may bring these up at any point during the hearing. Pay particularly close attention to the UI Division Fact Finding Record for Discharge/Voluntary Separation. This form asks claimants to explain why their job ended. If your client filled out the wrong form by mistake or gave different explanations on the form than what she tells the ALJ at the hearing, the ALJ may suspect that she is not credible. If you see any potential conflicts between her current story and what she wrote on any DOL forms she filled out, you need to talk with your client about what she wrote and why, so she can answer the ALJ's questions at the hearing.

B. Review the Entire DOL File

Examine the client's DOL file regarding your claimant's case.⁵⁴ **Do not add, remove, or alter any documents in or attached to the file.** Do not write anything on the folder – to do so may call into question the integrity of all the documents inside. If you wish to add or comment on anything in the file at this time, put it into writing to be submitted with the file. If you know ahead of time that you will be asking for an adjournment – write a letter stating your request and submit it via email or fax.

Note: Nothing in the DOL file will be a part of the hearing record unless, during the hearing, that document is properly identified and accepted into the record. See 12 NYCRR § 460.7, 461.4(j).

The file should include a summary of the DOL's interview of the employer, a summary of your client's Section C interview,⁵⁵ and a sheet stating the reason for the Initial Determination.⁵⁶ If at the time of the hearing the employer presents documents that were not in the file, take your time while reviewing them with your client during the hearing. If the judge does not permit this, tell the judge that they were not in the file when you reviewed its contents and ask for an adjournment if necessary. (Note: If the document raises significant issues that did not exist previously, this is also a reason to ask for an adjournment.)

The file may also include a CD ROM, USB, or transcript if there were any previous hearings. If overpayment is an issue, there will be a Benefit Control Record computer printout detailing all the checks your client received. If your client did not provide you with a copy of her UI Division Fact Finding Record for Discharge/Voluntary Separation, find this document in the file and examine it carefully, as explained earlier. If this or any other document does not square with what your client told you, speak with her again.⁵⁷

⁵⁴ This file will not be available until the client's hearing has been scheduled unless you request access to the file in advance from the UI Appeal Board Access Officer. Contact VOIS for an Access Request Form. This process is not always successful in obtaining access to the file before the claimant's case has been scheduled for a hearing.

⁵⁵ See Section V, Part C.

⁵⁶ If the documents from the claimant's initial application for benefits are not included in the file, make a note of this for yourself, and ask that a copy of that note be placed into the file as well. This will bring this issue to the attention of the ALJ and will relieve you from responsibility for their whereabouts.

⁵⁷ To learn the taxonomy of DOL forms, see the Insurance Forms binder at the DOL, which will identify all the forms currently used by the DOL (but not the Appeal Board). Forms here are identified by *number* and text includes the procedures that the DOL is to use in filling them out. <https://www.labor.ny.gov/secure/foilrequest.shtml>

Listen to prior testimony. If there was a prior hearing, you will be provided a recording of the testimony taken. It is likely to be submitted to you via email, so you should ensure you have the proper means to listen to the prior hearing. You should listen to the recording and take notes on anything important your client already testified to or the employer raised in the last hearing.

C. Gather Any Evidence That Supports or Contradicts Your Client's Story

You can greatly strengthen your client's case if you can obtain documents or other evidence to support her story and be prepared to counter evidence that hurts it. This evidence will boost her credibility. Be imaginative—you can use correspondence from the employer, timecards, pay stubs, medical records or prescriptions, letters from health professionals, award certificates, news articles, employee handbooks, other publications, dated bills, and receipts, etc. Have your client help you get them. Always try to obtain original documents; if that is impossible, get clear photocopies.

Once you've obtained these documents, send them by fax or email to the hearing office location listed at the top of the hearing notice at least three days before the hearing date. Be sure to include your client's name, case number, and contact information. If you are unable to send the documents in advance, the ALJ may ask if you can email or fax the documents to her and other parties during the hearing.

You may require documents from the intake officer to whom your client first made her claim. Many of these will be in the claimant's file. If they are not in the file, make your request to the DOL representative at the hearing to provide this information. If there is no DOL representative set to participate in your hearing, you or your client should also call or visit the local UI office to request the documents.

Seek out employer documents. Generally, the employer sends its personnel records to the DOL during the initial investigation of the claim. Those records will be available in the file prior to the hearing. However, the employer often does not provide all relevant documents and often provides irrelevant documents.

To obtain additional, relevant employer documents, first make a direct request to the employer – the employer may voluntarily provide them. To do this, (1) send/fax the employer an Authorization to Review Claimant's File signed by your client, or (2) ask your client to write a letter specifically authorizing the release of the records. If it refuses, you should argue that it is in its best interest to provide as you will subpoena the documents (as described below), and if the employer attempts to use any undisclosed records at the hearing, the ALJ will honor your request to adjourn on the hearing date to request time to study the documents. Even if the employer releases the records, beware of strategic omissions.

If the employer refuses to provide helpful documents, you can subpoena the employer to produce them. Requests for subpoenas are in the form of an offer of proof: state what facts the materials will purport to prove and why those facts are relevant to the case. Sample subpoena requests and form letters to employers are included in the reference materials at the end of this manual.

Subpoenas are rare in UI hearings and often rejected. If approved, the subpoenaed documents should be provided within a week. Make your request for subpoenas as far in advance of the hearing as possible. To subpoena:

- Fax your request for a subpoena to the hearing office or make a request in writing at the hearing office.
- If your subpoena request is rejected, you can make it again to the ALJ during the hearing.

If the subpoena is approved, the employer must produce the specified items on the day of the hearing, and you will have approximately 15 minutes to examine them with your client before the start of the hearing. If you need additional time, request a further recess or an adjournment to another date.

Both Administrative Law Judges and attorneys of record⁵⁸ can also subpoena witnesses who currently work for the employer. Be strategic: most employees will not be willing to show up voluntarily or will not be inclined to help you given potential conflict of interest. However, a subpoena may help a friendly coworker who wants to testify but fears retribution from the employer. A subpoena can provide some “cover” for such a witness— she can tell her employer that she “had no choice” but to testify. Request subpoenas as far in advance of the hearing as possible by faxing the request to the hearing office, or by making the request in writing at the hearing office. Again, be ready to explain why the witness is important and directly relevant to your case.

D. Seek Out and Interview Other Witnesses

When speaking with your client, ask if there are any other individuals who could back up your client's story. In most cases, there will not be a perfect witness or individual. Always interview any witnesses prior to the hearing using the same questioning techniques discussed in the previous section. Determine whether they would be willing to attend the hearing and strengthen your case. Remember to keep witness testimony relevant to the issues of the case. Some ALJs frown at hearing testimony from witnesses that were not employed by the employer unless they are deemed as critical. For example, ALJs may not find a biased witness such as a family member or friend of the claimant to be a worthwhile witness.⁵⁹

The ALJ has discretion as to whether or not a witness can ultimately testify at the hearing. Some ALJs have been known to telephone witnesses if an issue comes up for which neither side was prepared or if the witness may have particularly relevant testimony.

Prepare your witness – let her know how to login to the WebEx or phone system, that she will be sworn in, and that if she plans to refer to any materials, she should have them within reach when the ALJ calls (this is especially important with doctors). If the ALJ decides not to allow your witness' testimony, call the witness as soon as possible after the hearing to let her know.

E. Researching New York State Unemployment Insurance Law

Once you know the facts of your case, find out how the UI law has been applied in similar cases. There are several resources available to research UI law.

The DOL website is located at <https://dol.ny.gov/>. It has helpful information that is easy to access. The “Claimant Frequently Asked Questions” section will help you in answering many of the common questions you will get from your client regarding UI Benefits that may not be directly related to your case.⁶⁰

The **Unemployment Insurance Appeal Board's website** has a search feature that will allow you to search many recent Appeal Board decisions. This search tool is very helpful for finding recent cases that

⁵⁸ Under 12 NYCRR § 460.4(a)(2), “[a]n attorney who shall have filed with the board a notice of appearance on behalf of any party may issue and cause to be served, subpoenas to compel the attendance of witnesses in accordance with sections 2302 and 2303 of the Civil Practice Law and Rules.” See Section XIII, Part D, Sample Subpoena Request.

⁵⁹ Outside-of-work witnesses tend to be irrelevant in misconduct cases since the issue concerns the employer's reasons for termination of employment and the conduct of the claimant that led to the termination.

⁶⁰ Available at <https://labor.ny.gov/ui/faq.shtm>.

are on point with the issues you are researching. You can use a keyword search and a connector to limit the search, e.g., if you put in “security guard” you may get hundreds of cases; but if you put in “security guard and provoked discharge” you will get less cases. This feature is available at <https://uiappeals.ny.gov/searchdecisions>.

The **Bench Manual for Hearing Officers in Administrative Adjudication (ALJ Manual)** sets detailed standards for how ALJs should conduct hearings and constitute "recognized guidelines" for written UI decisions. The Bench Manual is available on the DOL’s website.

The **DOL Interpretation Service Index (ISI)** is especially helpful and can be found at <https://labor.ny.gov/ui/aso/interpserice.shtm>. It is a partial digest of old Appeal Board decisions compiled by the DOL. The Index is quite helpful because these decisions show how the Adjudication Services Office interprets standards like "misconduct" and "good cause" in specific factual scenarios. Within this link, there are indices in which you can look up hundreds of UI cases on issues such as misconduct, refusal of employment, and willful misrepresentation.

Appeal Board decisions are cited with "A.B." followed by a number. When you find a decision on point in the ISI click on the hyperlink and read the case in full (they are usually very short opinions). It is also useful to Shepardize the case as you may find other relevant case law that supports your client’s case.

There is a separate [Tax Liability Index](#) that you should use if your client's status as an “employee” is at issue (e.g. "independent contractor" cases).⁶¹

Lexis and Westlaw are the best resources for UI decisions from the Appellate Division, Third Department and represent broader legal principles in UI law that may not be as fact specific as the above resources. Still, you may find these cases to be useful guides. Begin by searching New York State cases under “unemployment insurance and misconduct/quit without good cause.” Searches can be narrowed by topic (absence, drug use, etc.) or date (after 1985, etc.). If you already have specific cases in mind, you can Shepardize them online. Some cases to begin a search with are:

TYPE OF CASE	CASE CITATION
Misconduct	<u>In Re Claim of Waszkiewicz</u> , 257 A.D.2d 882, 684 N.Y.S.2d 52 (1999) <u>In re Claim of Jacob</u> , 240 A.D.2d 798 (Poor judgment may not be misconduct.) (1997) <u>In re Claim of Pfohl</u> , 9 A.D.3d 729, 779 N.Y.S.2d 831 (2004) (poor behavior did not rise to the level of misconduct) <u>In re Claim of Wlos</u> , 42 A.D.3d 719, 839 N.Y.S.2d 330 (2007) (unprofessional attire did not constitute misconduct) <u>In re Claim of Marc</u> , 93 A.D.3d 991, 939 N.Y.S.2d 737 (2012) (poor work performance did not rise to the level of misconduct)

⁶¹ For Independent Contractor cases you will also find the list of factors considered by the DOL at <https://labor.ny.gov/ui/claimantinfo/ui%20and%20independent%20contractors.shtm> to be a useful guide.

	<p><u>In re Claim of Jackson</u>, 120 A.D.3d 1503, 992 N.Y.S.2d 382 (2014) (refusal to sign agreement may not be misconduct)</p> <p><u>In re Claim of Garcia</u>, 171 A.D.3d 1384, 96 N.Y.S.3d 918 (2019) (disruptive conduct didn't constitute misconduct)</p>
Absences/Tardiness	<p><u>In re Claim of Sunderland</u>, 121 App. Div. 2d 779, 503 N.Y.S.2d 191 (1986) (tardiness and excessive absenteeism).</p> <p><u>In re Claim of Russo</u>, 286 A.D.2d 847, 730 N.Y.S.2d 374 (2001) (unexcused absence)</p> <p><u>In re Claim of Anumah</u>, 60 A.D.3d 1216, 876 N.Y.S.2d 172 (2009) (excessive absences and tardiness)</p> <p><u>In re Claim of Buyukcekmece</u>, 82 A.D.3d 1400, 918 N.Y.S.2d 272, 273 (2011) (tardiness)</p> <p><u>In re Claim of Suchocki</u>, 132 A.D.3d 1222, 18 N.Y.S.3d 773, 774 (2015) (absenteeism)</p>
Job Refusal	<p><u>Hoffman v. Catherwood</u>, 34 A.D.2d 871, 311 N.Y.S.2d 129 (1970)</p> <p><u>In re Claim of Szatko</u>, 171 A.D.2d 911, 566 N.Y.S.2d 784 (1991)</p> <p><u>In re Claim of Wilson</u>, 241 A.D.2d 653, 660 N.Y.S.2d 176 (1997)</p> <p><u>In re Claim of Di Stefano</u>, 304 A.D.2d 950, 757 N.Y.S.2d 157 (2003)</p> <p><u>In re Claim of Reisen</u>, 129 A.D.3d 1433, 1433, 10 N.Y.S.3d 911 (2015)</p>
Quit	<p><u>Claim of Gunnip</u>, 108 A.D.2d 1007, 485 N.Y.S.2d 394 (1985) (verbal abuse)</p> <p><u>Matter of Cantor (Levine)</u>, 50 A.D.2d 638, 374 N.Y.S.2d 161 (1975) (job adverse to health)</p> <p><u>In re Claim of Knoblauch</u>, 239 A.D.2d 761, 657 N.Y.S.2d 250 (1997) (reduction of hours and elimination of benefits)</p> <p><u>In re Heller</u>, 83 A.D.3d 1229, 921 N.Y.S.2d 403, 404 (2011) (pay reduction)</p> <p><u>In re Campise</u>, 150 A.D.3d 1523, 1524, 54 N.Y.S.3d 761, 762 (2017) (denial of raise)</p>
Question of Quit vs. Fired	<p><u>In re Claim of Jakab</u>, 186 A.D.2d 304, 587 N.Y.S.2d 789 (1992)</p> <p><u>In re Claim of Lukaszewski</u>, 249 A.D.2d 861, 672 N.Y.S.2d 466 (1998)</p> <p><u>In re Burke</u>, 11 A.D.3d 870, 783 N.Y.S.2d 164 (2004)</p>

The **Unemployment Insurance Law statutes** can be found online at <https://labor.ny.gov/ui/dande/article18.shtm> and in governing Book 30 (Labor), Articles 18, 25-B, and 25-C (1988) (N.Y. Lab. Law §§ 500-643, §§ 861-861-G, and §§ 862-862-E (McKinney).

Relevant **New York Codes, Rules and Regulations (NYCRR)** can be found online at <https://labor.ny.gov/ui/dande/regintro.shtm>. 12 NYCRR §§ 460.1-465.9 lists procedural rules governing practice before the ALJs and the Appeal Board. Sections 473.1-473.5 provide information about claims and reporting, and §§ 482.1-482.5 deal with vocational training issues. The NYCRR is summarized in (but not to be substituted by) Rules and Regulations Governing Practice and Procedure Before Administrative Law Judges and Appeal Board, a DOL pamphlet.

Special Bullets (A-710 Series) are short papers outlining the DOL's position on specific issues. Certain bulletins have been recognized as having the force of law and can be found on the Department of Labor's website.

Adjudication Services Office (ASO) annual letters indicate the DOL's interpretation of recent changes in the law. Useful as an explanation and tool for understanding the DOL's position, and possibly as persuasive authority, but these letters are not law and should not be cited as such. These can also be found on the Department of Labor's website.

VIII. DEVELOPING YOUR CASE THEORY AND PREPARING YOUR CASE

A. Brainstorm Potential Theories of the Case

Your theory of the case consists of your most favorable facts, combined with the law you want the ALJ to apply to those facts to show your client is eligible for benefits. Avoid a hodgepodge of different factual or legal theories: you will appear unprepared or lacking expertise, and the facts will seem inconsistent. Brainstorm all possible theories and select what you believe is the most persuasive theory and focus your advocacy on proving it.

B. Creating a Theory

Focus on the Final Day of Employment: In hearings arising out of how the claimant's previous job ended, the focus of the ALJ's inquiry will be on the final incident that precipitated the claimant's separation (whether the decision was the claimant's or the employer's). The day when your client was fired or quit is generally the point at which the ALJ measures whether there was misconduct or good cause to quit. Your theory must therefore show that the legal standard was not met on that day. As a general rule, anything occurring after that day is irrelevant. Anything that happened before that day will not influence the ALJ unless you connect it to what happened on the last day. Oftentimes, the ALJ will not ask questions about or get into the details of the "context" i.e. previous incidents that led to the "final day." It's important to alert clients that not every detail of their situation will be addressed at the hearing and that the ALJ will focus on the last day of employment.

Make It Simple: A theory that is easy to understand and succinct is more likely to be believed. To keep your theory simple, focus it narrowly on the legal standard for eligibility, and don't stray into side issues that

do not address that standard. You should be able to summarize your theory of why your client should get benefits in two to three sentences.

Balance Both Rational and Emotional Appeal: In addition to your legal argument, present your client as a hardworking, sympathetic individual who deserves benefits, and present discussions of past good-performance and behavior. It is very important to establish that your claimant had never done anything wrong before being suddenly fired. Some ALJs do not care to know the personal side of your case and only want to hear the factual circumstances of the last day of employment. However, it does not hurt to include.

C. Write Out Your Theory

Always write out your theory to clarify it in your own mind and test it for simplicity. Also, discuss your theory with your advisor—a second opinion will help you sharpen your theory and plan how to prove it.

D. Anticipate the Employer’s Theory

Try to figure out the employer’s theory of the case: what legal arguments will they have to make, what facts they will have to prove, and how might they try to prove them? This will help you anticipate issues at the hearing so you can plan to win these disputes. Reviewing the case file at the DOL will help you to identify potential arguments. The employer interview and any documents submitted by the employer will be information that will clue you into what the employer will most likely be asserting at the hearing.

Also, anticipate the employer’s possible witnesses and documents that are not in the file. Ask the claimant what they think the employer will be prepared to argue, who they think the employer’s witnesses will be, and if they can describe the characteristics of the employer and its employees. This kind of information is helpful for cross-examination as well as dealing with the employer’s theory of the case.

E. Draft a Fact Checklist and a Preliminary Closing Statement

List the facts that you will need to prove or bolster your theory in a **fact checklist**. By proving as many of these “specific” facts as possible, you will persuade the judge to accept your client’s overall story.

For example, if your client is accused of misconduct for being absent without notifying her supervisor, your theory may be that her action did not rise to the level of misconduct because her absence was an isolated incident and she tried to notify her employer by calling in sick and leaving a phone message for her supervisor, but this message was never passed on to the supervisor. To prove this particular theory, your fact checklist could include the following:

- Your client had a good work and attendance records.
- She had a compelling reason for her absence that day.
- She has proof of a visit to her doctor.
- The company employee manual did not specify a proper procedure for calling in sick.
- She did leave a phone message with a specific co-worker.
- That co-worker forgot to pass on the message.

Your checklist should also include more detailed facts that help prove the broader facts. Proving enough facts on your checklist should prove your overall theory, provided you organize the facts into a coherent argument.

To do this, take the facts from your checklist and use them to write a first draft of your **closing statement**. A closing statement is your theory with an expanded “facts section”: your overall version of what happened, with specific facts plugged in to prove it step-by-step. By drafting your closing statement now, you organize your thoughts, identify the argument you want to be able to make, and identify those facts from your checklist that you must prove in order to make that argument. Remember that the closing statement is **very short**. Reiterate the main points of your client’s testimony, the theory of your case, and the case law to back it up. If you have case law available, be sure to provide two copies of the case: one for the judge and one for opposing counsel.

Once you've drafted your closing statement and identified the facts you must prove to make that statement persuasive, you need to plan out how you will prove those facts through direct and cross-examination.

F. Introducing Evidence

You submit copies of any document you plan to introduce into evidence. Any audio or video recording you plan to introduce should be copied onto a CD/DVD/USB drive so that it can be made a part of the hearing record.

IX. PLANNING THE DIRECT EXAMINATION AND PREPARING YOUR CLIENT FOR THE HEARING

A. Identify the Facts You Need from Each Witness

Your direct examination should prove the specific facts in your closing statement and your overall theory. Without proper, thorough, and thoughtful direct examination, your client will lose.

Most ALJs conduct an initial direct examination of the client. Following that exam, the ALJ will allow you to follow up with your own direct examination. The ALJ will often cover the “basics” of the situation – when was the claimant’s last day of work, when they applied for benefits, etc. Do not ask the same questions as the ALJ in your exam. As described above, be sure to elicit facts about your client’s good work record (raises, promotions, merit awards, good attendance, etc.). Make your direct complete but brief and to the point. Don't dwell on matters that are not essential to your theory of the case.

B. Draft Your Direct Examination

Draft your direct exam by creating a list of open-ended, non-leading questions that will elicit the key facts. You should place them in “chapters” where each “chapter” addresses a different segment of facts you wish to elicit. For example, the first chapter may be to describe the background of their work: when your client began, the nature of the job, what their schedule was like, and what their responsibilities were. Then the second chapter may center around the last day of work.

Think about the best way to let the client’s story unfold chronologically. Whatever order you choose, bring the client quickly to the subject of her last day of work. This is always the ALJ’s main focus, and the ALJ will lose interest if it is not yours as well.

Your questions should all begin with “who?” “what?” “where?” and “why?” However, do not ask questions that are too general. Your client may be unsure what you want her to talk about. The questions should focus the witness on a specific topic without restricting what she can say about it. You can sometimes do this by prefacing a series of questions with a **topic sentence**: “**I’d now like to ask you about...**” “**Let me direct your attention to...**”

Avoid leading questions. For example, if you wish to elicit facts that an employer told your client she was being fired to cut costs, do not ask: “Did your boss ever tell you she was laying you off to cut costs?” Most ALJs would find this impermissibly leading. To avoid leading, you might ask her to describe the events of the morning of her firing:

“When did you learn you were laid off?”

“What happened?” or “What were you told?”

“Did your boss say why she was firing you?”

These questions focus the witness on the subject without suggesting an answer. You could also focus the witness with a topic sentence:

“I’d like to ask you about how you heard you were being laid off.”

“Who told you?”

“Did she explain why?”

C. Introducing Documents or Other Evidence

Prepare to offer any documents or other evidence that support your client’s credibility. Make sure you have a copy of anything you will be introducing into evidence ready for the judge and the employer. When you introduce a document use the following simple steps:

- “Witness, do you recognize this document?”
- “Can you tell us what it is?”
- Establish when, why, and by whom the document was prepared.
- Bring out the relevance of the document. (Use your judgment. You may decide to establish its relevance before introducing it.)
- “Judge, I offer this as Claimant’s Exhibit number [one, two, etc.]”
- Provide a copy for the judge and the employer (some judges are very adamant about this and will be irritated if you do not provide these copies).

D. Acknowledge Weaknesses During Direct

It is often useful to ‘draw the sting’ of cross-examination by asking your client to explain weaknesses in her own story. This gives her a chance to fully explain herself to a friendly questioner, and defuses the impact of negative points. Make sure, however, that your client is well prepared for these questions, and don’t draw attention to anything that wouldn’t otherwise receive it.

X. PLANNING AND CONDUCTING CROSS EXAMINATION

A. Using Witnesses Strategically in Cross-Examination

Cross examination is the single most difficult advocacy task that must be planned carefully. Unfortunately, in this type of hearing you cannot finalize your cross until you hear the witness on direct. You can prepare, however, by considering the employer's likely theory of the case and anticipating much of the witness's direct testimony. By planning how you wish to cross-examine, you will be ready to make last-minute changes and advance your theory when you get to question the witness. In addition, in the hearing, if you need to revise your planned cross after direct, you may ask the judge for "just a moment" to revise your questions. Don't be afraid to create a moment of silence: it builds drama and focuses attention on you. You may also ask the ALJ for a brief recess after the direct, giving you the opportunity to brainstorm and discuss with your client.

It is important to ask your claimant beforehand who might be testifying on behalf of the employer. Your claimant can assist you in identifying what the employer's witness can personally testify to and what is hearsay.⁶² Establish from the source of information: does this witness have first-hand knowledge of the incident? Did she write the report? Did she witness the incident, or did she just hear about it? If the information is hearsay, bring this to the attention of the judge. Although hearsay is admissible at these hearings, it is not as credible as firsthand knowledge. In many situations the witness will have no personal knowledge of the events that took place with the claimant—it is therefore a good idea to point this out during cross-examination. (A common example is that there will usually be an individual from the employer's human resources department present on behalf of the employer).

Some people view cross-examination solely as a chance to discredit a witness. Consequently, cross-examination will often be a good chance to introduce evidence that contradicts the witness's testimony. For example, an affidavit signed by someone on behalf of the employer or the summary statement taken by a Labor Service Representative may contradict the witness's testimony. While this is one potential goal of cross-examination, it is not the first one you should consider.

To plan the cross of any witness, ask yourself the following three questions: (1) Can I get anything helpful from this witness? (2) Can I limit the reach of her testimony? (3) Can I discredit the witness or her harmful testimony?

Getting helpful facts through cross-exam: There is no more credible way to prove a fact than through your adversary's witness. You must, however, judge her candor and motivation—if she seems committed to helping the employer, be more indirect in your questioning, or limit yourself to points that are so obvious that she cannot credibly deny them.

If you decide to seek helpful testimony from a witness, ask these questions in a friendly manner. This will lower the witness' suspicion of you and increase her willingness to cooperate. Always ask such helpful questions before you ask any confrontational questions. You can always get tough after friendly questions, but it is harder to seem friendly after being tough.

⁶² Hearsay is admissible in DOL hearings, but it is given less weight than sworn, credible testimony. If, for example, your client and her employer's witness both testify to a set of events, but your client was the only one actually present, the ALJ must give the claimant's credible testimony more weight. In such a case, remember to mention during your closing that the employer's witness provided hearsay testimony while the claimant provided eyewitness testimony.

Limiting bad facts on cross: Often your adversary will argue that a witness's testimony proves more than what the witness actually said. You must limit the reach of the testimony by sharply distinguishing between what it does and does not prove, or else the ALJ may draw such inferences against your client.

For example: you represent Ms. Smith, a department store clerk who was fired for allegedly stealing merchandise. Your theory is that the employer cannot prove misconduct because they did not have sufficient reason to single out your client as the thief. The employer has no eyewitnesses to the theft. However, your client's former supervisor testifies that the merchandise disappeared from your client's work area while she was on duty. The employer wants the ALJ to infer your client's guilt from this coincidence, but you might limit the supervisor's testimony as follows:

- There were seven individuals besides Ms. Smith working in the store that day, right?
- And all seven of those employees have access to the store's various departments, isn't that right?
- And you have a number of customers going in and out of your store each day, don't you?
- Now you never actually saw Ms. Smith take the merchandise, did you?
- Nor did anyone else at the store?

By highlighting the limits of the witness's testimony, you show that that testimony is not enough to prove that your client was the thief.

Resist asking for a conclusion on your cross examination. In the above example, you might be tempted to ask a question like, "So, Mr. Supervisor, you really have no way of knowing that Ms. Smith was the thief, do you?" To which the supervisor could easily respond, "Actually, I do because the merchandise was in a locked drawer and only Ms. Smith had the key." In situations like this, asking for a conclusion or explanation can destroy your whole case – so resist the temptation.

Discrediting Cross: If the witness's direct exam significantly undermines your theory of the case, try to discredit the damaging testimony or the witness herself. There are numerous ways to discredit it.⁶³ Here, in order of increasing difficulty:

- Show that the testimony may be based on a mistake in perception, interpretation, or memory.
- Show that the witness omitted certain facts in a way that made her testimony unfair or misleading.
- Make the witness unattractive: raise dubious behavior and goad her to act badly while testifying.⁶⁴
- Show that the witness may be lying.⁶⁵

There are three ways you can establish such discrediting facts:

- Attempt to get the witness to agree to the propositions you hope will discredit her. Be careful to conceal your objective from her. Any self-respecting witness will resist your efforts to discredit her.
- Have the witness confirm related facts from which you can ask the judge to infer the discrediting facts. In our theft example, you could elicit the fact that no police report or charges were filed concerning the "theft," or that it occurred shortly after the supervisor failed to get her promotion.

⁶³ For more detailed discussion of each of these methods, see Amsterdam, *Cross Examination*, at 2-9.

⁶⁴ ALJs dislike employers who manipulate the circumstances of a claimant's termination in order to affect her eligibility for benefits. If you have evidence suggesting that the employer did this, raise the issue!

⁶⁵ In real life, unlike the movies, proving a witness to be a liar is extremely difficult. You should only attempt it when you can show both a motive to lie and solid evidence of untruthfulness, such as a recorded prior inconsistent statement. Because it is difficult to prove a witness is lying, you should focus instead on showing mistake through poor perception, misinterpretation, etc.

- Have the witness disagree in such an absolute or incredible way that the ALJ won't believe her. In the theft example, say you believe that the supervisor's theft accusation was a pretext. The supervisor was retaliating against your client because your client had recently gotten her into trouble with the store management. The supervisor will never admit such motivation, so you try to get her to deny it as incredibly as possible:
 - Sir, my client recently reported you to the store manager for mishandling store inventory, didn't she? (Yes, but...)
 - And shortly afterwards, you did not receive a promotion you had sought to be an assistant store manager? (That doesn't have anything to do with this....)
 - Well, it must have created ill will between you and Ms. Smith, didn't it? (No, not really.)
 - Didn't it anger you that your subordinate may have cost you a promotion? (No.)
 - Not at all? (Not at all.)

This is also an example of using a **false lead**. You frame the questions so that the witness thinks you are trying to get her to say one thing: here, to get her to change her story and admit her anger. She responds by repeating her story more and more absolutely, making it less and less credible, which is your true objective. At that point, don't argue the issue with the witness. You simply wait until your closing statement, when you argue to the ALJ that her claims contradict human nature and common sense. If you can get the ALJ to doubt the witness on one point, she may view her other testimony with skepticism as well.

B. Focus on Specific, Important Points, and Don't Repeat the Direct Examination

Consider the points you wish to make and pursue only the three or four specific points that are most important to your theory and have the greatest potential for success. Attempting any more than this lessens the impact of your cross and gives the witness more chances to hurt you. Avoid asking general questions: a witness can answer with a speech or lecture, or explain away any inconsistencies, or give the witness the opportunity to bring in testimony that would otherwise be inadmissible.

Do not repeat the direct. This is a common error made by an inexperienced cross-examiner. It only allows the witness to repeat her harmful testimony and bores the ALJ. You don't have to cross-examine every witness, and if you can see no specific purpose for doing so, simply tell the ALJ: "No questions at this time, Your Honor."

Avoid making petty or trivial points. New advocates often feel that any and all inconsistencies should be raised during cross-examination, but this is almost never the case. Witnesses often make inaccurate statements during their testimony; only point these out when they help your claimant's case or where you are attempting to show that the witness's memory of events is generally faulty.

Make your strongest points at the beginning and the end. Your cross will be most impressive to the ALJ if you begin and end with strength. Therefore, plan to pursue what you believe will be your best two points at the beginning and the end of your cross.

C. Control the Witness Through Leading Questions

An adverse witness will hurt you if you give her the chance. Thus, on cross you always want to control her testimony and prevent her from volunteering statements that could harm your case. You can achieve this control by using leading questions. Make a statement and simply ask the witness to agree to it.

Focus the topic of each question on one narrow fact, so you can get the witness to answer only “yes” or “no”: If you feel that the witness will not directly answer simply “yes” or “no” it can be very helpful to start your question by saying something to the effect of “now, this question will require only an answer of yes or no.” An example — “Did you ever report the incident to the police—yes or no will be just fine sir.” This is especially helpful with witnesses that seem to go on forever and try to talk their way out of the definitiveness of their answers.

For example, you could ask, “Isn't it true that you never reported the theft to the police?” Often, it is easier to get the witness to agree with the question if you leave off the “Isn't it true” part, and merely make a declarative sentence with a slight questioning inflection in your voice: “You never reported the theft to the police?” In any event, **do not** ask “why?” questions on cross or otherwise give the witness a chance to explain or elaborate. It only gives them an opportunity they will use against you.

D. Be Courteous to the Witness at All Times

British barrister Clifford Mortimer aptly stated, “The secret of cross examination is not to examine crossly.” When you seek to discredit a witness, do not show it in your attitude. Always treat her with courtesy, even if you think she is lying through her teeth. Doing otherwise only puts her on guard, making it harder to effectively cross-examine her. By contrast, being polite to the witness may relax her and consequently make her more likely to say something she hadn't planned to say. You also want to avoid the perception that you are “picking on” a witness; it builds sympathy for her and makes you look bad.

Being courteous, however, does not mean retreating from your theory or relaxing your control. If a witness evades your question, point it out by saying “Perhaps I did not make my question clear. Let me ask it this way...” and repeat the question. If she evades again, say it again. The ALJ will realize who is causing the problem. Politely but firmly limit the witness to the questions you ask. If she tries to elaborate, immediately ask the next question. Remember that it is your job to vigorously advocate for your client while trying to remain courteous and trying to avoid seeming like you are harassing the employer's witness. It is difficult to get what you want out of cross examination but staying composed is often even harder.

E. Pay Close Attention to the Witness's Answers

This may sound obvious, but during the hearing, it is easy to get so wrapped up in your questions that you pay insufficient attention to what is most important: the witness's answers. During your adversary's direct, focus your attention on the witness and jot down brief notes to keep track of her exact answers and potential subjects for cross that you had not anticipated. It is a good idea to write these down on a clean sheet of paper so as to keep your thoughts organized. If you are well prepared when it comes time for you to ask questions, you will be able to catch important facts and highlight them. A great technique for unanticipated questions is to begin your question by saying, “Ms...you just testified that...well, isn't it true that...” Also, pay close attention to how she answers your questions—you may get a better answer than you expected, but you will not be able to capitalize on it if you're already focusing on the next question.

F. Avoid Classic Pitfalls

In cross-examination, be careful to avoid falling in common traps.

Never ask a question to which you do not already know the answer. This overstates the case slightly. It is always risky, and usually unwise, to “go fishing” for new facts from an adverse witness. In UI hearings, however, since you have little opportunity to discover the employer’s case before the hearing, you may occasionally want to ask such a question if the potential benefit seems strong. Take care, however, to limit your risk. Do not ask a question that can damage your entire theory if you get an unexpected answer. Never ask a critical question if you are not prepared to deal effectively with whatever answers you receive.

When you get a bad answer from a witness, exercise self-control. Try not to hesitate or pause; instead, nonchalantly turn to another subject with a new line of questions as if the witness had said nothing important. The damage may already be done, but by moving on quickly its importance can be downplayed. In the event your client or witness produces a bad answer, don’t forget you can rehabilitate the witness or client on redirect.

Never challenge a witness to explain weaknesses or inconsistencies in her testimony. This gives her the ability to explain away what seems to you to be the most hopeless of inconsistencies. If you give them the chance to get out of your trap, they will, so do not give them the chance. Again, just elicit the facts you need to show the weakness or contradiction and wait until your closing statement to make the point. This is a great example of why cross-examination is best limited to direct “yes” or “no” questions.

Know when to stop. An otherwise-effective cross-examination can still backfire if you do not know when to stop. Stop cross-examining about a particular subject when:

- You have the facts you need for a good closing statement (i.e., you’re on the verge of an ultimate question);
- You get a particularly good answer (to prevent her from changing or qualifying it);
- The witness sees where you are going, and seems ready to put up a fight; or
- Information harmful to your theory starts to come out.

If you get an extremely good answer, end your entire cross right then. This dramatically underscores the importance of the answer, and anything else you are likely to get would only be anticlimactic.

Be mindful of the judge. Never underestimate the effect a judge’s questioning may have on your cross examination and your entire theory of the case. Often during hearings, judges may intervene with their own questions for a variety of reasons. Keep in mind the impact of an ALJ’s questions, since they can often clue you in on points that the judge finds important or unimportant — points which you may want to reiterate or pursue during cross examination.

XI. PREPARING THE CLIENT AND WITNESSES FOR THE HEARING: THE SECOND INTERVIEW

A. Meet Again with Your Client and Witnesses to Prepare Her for the Hearing

Most of the evidence presented to the ALJ is personal testimony. Thus, the decisive issue at any hearing is credibility.

To win the credibility issue, you must carefully prepare your client and any other witnesses. No matter how persuasive they may be one-on-one, they must be ready for the additional stress of appearing before a judge and opposing counsel. Meet with them before the hearing to rehearse the direct examination you have prepared, and the cross-examination you anticipate. Keep in mind that although the client may answer your questions well, most clients perform worse when questioned by the judge.

B. Interview Again to Nail Down the Facts

Begin by asking your client whether there is anything else about her case she has thought of since you last met. By this time, she may trust you more and tell you more. Ask her again: is there anything else that her employer may bring up? Double check the key facts and clear up any uncertainties and impart to your client the importance of telling you the full story. Make sure that you have closely evaluated what information is in the client's Department of Labor file. If your client tells you one thing, but the file says that they have told the DOL something else, this is something that must be addressed and explained. The judge will ask the client questions about what she told the DOL, and if she testifies inconsistently, the judge will unfavorably assess the client's credibility. If the client wishes to testify differently than what they have told or written the DOL, there should be a valid explanation as to the reason for this inconsistency.

C. Calm Your Client's Nerves - Explain What the Hearing Will Be Like

Your claimant may be nervous. Many have not been to a DOL hearing before. Use the time at the end of your first meeting to calm his nerves. Assure the claimant that you will not allow the judge or the opposing party to intimidate them or coerce them into answering questions.

Explain what the hearing room looks like and that it is not a court room. The hearing is held in a small office with a table that seats four to five people, and the judge's desk at one end of it. You will be seated next to her, with her employer across the table. The hearing will be tape-recorded, so remind the claimant to speak loudly and clearly.

The format of the hearing is as follows:

- ALJ gives a short opening statement, confirming all parties are present, have all documents and are ready to proceed.
- Party with burden of proof testifies (employer will testify first in misconduct cases, claimant will testify first in voluntary quit cases. In a reopening case, the party who reopened will testify first on the threshold issue of reopening.)
- Cross examination of person who testified.
- Other witnesses for the first side testify.
- Cross examination of those witnesses.
- Responding party testifies.
- Cross examination of responding party.
- Other witnesses for responding party testify.
- Cross examination of responding party's witnesses.
- Both parties make closing statements (usually employer first).

Keeping answers as direct and simple as possible is important to calm your client's nerves, as well as making the hearing easier for the judge. In this vein, the ALJs usually do much of the questioning themselves. Clients

may bring notes (not a prepared statement) if it helps calm their nerves, but a client cannot read the notes while testifying. They may only refer to the notes to refresh their memory.

Witnesses do better when they understand what their advocates are trying to prove. Therefore, explain your theory of the case in simple terms: what facts you want to prove, and why they are important. Also, explain the law. In unemployment hearings for misconduct cases the judge will be concerned about the last incident that caused the employer to fire the claimant, and in voluntary quit cases the judge will be concerned about that last thing that caused the claimant to leave her job.

D. Prepare Your Client for the ALJ's Direct Examination

The ALJ will likely ask questions of your client before allowing you to do so. Therefore, you must prepare your client for the various questions the ALJ might ask and how those questions may be worded.

PRACTICE. PRACTICE. PRACTICE. The single most important thing you can do to prepare for direct is to rehearse. Meeting in person is ideal. If you cannot get together with your client, you can rehearse over the phone. Prepare your questions and ask them as if you were in the hearing in front of the judge. Be as formal as possible so your client can get used to the process and tone of the hearing. Have her answer each question in her own words and discuss her response. Listen carefully to her answers. Take brief notes and always remember what you need to prove your theory. If your witness omits anything, ask a follow-up question to get the missing information. If she answers as you wanted, point out why her answer was good, and urge her to repeat it at the hearing. If she does not answer well, describe why, remind her of what she previously stated and explain why the ALJ will be asking such a question. Review this until your client feels comfortable with her answers.

Notice when your client answers your questions differently as you expected or gives an answer that you know is both incorrect and harmful to her case.. This happens when:

- The client is nervous or scared.
- The client is trying to be eloquent and, in the process, changed his story.
- The client is unknowingly caught in a lie.

You must act to correct this. If you think your client simply misunderstood the question, apologize for not making the question clear, and ask it again in a simpler way. You can also change topics and then return to the problem area later from another angle, which you think is more likely to remind her of the correct response (this is particularly useful if the first question came from the ALJ). If she contradicts what she said before, point out the conflict to her, and elicit her agreement that she was mistaken before. You can also introduce a document and have her take a moment to review it in order to "refresh her recollection" of details which she had misstated.

You cannot tell your client what to say. You can, however, go over the information revealed during the initial interview. This process requires some finesse and will change with each client. The bottom line is: practice makes perfect.

E. Prepare for Admitting Evidence

It is important to explain to your client how you will enter documents into evidence on her behalf. It is helpful to practice this so that it goes smoothly during the hearing. To enter documents into evidence in a

direct or cross examination it is advisable that the documents fit into your line of questioning. To enter documents into evidence:

- Tell the judge what document you will be referring to. Make sure the judge has the document (be sure to always bring three copies to the hearing) and ask the judge to mark the document for identification. This does NOT mean that the document is entered into evidence yet until the judge confirms it has been entered into evidence as hearing exhibit (X).
- Ask your client:
 - Do you recognize this document?
 - Can you tell us what it is?
 - How do you recognize it? (The client cannot read from the document but can explain what the importance of it is – e.g. this document shows that I in fact did attend work on September 28, 2009)
 - Is this a true and accurate copy of X document?
- Finally, after laying the foundation, ask the judge to please enter the document into evidence. The judge will show or reference the document to the employer and ask them if they have an objection. At that point the employer will be allowed to comment on the document. She will then ask you if you have an objection. If the judge accepts the document into evidence, she will call it Claimant's exhibit (number or letter). Objections: use them or lose them! If you do not object, your right to oppose the document is lost for appeal.

Please bring two additional copies of the document to the hearing. One copy is given to the employer and the other to the judge. If additional copies are not brought, the judge will have to make them at the end of the hearing and that will reflect poorly on your performance and preparation.

F. Prepare for Hostile Direct and Cross-Examination

The thought of tough questions from a judge or ex-employer makes clients nervous. Reassure your client that you will be there to defend her and tell her that the best way to be ready for such questions is to discuss them now. Make sure that the client understands that you are not crossing her because you do not trust or believe her but because you want to prepare her for the employer's questioning.

Anticipate much of the employer's cross by thinking about what they need to prove their theory of the case and pose potential questions to your client. Help her think through the best honest response that is consistent with your overall theory. **Emphasize that she should always tell the truth, and not be afraid to admit her own mistakes.**

Tell your client always to take her time in answering any question, whether it be from the employer or from the judge. This gives you extra time to object if the question is improper, and also helps her formulate a better answer.

Employers may suggest that you "coached" your client into giving the "right" answers. If this situation occurs, you may object to this line of questioning. If the judge allows the client to answer, one of two things may occur: your client may give an answer that is satisfactory, or there is an issue with your client's answer. Remember, you always have a right to redirect, at which point, you should rehabilitate the client.

G. Advise Your Client How to Dress, Speak, and Act at the Hearing

The ALJ will also judge your client's credibility based on how she speaks, how she looks, and how she acts. Hearings can now take place over WebEx, therefore, the judge and employer can now see you and the claimant. Therefore, stress that she must:

- Dress for the hearing as if going to a job interview.
- Take her time answering and speak loudly and clearly.
- Look at the ALJ, not you, when answering all questions.
- Stay calm no matter what anyone else says or does, and politely but firmly stick to her story.
- Not interrupt the ALJ.
- Respect the ALJ at all times.

XII. THE HEARING: MAKING OBJECTIONS AND DEALING WITH THE ALJ

A. What to Expect

Claimants must call or log in to the hearing at least 5 minutes prior to the start of the hearing. They should have their hearing file in front of them and remain prepared for the judge to start the hearing.

Most ALJs allow five minutes to pass before beginning. Still, it is imperative to be on time and prepared. If your claimant is running late, you can respectfully ask the judge for some additional time. Most hearings last about one hour, but if there are complex issues or additional witnesses, be prepared for a longer hearing. If the hearing goes on for over two hours with no hope of completion, the judge is likely to adjourn to continue the hearing another day.

If the employer is represented by an attorney or a hearing representative firm (TALX, ADP, Equifax, UCC, etc.), or by a Commissioner of Labor representative, prepare for a full-blown hearing. If the employer appears unrepresented, remain vigorous in your advocacy, but perhaps tone it down a bit, so you do not build sympathy for your unrepresented opponent. Finally, if the employer does not appear at all—which frequently happens—cut back your presentation to the bare essentials. Be attentive in these situations to what the ALJ seems most concerned about. You will probably win unless the ALJ finds your client unbelievable. Don't antagonize her with long proofs of uncontested issues.

If the claimant requested the hearing and the employer did not appear, the ALJ will proceed with the hearing, take testimony from the claimant, and decide based on that testimony. The employer can apply to reopen the case. If granted, the employer must show good cause for his failure to appear.

If the employer requested the hearing (therefore the claimant has already received or is receiving benefits), and the employer fails to show, the ALJ should sustain the initial determination that was in your client's favor. The claimant will receive a notice that she won due to the employer's default.

In misconduct cases, the employer presents their testimony first, while in voluntary quit cases, the claimant proceeds first. The Judge often directs who goes first based on the issue and who called the hearing.

Remember, no matter who speaks first, you and your claimant have the right to direct and cross-examination of all witnesses for ALL issues. A cross-examination problem arises occasionally when a claimant's hearing was adjourned, and you were not present at the first hearing. If an employer's witness testified at the first hearing, is not present, and is not available for cross-examination then be sure to remind the judge in your closing statement that that witness's testimony should not be considered when arriving at a decision because you were not given the opportunity to cross-examine that witness.

B. Objections

Because UI hearings are administrative hearings, the ALJs and Appeal Board are not bound by formal rules of evidence. They focus not on excluding evidence, but on weighing each piece to determine what it is "worth." Objections, however, are still important. Some evidence may be excluded if you object. Even if the ALJ does not exclude the evidence, a well-spoken objection may persuade the ALJ to give it less "worth." Don't object to unimportant or introductory matters – focus your objections on questionable attempts to prove key facts.

You should also use objections to protect your client from hostile examination. If the ALJ or employer is bearing down hard, do be persistent with your objections. You can also object to a question as "unclear" in order to signal to your client that the question is tricky.

Plan objections as part of your hearing preparation. Imagine what questions the employer is likely to ask on direct and cross to prove their theory. Also consider the answers their witnesses are likely to offer. Identify objections you could make to these questions and answers. By thinking about this before the hearing, you will recognize objectionable material and object faster during the hearing.

i. Testimonial Objections

Most ALJs recognize the following objections to varying degrees:

Irrelevant: A question or answer is irrelevant if it does not help determine any fact affecting your client's eligibility for benefits. ALJs interpret relevance broadly, but the following examples are irrelevant: Your client's job performance if the issue is whether she had good cause to quit, Incidents after her job ended.

Leading (direct and redirect only): A leading question "puts words in the witness' mouth" by suggesting the answer desired or assuming a "fact" which the witness has not yet stated. The "question" is really a statement which the witness can only affirm or deny. Such questions tend to control the witness; thus, they generally are not allowed on direct and redirect examinations.

Witness lacks personal knowledge or calls for a conclusion: A witness cannot testify about things she has no way to know. For instance, an employer cannot testify to what your client thought or felt.⁶⁶ The employer may think she can figure out what your client felt ("I knew she was angry because she ignored me"), but such conclusions are subjective inferences, not first-hand perception. The ALJ is supposed to draw such conclusions, not the witness.

⁶⁶ Most ALJs accept hearsay "for what it's worth." (Hearsay is an out-of-court statement offered for the truth of the matter stated). But see: Matter of Perry, 325 N.Y.S.2d 888.

Misstates the prior testimony: Particularly during cross, the questioner may misrepresent what a witness said earlier. Pay attention whenever a questioner refers to previous testimony, and object if the questioner distorts it.

Asked and answered: The questioner may try to ask your witness a question more than once in order to elicit a different response. If you know your client has answered the question, object to it being asked again or in a slightly different way.

Arguing with the witness or harassing: This applies when an employer or ALJ debates the facts with the witness or otherwise abuses her.

Document speaks for itself: This applies when the witness attempts to read from a document. Reading aloud from a document in evidence is redundant, and witnesses should speak in their own words.

Objection (general objection): Even if you can't put your finger on the exact rule being violated, object anyway, and explain your reasons. Your job is to get an objection on the record. In many situations, there is no exact rule: the ALJ simply does what seems fair. Again: use it or lose it! It is better to object “generally” than to lose the ability to do so on appeal.

You need to react fast to make effective objections. In most cases, you will vaguely “sense” that a question or answer is somehow wrong a moment before you can articulate just what is wrong about it. You will improve your speed with objections if you let that first vague “sense” be your trigger to say “Objection!” Then, begin explaining why you object. It may take a second, but verbalizing it “on your feet” will usually remind you of the rule you are looking for. If you draw a blank, make a general “unreliable” or “unfair” objection. Your speed and skill with objections will improve with experience and understanding of the possible objections.

Pro tip: It’s helpful to explain the concept of objecting to the client, so they know not to answer IMMEDIATELY and to give you a half-second to hear the whole question. I find telling claimants to take “a beat or a Mississippi” before answering questions helps to slow them down and think about their answer, but also helps avoid a claimant half-answering a question before you can get the objection out.

ii. Objections or Comments to Documents Entered into Evidence

You have a right to see any document before it is accepted as evidence. Ask for a copy of anything the employer refers to or seeks to introduce. If it is completely new to you, take a break to review it if necessary. Look it over carefully and object if it is ambiguous, altered, or does not show what they say it shows. You may also ask the employer questions about any document they wish to introduce into evidence.

While the ALJ will ask both sides if there are any objections or comments to the document being entered as evidence, most documents will be entered. You can, however, note for the record any dissatisfaction or concern you have with regard to the documents. For example, you may object because:

- “My client has never seen this document.”
- “My client was forced to sign this document.”
- “This is a warning letter which my client has never signed.”
- “This document was created X days after the incident in question and is highly untrustworthy.”

- “The employer is present, so the summary of interview forms filled out by DOL personnel are unnecessary hearsay.”
- “Those written affidavits in lieu of testimony are not the best evidence because live testimony is available.”

Hearsay is allowed into evidence in administrative hearings and given the weight the judge deems it's worth, though a judge may refuse to hear testimony because it's hearsay. Also remember that hearsay comes in paper form. Make note of when it was written, to and by whom. If the documents are hearsay, or are objectionable for any reason, bring these to the attention of the ALJ, even if they are not mentioned directly during the hearing (the judge is still going to be looking at them during their review of the case).

C. ALJ Considerations

If the judge is antagonistic toward you or your client, be respectful but **stand your ground**. Don't let any ALJ bully your client or bully you into forfeiting your client's rights. If you make a reasonable request or objection and the judge is hostile, explain your position calmly but firmly. If this gets you nowhere, note your objection for the record, and be ready to object again if needed—don't be intimidated!

Even though you should never let an ALJ bully you, you can make your advocacy more persuasive by noticing what the ALJ seems to find important and adapting your arguments to address these points. Note where she focuses her questions: these are the key factual issues you must address. Also watch her reaction to testimony: if she takes particular interest in a point, emphasize it in your closing statement. By making "in-flight" adjustments to your arguments so they are responsive to her concerns, you make it easier for her to accept your overall theory.

The ALJs are under administrative pressure to resolve cases fast. As a result, many are impatient, and some act "bored" just to try to speed you up. You must strike a balance: don't let the ALJ rush you into skipping important points, but don't go beyond what you need in order to prove your theory. Make everything as easy as possible for the ALJ. Provide copies of all information and documents; keep answers and questions to the point.

The ALJ might adjourn the case for certain reasons regardless of whether either side has requested an adjournment. You should be ready to inform the ALJ of any dates over the next four to eight weeks that are inconvenient for you and your client should the case be adjourned. If your client is not currently receiving benefits and you believe the ALJ has sufficient evidence to make a favorable decision for your client, you should object to the adjournment because it prejudices your client.

D. Conclude with a Brief, Persuasive Closing Statement

At the end of the hearing, the ALJ will allow you to make a closing statement. Your closing statement should take no more than two or three minutes. Since most unemployment cases turn on disputed facts, you should emphasize specifically why your client's account is more credible than that of the employer. This is also your opportunity to cite supporting case law – be prepared to give the judge copies of any case cited. In discussing the law, treat it like shared knowledge discussed by two insiders: “As you know, Judge, the Appeal Board has held” You only need to cite specific cases in unusual situations.

The ALJ will not inform you of the final decision at the end of your hearing. The ALJ reserves the right to make her decision on all issues and provide written notice of her decision within ten days.

XIII. POST HEARING RESPONSIBILITIES

A. The Decision

Once the hearing is over, tell your client that she should receive a decision in two weeks.⁶⁷ If two weeks pass without a decision, call your client, and then perhaps the hearing site if the client hasn't received the decision either. You should receive a copy of the decision as well. Please notify VOLS of the decision once you or your client receives the decision.

If the claimant wins, she will start receiving benefits in one to two weeks. Please note that she may have to repay them if she loses on appeal. If the claimant loses and is subject to overpayment, please let her know that claimants can usually work out a very reasonable repayment plan with the DOL.

Note: You are not a financial advisor and have limited knowledge of the claimant's financial situation. If the claimant expresses an inability to repay or their overpayment is over \$10,000, reach out to VOLS for referral resources.

B. Reopenings

Parties who are absent from a hearing with good cause will ask the Appeal Board to reopen, rather than appeal, the decision.⁶⁸ If the ALJ proceeded without the employer, the employer may request a reopening within a "reasonable time" after receiving the decision.⁶⁹ A reopening is essentially a new hearing, except that the party making the request must first show "good cause" to reopen the case and get to the merits. "Good cause" to reopen a hearing could include lack of notice, lack of representation or inadequate time to collect necessary documentation. If the employer does not appear at the hearing, let your client know that the case may be reopened – and ask her to call you if she receives a notice that the employer has requested a new hearing. If you are on record as the claimant's representative, you should also receive notice of any further hearings.

C. Appeals

Any party who loses a hearing before an ALJ has the right to appeal the ALJ's Decision to the Unemployment Insurance Appeal Board.⁷⁰ The Appeal Board, despite its name, does not function like an appellate court because the Appeal Board owes no deference to the decision rendered by an ALJ: the Appeal Board has the power to reverse *any* finding of fact or conclusion of law reached by an ALJ.⁷¹ This includes credibility determinations. Thus, no hearing outcome is certain until the losing party decides whether to appeal. An appeal should be treated as seriously as the original hearing.

Decision to Appeal: Your client has an absolute right to appeal the ALJ decision, but you (or VOLS) are not required to represent her on appeal. However, if you have the time and feel the ALJ decided wrongly,

⁶⁷ In practice, most decisions are issued much sooner, sometimes within a week.

⁶⁸ See In Re Green, 914 N.Y.S.2d 456, 458 (2011). Parties other than the Commissioner of Labor must have appeared at the ALJ hearing before they may appeal that decision to the UI Appeal Board. See 12 NYCRR § 463.1.

⁶⁹ Any party that does not attend a hearing may request a reopening within a reasonable time. A third request to reopen will be referred to the Appeal Board. Administrative Law Judges generally grant a third leave to apply to reopen.

⁷⁰ N.Y. Lab. § 621 (McKinney 1991); 12 NYCRR § 463.1.

⁷¹ N.Y. Lab. § 622 (McKinney 1991); 12 NYCRR §§ 463.2(a) to (c) and 463.3.

you may wish to continue representation. Consult your mentor if you are unsure whether or not to appeal. If you decide not to represent your client on appeal, be sure to **notify your client as soon as possible**. Advise her that she can appeal on her own and tell her how to request a transcript and an extension. Also notify the VOLS office of your decision **not** to assist on the appeal. Important: if you are not going to represent the client in the appeal, make sure to tell the client they have a 20-day window from the date the decision was made to appeal the ALJ decision.

If you wish to continue on appeal, you must inform VOLS. VOLS will provide you with our Appeals Manual, which will direct you toward helpful resources and detail substantive and procedural requirements. You must have a mentor read over your brief before it is submitted to the DOL. This means having the brief done several days early in order to give your advisor time to review and discuss it with you.

Further information on appeals can be obtained from the VOLS website.

Appeal Deadlines: You have 20 days from the date of an adverse ALJ decision to submit a letter to the DOL indicating your intent to appeal. A form letter is available with VOLS for this purpose.

Once the DOL receives your letter, it will send all parties a Notice of Receipt of Appeal. You have 7 days from the date of this notice to submit a letter requesting production of the written transcript of the hearing. If you used the VOLS form letter to request your appeal, the request for a transcript is included in your request for appeal. If, for some reason, you request the transcript in a separate letter, you should also request that your appeal brief be due no earlier than 20 days from the date that you receive notice that the transcript is available.

Employer or Commissioner of Labor Appeals: If you receive Notice indicating the employer is appealing a case you won, you again have seven days to request production of the transcript.

If the employer submits any briefs or papers for consideration by the Appeal Board, and you have 12 days from the date they mailed it to submit a reply to their papers, if you so desire. Many employers, however, appeal without submitting any papers, so don't count on being able to put all your arguments into a reply – file your own brief within the 20 days after the transcript becomes available, and then see if the employer files anything that requires your reply.

For more information on appeals - see the VOLS Appeals Manual.

XIV. REFERENCE MATERIALS

A. Useful Contacts

New York Department of Labor:

(518) 457-9000

(888) 4-NYSDOL (888-469-7365)

The DOL Telephone Claims Center

Monday through Friday, 8 a.m. to 5 p.m.

888-209-8124

Interpreters are available for most languages; press 9 for an interpreter.

Contact the Brooklyn Hearing Office if you do not know your hearing location.
250 Schermerhorn Hearing Office
Telephone: (718) 613-3500
Fax: (718) 613-3566

UIAB Administrative Local Offices:

Brooklyn: brooklynhearings@uiab.ny.gov
Garden City: gardencityhearings@uiab.ny.gov
Hauppauge: hauppaugehearings@uiab.ny.gov
Menands (Capital District): menandshearings@uiab.ny.gov
Buffalo : buffalohearings@uiab.ny.gov

UI Appeal Board, Appeal Section (for appeal status inquiries):

Telephone: (518) 402-0205
Fax : (518) 402-6208

B. Sample Letters

Sample Request for Subpoena for Law Firm Participants

Date:

To: Presiding Hearing Officer
From: Your Name
Name of Firm (or “Volunteers of Legal Service” if not affiliated with a firm)

Re: Claimant's Name
Case Number

REQUEST FOR SUBPOENA

On behalf of the claimant, Mr. _____, I request that the following materials be subpoenaed for the hearing in the above referenced matter on (date of hearing) at (time of hearing):

1. **Surveillance camera tapes dated 06-04-09.** Mr. _____ denies having eaten in the lab on that date, except in the designated eating area. The memorandum which the employer submitted for inclusion in the case file offers to produce the tapes: "A selection of tapes should be saved if this ever needs to be documented." (see case file). Since all parties are in agreement that the tapes could settle this matter definitively, the tapes from that date should be subpoenaed, along with the appropriate equipment necessary to view them in the presence of a hearing officer.

2. **Mr. _____'s last work review.** Not long before his discharge, Mr. _____ was given a very favorable review by his superiors. The review contained none of the criticisms which the employer now alleges had been going on for a long time. Mr. _____ read the review and signed it, but was not given a copy. It is therefore necessary to subpoena the employer's copy of that review.

These materials will help clarify this case and allow for an easy resolution of the issues in dispute.

Sincerely,

Your Name
Claimant's Representative
Firm Name (or VOLS)

Sample Letter to Employer Requesting Documents for Law Firm Participants

(DATE)

(Name) OR
Human Resources Department
Company Name
Address
New York, NY

(Employer's Representative)
(If the Employer is represented)
Firm or Company Name
Address
New York, NY

Re: Claimant's Name
Case Number _____

Dear _____,

I am writing on behalf of _____ as his unemployment insurance claims representative. In order to prepare for next Monday's hearing, I would like to review any documents you may have on file regarding Mr. _____'s discharge. I am particularly interested in written statements made by Mr. _____'s

co-workers who were with him when the relevant incidents occurred, as well as statements by his supervisor and by _____ who witnessed the alleged misconduct.

We would also like copies of records or documents pertaining to the investigation of the incident.

Please send the requested materials by fax as soon as possible. My fax number is _____. If you prefer, I could arrange to come to your office to collect the documents. Feel free to call me and leave a message at (212) 555-5555. In any event, I will call on Thursday morning, June 9, to discuss arrangements for collecting the documents.

Thank you in advance for your cooperation.

Sincerely,

Your Name
Claimant's Representative
Firm Name (or VOLS)

Sample Notice of Appearance to the Unemployment Insurance Appeals Board

STATE OF NEW YORK UNEMPLOYMENT INSURANCE DIVISION
ADMINISTRATIVE LAW JUDGE SECTION

In the Matter of the Claim for Benefits
Made By

Claimant

NOTICE OF APPEARANCE

S.S. # XXX-XX-_____
A.L.J. Case #:_____

Please take notice, that the claimant, _____, appears in this proceeding by her/his duly retained and authorized representative _____, as part of the VOLS Unemployment Insurance Advocacy Project in conjunction with the Department of Labor's *pro bono* initiative and that such authorized representative demands that copies of all subsequent notices and decisions be served on her/him at her/his mailing address at

Please note that (name of authorized representative) is not available on

_____.

Claimant's Representative (*signature*)

Dated:

Sample Notice of Appearance and Request to Re-Open to the Unemployment Insurance Appeals Board

STATE OF NEW YORK UNEMPLOYMENT INSURANCE DIVISION
ADMINISTRATIVE LAW JUDGE SECTION

In the Matter of the Claim for Benefits
Made By

Claimant

S.S. # XXX-XX- _____

**NOTICE OF APPEARANCE
&
REQUEST FOR HEARING**

A.L.J. Case#: _____

ON BEHALF OF CLAIMANT, _____, we request to schedule a hearing to
present claimant's case before an Administrative Law Judge. Claimant disagrees with the DOL
Determination and would like to present his/her case before an impartial judge. Please take notice, that the
claimant, _____, appears in this proceeding by her/his duly retained and authorized
representative _____, as part of the VOLS Unemployment Insurance Advocacy Project
in conjunction with the Department of Labor's *pro bono* initiative and that such authorized representative
demands that copies of all subsequent notices and decisions be served on her/him at her/his mailing address
at

Please note that (*name of authorized representative*) is not available on _____.

Claimant's Representative (*signature*)

Dated:

C. Checklist

Step-by-step checklist for handling unemployment insurance pro bono matters:

- ☐ Contact the claimant as soon as possible and set up your first meeting.
- ☐ Fax a Notice of Appearance to the Department of Labor (including any dates of unavailability).
- ☐ Ask the claimant to sign your firm's retainer letter.
- ☐ Review claimant's file from the Department of Labor (available once a hearing date has been set).
- ☐ Research the case if necessary and develop your case theory.
- ☐ Talk to your mentor or advisor about the case.
- ☐ Prep your witness(es).
- ☐ Represent your client at the hearing.
- ☐ Tell your client to call you when they get their decision in the mail.
- ☐ Scan and e-mail the ALJ's decision to VOLS.