

## Self-Employment/Sideline Business

There is an exception in Section 402(h) for the operation of a sideline business. The courts have provided a four-pronged test for eligibility for an individual engaged in a sideline business. An employee who has a proprietary interest in a sideline business may still receive benefits if it is proven that all four of the following conditions are met:

- 1) Concurrency—the self-employment activities must have been conducted while engaged in employment.
- 2) Primary source of income—the earnings from employment must exceed the net profit from the self-employment activities.
- 3) There cannot be a substantial increase in involvement in self-employment.
- 4) The claimant must be able and available for full-time suitable work.

The burden of proof in a situation involving a sideline business rests with the claimant. The claimant must provide information and documents showing that the self-employment venture is a sideline business and that the claimant is separated from employment that constituted the individual's major source of income.

## Corporate Officers

The UC Law was never intended to provide benefits to those individuals who become "unemployed" by reason of the failure of their own business ventures. An individual, who, through ownership of stock and his/her position in the corporation, exercises a "substantial degree of control" over its operation, must be considered a self-employed businessperson. The claimant must provide information showing that he/she is not a self-employed businessperson to be eligible.

The only exception with respect to ineligibility of corporate officers is provided in Section 402.4 of the law. If the corporation has been forced into involuntary bankruptcy under the provisions of Chapter 7, Title 11, of the United States Code, the officers of the corporation would not be ineligible for benefits.

## Refusal of Suitable Work

Section 402(a) provides, in part, that an employee shall be ineligible for compensation for any week in which his/her unemployment is due to failure, without good cause, either to apply for suitable work at such time and in such manner as the department may prescribe, or to accept suitable work when offered to him/her by the employment office or by any

employer. The employer must notify the department within 7 days of the offer of work.

Section 402(a.1) provides a claimant is ineligible for compensation for any week in which the unemployment is due to failure to accept an offer of suitable full-time work in order to pursue seasonal or part-time employment.

The responsibility rests with the department to determine whether the work that was offered was suitable. If the work is determined to be suitable, the claimant must show that he/she had good cause to refuse the referral or to refuse the offer of suitable work to be eligible.

## Incarcerated Employees

Section 402.6 provides, in part, that an employee shall not be eligible for any weeks of unemployment during which the employee is incarcerated after a conviction.

The party who carries the burden of proof is dependent on who alleges that the claimant is both convicted and incarcerated.

- 1) If an employer alleges that the claimant is convicted and incarcerated, the employer must show that the claimant meets both requirements for ineligibility under Section 402.6, in that he/she is **both** convicted **and** incarcerated.
- 2) Where the bureau investigates potential ineligibility under Section 402.6 without information from an employer or claimant, the bureau must show that the claimant is both convicted and incarcerated.

If the claimant provides information, which indicates there is a potential issue under Section 402.6, the claimant must show that he/she is not both convicted and incarcerated.

## Severance Payments

Section 404(d)(1) of the PA UC Law provides, in part, that benefits shall be paid to an otherwise eligible employee, compensation in an amount equal to his/her weekly benefit rate less the total amount of severance pay that is attributed to the week.

Severance pay in an amount greater than 40% of the average annual wage will be attributed to the weeks immediately after the claimant's separation from employment. The claimant's weekly benefit rate will be reduced for a certain number of weeks, but not to an amount less than zero. The number of weeks will depend on the amount of the severance payment and the claimant's regular full-time wage.

## Pensions

Pensions and retirement payments are deducted from UC if a base-year employer maintained or contributed to the pension plan and base-year employment affected the claimant's eligibility for, or increase the amount of, the pension. 50% of the pro-rated, weekly pension amount is deducted if the claimant contributed in any amount to the pension plan. If the pension is entirely employer funded, 100% of the pro-rated, weekly pension amount is deducted from the claimants' weekly UC payment.

Social Security and Railroad Retirement pensions are not deducted from UC benefit payments.

A lump-sum pension payment is not deducted from UC, unless the claimant had the option of taking a monthly pension. In addition, a lump-sum pension is not deductible if the claimant "rolls over" the lump sum into an eligible retirement plan such as an Individual Retirement Account (IRA) within 60 days of receipt.

## Predetermination of Claims

Please note that eligibility for UC benefits is not predetermined. Eligibility determinations are made only after an application for benefits has been filed, and are based on the individual circumstances of each case. If you have a question regarding your claim or the claim of a former employee, please contact a UC Service Center at 888-313-7284.

## Understanding the Determination

If you have any questions or do not understand any part of a UC determination, please feel free to contact the UC Service Center to request an explanation. For example, if you do not understand the provision of the Law, or if there are findings of fact that you question, the UC Service Center will provide you with information so that you may have a better understanding of the determination.

## Appeal Rights

*If you are the claimant*, you may appeal if the determination denies benefits and you think you should be eligible for benefits, or the determination grants benefits and you think you should be eligible for more benefits.

*If you are the employer*, you may appeal if the determination grants benefits and you think the claimant should be ineligible for benefits or eligible for fewer benefits.

*Auxiliary aids and services are available upon request to individuals with disabilities.  
Equal Opportunity Employer/Program*

# Unemployment Compensation Eligibility Issues

This pamphlet provides information about issues that affect eligibility for unemployment compensation (UC). It also contains information about facts that each party—employer and claimant—is responsible to establish when an issue arises.

This pamphlet was prepared to provide general information only. It is not an official statement of the law.

## Voluntary Quit

**Section 402(b)** of the Pennsylvania UC Law provides, in part that a claimant shall be ineligible for benefits for any week in which his/her unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature. A claimant who voluntarily quits continuing work has the burden of proof in establishing good cause for quitting; and, that such cause was real and substantial, leaving the claimant no other alternative. The burden is on the claimant to show that, prior to quitting continuing employment, he/she made every reasonable effort to maintain the employer-employee relationship. Following are examples of some common voluntary quit situations.

**Health reasons** - To be eligible, the claimant must inform the employer of his/her health limitations prior to quitting so that the employer has an opportunity to offer suitable work within the claimant's limitations. The claimant must also be able and available for suggested accommodations. If the employer fails to offer suitable work, the claimant may be eligible for UC.

**Transportation problems** - To be eligible, the claimant must show that the loss of the transportation was through no fault of his/her own and rendered his/her problem virtually insurmountable. He/she must attempt to secure alternate transportation prior to quitting. The claimant must also be able and available for suitable work in the local labor market consistent with his/her limitations.



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**Spouse following spouse** - To be eligible, the claimant must show that the reason for the spouse's relocation was beyond the spouse's control, and that such relocation created economic circumstances which could not be overcome or that it was economically impossible to maintain two residences.

**Leaving work due to personal reasons** - To be eligible, the claimant must show that he/she quit due to personal circumstances that left him/her no reasonable alternative. The claimant must show that, prior to quitting, he/she made a reasonable attempt to maintain the employer-employee relationship. The claimant must also be able and available for suitable work.

**To attend school** - Quitting a job to attend school is not considered a cause of a necessitous and compelling nature, unless it is to attend school or training provided under the Trade Adjustment Assistance Act (TAA). If the claimant quits to attend TAA-approved training, he/she must show that the job he/she quit was not suitable work to be eligible for UC. Suitable work for the purposes of this exception to Section 402(b) means work of a substantially equal or higher skill level than the claimant's past "adversely affected employment," and wages of such work are not less than 80% of the worker's "average weekly wage."

**Due to unsuitable work** - When an employee accepts a position, he/she admits to the initial suitability of the position with respect to its wages and the conditions of employment. When a claimant quits because he/she feels the job was unsuitable, the claimant must show there were changes in the conditions of employment, to which he/she did not agree upon, that made the job unsuitable, or there was deception on the part of the employer with regard to the conditions of employment at the time of hire, or he/she shall be considered ineligible. The suitability of the work will be determined by considering factors such as the degree of risk involved to the claimant's health, safety and morals; the claimant's physical fitness; the claimant's prior training and experience; the distance of the available work from the claimant's residence; the prevailing condition of the labor market; and the prevailing wage rates in the trade or occupation.

**Job not the same as what was anticipated** - To be eligible, the claimant must show that the monetary expectations of employment were not fulfilled through no fault of the claimant. For example, a claimant takes a job selling vacuum cleaners because he/she has been told he/she could make \$50,000 per year through commission sales. After three weeks, the claimant quits the job because he/she was unable to make any sales and the personal expenses exceeded the income, thereby warranting the allowance of benefits.

## Discharge

**Section 402(e)** provides that an individual who is discharged from employment for reasons that are considered to be willful misconduct connected with his/her work, is not eligible to receive benefits. The employer must show that the employee's actions rose to the level of willful misconduct.

"Willful misconduct" is considered an act of wanton or willful disregard of the employer's interests, the deliberate violation of rules, the disregard of standards of behavior which an employer can rightfully expect from an employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations. While it is the employer's prerogative to discharge an employee, an employee is not ineligible for UC benefits unless the discharge is due to willful misconduct.

Pennsylvania's courts have provided guidance in determining an individual's eligibility in specific situations involving a discharge for willful misconduct. Following are examples of some common discharge situations.

**Absenteeism/Tardiness** - Prior to being discharged for absenteeism or tardiness, the claimant must have been warned about such conduct. In addition, there have been cases where one absence was sufficient to show willful misconduct. The reason for the last occurrence will be taken into consideration in determining if the claimant had a good reason for being tardy or absent. Absenteeism alone may justify a discharge, but without a showing of wanton and willful disregard of the employer's interests, benefits cannot be denied. Generally, if an individual has good cause for missing work, such as being ill or having an ill child, and reports off according to the employer's policy, that individual's conduct does not rise to the level of willful misconduct. However, there can be factors that may affect the eligibility determination, such as the employer's rule for calling off, the method which the individual used in calling off, the reason for the last incident, the nature of the work, past attendance record, and previous warnings for absenteeism or tardiness. When the employer has a progressive discipline point system and an individual is discharged due to accumulating points as a result of absenteeism/tardiness, all absences/tardiness will be reviewed to determine if any of the absences were justified. Willful misconduct is not established if the claimant had good cause for any of the absences.

**Rule violation** - Deliberate violation of an employer's rule which is known to the employee constitutes willful misconduct if the employer's rule is reasonable and the employee's conduct, in violating the rule, was not motivated by good cause. The employer must show the existence of the rule and that the rule was violated. The employer must also show that the claimant was aware, or should have been aware, of the

rule. If this is established, the claimant must show that the rule was not reasonable, or that he/she had good cause for violating the rule.

**Attitude toward employer or disruptive influence** - Disregard of standards of behavior which an employer can rightfully expect from his/her employee constitutes willful misconduct. However, where a claimant is discharged due to his/her attitude toward the employer or due to being a disruptive influence, the employer must show specific conduct adverse to the employer's interests.

**Damage to equipment or property** - Negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations constitutes willful misconduct. Where the negligence results in damage to equipment, damage caused by the worker to equipment or materials is not usually misconduct. The employer must show that the action which caused the damage was willful or due to willful carelessness; or, to show that the claimant would not have damaged the equipment if he/she had used reasonable care of which he/she was capable in order for the action to be willful misconduct.

**Unsatisfactory work performance** - Unsatisfactory work performance is not considered willful misconduct where the claimant is working to the best of his/her ability. However, it is willful misconduct where the employer shows that the claimant was capable of doing the work, but was not performing up to standards despite warnings and admonitions. This is conduct showing an intentional and substantial disregard of the employer's interests.

**Drug and alcohol testing** - The UC Law provides for the denial of benefits for failure to submit (to) and/or pass a drug or alcohol test, provided the test is lawful and not in disagreement with an existing labor agreement. In order to be eligible for UC, the claimant must show that the test was unlawful, violated an existing labor agreement, or was inaccurate.

## Other Eligibility Issues

Following are examples of eligibility issues that are not related to the claimant's separation from employment.

### Able and Available

Compensation shall be payable to any employee who is or becomes unemployed, and is able to work and available for suitable work.

The claimant must prove a realistic attachment to the local labor market as a whole, as indicated by the claimant's

readiness, willingness, and ability to accept some substantial and suitable work. The claimant must certify that he/she is able to accept and is available for suitable work during each week for which he/she files a claim for benefits.

### Active Search for Work

Effective with applications for benefits dated Jan. 1, 2012, and after with some exceptions, the claimant is required to register for employment search services offered by the Pennsylvania CareerLink®, apply for positions that offer employment and wages similar to those the individual had prior to becoming unemployed, participate in work search activities, and keep a weekly record of the efforts made to find work.

This is a week-to-week test. The claimant must meet the requirements for each week in order to qualify for benefits.

### Self-Employment During the Base Year

Services performed in self-employment do not qualify as base-year employment and will not be used to establish financial eligibility for benefits. Independent contractors are self-employed. The following two factors must exist for a claimant to be considered self-employed.

1. The individual has been and will continue to be free from the control or direction over the performance of his/her services, both under his/her contract of hire and in fact.
2. As to such services, the individual is customarily engaged in an independently established trade, occupation, profession or business.

If the claimant alleges an employer-employee relationship, but the employer states that the claimant is self-employed, the employer must prove that the claimant is free from control over the performance of the service and customarily engaged in an independently established trade, occupation, profession or business.

### Self-Employment While Claiming Benefits

Section 402(h) provides that a claimant is ineligible for any week in which he/she is engaged in self-employment. When a claimant is starting a new business, the claimant becomes self-employed with the first positive step toward starting the business. For example, the claimant would become self-employed when he/she began advertising for business, rented an office, purchased equipment/property, etc.