I. Overview of Procedural Unemployment Compensation Issues

- The Department of Workforce Development, Unemployment Division representative conducts an initial “investigation”. This is very quick and an Initial Determination is issued within about two weeks of the claimant filing a claim. A review by Legal Action revealed that approximately 45% of the Department’s initial determinations contained errors.

- The parties have **fourteen days to submit an appeal from the date of the Department’s initial determination** that must be received or postmarked by the deadline to the Department of Workforce Development, Unemployment Division. The appeal must simply contain a legible printing of the parties’ names, the date of the appeal, a simple statement that this is an appeal, and the signature of the appellant. The UI Division’s facsimile number for the Milwaukee office is **(414) 227-4264** and the mailing address is as follows: Dept. of Workforce Development, Unemployment Insurance Division, 819 N. 6th Street, Room 382, Milwaukee, WI 53203.

- An appeal to the Labor and Industry Review Commission must be received or postmarked within **21 days of the appeal tribunal’s decision**. LIRC’s mailing address is: **P. O. Box 8126, Madison WI 53708-8126**; LIRC’s facsimile numbers is **(608) 267-4409** or file an electronic appeal at [http://www.dwd.state.wi.us/lirc/petition.htm](http://www.dwd.state.wi.us/lirc/petition.htm).

- If the claimant fails to submit a timely appeal, a hearing on whether the claimant had “good cause beyond the control of the party” (see §108.09(6)(a) Wis. Stats.) to submit a late appeal is held, usually by telephone. “Good cause” for a late appeal was discussed in Judith Ross v. DILHR & County of Manitowoc, Dane County Circuit Court Case No. 79-CV-2694, a case in which a late appeal was filed because both an attorney and his client each mistakenly thought the other had filed the appeal, the Honorable Judge George R. Currie stated that:

  To constitute good cause beyond the control of the party requires not only good cause, but factors which are beyond the control of the party. An example might be failure of the United States Postal Service to deliver the initial determination to a party where the proper address is given. Another might be incapacitating illness of either the employee or her attorney who had been entrusted with filing the request for hearing. Here there was no explanation offered that an event beyond the control of either the employee or her attorney had occurred which prevented the timely filing of the request for hearing.
(E.g. the employee would have to show that his medical condition during the appeal period was actually incapacitating, and prevented him from filing a timely petition. See, McCloud v. Badger Meter, Inc., UI Hearing No. 99606530MW (LIRC May 10, 2000); but see McMurtry v. Refrigerant Recovery, Inc., UI Hearing No. 03601987MD (LIRC July 24, 2003). The commission has repeatedly recognized that where a party is given incorrect information by the department that led them to misunderstand the necessity or advisability of appealing, it can be appropriate to find that the party’s failure to file a timely appeal is for a reason beyond their control. See, Sprague v. Nostam, Inc., (LIRC, February 20, 2004). Inability to read well does not excuse late appeal in Udora Hubanks v. BSG Maintenance Corp., UI Hearing No. 99601362MW (LIRC 5/26/1999); confusion over the Thanksgiving holiday for a late appeal not a reason beyond the appellant’s control in Dean Rhodes v. Rural Mutual Ins. Co., UI Hearing No. 99402128G(LIRC 12/17/1999).)

- While waiting for the scheduling of the hearing, the claimant must apply for weekly benefits either by telephone or on-line at http://unemployment.wisconsin.gov. If the claimant does not file a weekly claim, he/she foregoes those potential unemployment compensation benefits as there is no retroactive mechanism to apply for benefits. Remind claimants that if they obtain subsequent employment, they must report any earned wages when they file the weekly claims.

- Remind claimants that the Unemployment Insurance Act requires a job search of contacting at least two potential employers per week, unless the claimant has a waiver, and the claimant should keep a copy of his/her job-seeking efforts for his/her records.

- Request a copy of the claimant’s unemployment file from the Department. If there is an issue of whether the claimant must repay benefits under §108.04(13)(c) Wis. Stats., review the file to see if the employer failed to provide correct and complete information to the Department during its fact-finding investigation. If the employer failed to provide timely information, it may be a basis for a waiver for the claimant to re-pay UI benefits.

- Legal Action of Wisconsin and attorneys through the Volunteer Lawyers Project provides legal representation to indigent claimants. Claimants may contact Legal Action of Wisconsin regarding potential representation at (414) 278-7722. Legal Action of Wisconsin is located 230 W. Wells, Suite # 800 Milwaukee, WI 53203.

II. The Presumption of Eligibility

- A claimant who has sufficient wages in the base period, who is registered (if registration is required), and who has given notice of unemployment, is presumed eligible. §1028.01(11) Wis. Stats.

- If the Department’s initial determination is a finding of the claimant’s eligibility, and then the employer does not appeal or the employer does not appear at the hearing,
the appeal will be dismissed, and the initial determination allowing benefits, will stand.

- If the Department’s initial determination denies benefits, and the employer fails to appear at the hearing, since the hearing is de novo and due to the presumption of eligibility and with no evidence to the contrary, the employee/claimant must prevail. If however, the employee is present and questioned by the Administrative Law Judge, and evidence is elicited, that may disqualify the claimant. Thus, to avoid this dilemma, the employee/claimant may appear by a representative and not appear at the hearing. Since the hearing is de novo, and there is no evidence, the presumption of eligibility must prevail. Second, the appearance by the employee’s representative, is an appearance “by” the employee appellant, and thus the appeal may not be dismissed for a purported failure to appear. See Smith v. Milwaukee Transport Services., Inc., Hearing No. 06603123MW (LIRC 7/7/06); Frank v. Menasha Packaging Co., LLC, Hearing No. 05608973WB (LIRC 5/12/06).

The presumption does not, however, mean that a party contesting the payment of benefits always has the burden of persuasion on the issues which allegedly disqualify. If the employer asserts that it was a discharge for misconduct, the employer has the burden to prove the reason for the discharge. If the employer contends the employee quit, the ALJ will determine if the claimant agrees that the separation was a quit. If the claimant agrees, the burden of proof (both going forward and persuasion) will shift to the claimant since the claimant knows the reasons for the quit. If the parties do not agree on what the separation was, the ALJ will generally leave the burden of going forward on the employer since, ultimately, the claimant is presumed eligible, and the employer must go forward until there is some basis for determining that some specific statutory provision disqualifies the claimant.

III. Discharge for Misconduct Connected with Employment

A. Effect of a Finding of Misconduct Connected with Employment – ineligible for benefits until claimant requalifies when 7 weeks elapse and earns 14 times his/her weekly benefit rate. In addition, even after the claimant requalifies, the wages from the discharging employer are excluded from “base period wages”, and this usually results in a lower weekly benefit rate and lower total benefits. Encourage claimants to obtain part-time employment to assist in requalifying.

B. General Standard: Boyton Cab Co. v. Neubeck & Industrial Comm’n, 237 Wis. 2d 249, 296 N.W. 636 (1941):

"...the intended meaning of the term ‘misconduct’....is limited to conduct evincing such willful or wanton disregard of an employer’s interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer’s interest or of the employee’s duties and obligations to his employer. On the other hand mere inefficiency,
unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed ‘misconduct’ within the meaning of the statute.”

Although the Boyton Cab standard is in terms of intent, the employee’s actual state of mind is not the determinative factor. Rather, a “reasonable person” standard is used. The issue is what a reasonable person would have intended by the conduct.

C. Connected with employment – general rule: off-duty conduct must have an “on-duty effect”.

1. The mere fact of having committed a criminal offense, or being arrested and incarcerated, does not necessarily constitute misconduct because it may not be “connected with employment.” However, if the criminal conduct results in appreciable absence from work, the absence from work may be for an invalid reason and therefore misconduct.

2. Off-duty consumption of alcohol: where the off-duty consumption of alcohol impairs the employee’s job performance there is an obvious “connection” to employment of the otherwise lawful activity of drinking. Where the job performance is not impaired, however, the off-duty consumption of alcohol is probably not “connected with employment”.

3. Off-duty use of illegal drugs: the starting point remains that off duty conduct, so long as it does not affect on-the-job performance, is not “connected with employment.” This starting point is modified by LIRC’s acceptance that, with proper notice to employees, employers may enforce “drug free work environment” policies, including random drug testing. LIRC will find an employer rule “reasonable”, with a violation will be “misconduct connected with employment” if:
   a. the rule prohibits both on-duty and off-duty use of illegal drugs, is known to the employee, is provided in writing, and spells out the consequences of a positive test, OR
   b. the rule implements a drug testing policy mandated by either state or federal law and the employee is provided written copies of both the legal mandates and the consequences of a positive test.

(Hawthorne v. Elder Care Lines, Inc., UI Hearing No. 98604815MW (LIRC 10/15/98).

4. Refusing to conform personal lifestyle to employer’s standards is not misconduct connected with employment. (e.g. teacher at Catholic school who did not have employment contract renewed because she married divorced man before all steps had been taken to have first marriage annulled was not discharged for misconduct. Holy Name School of Congregation of the Holy Name of Jesus of Kimberly v. DILHR, 109 Wis. 2d 381 (Ct. App. 1982.).)

D. “Single isolated incident” and condonation/progressive discipline. Generally, a single intemperate remark or disobedience or unsatisfactory work does not constitute
misconduct. However, some conduct is so unacceptable, that a single instance will generally result in a finding of misconduct. Theft from the employer, even of small amounts, will usually result in a finding of misconduct because the conduct is intentional and employees know that thieving is wrong. Using physical force is another type of conduct that will result in a finding of misconduct for a single incident. The other end of the spectrum is when conduct for which the employee was discharged is so frequent that the employer appears to condone it. Similarly, where the employer has a disciplinary procedure which sets a lesser penalty than discharge for violation of rules on tardiness and absenteeism, an employee has a right to rely on such procedure as indicating the severity of the prohibited conduct. If the employee has reason to believe that a particular conduct is not a “capital” offense, i.e., that employment is “in jeopardy” by engaging in particular conduct, it is difficult to infer that the conduct intentionally violated the standard the employer expects. (e.g. employee warned twice for “horseplay” under employer’s progressive discipline rules, but did not commit further violation of that rule. Where the occasion of the discharge was poor job performance, LIRC held no misconduct.)

E. Absenteeism and Tardiness

1. Misconduct under Boyton Cab

   Generally, under Boyton Cab absences – no matter how many – which were for “valid” reasons and with reasonable notice to the employer would never result in a finding of misconduct. What was never clear under the Boyton Cab, standard was what mix of absences with invalid reason or insufficient notice would result in a finding of misconduct. What constitutes a valid reason depends on the frequency of the excuse as well as the excuse itself. Occasional transportation difficulties or child care responsibilities will generally be considered valid reasons. Repeated use of these reasons, or when they could have been avoided, will result in a finding of misconduct on the theory that at some point the employer has the right to expect the employee to make other arrangements. When the last absence is for a valid reason, but preceding absences are not, the cases are conflicting. A final absence for a very good reason clearly beyond all control of the claimant may result in a finding of no misconduct. However, a slightly suspicious reason, which might be considered valid the first time it was used, or a reason the claimant could have foreseen and prevented may result in a finding that the last absence was “merely the occasion for the discharge” while the entire attendance record was the “reason for the discharge.”

2. The Attendance Statute – for discharges occurring after 4/2/06 - §108.04(5g) Wis. Stats. This was a middle ground and the effect is the suspension of benefits for 6 weeks and until the employee has earned six times the weekly benefit rate. Wages from the discharge employer are not cancelled. The (5g) statutory provision allows the denial of benefits for five occurrences of absence or six occurrences of tardiness in a 12 month period, if the occurrences are “without adequate notice.” Under the new (5g) statute, the validity (or invalidity) of the reasons for the absence/tardiness appears to be irrelevant.

Section 108.04(5g)(d) requires:
a. The employer has a written policy on notification which:
i. Defines what constitutes a single occurrence of tardiness or absenteeism;
ii. Describes the process for providing adequate notice of tardiness or absence;
iii. Notifies the employee that failure to provide adequate notice of an absence or tardiness may lead to discharge;
b. The employer provides a written copy of the policy to the employee and has written evidence that the policy was given to the employee;
c. The employer has given at least one warning concerning the employee’s violations of the written policy in the 12 months preceding the discharge; and
d. The employer applies the written policy uniformly.

LIRC has applied each element of the statute literally. (e.g. If the employer has a written policy, but the policy does not define an “occurrence”, the statute will not be applied. Erickson v. Bergquist, 2007 WI LIRC Hearing No. 06201689EC; that the employee received a written copy of the policy Gosha v. Payless Shoessource, Inc., 2006 WI LIRC Hearing No. 96472072AP.) The 2008 amendment to this provision clarified that if the claimant was not disqualified by this attendance provision, the employee may “nevertheless be subject to disqualification under [for misconduct]” Wis. Stat. §108.04(5g)(a).

F. Job Performance Cases
1. Quality or quantity of work
A worker performing to the best of ability is not discharged for misconduct even though the job performance is undeniably below the employer’s reasonable expectations. (e.g. Uphoff v. Travel Ctrs of America, UI Hearing No. 98003561MD (LIRC 12/29/98) Claimant worked as a server at a truck stop seven months and regularly had a cash drawer that did not balance, sometimes over, sometimes under. Because the employer did not establish that the errors in counting change were intentional, rather than merely unsatisfactory mistakes, LIRC held there was no misconduct.) However, where the same work errors are repeated, LIRC may infer that the employee disregards reasonable instructions for improving performance, and find misconduct on the reasoning that the employee is either intentionally disregarding the instructions or is not performing to the best of ability.

2. Neglect of duty
Where the neglect is a single instance, it is not necessarily misconduct, even though the neglect has serious consequences to the employer. (e.g. Cheese v. Afram Bros. Co., 21 Wis.2d 8, 123 N.W.2d 553 (1963) (on direction from supervisor, laborer used gasoline can to bring water for crane radiator; later in the day the laborer, forgetting water was still in the gasoline can, poured the contents into the gasoline tank., a finding of no misconduct.) However, where the employee has the ability to perform, but neglects to perform certain tasks, a finding of misconduct may result. The neglect must usually be for an extended period of time so it is apparent that the employee did not simply fail in one isolated instance to perform as expected. (e.g. Kieper v. Pit Stop Quick Lube, UI Hearing No. 98001756WU (LIRC 9/18/98) employee previously warned about replacing oil caps when changing customers oil and following procedures of checking oil level before releasing car to customer;
when a customer’s car seized due to lack of oil after customer had driven 10 miles from employer, the discharge was for misconduct.)

3. Relations with patrons
Because of the importance of customer relations, most discourtesy to customers will be regarded as intentional. (See Ryba v. Palmisano & Baake Produce Co., Inc., UI Hearing No. 98602774MW (LIRC 1/7/99) truck driver, after being warned twice about being courteous with customers to whom deliveries were made, was fired for misconduct after refusing to help a customer unload the truck.)

G. Employer Work Rule Cases
a. Knowing violation of a reasonable work rule is misconduct. The issue is still whether a reasonable person would have intended by the conduct to disregard the employer’s interest. The analysis turns on such matters as the clarity of the rule, its importance, whether the consequences of violation are spelled out, and whether the employee knew the conduct violated the rule. For example, violations of safety rules are generally misconduct because of the importance of workplace safety. (e.g. Samplawski v. Industrial Fabricators, Inc., UI Hearing No. 96200458EC (LIRC 6/28/96) Welder’s failure to wear safety glasses after three warnings.)

b. LIRC’s decisions on when sexually harassing behavior is misconduct turns on the work relationship between the alleged harasser and victim, the frequency and severity of the alleged harassment, and the existence of the employer’s policies with respect to sexual harassment. This is still the Boyton Cab, standard, and there are some generalizations:
1. Because of work-place power relationship, the conduct of supervisors alleged to be harassing a subordinate is more likely to be found to be misconduct than similar conduct between co-workers who have no supervisor/subordinate relationship.
2. Even in the absence of a supervisor/subordinate relationship, physical touching is more likely to be found to be misconduct than unwelcome remarks.
3. Whether the employee has been warned that his/her conduct “crosses the line” appears significant.

H. Insubordination/Attitude/Disobedience
a. Abusive or Profane Language: As with other misconduct cases, the number of instances of profanity, prior warnings, condonation, whether customer’s overheard the remarks, to whom the remark was addressed and whether there was any provocation are all relevant considerations. A single instance of offensive language directed at a supervisor, with the obvious intent to demean or challenge the authority of the supervisor, as opposed to the offensive language being more in the nature of an exclamation is likely to be found to be misconduct because it is likely to be deemed intentional, not simply an error in judgment. (e.g. Burmeister v. Fox Valley Iron Metal & Auto Salvage, Inc., UI Hearing No. 0400567605 (LIRC 2/22/05) (employee used “fuck” and “shit hit the fan” in a conversation with
wife/owner of business; LIRC found an isolated instance of poor judgment and not misconduct.)

b. Deliberate refusal to follow directions
Generally, the deliberate refusal to follow the employer’s directions on job performance will be misconduct as it is, almost by definition, an intentional disregard of the employer’s interests. There are, however, circumstances in which the employee’s reason for disregarding the employer’s instruction is, although knowing, not an intentional disregard of the employer’s interest because the employee had a good reason and the importance to the employer of the rule is not clearly established. (E.g. Rathe v. New Berlin Plastics, Inc., UI Hearing No. 98601636MW (LIRC 8/19/98), the employee was asked to do a rush job on a particular machine which involved using sprays to which the employee was allergic. The employee believed the job could be accomplished with only a minimal use of the sprays, but apparently the rush job was not performed satisfactorily. LIRC concluded that the employee’s disregard of the employer’s production procedure was not misconduct.)

c. Dishonesty: Employee dishonesty, even if a single incident, usually results in a finding of misconduct because the dishonesty will usually be intentional and without a reasonable explanation. Falsifying time cards, theft, lying about a co-worker’s whereabouts are all generally misconduct. On the other hand, what the employer contends is a theft or falsehood, may be a simple mistake or oversight. For example, the employee may have taken property without intent to steal (e.g. placing tool in pocket during work day and forgetting to remove on leaving at end of shift). Mistakes are made on timecards.

IV. Voluntary Termination or Quits in Lieu of Discharge

A. Effect of a finding of a voluntary termination or quit in lieu of discharge – ineligible for benefits until claimant requalifies when 4 weeks elapse and earns 4 times his/her weekly benefit rate. Requalification required after voluntary termination unless statutory exception applies.

B. The nature of the separation from employment – what is it? Is it a quit, a discharge, a lay-off, a suspension or a job refusal? The test to determine whether a separation was a “voluntary termination” is:

When an employee shows that he intends to leave his employment and indicates such intention by work or manner of action, or by conduct, inconsistent with the continuation of the employee-employer relationship, it must be held, ....that the employee intended and did leave his employment voluntarily...” [Citations omitted.] Nottleson v. DILHR, 94 Wis. 2d 106, 287 N.W.2d 763, 770 (1980); Shuderek v. LIRC, 336 N.W.2d 702, 705 (Ct. App. 1983).

A starting point for analyzing whether a separation is a quit or a discharge is determining who appears to have initiated the possibility of the employment
relationship ending. In Kline v. Laub & Norton, Inc., UI Hearing No. 00601736MW (LIRC 5/16/00), the employer suggested that the employment relationship be terminated because it was not working out; the employee agreed and offered to terminate in 60 days; the parties agreed to a last day of work more than 60 days in the future. LIRC held because the employer initiated the suggestion that the employment relationship end, the separation was a discharge. That the separation was mutually agreed did not make it a “voluntary termination” under §108.4(7) Wis. Stats.

Generally, when there is ambiguity in the employer’s statements or conduct, it is up to the employee to clarify the situation. In Wilson v. Reinke Service, UI Hearing No. 02600504 MW (LIRC 7/31/02), when the owner told the employee to “go home” and “to get out”, punctuating the remarks with expletives, the employee did not return, and LIRC held it to be a quit, imposing the duty on the employee to clarify the employment status and noting that the owner had made similar remarks on other occasions that were not interpreted as a discharge. However, LIRC seems willing to infer that when an employer asks for the keys, the employee is reasonable in inferring a discharge. Eiler v. Shoney’s Restaurant, UI Hearing No. 01402295AP (LIRC 10/26/01); Livingston v. L & D Trading Post, Inc., Hearing No. 0220117EC (LIRC 6/13/02). Even this guideline depends on the circumstances. (But see Valentine v. Currie Park Service Center, UI Hearing No. 01611074MW (LIRC 1/30/03), while the employee was on an eight week medical leave, the employer asked for the keys to be returned. LIRC held this not to be a discharge.)

C. Constructive quit: the employee’s intention to quit may be imputed where the employee’s actions are inconsistent with continuing employment. Examples of such situations include when the employee is absent without notice, refuses a transfer, or refuses or fails to meet a job requirement without “meritorious justification.”

a. Whether the taking of an unapproved absence is a “voluntary termination”, a discharge, or something else appears to depend on the intent of the employee. In Tate v. Briggs & Stratton, 23 Wis.2d 1, 5, 126 N.W.2d 6 (1964), the Supreme Court observed that “[i]f an employee absents himself from work, but does not intend to terminate the employment relationship, his failure to notify his employer of the reasons and probable duration of the absence might” constitute misconduct. The Tate Court also observed, however, that since employees do not always inform employers of when they are quitting, the absence might, if the employee did intend to sever the employment relationship, be a “voluntary termination.” An example of a situation that is not a quit is Milwaukee Transformer Co. v. Industrial Comm’n, 22 Wis.2d 502, 126 N.W.2d 6 (1964). The employee was absent on medical advice and gave adequate notice the first week, but not thereafter because of ambiguous statements by the employer, LIRC held not a quit since the absences were for valid reasons, and there was notice, at least initially, and the discharge was not for misconduct. (See also Mackowiak v. J.B. Hunt Transport, UI Hearing No. 00201700EC (LIRC 12/7/00), where employee requested 60 days leave to deal with personal matters, employer granted 30 days, and when the employee did not return after 30 days, the employer terminated the employee. LIRC held a discharge, but not for misconduct.)

b. Refusal of transfer as a voluntary termination
Refusal by employee to accept reasonable transfers when work has been cut back is a constructive quit, disqualifying the employee from benefits. *Denticic v. Industrial Comm’n*, 264 Wis. 181, 58 N.W. 2d 717 (1953), even when the transfer could properly have been refused under the employment contract, *Roberts v. Chain Belt Co.*, 2 Wis. 2d 399, 86 N.W.3d 406 (1958).

c. Refusal/failure to meet job requirements as a voluntary termination
An employee who reasonably refuses to abide by a work rule or contractual requirement had not demonstrated an intent to sever the employment relationship, and therefore, has not quit. The employee must have a “meritorious justification” for the refusal or failure. (e.g. *Nottelson v. DILHR*, 94 Wis. 2d 106, 287 N.W.2d 763 (1980), a Seventh-Day Adventist refused to pay union dues on religious grounds and was discharged, held not a quit.)

D. Forced Quit – Constructive Discharge
Under certain circumstances, a quit which appears to be “voluntary” may be deemed a discharge because the employer provoked or induced the resignation. But what if the employer is the moving force behind the separation, and the employee essentially has a “choice” of resigning or being fired? Where the employee is able to prove that the employer was, in fact, going to discharge the employee, the ostensible “quit”, knowing that a discharge is coming, is not a “voluntary termination.” Note: However, resigning while a grievance or hearing is in process where the ultimate authority has not reached its decision is usually a voluntary termination. Most of these cases involve public employee where there is a board or commission that has the final authority to decide whether the employee will be discharged. (See *Kothrade v. Nicolet High School District*, UI Hearing No. 93603718MW (LIRC 2/1/1994); *Markowski v. Northwood School District*, UI Hearing No. Hearing No. 07201398MD (LIRC 11/2/07). *But see Charles Stahlman v. Whitnall School District*, UI Hearing No. 06002990MD (LIRC 1/11/07) The Commission held the employee was discharged but not for misconduct reasoning that the school board had always followed the superintendent’s recommendation, which demonstrated that the employer was going to discharge him and that a conference with the school board would have been pro forma.)

E. Exceptions to the suspension of benefits for voluntary termination under Wis. Stat. §108.04(7)(am)-(r).
1. Suspension or termination of one employee in lieu of another employee – Wis. Stat. 108.04(7)(am): a claimant must show that the voluntary suspension or termination was related to the identifiable, threatened suspension or termination of another employee. *Berry v. LIRC*, 213 Wis. 3d 397, 570 N.W. 2d 610 (Ct. App. 1997).
2. Good cause attributable to the employer - Wis. Stat. 108.04(7)(b): “Good cause” includes, but is not limited to, a request, suggestion, or directive by the employing unit that the employee violate federal or Wisconsin law. In general, “good cause attributable to the employing unit”, means some act or omission by the employer justifying the employee’s quitting; it involves, “some fault” on the part of the employer and must be “real and substantial”. *Nottelson v. DILHR*, 94 Wis. 2d 106, 298 N.W.2d 763, 770 (1980); *Kessler v. Industrial Comm’n*, 27 Wis. 2d 398, 134 N.W.2d 412 (1965). To hold the employer responsible for “real and substantial” harm to the employee which justifies a quit, the employee ordinarily must have made timely and adequate complaints to the employer and have given the employer an
opportunity to rectify the situation. These efforts by the employee are not required if they would be unreasonable or futile, under the circumstances.

Examples demonstrating the various outcomes of “good cause” determinations follow:

a. Unilateral, material change in the terms of employment by the employer. In Farmers Mill of Athens, Inc. v. DLHR, 97 Wis. 2d 576 ( Ct. App. 1980), the court upheld LIRC’s determination that a unilateral change in the conditions of employment on the part of the employer, which resulted in a significant pay reduction to the employee because of a change in commuting distance was “good cause attributable to the employer”.

b. Failure of employer to comply with terms of employment contract. Where employer wrote several paychecks on “insufficient funds” or failed to pay overtime wages, Midwest Electric Contracting Services, Inc. v. DLHR and Larson, Case No. 161-458 Digest of WI UC Court Cases 1977-1981, at p. 155 (Dane Co. Cir. Ct. 12/17/78).

c. Illegal acts by employer – employer makes unlawful wage deductions, Case No. 74-C-275, UC Digest VL 1080.14, at p. 155; or required the employee to work excessive hours e.g. 50-72 hours per week at straight time, Case No. 65-A-1348, UC Digest VL 1039.05 at p. 87.

d. Improper or unreasonable conduct by employer - Employees are not expected to continue to suffer abuse or mistreatment from their supervisors and may quit with good cause, Case No. 74-A-1601 MC, UC Digest VL 1005, at p. 20 (laundry worker quit when supervisor slapped her face). Reasonable criticism and denial of benefits based on merit are prerogatives of management and do not constitute “good cause” for employee’s quitting. But if the employer’s discipline is improper or abusive, the employee may have “good cause” to quit. (e.g. Vilter Mfg. Corp. v. DLHR, Case No. 151-468, UC Digest VL 1005, at p. 25 (Dane Co. Cir. Ct. 11/19/76) (disciplinary lay-off imposed for excusable medical absence.))

e. Unsatisfactory working conditions – an employee may quit with “good cause” if the working conditions are dangerous. (Brakes not working on truck in Hodgeman v. B & D Services, Inc., WI Hearing No. 97201997RL (LIRC 7/30/98); employee refused to work on saw that threw material back at him; employee had unsuccessfully tried to get the employer to install a safety guard and a subsequent OSHA report established that the saw had numerous safety violations. Kuhr v. Harvest Day Wholesalers, LIRC Dec. 1992.)

3. Personal or family health - Wis. Stat. 108.04(7)(c) provides:

Paragraph (a) does not apply if the department determines that the employee terminated his or her work but had no reasonable alternative because the employee was unable to do his or her work or because of the health of a member of his or her immediate family; but if the department determines that the employee is unable to work or unavailable for work, the employee is ineligible to receive benefits while such inability or unavailability continues.
An employee incapacitated from his or her work still must be able and available. The immediate family includes more than just the claimant’s household. A step-mother was immediate family in *Lamb v. Dept. of Corrections*, UI Hearing No. 98002528MD (LIRC 9/16/08) and a mother in a foreign country was “immediate family” in *Bartczak v. Supreme Cores, Inc.*, UI Hearing No. 06607150 MW (LIRC 2/27/07).

The no “reasonable alternative” has two sides to its coin: no reasonable alternative with the family, and no reasonable alternative within the workplace, thus the employee must explore reasonable alternatives to quitting by providing notice to the employer of the health problem and an opportunity to accommodate the employee.

4. Recall by former employer - Wis. Stat. 108.04(7)(d) provides:
   Paragraph (a) does not apply if the department determines that the employee terminated his or her work to accept a recall to work for a former employer within 52 weeks after having last worked for such employer.

5. Quit for “good cause” after trial work period - Wis. Stat. 108.04(7)(e) provides:
   Paragraph (a) does not apply if the department determines that the employee accepted work which the employee could have refused with good cause under sub. (8) or (9) [suitable work provisions] and terminated such work within the first 10 weeks after starting work.

Subsection (8) provides a “canvassing period” of up to six weeks during which a claimant may refuse to accept work at a significantly low skill level or rate of pay.

Despite the clear, unambiguous wording of Wis. Stat. 108.04(7)(e), that an employee may quit 10 weeks after starting the work, LIRC has construed the statute to require that, if the employee accepts work that is “unsuitable” under Wis. Stat. 108.04(8), the employee must also quit that work within six weeks of becoming unemployed. *See Arnett v. University of Tulsa*, 97000239MD (LIRC 10/1/97), aff’d, Case No. 97-CV-2939 (Dane Co. Cir. Ct. 7/30/98).

Until 2006, Wis. Stat. 108.04(7)(f) provided a bright line rule that a transfer to different work and the reduction of pay by 1/3 was always sufficient cause to quit. That section was repealed in 2006. Although the bright line standard no longer exists, a substantial pay cut and other unilateral material changes in the terms of employment may constitute “good cause attributable” to the employing unit under Wis. Stat. 108.04(7)(b).

6. Hours reduced at employee’s temporary location – under Wis. Stat. 108.04(7)(g), the quit does not disqualify the claimant if each of the following conditions are satisfied:
   a. Maintained a temporary residence near the employment terminated; and
   b. Maintained a permanent residence in another locality; and
   c. Terminated such work and returned to his/her permanent residence because the work available to the employee had been reduced to less than 20 hours per week in at least two consecutive weeks.
7. Sexual harassment of employee – In December 1999, §108.04(7)(i) was repealed (1999 Act 15 §25). The repeal, however, does not change the law. Section 108.04(7)(i) had been a very narrow exception, passed in the 1980s to address “quid pro quo” sexual harassment. Even while §108.04(7)(i) existed, sexual harassment cases could also be analyzed as “good cause attributable to the employer” under §108.04(7)(b) for the “quid pro quo” theory and the “hostile environment” theory. The 1999 Act 15 also amended §108.04(7)(b) to make it explicit that sexual harassment cases should be analyzed as “good cause attributable to the employer” cases. Section 108.04(7)(b) now, consistent with developing Fair Employment Act case law, covers “hostile environment” sexual harassment by non-supervisory co-employees that the employer should have known about but failed to take appropriate corrective action.

As in the sexual harassment cases under anti-discrimination laws, the key issues are usually the severity of the harassment and the employer’s knowledge of the harassment and the failure to take effective corrective actions. (e.g. Hodgson v. Meat Market, Ul Hearing No. 98001439BO (LIRC 7/29/98) two instances of obvious sexual touching by co-worker was “good cause attributable to the employer” where a supervisor observed the first incident and failed to take corrective action in response to the claimant’s immediate complaint.)

8. Compulsory retirement – under §108.04(7)(j) Wis. Stats., compulsory retirement does not disqualify. Wages from any pension may, however, reduce the level of benefits. See § 108.05(7)(a) Wis. Stats. (definition of a pension) to §108.05(7)(f) Wis. Stats. (allocation).

9. Quitting certain part-time work – Under §108.04(7)(k), the quitting does not disqualify if the quit work was not more than 30 hours, the employee had recently lost other full time work, and the loss of the full time work makes it economically unfeasible to continue the part-time work. DWD had promulgated a formula for determining whether continuing the part time work is “economically unfeasible.” See Wis. Admin. Code DWD §132.03(3)(b). The part time work is “economically unfeasible” if, for the week prior to quitting the part time work, the partial UC benefit for that week, plus gross wages earned in part time work minus expenses related to the part time work is less than the claimant’s full weekly benefit rate (i.e. the UC benefits the claimant would have received without the part time earnings). Commuting expenses (tolls and mileage at the IRS rate) are expenses related to the part time work. (See Smiewlewski v. Johnson Bank, Ul Hearing No. 02602323RC (LIRC 10/3/02).)

Additionally, an employee who quits one or two or more concurrently held jobs is eligible for benefits if the employee is then laid off from the other job, provided the other job is more than 30 hours per week.

If partially-employed claimant quits the part-time job for another with higher pay, the quit does not disqualify the claimant. §108.04(7)(p) Wis. Stats.
Honorably discharged military personnel who quit a second job when discharged from the military are not disqualified from benefits. §108.04(7)(q) Wis. Stats.

10. Quit-to-take: Under §108.04(7)(L), a quit to take another job does not bar benefits if the claimant earned in the new work four times the weekly benefits rate, if the new work:
   a. Offered average weekly wages at least equal to the average weekly wages the employee earned in the most recent quarter in the terminated work; or
   b. Offered the same or a greater number of hours of work than those performed in the work terminated; or
   c. Offered the opportunity for significantly longer term work; or
   d. Offered the opportunity to accept a position for which the duties were primarily discharged at a location significantly closer to the employee’s domicile than the location of the terminated work.

11. Quit because shift transfer results in lack of child care: In December 1999, a new exception was created permitting an employee to quit, without being disqualified for UI benefits, if the quit is because the employee’s shift was changed and the new hours result in the lack of child care for the claimant’s minor children. 1999 Act 15 §23, created §108.04(7)(cm) Wis. Stats. The claimant must still be “able and available” to work on the same shift as the “old” job.

A transfer to different hours, but not a different shift as defined under Wis. Admin. Code DWD § 100.02(55) (first shift defined as work period begins and ends between 6 a.m. to 6 p.m.), LIRC found “[w]hile it is regrettable, the exception at Wis. Stat. § 108.04(7)(cm) does not cover the employee's situation. His quitting was for valid personal reasons, but not within any exception permitting the immediate payment of benefits.” (Don Enemuoh v. Wisconsin Physicians Service Ins. Corp., UI Hearing No. (LIRC 7/22/05).)

Tracy Prochnow v. Evenflo Co., Inc., UI Hearing No. 02402138AP (LIRC 9/25/02) (benefits allowed when employee hired to work a particular shift then quits due to transfer to a shift when no child care available) but see Candy Heimerl v. Ariens Co., UI Hearing No. 07400772AP (LIRC 7/24/07) where employee was not hired to work a particular shift, had worked several different shifts for the employer, was being moved back to the shift she had previously worked: LIRC found change in employee’s personal circumstances (loss of child care), not the employer’s actions, caused separation – not eligible for benefits.

12. Quitting because of domestic abuse or harassment – in December 1999, a new exception was added by 1999 Act 15 §28, creating §108.04(7)(s) Wis. Stats, permitting the payment of UI benefits if the employee:
   1. Quits because of a concern about personal safety or harassment of the employee, a family member, or a household member, and
   2. Prior to quitting has obtained a temporary restraining order or an injunction; and
3. Demonstrates that the temporary restraining order or injunction has been or is likely to be violated.

The employer does not suffer any adverse consequence from an employee quitting under this section because benefits are charged against the “balancing account”, not the employer’s account. §108.07(h) Wis. Stats., as amended. In Christine Huck v. Econo Print Centers, Inc., UI Hearing No. 02006183WU (LIRC 4/11/03) (term household member is a person who is currently or formerly residing in a place of abode with another person, contemplates something beyond a two-week temporary stay.)

13. Quitting union-related work - Under §108.04(7)(m) Wis. Stats., an employee may quit the union related job without jeopardizing their UI based on the employment with the “management” employer.

14. Quitting part-time political appointments – Under §108.04(7)(n) Wis. Stats., applies to political appointments of part-time boards, commissions, and similar bodies. The purpose behind the statute is that the appointee should be permitted to resign from the public service position without risking that a lay-off from the full time employer might occur before the employee had earned re-qualifying wages of §108.04(7)(a) Wis. Stats. The “political appointment” provision applies if the employee held other employment and the political appointment wages were not greater than five percent of the base period wages.

F. Employee-Initiated Reduction in Hours: an employee initiated reduction in hours is considered a quit. The wages from the ongoing employment may not be used to meet the requalifying requirement provided the employer has provided the employee with written notice of this prior to granting the reduction in hours. §108.04(7m) Wis. Stats.

V. Able and Available

The previous 15/50 rule is abolished with the revision of Wis. Admin. Code DWD §128.03 in April 2008.

A. Availability for Work – General Labor Market - §108.04(2)(a) Wis. Stats. The claimant is required to be available for work in the general labor market when the claimant earns no wages for the week for which UI is claimed. The earning of any wages is important because the “able and available” requirement of §108.04(2)(a) Wis. Stats. does not apply. Thus, an eligible claimant who would otherwise be found ineligible may qualify with the earnings of some wages. If the claimant earns some wages during a week for which UI benefits are claimed, the claimant need not be “able and available” unless there is some definite indication that the claimant is not willing to work full time.” See Mosgaller v. Two Rivers Comm. Hospital, Inc., UI Hearing No. 99400648 MN (LIRC 6/24/99).

The claimant is required to be available for work in the general labor market when the claimant is physically unable, or is suspended by the employer for being unable, to do the claimant’s regular work. §108.04(1)(b)1 Wis. Stats.
The claimant is required to be available for work in the general labor market when the claimant voluntarily quits because of the health of the claimant or a family member, and there is no reasonable alternative to quitting. §108.04(7)(c) Wis. Stats.

The claimant is required to be available for work in the general labor market when the claimant refuses to accept work offered, if the refusal is because of inability to do that work. §108.04(8)(e) Wis. Stats.

B. Able to Work – “Able” to work and “available” to work are analytically discrete concepts. For weeks of unemployment beginning after 4/1/08, a claimant is “able” to work if the claimant “has the physical and psychological ability to perform suitable work.” Wis. Admin. Code DWD §128.01(3).

C. Factors to consider in determining “able to work” pursuant to Wis. Admin. Code DWD §128.01(3):
   a. The claimant’s usual or customary occupation;
   b. The nature of the restrictions caused by the claimant’s physical or psychological condition;
   c. Whether the claimant is qualified to perform other work within the claimant’s restrictions considering the claimant’s education, training, and experience;
   d. Whether the claimant could be qualified to perform other work within the claimant’s restrictions with additional training;
   e. Occupational information and employment conditions data and reports available to the department showing whether and to what extent the claims is able, within his/her restrictions, to perform suitable work in his/her labor market area.

A claimant is unable to work only if the claimant is not able to perform any work due to a physical or psychological condition under Wis. Admin. Code DWD §128.01(3). “Able” to do work is a low threshold.

(e.g. Jocelyn Osborne v. U.S. Postal Service, UI Hearing No. 08604715MW (LIRC 10/10/08), employee, postal clerk, unable to perform usual work due to foot condition, but could perform other work for employer, including work she had prior experience in, and could perform 13% of suitable full-time jobs in her labor market, and is able and available under Wis. Admin. Code DWD §128.01(3). See also Kim Fuller v. Healthcare Services Group, Inc., UI Hearing No. 08602796MW (LIRC 7/25/08); Grinnage v. AMI Services, UI Hearing No. 08604270MW (LIRC 8/14/08) (five pound lifting restriction and no bending or reaching still meets new “able” to work standard).)

D. Factors to consider in determining “availability”. “Availability” is analyzed, not in terms of one’s physical capacity, but in terms of the claimant’s connection to the labor market. The old analysis looked at how many of the jobs the claimant formerly could do and can the claimant still do. The new analysis looks to whether the claimant has done something to “withdraw” from the market of the jobs the claimant is still capable of performing. The new regulation deems not “available” for “suitable work” when one
who “has withdrawn from the labor market due to restrictions on his/her availability for work.” Wis. Admin. Code DWD §128.01(4)(a). The regulation lists factors to be considered in determining whether one is “available” are:

1. Salary and wage restrictions – Wis. Admin. Code DWD §128.01(4)(a)1. The operative language appears to be “comparable to the usual wage that was paid to the claimant while working in the claimant’s usual occupation.” Thus, it looks at the claimant’s actual earnings history. There are no LIRC cases yet on what is “comparable”. TIP: A claimant still should not state that they will only accept work paying a particular wage. A “preference” or compensation goal is acceptable.

2. Shift and time restrictions - Wis. Admin. Code DWD §128.01(4)(a)2. There are no LIRC cases applying this standard. Several changes are noteworthy. First, the “standard hours”, are the standard hours for the claimant’s occupation. This is probably more precise than the old “first shift” standard which might easily run from 6:00 a.m. to 3:30 p.m. for some production workers but from 9:00 a.m. to 6:00 p.m. for some office workers. Second, the claimant’s actual former work shift must be included. Third, the rule explicitly recognizes that people actually providing in-home care to family members can still be “available” for work, in the sense of not withdrawing from the labor market, if the claimant “remains available for full-time suitable work, regardless of the shift or hours.” The rule thus seems to accommodate those who must re-arrange the schedules of their lives to provide care to family members. Note, however, this new rule is providing care to family members who are ill, it is not an exemption from the “availability” requirement for persons caring for small, but healthy, children.

The second sentence of the new rule should make it much easier for students who lose their jobs while attending school to qualify for UI benefits. In the past, students working second, third, or split shifts might be able to arrange their schedules to attend classes, but when the employment was lost, the old “full time, first shift” rule would make them not available. (See, e.g. Kavalary v. Flexi Force Temporary Services, UI Hearing No. 99602110MW (LIRC 10/28/99.) The new rule, however, explicitly requires that the department consider the claimant’s hours and shift that the claimant actually worked in one or more jobs during the base period. If the student remains available for those hours – regardless of what they were – the new regulation makes a great deal of sense in terms of the purposes of UI because the student has done nothing new to “withdraw from the labor market”.

3. Travel and transportation restrictions - Wis. Admin. Code DWD §128.01(4)(a)3. Functionally, this is probably not a change. Travel distance used to be considered in determining a claimant’s hypothesized “labor market” for applying the old 50% rule. (See Brumm v. C.C.P.Q. & W., UI Hearing No. 99003277WR (LIRC 7/14/00).)

4. Incarceration for 48 hours - Wis. Admin. Code DWD §128.01(4)(a)4. Incarceration, without work release privileges, for 48 hours during a UI “week” makes the claimant “withdrawn from the labor market.”
5. Absence from labor market for 48 hours - Wis. Admin. Code DWD §128.01(4)(a)5. This rule is intended to address those circumstances in which a claimant leaves town. Being outside of one’s “labor market”, by which is probably meant a reasonable commuting distance from one’s residence, for more than 48 hours in a week disqualifies the claimant unless the claimant shows an ability to receive job offers and return to the labor market within 24 hours. There are no LIRC decisions applying this provision.

6. Types of work sought restrictions – Wis. Admin. Code. DWD §128.01(4)(a)6. There are no decisions yet on how much and how fast one must “broaden” his/her availability.

7. Other unreasonable restrictions on working conditions – Wis. Admin. Code DWD §128.01(4)(a)(a)7. There are no LIRC decisions applying this standard.

8. Other data available to the department (the Department’s Conditions of Employment Database “COED”). – Wis. Admin. Code DWD §128.01(4)(a)8. There are no LIRC cases applying this final criterion.

    The new regulation still requires that one be available for “full-time” work, but it does not require being available for full-time, first-shift work. This analysis is more compatible with current work patterns of part-time and flexible hour work than the old assumption that “able and available” meant only standard first shift work.

E. Availability for work at the claimant’s current employer - §§108.04(1)(a) and (b) Wis. Stats., addresses only unavailability for work at the claimant’s “current employer”. The three subsections, (1)(a), (1)(b)1, and (1)(b)2 must be read together because they are not applied literally.

F. Note: The law changes to Wis. Admin. Ch. DWD 128, effective April 2008, eliminated the provision that provided a claimant did not have to repay benefits paid prior to the date the claimant’s ability to work was resolved. Thus, if on appeal to the Commission, and the Commission were to find that an employee was not able to work and unavailable for work, the employee would have to repay benefits even though benefit checks may have been issued prior to the date the employee was found not able to work.

This outline is prepared for educational and information purposes only. The materials should not be construed as rendering legal advice for specific cases. Because of the rapidly changing nature of the law, information in this outline may be outdated. Anyone using this material must always research original sources of authority to ensure accuracy when dealing with a specific client’s legal matters. A special thank you to Attorney Jeff Myer and the Unemployment Compensation resource handbook prepared on behalf of Legal Action of Wisconsin for the annual CLE training.
Chapter DWD 128

ABILITY TO WORK AND AVAILABILITY FOR WORK

DWD 128.01 Definitions.

DWD 128.02 Able to work and available for work.

DWD 128.03 Eligibility review.

Note: Chapter ILHR 128 was created by emergency rule effective 1–8–84; Chap-
ter ILHR 128 was renumbered Chapter DWD 128 under s. 13.03 (2m) (b) 1., and
conversions made under s. 13.03 (2m) (b) 6. and 7., Stats., Register, June, 1997, No.
498.

DWD 128.01 Definitions. Unless the context clearly
indicates a different meaning, the definitions in ch. DWD 100
apply to this chapter.

History: Cr. Register, September, 1995, No. 477, eff. 10–1–95.

DWD 128.02 Able to work and available for work.

(1) Applicability. Under s. 108.04 (2), Stats., a claimant shall be
eligible for unemployment benefits for any week of total unem-
ployment only if the claimant is able to perform suitable work and
available for suitable work. Under ss. 108.04 (1) (b), 108.04 (7)
(c), and 108.04 (8) (e), Stats., a claimant shall be eligible for unem-
ployment benefits only if the claimant is able to perform suitable work and
available for suitable work. The department may deter-
mine the claimant’s ability to perform suitable work and availabil-
ity for suitable work at any time through questioning of the claim-
ant and other procedures.

(2) Presumption. Unless evidence is obtained that in the rele-
vant week the claimant was not able to work or available for work,
a claimant is presumed able to work and available for work for any
week that all of the following conditions are met:

(a) The claimant has registered for work and has complied with
ss. DWD 126.02 and 126.04, or registration is waived under s.
DWD 126.03 or excused under s. DWD 126.05.

(b) The claimant has complied with the work search require-
ments of s. 108.04 (2) (a) 3., Stats., and ch. DWD 127, or a work
search is waived or excused under ch. DWD 127.

(3) Able to work. Able to work means that the claimant has
the physical and psychological ability to perform suitable work.
During any week, a claimant is not able to work if the claimant is
unable to perform any suitable work due to a physical or psycho-
logical condition. In determining whether the claimant is able to
perform suitable work, the department shall consider all factors
relevant to the circumstances of the case, which may include the
following:

(a) The claimant’s usual or customary occupation.

(b) The nature of the restrictions caused by the claimant’s
physical or psychological condition.

(c) Whether the claimant is qualified to perform other work
within the claimant’s restrictions considering the claimant’s
education, training, and experience.

(d) Whether the claimant could be qualified to perform other
work within the claimant’s restrictions with additional training.

(e) Occupational information and employment conditions data
and reports available to the department showing whether and to
what extent the claimant is able, within his or her restrictions, to
perform suitable work in his or her labor market area.

(4) Available for work. (a) Withdrawal from labor market.
Available for work means that the claimant maintains an attach-
ment to the labor market and is ready to perform full–time suitable
work in the claimant’s labor market area. During any week, a
claimant is not available for suitable work if he or she has with-
drawn from the labor market due to restrictions on his or her avail-
ability for work. In determining whether a claimant has with-
drawn from the labor market, the department shall consider one
or more of the following factors:

1. ‘Salary or wages.’ A claimant is considered to have with-
drawn from the labor market if he or she is not available for full-
time suitable work at a wage reasonably comparable to the usual
wage that was paid to the claimant while working in the claimant’s
usual occupation. The claimant’s usual wage is determined by
evaluating the wage rates that were paid to the claimant in one or
more previous jobs since the start of the claimant’s base period.
The claimant’s usual occupation is determined by considering the
claimant’s training and experience as evidenced by the claimant’s
employment since the start of the claimant’s base period.

2. ‘Shift and time restrictions.’ A claimant is considered to
have withdrawn from the labor market if he or she is not available
for full–time suitable work during the standard hours in which
work is performed in the occupations in which the claimant usu-
ally works or has prior training or experience. In determining the
standard hours in which work is performed in the occupations, the
department shall include the hours and the shift that the claimant
worked in an occupation in one or more previous jobs since the
start of the claimant’s base period. For purposes of this subdivi-
sion, a claimant whose availability is restricted by an immediate
family member’s medical or health condition or other infirmity
requiring essential care that is uniquely and actually provided by
the claimant is not considered to have withdrawn from the labor
market, provided that the claimant remains available for full–time
suitable work, regardless of the shift or hours.

3. ‘Travel and transportation.’ A claimant is considered to
have withdrawn from the labor market if he or she is either not
will ing or not able to travel a reasonable distance and time to and
from work. In making this determination, the department may
consider the wage sought, the modes of available transportation,
commuting costs, and the claimant’s commuting history.

4. ‘Incarceration.’ A claimant who is incarcerated for more
than 48 hours during any week is considered to have withdrawn
from the labor market for that week unless the claimant has work
release privileges that allow the claimant to meet all requirements
related to availability for work.

5. ‘Absence from the labor market.’ A claimant who is absent
from his or her labor market area for more than 48 hours during
any week is considered to have withdrawn from the labor market
for that week, unless the claimant shows that he or she remains
continuously attached to the labor market during the absence or
that the primary purpose of the absence was to seek suitable work.
A claimant may show continuous attachment to the labor market
by the claimant’s availability to timely receive and respond to
offers of work by phone or other means of communication and
willingness and ability to return to the labor market within 24
hours.

6. ‘Types of work sought.’ A claimant is considered to have
withdrawn from the labor market if the claimant does not broaden
his or her availability for work to additional types of suitable work
as the period of his or her unemployment lengths.

7. ‘Other unreasonable restrictions on working conditions.’
A claimant is considered to have withdrawn from the labor market
if he or she places other unreasonable restrictions on working conditions.

8. ‘Occupational information and employment conditions data.’ Occupational information and employment conditions data and reports available to the department showing the extent to which full-time suitable jobs exist in the claimant’s labor market area within his or her restrictions.

(b) Standards for suitable work distinguished. Nothing in par. (a) may prevent the department from denying benefits to a claimant who fails, without good cause, to accept suitable work when offered, as provided in s. 108.04 (8) (a), Stats., or to a claimant who fails, without good cause, to return to suitable work with a former employer that recalls the claimant within 52 weeks after the claimant last worked for the employer, as provided in s. 108.04 (8) (c), Stats. The standards for determining a claimant’s availability for suitable work and a claimant’s failure, without good cause, to accept suitable work are different standards.

5. LAWFUL RESIDENT. To be considered available for suitable work for a week, an alien must be legally authorized to work that week in the United States by the appropriate agency of the federal government. In determining whether an alien is legally authorized to work in the United States, the department will follow the requirements of 42 USC 1320b–7 (d) (2), which relates to verification of and determination of an alien’s status.

Note: 42 USC 1320b–7 (d) (2) is Section 1137 (d) of the Social Security Act.

(6) JURY DUTY. The department shall consider a claimant to be available for suitable work during the time that the claimant responds to and remains under a summons for jury service, whether or not impaneled on a jury. Jury duty shall be good cause for not reporting for an eligibility review under s. DWD 128.03.

(7) PARTIAL UNEMPLOYMENT. The department may require a claimant who is partially unemployed to comply with the requirements of this chapter if any of the following apply:

(a) There is a definite indication that the claimant is not genuinely interested in working full-time.

(b) During any week, the claimant was not able to perform or not available for work available with an employing unit.

History: Cr. Register, July, 1984, No. 343, eff. 8-1-84; am. (3), Register, September, 2000, No. 537, eff. 10-1-00; CR 01-039; am. (2) (b), Register September 2001 No. 549 eff. 10-1-01; CR 07-054: r. and recre. Register March 2008 No. 627, eff. 4-1-08.

DWD 128.02 Availability for work; temporary grace periods for claimants with uncontrollable restrictions. History: Cr. Register, July, 1984, No. 343, eff. 8-1-84; am. (2), Register, November, 1989, No. 467, eff. 12-1-89; am. (1) (a), (b) and (c), renum. (2) (c) to be (2) (b) and am. (2) (b), renum. (2) (b) to be (2) (c) and am. (2) (c), cr. (2) (a), Register, November, 1999, No. 527, eff. 12-1-99; CR 01-039: am. (1) (a), cr. (3), Register September 2001 No. 549 eff. 10-1-01; CR 07-054: r. Register March 2008 No. 637, eff. 4-1-08.

DWD 128.03 Eligibility review. (1) The department may periodically review the records of any individual claiming unemployment benefits to determine whether the claimant meets the continuing eligibility requirements of chs. DWD 126 to 128 and s.108.04, Stats. A claimant shall respond as required when notified by the department of a review of the claimant’s continuing eligibility for benefits.

2. The eligibility review may include any of the following:

(a) An interview with the claimant conducted by a representative of the department.

(b) A review of the appropriateness of the claimant’s registration or waiver of registration under ch. DWD 126.

(c) A determination as to whether the claimant is able to perform suitable work and available for suitable work under this chapter.

(d) An assessment of the claimant’s work search efforts under ch. DWD 127.

(e) A determination as to whether the claimant is making satisfactory progress under s. 108.04 (16), Stats., if the claimant is participating in approved training.

(f) A review of any reemployment services the claimant has received.

(g) Preparation of a reemployment plan as reasonably necessary to assist the claimant in his or her efforts to obtain work.

3. If the claimant fails to participate in an eligibility review interview under sub. (2) (a) without good cause, the claimant shall be ineligible for benefits for the week in which the interview was scheduled.

History: Cr. Register, July, 1984, No. 343, eff. 8-1-84; CR 07-054: r. and recre. Register March 2008 No. 627, eff. 4-1-08.

Register, March, 2008, No. 627