

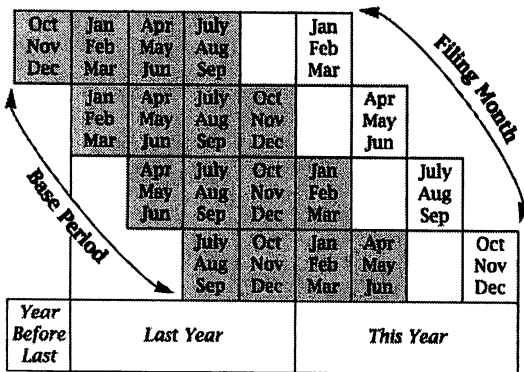


DIVISION OF EMPLOYMENT SECURITY

Unemployment Insurance Benefit Claims

How does a claimant qualify – monetarily

- Must be paid wages for insured work of at least \$1500 in one quarter of the base period
 - Base period is the first four of the last five completed calendar quarters
- Total base period wages must equal one and one-half times the high quarter wages OR wages for insured work in at least two quarters with total base period wages which equal one and one-half time the maximum taxable wage base.
 - The taxable wage base currently is \$13,000



Monetary entitlement

- Claimant's weekly benefit amount (WBA) is 4% of the average of the two highest quarters in the base period not to exceed \$320
- Maximum benefit amount is one-third of wage credits in the base period or 20 times the WBA, whichever is less.
- Wage credits each quarter are limited to 26 times the claimant's weekly benefit amount

If a claimant qualifies for an unemployment benefit claim, a notice is mailed to:

- **The claimant** - listing the wages credits on which the claim is based and the monetary entitlement
- **The employers** – notices are mailed to the last employer and the base period employers
- This means you may receive two notices if you are both the last and base period employer. **PROTEST PERIOD OF 10 DAYS**

Filing a Protest

- A protest can be filed by mail, fax, or online using the State Information Data Exchange System (SIDES)
- Use the address or fax number listed on the protest form
- Return the protest form that was sent to you when you fax or mail
- Instructions for filing online using SIDES are included on the notice
- Include the name and telephone number of the company representative who can provide additional information , if needed

Reasons to Protest

- Discharged for misconduct
- Quit for reasons not attributable to the work or employer
- Receiving vacation or holiday pay

Other protest issues (Not timely to a notice)

Protest does not have to be timely to a notice if:

- The employer offers and the claimant refuses suitable work
 - The Employer must file a written protest within 10 calendar days after the claimant refuses the job
- The employer files a written protest raising as an issue to the claimant's physical ability to work or availability for work. (the statute does not seem to provide any deadline for such protests – 288.070.3)

DISQUALIFICATIONS

- **Quit** – return to work, earn 10X WBA, be unemployed and otherwise eligible
- **Discharge** – return to work, earn 6x WBA, be unemployed and otherwise eligible
- **Refusal of Suitable Work** – return to work, earn 10x WBA, be unemployed and otherwise eligible

Determinations Not to Appeal

- Deputy rules Claimant quit to accept a more remunerative job.
- Deputy rules that Claimant quit a job within 28-days of starting for a reason that would have been good cause to refuse the job.
- Deputy rules that claimant left temporary work to return to regular employer.
- Deputy rules claimant moved to follow military spouse

In each of those cases Chapter 288 provides relief of charges to a contributory employer (a reimbursable employer would be charged).

For additional information on this review the Division's Employer Benefit Charge Pamphlet.

Reasonable Assurance

School District Liability for UI

- Section 288.032, RSMo., states in part as follows:
- After December 31, 1977, "employer" means:
- (3) Any governmental entity for which service in employment as defined in subsection 7 of section 288.034 is performed.

Definition of Reasonable Assurance

- “Reasonable assurance” is defined as a written or implied agreement that the employee will perform services in the same or similar capacity during the ensuing academic year, term, or remainder of a term. USDOL Unemployment Insurance Program Letter No. 04-87.

Reasonable Assurance

- The following four conditions must be met for reasonable assurance to apply:
 - There must be school wages in the base period. (Employer account numbers ending in 8211, 8221 and 8222);
 - The claimant must have worked in the preceding academic term or semester;
 - The claimant must be between successive terms or semesters; and
 - The claimant must have a contract or “expectation” of returning to work in a similar capacity in the next school year or term.

Reasonable Assurance – Classifications of Workers

- Two classifications of workers:
- Professionals:
 - Teachers
 - Principals
 - Substitute teachers
 - School administrators
 - Certified teaching assistants
- Non-professionals:
 - Secretaries and clerical staff
 - Most teachers aides
 - Maintenance and janitorial staff
 - Cooks and cafeteria workers
 - Bus drivers

Appellate Court Rulings

- *Nelson v. Labor and Industrial Relations Commission*, 594 S.W.2d 356 (Mo. App. W.D. 1980)
- The claimant has the burden to show that he or she did not have reasonable assurance of being reemployed.
- *Mack v. Labor and Industrial Relations Commission*, 807 S.W.2d 688 (Mo. App. W.D. 1991)
- The court held that reasonable assurance exists when a school district notifies the claimant that the claimant will be retained in the same type of job in the next school year.

The term implies a high probability that such reemployment will occur. The statute does not require that the notice be written.

Reimbursable/ Contributing Employers

The Employment Security Law - Chapter 288, RSMo

- The purpose of the Employment Security Law is to provide benefits to workers who are unemployed through no fault of their own. Section 288.020, RSMo.
- Employers pay contributions based upon the wages paid to employees up to the taxable wage base to provide these benefits.

Who is a Liable Employer

- The term “liable employer” refers to an employing unit that has become liable by DES law to cover workers for unemployment insurance benefits and to pay unemployment taxes on worker’s wages.

Electing Reimbursable Status

- Pursuant to Section 288.090.3, RSMo, governmental entities and nonprofit organizations are liable to pay contributions.
- Governmental entities and nonprofit organizations may elect to make payments in lieu of contributions (elect reimbursable status).

Election at Time Governmental Entity or Non Profit Organizations Becomes Subject to the Law

- Must make election within thirty days of the determination of subjectivity.
- Election must be for at least one calendar year.
- To terminate election, entity must file written notice terminating election not later than thirty days prior to beginning of calendar year for which termination shall be effective.

Election for Currently Contributing Governmental Entities or Non Profit Organizations

- Must file a written notice of election to become liable for payments in lieu of contributions.

- Election must be filed not later than thirty days prior to the beginning of the calendar year in which the election is effective.
- Election must be for at least two calendar years.
- To terminate election, entity must file written notice terminating election not later than thirty days prior to beginning of calendar year for which termination shall be effective.

Liability of Reimbursable Governmental Entity

- Reimbursable governmental entity must make payments in lieu of contributions equal to full amount of regular benefits and extended benefits attributable to service in employ of governmental entity.
- Thirty days after the end of each calendar quarter, the Division will bill reimbursable governmental entities for full amount of regular and extended benefits.

Nonmonetary factors that prevent charges to a contributing employer's account are:

If the Deputies Determination

- Disqualifies the claimant for being discharged due to misconduct connected with the work, or for quitting without good cause attributable to the work or employer
- Disqualifies the claimant for failure without good cause to accept suitable work offered by a former employer.
- Indicates the claimant quit the employer to accept more remunerative work, or quit temporary work with the employer to return to work for a regular employer.
- Indicates the claimant quit work, which was determined not suitable, within 28 calendar days of the first day worked.
- Indicates that the employer was required to discharge the claimant because the claimant was placed on the Employee Disqualification List maintained by the Department of Health and Senior Services after the date of hire.

Employing part-time workers may create the situation that allows charges already made to be credited at a later time. Charges may be credited if the employer continued to employ the individual on a regular recurring basis each week claimed during the charged period, to at least the same extent that the employer previously had employed the individual, and **if the employer files a protest and so informs the DES within 30 days from the mail date of the "Statement of Benefit Charges."**

Other factors that prevent charges to a contributing employer's account are:

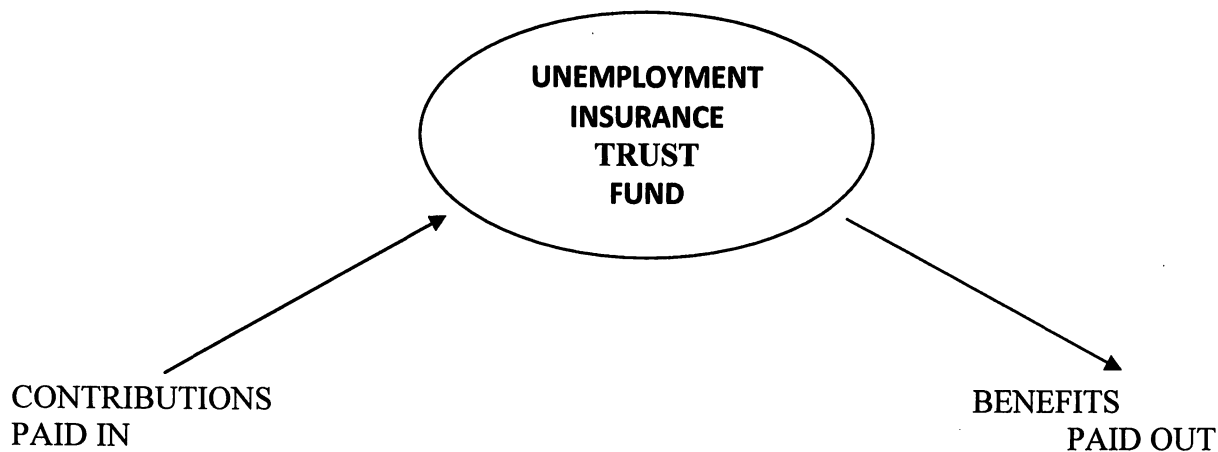
- The claimant was paid \$400 or less by the employer during the entire base period of the claim.
- The claimant was properly reported as a probationary worker whose period of employment for the employer was 28 consecutive days or less.

The factors shown above that prevent charges to a contributing employer WILL NOT EXEMPT THE REIMBURSABLE EMPLOYER FROM CHARGES FOR ALL BENEFIT PAYMENTS. **This should not be taken to mean a reimbursable employer should not protest a claim for unemployment benefits made by a former worker whose separation reason is other than lack of work. Because, if the claimant is disqualified and prohibited from receiving benefits until the claimant has enough earning to remove the disqualification, this will prevent charges during the disqualification period.**

Contributing Employers - Tax Rate Calculation

- As provided by law, unless an employer has been determined to be a successor to another employer, for its first two or three years of liability, an employer receives the new employer rate. This is a rate assigned to all new employers of the same industrial classification. Once an employer becomes eligible for an experience rate, a rate calculated based on the ratio between an employer's average annual taxable payroll, unemployment claims against its account, and taxes paid in previously by the employer.
- *Contribution Rate Adjustment (CRA)*. A contribution rate adjustment is a percentage increase or decrease to the tax rate that is based on the average cash balance of the Unemployment Trust Fund. Rates may be increased by 10%, 20% or 30%, or reduced by 7% or 12%.
- *Maximum Rate Surcharge*. If an employer has been at the maximum experience rate for two consecutive years, a surcharge of one-quarter percent is added to the rate. In the event that an employer remains at the maximum rate for a third or subsequent year, an additional surcharge of one-quarter percent shall be added each year to the annual rate calculation up to one percent. If an employer continues to remain at the maximum rate, an additional surcharge of one-half percent shall be added. In no case shall the surcharge exceed one and one-half percent in any given year.

Contributing Employers - Experience Rate Calculation



All contributions paid are deposited in the unemployment insurance trust fund to be used for the payment of benefits: *Administrative funds to operate the Division are received from the federal government from federal FUTA taxes paid.*

EXPERIENCE RATE ACCOUNT	
<u>CREDITS</u>	<u>DEBITS</u>
Contributions Paid	Benefits Paid

BALANCE as of July 31

$$\begin{array}{ccccccc}
 \text{Account} & & & & & & \\
 \text{Balance} & / & \text{Average Annual} & = & \text{Percent Excess} & = & \\
 & & \text{Taxable Payroll} & & \text{Factor} & & \\
 & & \text{"Employer's Rate"} & & & &
 \end{array}$$

Worker Misclassification

- Section 288.034.5 of UI law provides that “Service performed by an individual for remuneration shall be deemed to be employment subject to this law unless it is shown to the satisfaction of the division that such services were performed by an independent contractor. In determining the existence of the independent contractor relationship, the common law of agency right to control shall be applied. The common law of agency right to control test shall include but not be limited to: if the alleged employer retains the right to control the manner and means by which the results are to be accomplished, the individual who performs the service is an employee. If only the results are controlled, the individual performing the service is an independent contractor.”
- The determination of whether an individual is an employee or independent contractor is important for several reasons for Missouri unemployment tax purposes. Under Missouri law, wages paid to employees are subject to employment taxes paid by the employer. Only compensation paid to employees is used to calculate unemployment benefits for that employee should he/she become unemployed through no fault of his/her own.
- If an employer has individual(s) performing services in connection with its business operations that are not considered employees, the employer has the responsibility to contact the DES for a ruling on the workers' employment status.
- Any agreement by an individual to waive rights to unemployment insurance coverage is void under the Missouri Employment Security Law.
- If you have an employer-employee relationship, it makes no difference how it is labeled. The substance of the relationship, not the label, governs the worker's status. It does not matter how the payments are measured or paid, what the payments are called, or if the individual is employed full time or part time.

The Appeal Process

FILING AN APPEAL

- **Requirements for a valid appeal – written**
 - Name and title of the person filing the appeal
 - Brief reason for appeal

- **Who may file**
 - The claimant
 - An employee of the employer
 - Licensed Missouri attorney
 - **In Missouri a third party agent cannot file an appeal on behalf of an employer**

- **What to include in the appeal**
 - The claimant's name and social security number
 - The issue number from the determination (located in the upper right corner)
 - A short reason why the employer disagrees with the deputy's determination

Processing the Appeal

- Upon receipt of the appeal, the Appeals Section in Jefferson City will set it up and mail a notice advising each party that the appeal has been filed along with an informational pamphlet.
- Upon scheduling a hearing, a Notice of Hearing will be mailed to each party along with a copy of the file that you must have with you at the hearing.
- The Notice will provide instructions on how to take part in the telephone hearing and give each party the address of the other party.

What to do When the Notice Arrives

- Read the Notice of Hearing carefully (both front and back).
- Note the date and time of the hearing.
- Mail or fax any proposed exhibits to both the claimant and the referee at the addresses/numbers provided on the notice. Do not resend documents that are in the packet received with the notice of hearing.
- Follow the instructions on the notice of telephone hearing about calling in to connect to the conference bridge.

Representation Rules – Supreme Court Rule 5.29

- Claimant can represent him/herself or be represented by an “authorized agent” who does not charge a fee, or by an attorney licensed in this state.
- Sole proprietor may represent him/herself.
- An officer or full-time managerial employee may represent the employer; this includes a managerial employee of a governmental entity who may represent the employer.
- An employee (not included above) can testify and offer exhibits.
- A licensed Missouri attorney (an out-of-state attorney must comply with Missouri Supreme Court Rules).

What Does Representation Mean?

- Representation means you can question your own witnesses, question the claimant, object to evidence and make legal argument concerning the appeal.

Order of Proof and Burden of Proof

- Quit – claimant goes first and has burden to prove good cause to quit.
- Discharge – employer goes first and has burden to prove misconduct.

Misconduct Issue

- Defined in Section 288.030.1(23) of the Revised Statutes of Missouri.
- “‘Misconduct’ an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has the right to expect of his or her employee, or negligence in such degree or recurrence as to manifest culpability, wrongful intent or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer....”
- All four parts of the definition require willful intent on the part of the claimant.

The Fendler Decision

- In the case *Fendler v. Hudson Services*, 370 S.W.3d 585, 590 (Mo. banc 2012), the Missouri Supreme Court found that the Labor and Industrial Relations Commission could properly determine that the claimant acted willfully even though there was no direct evidence that she had done so, because “an employee’s repeated violation of a known, understood and reasonable work rule, in and of itself, can provide competent and substantial evidence that the employee willfully or deliberately violated the rule.”
- There was no direct evidence of the claimant’s state of mind.

Absenteeism

- Section 288.050.3, RSMo – what does it mean?
- “Absenteeism or tardiness may constitute a rebuttable presumption of misconduct, regardless of whether the last incident alone constitutes misconduct, if the discharge was the result of a violation of the employer's attendance policy, provided the employee had received knowledge of such policy prior to the occurrence of any absence or tardy upon which the discharge is based.”

What the Employer Must Show

- The claimant was discharged as the result of a violation of the employer's attendance policy.
- The claimant had knowledge of the policy before any of the occurrences upon which the discharge was based.
- Then the absenteeism or tardiness may constitute a rebuttable presumption of misconduct.
- The rebuttable presumption, even if raised, will probably be defeated as soon as the claimant participates in the hearing to explain his or her reasons for being absent/tardy.

What the Courts Have Held

- “Absences due to illness or family emergency, where properly reported to the employer, do not constitute willful misconduct within the meaning of section 288.050.2. The reason for the rule is obvious--if absences were due to illness or family emergency, a claimant has not willfully violated the employers rule. This is because the employee's absence is fairly attributable to circumstances beyond [his or her] reasonable control—the exigencies of an involuntary medical condition or family emergency--rather than a willful violation of employer's rule.”
- *Dameron v. Drury Inns, Inc.*, 190 S.W.3d 508, 511-12 (Mo. App. 2006) (Citations omitted).

Quit Issue

- Section 288.050.1 states in part as follows:
- “Notwithstanding the other provisions of this law, a claimant shall be disqualified for waiting week credit or benefits until after the claimant has earned wages for work insured pursuant to the unemployment compensation laws of any state equal to ten times the claimant's weekly benefit amount if the deputy finds:
- (1) That the claimant has left work voluntarily without good cause attributable to such work or to the claimant's employer.”

What is Good Cause?

- “To constitute good cause, the circumstances motivating an employee to voluntarily terminate employment must be real not imaginary, substantial not trifling, and reasonable not whimsical, and *good faith* is an essential element. The standard as to what constitutes good cause is the standard of reasonableness as applied to the average man or woman, and not to the supersensitive.” *Belle State Bank v. industrial Comm'n*, 547 S.W.2d 841, 846, 847 (Mo. App. 1977).

What is Good Faith?

- “A worker has good cause to terminate employment voluntarily when that conduct conforms to what an average person, who acts with reasonableness and in good faith, would do.” *Contractors Supply Co. v. Labor and Industrial Relations Commission*, 614 S.W.2d 563, 564 (Mo. App. W.D. 1981). “To demonstrate good faith, a claimant must show that before taking the ‘drastic’ measure termination of employment, he or she attempted to remedy the situation or dispute.” *American Family Insurance Company v. Hilden*, 936 S.W.2d 207, 210, 211 (Mo. App. W.D. 1996).

The Difatta-Wheaton Decision

- In the case *Difatta-Wheaton v. Dolphin Capital Corp.*, 271 S.W.3d 594 (Mo. 2008), the Missouri Supreme Court substantially changed the way the courts analyze a separation from work.
- The Court held that when the claimant was not able to return to work after an approved leave, due to a serious health condition, she was not disqualified from receiving benefits because she did not quit her employment “voluntarily.” The claimant did everything possible to retain her job.

Expanding Difatta-Wheaton

- In *Johnson v. Division of Employment Security*, 318 S.W.3d 797 (Mo. App. W.D. 2010), the Missouri Court of Appeals held that the *Difatta-Wheaton* ruling is not limited to life-threatening medical conditions, but rather addresses cases in which the problems are not under the control of the worker so that the worker is not at fault.

Telephone Hearings

- Remember that the telephone hearing is quasi-judicial proceeding.
- The hearing is “de novo”, which means that the Referee hears the matter from the beginning and the parties must present evidence to the Referee. The case is decided based upon the evidence presented at the hearing.

Role of the Referee

- During a hearing the referee has the authority and responsibility to:
- Conduct and control the hearing;
- Explain the issues and establish the order in which persons will testify;
- Admit Division records as an exhibit;
- Question witnesses and assist parties in questioning witnesses;
- Rule on the admissibility of testimony and documents; and
- Stop the presentation of evidence not relevant to the case.

Appealing the Referee’s Decision

- A party has thirty days from the mailing of the Referee's decision to file an appeal to the Labor and Industrial Relations Commission.
- Appeal rights are set out at the end of the Referee's decision. You should state in your appeal why you believe the Referee erred in his or her decision.
- Many employers mistakenly believed that the Commission will conduct a new hearing and that the Employer can present new evidence. The Commission will not conduct a new hearing. The Commission reviews the transcript (including the exhibits) presented at the hearing.

Appealing the Commission’s Decision

- If an aggrieved party does not agree with the Commission's decision that party may file an appeal to the Missouri Court of Appeals.
- Instructions on how to file that appeal are on the decision sent by the Commission. A special form (Form 8–B) must be used and can be obtained from the Commission or downloaded from the Commission’s website.
- You have thirty days to file an appeal to the court. The appellate court does not receive new evidence, but rather reviews the hearing transcript, exhibits if any, and the Commission's ruling.

5 Tips That You Need to Remember for a Hearing

- 1. Read and follow **all** instructions received from the Appeals Section. This includes calling the toll free number and entering the access code on the notice.
- 2. Have the correct witnesses available for the hearing (the person with firsthand testimony to offer).
- 3. Be prepared – have background information ready including dates of employment and dates of events you want to address.
- 4. Have the materials mailed with the Notice of Telephone Hearing with you because they will be used during the hearing.
- 5. Read the decision in its entirety when you get it.

UI Tax Information

DeSheila Milton, Liability Unit Manager

Phone: 573-751-3331

Email: DeSheila.Milton@labor.mo.gov

Questions concerning new accounts, status changes and Independent Contractor issues

Moneen Gilleland, Employer Accounts Unit Manager

Phone: 573-751-3410

Email: Moneen.Gilleland@labor.mo.gov

Questions concerning tax rates, certifications, adjustments or any tax accounting matters.

Benefit Charge – Questions: 573-751-4034

UI Appeals Information

Ron Miller, Chief Referee

Phone: 573-751-3913

or

James Skain, Supervising Referee

Phone: 573-751-3913

Questions concerning appeals decisions, procedures, regulations or any other Appeals related issues.

Email: appealstribunal@labor.mo.gov

UI Claims Information

- If you need to contact a Regional Claims Center deputy call the office that serves your region and select Option 3
- Input your 14 digit DES account number or your 9-digit FEIN
- You will be placed in a priority queue to handle your inquiry

Janet Lepper, Chief of UI Programs

Responsible for management of Regional Claims Centers and DES policy instructions.

Phone: 573-751-3648

Email: Janet.Lepper@labor.mo.gov

Website: <http://www.labor.mo.gov/es/index.asp>