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5 GENERAL

A. Right to Equal Treatment

Persons have a right generally to expect equal treatment under the law. However, the law may properly distinguish allowable and unallowable courses of action where there is a clear legislative interest in so doing.

> Example: Joseph Sonneman argued (Sonneman vs. Judy Knight, Department of Labor, State of Alaska, Superior Court, 1JU-86-2608, April 5, 1988) that to distinguish between academic and vocational instruction was unequal treatment, forbidden under the Constitution. The Court held that the legislature had a valid and allowable interest in limiting unemployment benefits to those validly attached to the workforce.

B. Incorrect Information

Although claimants can expect to rely upon information given them by official publications and representatives of the Agency, this information, if incorrect, cannot substitute for the clear wording of the law.

> Example: A claimant (9225022, May 20, 1992) was instructed by a Departmental employee to continue filing her claims without showing a work search while receiving Extended Benefits. Although she had not intended to file for the weeks in question until the Departmental employee induced her to do so, the Commissioner held that "We must apply the law as it is written. . . . The Department cannot waive the disqualification . . . solely on the basis that the claimant was induced by the ESD to file the weeks."

C. Tribunal's Right to Exercise Discretion

The Tribunal is not limited in exercising discretion, and may remand a case to the DETS if there is insufficient information on which to make a decision (Newman vs. State of Alaska, Department of Labor, Division of Employment Security, 3AN-95-02578 CI, June 25, 1996.)

D. Continuous Jurisdiction of Department

Law: AS 23.20.340(b)

The Department has continuous jurisdiction over determinations that result from a misapplication of law or policy by the department.

Cases must be:

- Found after July 1, 1996;

- Redetermined within one year of the initial monetary determination; and
- Clearly contrary to law or policy.

60 BENEFIT COMPUTATION FACTORS

60.05 Base Period Wages

Law: AS 23.20.350(a)

A. Amount of Benefits

The amount of benefits an individual can receive is based on work and wages paid during the base period. Not all work is considered employment and not all monies paid by an employer are covered wages.

a) Employment

AS23.20.525 (a) defines employment. For UI benefits purposes, employment is work that is insured or covered under Alaska statute. Not all work performed meets the definition of employment, AS 23.20.526.

Work that is excluded from coverage cannot be used to establish monetary entitlement. Examples of work excluded from coverage are listed below. These are general examples, and if encountered require further investigation. Individuals with these types of wages may need a wage investigation to determine if wages are correctly reported.

a) Work as a domestic in a private household if paid less than $1000 in a quarter;
b) Persons selling or distributing newspapers;
c) Casual labor outside the employers normal business if paid $50 or less and work fewer than 24 days in a calendar quarter;
d) Work performed for a family member;
e) Work performed for a foreign government or instrumentality thereof;
f) Work as an insurance agent, insurance solicitor, real estate broker; real estate or securities salesperson if paid on commission;
g) Work as crew on board an American vessel if the operating office is outside of Alaska;
h) Work as crew on board a non-American vessel if all or part of the work is performed outside US waters;
i) Work as a commercial fisherman on a crew less than 10, paid on a share of catch basis;
j) Work for the government:
    1) As a juror;
    2) As National Guard except during periods of active duty;
    3) As a temporary emergency worker – fire, flood, earthquake;
    4) As an election worker paid less than $1000 during the year;
    5) As an elected or appointed public official;
k) Work as a corporate officer;
l) Work as a taxicab driver;

m) Agricultural work;
n) Work as training or rehabilitation:
   1) Nurse trainee in a hospital;
   2) For a school by an enrolled student;
   3) In a prison or hospital by an inmate of the institution;
   4) Work relief or work training financed by federal, state, or federally recognized tribal funds;
   5) Work study taken for credit by a full time student under 22 years of age.
o) Work as a tribal officer for a federally recognized tribe;
p) Work for a religious order or religious organization;
q) Direct sales outside a retail establishment and paid by commission.

b) Wages

Wages are defined in AS 23.20.530(a) as "all remuneration for service from whatever source, including, but not limited to, insured work, noninsured work, or self-employment; commissions, bonuses, back-pay and the cash value of all remuneration in a medium other than cash".

Not all wages can be used to establish a benefit year. The wages must be earned in employment as defined by AS 23.20.525 to be used to establish benefit entitlement.

AS 20.20.530(b) lists monies paid by an employer that are not considered wages. These types of monies are not included in taxable wages and cannot be used to establish a benefit year. Individuals with these types of wages may need a wage investigation to determine if wages are correctly reported.

Excluded wages include:
a) Payments to a plan or system that provides for employees or employee dependents for retirement, disability, medical or death benefits;
b) Payments to a trust or annuity, such as a 401(k) plan;
c) Disability retirement or death benefits, if the employer's plan makes provision for employees generally;
d) Employer contributions to Social Security;
e) Other than cash payments, if outside the employers course of business, such as room & board;
f) Standby pay or retainer paid to individuals over age 65;
g) Severance pay the employer is not legally required to pay;
h) Per diem for actual expenses incurred;
i) National Guard inactive duty service;
j) Payments made on behalf of the employee into a cafeteria plan;
k) Survivor's benefits on behalf of a deceased person, whether paid to an estate or to an individual, paid in the calendar year after death;

l) Educational assistance payments that the employee would not have to claim as income on federal income tax;
m) Payments to a fund to supplement unemployment insurance benefits.

c) Wages as paid

To determine the base period the wages are calculated as paid, rather than as earned.

Example: In the case of McCulley vs. Alaska Department of Labor, (Superior Ct., 3AN-90-7980, Civil, May 13, 1991), Mr. McCulley had been paid all his monthly wages in one quarter, although he had worked in two. He argued that the statute should be liberally construed to award him benefits, although he did not meet the terms of the statute. The Court disagreed, holding that it could not contravene the plain language of the statute.

Example: In Fenton v. State of Alaska (1JU-89-615 CI, Superior Ct., September 27, 1989), Mr. Fenton worked for two days in June, but was paid all his wages in July. The Court distinguished between wages "actually" paid, when they are physically in the employee's possession, and "constructively" paid, when they are set aside for the employee without qualification. However, the wages were not constructively in Mr. Fenton's possession; therefore, the wages were properly allocated to the third quarter.

Example: In 9227517, (September 22, 1992) a claimant was paid a cash advance in the third quarter, and the remainder of his wages in the fourth quarter. The cash advance was considered as payment, and the wages were credited to both the third and fourth quarters.

Example: A claimant (97 0772, April 18, 1997) was paid twice monthly. He argued that the six-day delay between the end of the work period and his payment was due in part to the fact that he worked in a remote location, and that therefore his wages should be reallocated to compensate for his being "geographically challenged." The Tribunal, in denying his request, held that he could not go contrary to the clear wording of the statute.

B. Earnings ratio

Law: AS 23.20.350(g)

The "earnings ratio" formula determines the number of weeks of benefits. Claimants whose earnings were concentrated in some quarters receive fewer weeks of benefits than claimants whose earnings were evenly distributed through the benefit year, on the theory that the latter claimants show a closer attachment to the labor market.

> Example: A claimant (98 0368, March 19, 1998) appealed receiving only 18 weeks of benefits because he had a job sharing arrangement where he took six months off in order to be with his ill mother. During this time period he was still connected with the employer, received his benefits, and paid his union dues. Nevertheless, the Tribunal concluded that the wage ratio formula was properly applied, as he was unemployed during the time in which he was not working.

C. Benefits in the Second Claim Year- Requalification

Law: AS 23.20.381(g)

Regulation: 8 AAC 85.255

To re-qualify for a second benefit year, the claimant must have performed services and earned at least eight times the weekly benefit amount of the first claim in wages. However, for the need for requalification to be operative, the claimant must have been paid benefits on the claim in the first benefit year.

> Example: A claimant (8913008, February 7, 1989) filed a claim upon which he was never paid. He filed a second claim but had earned less than eight times his weekly benefit amount since the first filing. He did not need to meet the requalification requirement.

Although the wages need not be covered under the provisions of AS 23.20.525, earnings from self-employment do not serve to meet the requalification amount.

> Example: In 98 1519, (July 30, 1998) a claimant filed for a claim on June 26, 1997. His last day of work was June 7, 1997. On June 26, 1998, he filed for a new benefit year. The only work he had done since that date was concrete labor for a private person. In denying the establishment of the new claim, the Tribunal held that the clear wording of the regulation said that earnings from self-employment could not serve to establish a new claim.

60.1 Allocation of Wages

A. Reallocation

Law: AS 23.20.530(a)

Regulation: 8 AAC 85.075(a)

a) Payment period greater than monthly

When the wages are paid less often than once a month, the wages may be reallocated to show monthly payments. Otherwise they are credited to the month in which they were paid.

Example: A worker (9027301, August 30, 1990) was paid later than within one month due to the employer's error. The Commissioner held that the wages were to be reallocated to the period in which they ought to have been paid.

Example: A school district employee was paid on a twelve-month contract. However, the June and July wages were paid at the end of May. The claimant requested that the July wages be reallocated to July. The Commissioner concurred with the Hearing Officer in denying the request, as Mr. Phelan performed no services in July. (9325025, February 4, 1994)

Example: A worker was ordinarily paid on the fifth and twentieth day of each month. However, for the month of June, she was paid on June 30, so that the employer could change the bookkeeping system. The Tribunal held that the wages could be reallocated so that she did not have to bear the brunt of the employer's convenience. (99 0045, February 4, 1999)

b) Final payment

Law: AS 23.05.140(b)

If the employer is the moving party in a separation, and does not make the final payment to the employee within three working days following separation, the final payment may be reallocated to the period in which they were due. (97 0239, April 29, 1997)

If the employee is the moving party, the employer is not required to issue the final payment within three working days, payment would not be reallocated to when due.

"Bonuses" which was formerly 3. below has been moved (see 375.075 Back Pay, Bonuses, Commissions, Loans and Draws, C. Bonuses.)

B. Extension of Base Period

Law: AS 23.20.376(a)

To receive an extension of a base period, a claimant must have been physically incapable of working in at least seven weeks during the calendar quarter.

Example: A claimant requested an extension of his base period. He had worked only 2.5 weeks in the last quarter of his base period, but it was not because he was unable to work. Therefore, the Tribunal denied the extension. (98 0520, March 27, 1998)

Example: In Swafford v. State of Alaska, Department of Labor, 4FA-95-969 CIP, March 1, 1996, a worker was unable to work for seven full weeks, which fell partly within one calendar quarter and partly within the next. The Court held that the clear meaning of the statute and regulations required that all seven weeks must be within a single calendar quarter.

Example: A worker was unable to work between April and December because she had to care for her twin sons who were born prematurely. The Tribunal held that only the personal incapacity of the claimant allows a base period extension. (98 1927, September 24, 1998)

Example: A flight attendant was unable to work in her usual position but was placed as a counter attendant and was able to do that type of work. She requested a base period extension because she could not work in her usual profession. The Tribunal held, in denying the request that an extension could only be granted if the person was unable to perform any work. (98 0736, April 30, 1998)

Example: A worker was unable to work fulltime for part of her base period. She was, however, able to work part-time. The Tribunal held that she could not receive a base period extension as she could at all times do some work. (98 2692, January 22, 1999)

75 CLAIMS, REGISTRATION, AND PROVISION OF INFORMATION

75.1 Claim for Benefits: General

Law: AS 23.20.345

Claimants are eligible to receive benefits with respect to any week only if they have claimed such benefits for the week according to the provisions of the Alaska statutes. The statutes, among other things, require that claimants must file according to the regulations. The word "filed" means that the claim must be submitted by electronic means using an Internet application or by telephonic means. The claim must be received by a proper authority or employee of the agency who is in a position to take unemployment insurance claims.

75.12 Claim for Benefits: New Claims

Regulation: 8 AAC 85.100

A. Effective date

New claims are effective with the Sunday of the week in which the claimant contacts the Claim Center to file an initial claim. There are rarely allowable reasons for backdating a new claim.

> Example: A claimant filed in the local office in May for job placement assistance only. When he later wished to backdate a new claim to the May date, the Commissioner held that the regulation did not allow this backdate. (9122650, January 29, 1992)
>
> The Commissioner confirmed limits on backdating, stating "There is no provision for backdating new claims, whether filed in person or by mail. The claim in question was a new claim and it cannot be backdated." (92227994, November 24, 1992)

Ignorance of the law is not a justification for backdating an initial claim. In 99 2621 (January 10, 2000), the Commissioner quoted McClure V. Township of Oxford, 94 US 429 24 L.ed. 129 (1877) cited with approval by the Alaska Supreme Court in Burnett, Waldock & Padgett v. CBS Realty, 668 P.2d 819 (Alaska 1983), saying

> "Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence."

Misinformation from non-official persons is not an allowable reason for backdating.

> Example: A claimant (Erley vs. State, 4FA-89-482 Civil, Super. Ct., January 25, 1990) relied on information from friends that he was not eligible. Later when he learned that he might be eligible for the time in question, he wished to backdate to the beginning date of his claim. The Court held that the misinformation by non-official persons was not a circumstance beyond his control and denied the request.

B. Backdating

There is no provision made for an individual who waits to file a claim. However three distinct situations may provide reasons for backdating when a claimant has taken the reasonable and necessary steps to file an initial claim with the division:

- The claim cannot be immediately accepted by the claim center and information was later submitted timely to the division;
- Refusal by the Claim Center to accept an initial claim when contacted by a claimant; or
- Claimant is exercising their filing options associated with a CWC claim.

1. The claim cannot immediately be accepted by the Claim Center

   The regulation allows when a claimant properly files an initial claim, but for whatever reason, the Claim Center is unable to process the application, a backdate is appropriate, if the claimant submits the completed application within 5 days.

2. Refusal by the Claim Center to accept an initial claim

   Never discourage a claimant who wishes to file from filing a new claim, whether the client is monetarily or otherwise eligible. Clients have a right to file and to receive an appealable monetary determination. If agency personnel discourage a claimant from filing, the claimant may have grounds for backdating the claim.

   > Example: A claimant testified that he attempted to file a new claim in August, but at that time was monetarily ineligible, and his testimony was that the claim had not been accepted. When he filed an eligible claim in October, he requested that it be backdated to October 1, the first day of his eligibility. Since he had not been adequately informed of the necessity to file on the first day of the new quarter of eligibility on his first visit to the office, the backdate was accepted. (9123537, March 1, 1992)

3. Alaska is assuming liability for a claim previously filed in another state.

   If Alaska is assuming the liability for a claim which was previously filed erroneously in another state, the claim should be backdated to the original new claim date of the claim in the other state.

C. Transitional claims

A new claim will be effective immediately after the end of a benefit year or the week of the applicable calendar quarter if a claimant is in continued claim status and files a new claim no later than seven days after the end of the benefit year or applicable calendar quarter; otherwise the new claim is effective the week of contact.

Weeks past the BYE or quarter change and before the new claim effective date are denied.

75.14 Claim for Benefits: Claim Extensions, Reopenings, Transitional, and Additional Claims

Regulation 8 AAC 85.100

The Sunday of the week in which the claimant first attempted to file for an extension, a reopened, or an additional claim should be considered as the effective date.

If a claimant is in continuous claim status, a transitional new claim is effective immediately after the end of a benefit year, if the claimant files a new claim no later than seven days after the end of the benefit year.

If the claimant does not file a new claim within seven days of the prior benefit year end, intervening weeks past the end of the old benefit year and prior to the new, are denied, and the new claim is effective the Sunday of the week in which the claimant contacts the agency to file the new claim.

> Example: A claimant attempted to file on January 23 in Kalispell, Montana, but was refused because he needed a pre-set appointment time. He filed on January 28, and requested a backdate for the week beginning January 19. Since he attempted to file, was refused by an employment service representative, and did file within five business days, his claim was backdated to January 19. (97 0340, March 12, 1997,)
>
> Example: On the other hand, a claimant failed to file her reopened claim in a timely manner. She moved to another state and did not reopen her claim, although she registered with the local office's employment services. She continued to file for benefits, expecting that the local office would report to the interstate unit that she had reopened her claim. When she talked to the interstate office on another matter, she learned that she needed to reopen her claim, which she did at that time telephonically. Benefits were denied for the time period before she reopened her claim, because she had been instructed in her claimants' handbook of the need to reopen a claim after traveling. (97 2271, November 3, 1997)
>
> Example: A claimant had a benefit year effective from December 13, 1996 to December 12, 1997. He reopened it effective November 23. Since the reopened claim could also have been used as a new claim, the Tribunal allowed the reopened claim to serve as a transitional claim as well. (98 0194, February 24, 1998)

Non-receipt or possible non-receipt of information can give good cause for failure to file for extensions.

> Example: A claimant received two notices telling her to reopen her claim and giving different dates by which to comply. She complied with one, and

in allowing benefits the Commissioner held that, having in effect given the claimant a second chance, the agency was then bound to honor that second chance. (9028865, January 16, 1991)

75.16 Claim for Benefits: Weekly Claim Certifications

Regulation: 8 AAC 85.102

Regulation: 8 AAC 85.110(d)

Claims for benefits or for waiting period shall be filed by an interstate claimant in accordance with the liable state's procedures.

A. Place of Filing

Claims sent by mail or by fax are considered to be filed by mail. Claims may also be filed telephonically according to procedures established by the director.

Claimants who travel may file by mail, fax, or telephone. A claimant who files for weeks prior to the travel from the new location by sending them to the original office is not subject to disqualification.

> Example: A claimant traveled to Seattle from Anchorage. While in Seattle, she mailed her claim for the two previous weeks, before she had traveled from the Anchorage area. The Tribunal held that the weeks had been properly filed. (97 0658, April 11, 1997),

B. Date of Filing

a) If the claimant did not work

Claimants must file their week claimed certifications within 7 days of the week ending date. Where the claims are filed bi-weekly, the claim must be filed within 7 days of the week ending date for the second week.

b) Date of filing for partially employed claimants

If the claimant worked and earned wages in the week, the weekly claim certification must be filed within 7 days of the date wages are paid for that week.

> Example: A claimant worked on a fishing boat getting ready to fish in the week ending January 17 and filed his form for that period on February 20. His earnings were based on a percentage of the catch. The Tribunal held that his claim was filed timely as he had earnings in the week and at that time had not been paid. (98 0386, March 18, 1998)

C. Late Filing

a) Duplicate claims

If a claimant has filed a timely week claimed certificate but it was not received by the agency, the claimant has 15 days to contact the agency about the status of the certification. After 15 days the claimant would have to establish good cause for failing to inquire timely. (97 2304, November 5, 1997)

b) Cause beyond the claimant's control

Late filing may be allowed for good cause beyond the claimant's control**,** including weather conditions that prevented timely filing. In the case of Borton (Borton vs. ESD, 1KE-84-620 CI, October 10, 1985) 88H-UI-008,) the Superior Court held, " . . . "a late claimant must show some quantum of cause; implicit is the requirement that the claimant's delay be caused by some incapacity, be it youth, illness, limited education, delay by the post office, or excusable misunderstanding, at the very least, and that the state suffer no prejudice."

Example: A claimant filed his claim late because he received the form late. He tried to file by VICTOR, but the system was not operational. He filed the following business day. The Tribunal held that his efforts to comply with instructions, coupled with the short delay gave good cause for failure to file timely. (97 2360, November 25, 1997)

Example: A claimant waited until the last two hours of the fourteenth day to file on VICTOR, when he found VICTOR inoperative. He then called and filed the next day, but did not notice the weeks he was claiming had changed. Nine days passed before he attempted to rectify the situation with his claims filing office. In denying benefits, the Commissioner ruled the circumstances surrounding the filing of the weeks, were not beyond the claimant’s control. (99 1142, September 24, 1999)

Example: A claimant filed her claim late because she went to Puerto Rico and was not able to get through the phone system there to file by VICTOR. She filed for the weeks in question when she returned to her home in Ketchikan three weeks later. The Tribunal held that she did not have good cause for failure to file timely. (99 0440, March 18, 1999)

c) Incorrect information or allowable misunderstanding

Under the regulation, receipt of incorrect information from the Division, or misunderstanding said information, provides good cause for the late filing of week claimed certifications. In the case of Barrow (88H-UI-008, March 8, 1988,) the Commissioner held, "It has been consistent holding of the courts of Alaska that claimants should not be held to the strict technicalities of the law [cite omitted]. I do not feel that claimants should be any more held to strict technicalities of procedure. . . ."

> Example: A claimant filed late because the travel instructions told him to file in his new area, and weather held up his plane, making him late to arrive. The Commissioner allowed benefits, as he had attempted to file timely and had been prevented by his misunderstanding of instructions. (9129525, February 27, 1991)
>
> Example: A claimant had twice been told that his claim was monetarily ineligible and it was foolish to continue filing. He had no reason to doubt the information as it was from an agency representative. He therefore did not file weekly certifications. When his employer later reported his wages, the claimant received an eligible monetary determination, and filed for the back weeks. The Commissioner accepted the late claims, holding that the claimant's misunderstanding, in view of the information he had received, was allowable. (9028308, November 14, 1990)
>
> Example: However, the Commissioner distinguished the case above, from that of a claimant who failed to file while appealing a monetarily ineligible determination. The Commissioner held that he was told to continue filing pending the appeal, and should therefore have known to continue filing while the issue was being resolved. (9227413, October 28, 1992,)

d) Non-receipt of mail or information

Non-receipt or possible non-receipt of information or mail can give good cause for failure to file timely.

> Example: A claimant had not received his Claimant Information Handbook because the Post Office had returned it as non-deliverable. The Seattle local office had told him to wait for word from Alaska, and he had made efforts to file, complicated by his language difficulties, his change of

address, and his not knowing whether to file against Alaska or Washington. The Commissioner, in allowing benefits, held, ". . . it is simply bad procedure to hold a claimant responsible for filing procedures which have not been explained to him, regardless of the reason for the late claims." (9224442, June 24, 1992,)

Example: Similarly, a claimant had trouble with mail delivery to her post office box. As soon as she received her claim, she filed it. The Commissioner held that she had filed as promptly as possible under the circumstances. (8920562, April 10, 1990)

e) Personal activities or circumstances within the claimant's control

Good cause does not include personal activities or circumstances of the claimant that are within the claimant's control.

Example: The Court found that a claimant (Griffith vs. State, Super. Ct., 4FA-89-0120 Civil, September 25, 1989) did not have sufficient reason for late filing; she was busy looking for work and appealing her denial of benefits.

Example: Similarly the Court held that a claimant (Fly v. Dept. of Labor, Super. Ct., 1JU-92-696, February 12, 1993) did not have sufficient reason for late filing; he had been confused and omitted the week in error.

D. Early Filing

Weekly claim certifications cannot be accepted for weeks before the opening of an initial claim.

Example: A claimant filed claims before the opening date of her initial claim. The Commissioner held that these claims could not be accepted. (8925070, October 5, 1989)

Weekly claim certifications cannot be accepted before the end of the week claimed.

75.3 Withdrawal of Claim

Regulation: 8 AAC 85.075(f)

Claimants may withdraw their claims at any time within the benefit year. They must repay all benefits that cannot be charged to a new eligible benefit year, and must have terminated any disqualification for refusal of work, voluntary quit, or misconduct by returning to work as described in AS 23.20.379(d) and 8 AAC 85.095(a).

> Example: A claimant requested that her claim be cancelled. Because she had been disqualified for having voluntarily quit work and had not purged that disqualification by having returned to work and earned eight times her weekly benefit amount, the Tribunal held that the claim could not be cancelled. (98 2031, October 14, 1998)
>
> Example: A claimant wished to withdraw his claim against Alaska in order to file a combined wage claim against Montana. He had been paid $780 on the Alaska claim, which the Tribunal held, he was liable to repay. (99 0119, February 22, 1999)

75.4 Waiver of Requirements

Regulation: 8 AAC 85.106(a)

The agency may waive or alter requirements to register and report when compliance with the requirements is oppressive or inconsistent with the purposes of the Act.

75.5 Provision of Information

Regulation: 8 AAC 85.104

A. Claimants to Provide Information as Requested

a) General

Claimants by regulation must provide the requested information.

Example: The Supreme Court in Falke v. Employment Security Division of the Alaska Department of Labor (AK S. Ct. No. 117, November 24, 1982) upheld the Commissioner and the lower court in finding that the denial of benefits because the claimant failed without good cause to complete the required forms was in order. The claimant contended that it was unnecessary for him to complete the form, as the information was contained on other forms he had completed. The Court and Commissioner disagreed.

Example: A claimant was requested by the agency to give medical information. Because he had not filed for the weeks in which he was unable to work, he did not think that it was necessary to do so. In denying benefits, the Tribunal held that Mr. Hubbard did not have good cause for failure to supply the information because, "It was within (his) control to supply information to the agency within allotted time frames, request deadline extensions, or question the agency concerning the validity of requests." (97 1822, November 25, 1997)

b) In response to audit request

Claimants are required to provide information to Quality Control auditors at their request.

Example: A claimant refused to give information to the Quality Control Auditor because he believed that he had already given all the information, and was afraid that he might perjure himself if his answers differed from what he had said previously. He also did not want his information given to the Federal government, felt the audit was an incursion on his time, and resented the implication that he might have been fraudulent in filing. The auditor attempted to allay his concerns, and told him he could see the forms that he had originally filled out. The Tribunal held that he

was disqualified until he complied with the auditor's request. (98 0807, May 28, 1998)

B. Information to be Accurate

The information that the claimants provide must be accurate.

Example: A claimant traveled to Florida in search of work. On his weekly claim certifications from Florida he answered "no" in response to the question as to whether he had traveled in the week claimed. By his so doing, the Tribunal held, in denying benefits for failure to report, he had prevented the agency from offering additional travel instructions. (97 0590, March 3, 1997)

C. Claimants to Certify Information is Accurate

Claimants must certify to the accuracy of the information provided to receive benefits. No one else may do this for them.

Example: A claimant attempted to file by VICTOR, but the system was down. She asked her friend to file on her behalf, which the friend did. In denying benefits, the Tribunal held that the regulation required that the claimant certify to the accuracy of the information, which she had not done. (98 0551, April 9, 1998)

D. Provision of Information to be Timely

Claimants are expected to respond to agency requests for information within the stipulated time lines. However, good cause for late response is interpreted liberally.

Example: A claimant reopened his claim on August 15, 1998. He was requested by the Claim Center to identify his last employer prior to that date. He procrastinated and failed to provide the information until February. The Tribunal held that a determination denying him benefits for failure to provide timely information was in order. (99 0329, March 16, 1999)

Example: Another claimant was sent medical forms to be completed. She was traveling in search of work and did not complete them by the date they were originally due. The Tribunal held that she had good reason for the late return of the information, and she was allowed benefits for the weeks in question. (97 0453, March 26, 1997)

Example: A claimant had trouble with his mail delivery, causing him not to receive a questionnaire sent by the agency. He followed up his non-receipt of benefits by calling the Interstate liable office. The

Tribunal held that his difficulties with his mail service and his efforts to follow up were good cause for his failure to give the information timely. (97 1465, August 7, 1997)

95 CONSTRUCTION OF STATUTES

95.05 General

As a rule, if not defined by the statute itself, each word in a statute bears its usual meaning. With respect to its own special purposes, each statute is self-sufficient. Other statutes, for other purposes, except where they are specifically cited, usually have little bearing upon the meaning of the unemployment compensation law.

Regulations cannot alter law. Properly adopted, published, and disseminated regulations have the full force and effect of law. **However, no regulation can properly add additional conditions or requirements or subtract them from the statute itself, except as the statute provides.** Employees of the agency cannot add to or detract from either regulations or statutes (87H-EB-162, June 18, 1987.)

Employees of the agency may not add to the requirements of the agency regulations to deny benefits to anyone who has met the actual requirements of the statute and of the regulations as they are written. Only the agency, through its capacity to write regulations, has authority to add requirements, and then the agency may make the regulation more restrictive than the statute, but not less.

95.1 Common Meaning

In interpreting a statute, give words their ordinary and everyday meaning unless they are otherwise defined. "While Alaska does not recognize the 'plain meaning rule' in statutory construction, the clearer the statute's meaning appears, the greater the burden of the party asserting a different meaning." (Swafford v. State of Alaska, Department of Labor, 4FA-95-969 CIP, March 1, 1996)

Example: Where the regulation provided that the vocational training waiver may be allowed if "other factors make training necessary for the individual to become or remain fully employable," the Commissioner interpreted the phrase "other factors" to mean "any factor which makes training necessary for a worker to become or remain fully employable." This phrase gives the Division broad discretion to waive availability and suitable work provisions and allow training if there are factors beyond those specifically enumerated in the regulation that make the training necessary for the worker to become or remain fully employable. In 88H-UI-096 (88H-UI-096, August 8, 1988), a claimant had not been dispatched by his union in over two years, and the projected number of available positions was expected to decline still further. This situation was an "other factor" as described in the statute and the Commissioner allowed the vocational waiver.

95.15 Construction with Reference to Other Statutes

One guide to interpreting a statute is by reference to other statutes with a similar purpose. "When a statute or a regulation is part of a larger framework, it must be interpreted in light of the other portions of the framework." (Swafford v. State of Alaska, Department of Labor, 4FA-95-969 CIP, March 1, 1996)

> Example: In the case of Henderson vs. Employment Security Division (Alaska Superior Court, 3PA-84-28 Civil, January 7, 1988), the claimant argued that there was no valid reason for the regulation (regarding travel.) The Court disagreed, stating that the regulation was consistent with and reasonably necessary to carry out AS 23.20.378, the authorizing statute.

95.2 Legislative Intent

Always take the intent of the legislature into account in the interpretation of the statutes as a whole. No interpretation contrary to that intent may be taken, nor may the clear wording of the statute be contravened. A strong indication of legislative intent is the distinguishing in the law between permissible and impermissible behaviors.

Example: The Commissioner held that the intent of the Legislature was to deny benefits to persons who were unavailable for work. The Legislature set ten credit hours as the benchmark to distinguish between availability and non-availability. (88H-UI-109, April 20, 1988)

Example: In the case of Henderson vs. Employment Security Division (Alaska Superior Court, 3PA-84-28 Civil, January 7, 1988,) the claimant argued that, in allowing travel for certain purposes, the legislature had intended to allow all travel. On the contrary, the Court held that, in stipulating some kinds of travel, the legislature intended to limit allowable travel to only the stipulated kinds.

95.3 Statute as a Whole as an Aid to Construction

Consideration of the statute as a whole, or of parts of it, may serve as a guide in the interpretation of a particular provision.

Example: A claimant had worked for two educational institutions in the preceding year and had reasonable assurance of returning to work with only one. In denying benefits the Commissioner held that the legislative intent was to deny between-terms benefits to all employees who received wages based on services for an educational institution. (88H-UI-225, January 31, 1989)

95.35 Strict or Liberal Construction

Law: AS 23.20.005(a)

The statute is generally required to be interpreted liberally to accomplish payment of benefits, unless the claimant is clearly not entitled to receive them.

Ignorance of the law is not generally an excuse for failure to comply with it, and, in theory, claimants are presumed to have read the unemployment compensation law and its regulations, and therefore to be fully aware of the law and the procedures by which they may claim and receive benefits. However, the employment insurance law is complex, and legal precedents allow some leeway. In the case of Estes V. DOL, 625 CCH UI Reports AK §8078, January 30, 1981, the Supreme Court in mandating a liberal interpretation, quoted a California case to say, "The law deals with a class of persons for whom the Legislature has expressed a particular concern and with a class of persons who are highly unlikely to be skilled either in law or in semantics, and, thus, particularly dependent on the administrative agency to help them in securing the benefits that the law provides."

> Example: In 88H-UCFE-044, June 7, 1988, an agent state office person told the claimant to continue filing to her local office. The claimant did so, mailing the claim to her daughter to file for her, as neither she nor the agent office had the correct local office address. In his decision allowing benefits, the Commissioner held that "[the claimant] was given incorrect instructions by the Ukiah office, an office she reasonably could expect to give her correct instructions, and she followed those instructions. The fact that she may have mailed her claim to her daughter instead of direct to the Fairbanks office is not, under the circumstances, of such a dire digression of the reporting requirements as to require reversal."

Sometimes, a misunderstanding of agency instructions may be an allowable reason for a claimant error.

> Example: In Toper v. State (Superior Ct., 3AN-89-720 Civil, January 10. 1990), the claimant wished to withdraw his claim later than the period stipulated by law. The Court held that, although the claimant's handbook gave the explanation of withdrawal, it was separated by the factors that determine its necessity by twelve pages, so that the claimant did not see the significance of the conjunction of the elements.

> Example: A claimant (9120085, June 7, 1991) followed the advice of the agency representative, rather than the information in the claimant handbook. The Commissioner, in allowing benefits, held: "(W)e would expect a claimant to follow the specific advice of an office representative over that contained in the claimant information handbook."

Example: Another claimant, (9026281, April 10, 1990) was several times told that his claim was monetarily ineligible before he at last received wages from an out-of-state employer. The Commissioner held that the confusion this caused was sufficient reason for the claimant's late appeal.

Example: On the other hand, when a claimant (9027175, June 7, 1990) requested a one-year backdate of his claim, the Commissioner, held, based on the testimony given, that there was insufficient evidence that an agency representative had discouraged him from filing what at the time was a monetarily ineligible claim.

A claimant who relies on advice given by unauthorized persons bears the responsibility if that advice is incorrect.

Example: In 76A-1484, the claimant did not file unemployment insurance claims while participating in a labor dispute because his fellow workers and union officials told him, that it would do no good to file. He did not contact any representative of the Employment Security Division of the Alaska Department of Labor to verify this information. The Tribunal upheld the denial of benefits because the claimant had not relied upon agency information in making his decision.

The plain wording of the statute cannot be contravened to secure a liberal interpretation.

Example: In the case of McCulley vs. Alaska Department of Labor, Superior Ct., 3AN-90-7980, Civil, May 13, 1991, the worker had been paid wages in one quarter, even though he had worked in two. He argued that the statute should be liberally construed to award him benefits, although he did not meet the terms of the statute. The Court disagreed, holding that it could not contravene the plain language of the statute.

120 ALLOWANCE FOR DEPENDENTS

Law: AS 23.20.350

Regulation: 8 AAC 85.075(d)

To receive dependent allowance, the dependent must be:

- Unmarried,
- Under 18 years of age, or
- Dependent upon the claimant and unable to work because of a permanent disability.

A. Number of Dependents Claimed

The claimant may claim no more than three dependents on any claim.

Both parents with whom the child is living may claim the same child or children, up to a maximum of three on each parent's claim. And if the noncustodial parent furnishes more than 50% support they may also receive dependents allowance for the same child that is being claimed by the custodial parents.

B. Time in Which Claim Made

A claim for a dependent allowance must be made before the end of the benefit year, and also before the claimant exhausts regular benefits. The dependent may be added at any time; the effective date is the week the request is made.

> Example: A claimant's natural son came to live with him during his benefit year. The claimant requested that allowance for dependents be added. The Commissioner held that 8 AAC 85.075(d), which allows an additional allowance for dependents acquired during the benefit year by birth or adoption must be read to harmonize with the statute (AS 23.20.350(f).) Since the statute clearly allows any additional dependent, the regulation must be read to allow the addition of any otherwise eligible dependent. The allowance for dependents for the new dependent begins with the Saturday of the week the request is made. (9227292, October 12, 1992)

> Example: A claimant telephoned the local office to ask if the birth of his child affected his claim. He was (incorrectly) told by an Employment Services representative that the child could not be added until the start of a new benefit year. The Tribunal allowed the allowance for dependents from the time that the claimant first requested it. (97 1314, June 20, 1997)

C. Relationship of Dependent to Claimant

The dependent must be the claimant's unmarried child, stepchild, legally adopted child, or legal ward.

> Example: A claimant attempted to claim for allowance for dependents the child of his fiancée, who was living with him. As the child was neither a child of the claimant, a stepchild, a legally adopted child, nor a legal ward, the Commissioner upheld the Tribunal in denying the allowance for dependents for this child. (9027066, July 19, 1990)

> Example: A claimant wished to receive allowance for dependents for his wife and himself, as he could do under Federal income tax statutes. The Tribunal held that the unemployment insurance law defined dependents differently, and it was that law that was applicable. (8913033, February 6, 1989)

a) Legal relationship

Parents of a legally adopted child may claim dependents allowance. If the birth certificate is unavailable, court documents certifying the adoption has been completed are acceptable. Documents may be from a state court, tribal court, or tribal council if the adoption is under the Indian Child Welfare Act.

> Example: Another claimant, wished to claim a child whom she was in the process of adopting, who had lived with her since shortly after the child's birth, and for whom she had power of attorney. Since the adoption was not final, the Commissioner held that, "[T]he term dependent <u>means</u> unmarried child, step-child, legally adopted child, or legal ward. It would have been a simple matter for the Legislature to include a child for whom the claimant stands in place of a parent, or has custody, or provides for the child's welfare. It has not done so. The Department could not supply this omission, even if it believed that it would be good policy to do so. . . . We have no authority to award allowance for dependents for any but the four classes included in the definition." (9226870, September 9, 1992)

A legal ward is a dependent that has been placed in the custody of a guardian by a **court order**. Either a Tribal or State court may have jurisdiction, but the order must be executed and recorded in writing by a judge of the court. In some instances a Tribal Council may serve as the Tribal court.

Example: A claimant wished to receive an allowance for dependents for her niece who lives with her. The claimant was appointed her niece's temporary guardian by the court and is her sole support. The Tribunal held that the claimant was eligible for an allowance for her niece. (97 1210, June 6, 1997)

Example: A claimant filed for dependents allowance for her three grandchildren whom she cared for and provided sole support. Her son had executed a notarized power of attorney giving her temporary guardianship. Because she was not given legal custody through a court order, the Commissioner held they were not legal wards and did not meet the agency definition of a dependent. (02 1340, June 28, 2002)

A power of attorney, temporary guardianship agreements, or designation of Indian custodian, even if witnessed by a notary, or contained in a will are not enough to make the dependent a legal ward. A foster child is not a legal ward of the foster parent; a foster child is a legal ward of the agency placing the child.

Example: In denying dependents allowance for a claimants grandson, the Commissioner stated "The law does not speak in terms of responsibility, but in terms of 'legality.' A legal ward is one who has been placed into a person's custody by court order. There is no indication that any court has declared the grandson to be a ward of (claimant)." (86H-UI-316, December 10, 1986)

Guardian is defined in AS 13.06.050(20); ward is defined in AS 13.26.005 (13).

D. Custody or Support Requirement

At the time the allowance for dependents is claimed, the claimant must either have lawful physical custody of the dependent, or furnish more than 50% of the dependent's support. If the claimant has legal physical custody, the claimant need not furnish any support.

a) Legal physical custody

Legal physical custody has two parts: **the child must be physically with the person claiming the child as a dependent, and the person must legally be responsible for the child.**

a) Legal custody

When the parents are married to and living with each other, and the child lives with them, both parents have legal physical custody of the child and both can claim the child as a dependent.

b) Custodial parent

If the parents are divorced or legally separated, the court usually grants custody to either or both of the parents. The parent to whom the court has granted custody is the custodial parent. The non-custodial parent must provide financial support even if the child is physically with the claimant when the claim is filed.

> Example: A claimant's natural son came to live with him during his benefit year. The child's mother had legal custody of the child. She signed a notarized statement transferring the custody to the claimant. The Commissioner held that: The claimant in this case does not have legal custody, because custody was awarded to his ex-wife by a court of jurisdiction, and there is no evidence of any court-ordered modification of the custody decree. The court's decision cannot be nullified by the unilateral action of one of the parties, such as the notarized statement submitted at the hearing. . . . This temporary custody could be revoked at any time by the lawful custodial parent. . . . We conclude that the Legislature intended a more stringent test, i.e., relatively long-term, stable physical custody or majority support.
>
> However, since the claimant was paying child support until the child came to live with him, and after that was the sole support, the Commissioner held that the claimant was furnishing more than 50% support, and granted allowance for dependents. (9227292, October 12, 1992)

c) Joint custody

If the court has awarded joint custody, both parents have equal custodial rights, and the child is equally in the custody of either parent. Therefore the parent with whom the child is living at the time the parent files a claim is the custodial parent.

> Example: A claimant had joint legal and physical custody of her children with her ex-husband, and each paid 50% of the children's support. Since the father had physical custody of the children at the time she filed the claim, the Commissioner upheld the Tribunal in denying allowance for dependents. (8822157, November 10, 1988)

d) Third party custody

A child who is living outside the parent's home is in the lawful custody of the parent if the arrangement is controlled by and can be revoked by the parent. If a court has ordered that the child be in that place, the parent does not have custody. In either case, if the parent furnishes more than 50% of the financial support of the child, the parent may claim the child as a dependent.

Example: If the child is attending boarding school, the parent may claim the child for allowance for dependents. On the other hand, if the State has placed the child in a State home or institution, the parent no longer has custody and may not claim the child, unless the parent can prove more than 50% support.

b) Financial support

If the claimant does not have lawful physical custody **at the time of filing**, the claimant must furnish more than 50% support of the child. The statute allows for either physical custody **or** financial support and **at no time requires both**.

c) Proof of support

Proof of the support may be by a notarized statement from the person with physical custody of the dependent, or by other convincing documentation.

Example: In the case of Connolly v. State, 4FA-88-591 Civil, Superior Court, March 21, 1989, the Court held, "This regulation (8AAC 85.075(d)(5)) does not provide that only one kind of evidence is required to prove eligibility. Rather, it provides that many different kinds of evidence may be used. While it may be true that the Department may find some types of evidence more persuasive than others, it is unreasonable to insist that only one piece of evidence is permitted. Getting a statement from an angry and uncooperative ex-spouse is often impossible. However, there may be many other kinds (of) evidence that are available to prove eligibility."

Example: In Beaudry v. State, 3AN-90-6486-CI, Superior Court, March 15, 1991, the claimant requested allowance for dependents for his three children. He did not have physical

custody of the children at the time he filed his claim. He was divorced and had custody for the summer, and was under a court order to pay for their support. The claimant did not furnish a notarized statement from his ex-wife that he furnished more than 50% of the support of the children nor other documentary proof that he had given such support. The Court upheld the Hearing Officer in finding that he had not furnished sufficient evidence of support. The allowance for dependents was denied.

Example: A claimant had two dependent children for which he was paying child support of $65.60 per week in addition to furnishing clothes and toys. In denying the allowance for child support, the Tribunal held that, lacking a statement from the children's mother to the contrary, that amount of money did not constitute more than 50% support. (98 2376, November17,1998)

160 EXTENDED BENEFITS

160.05 Eligibility for Benefits

A. Eligibility

Law: AS 23.20.406(h)

To be eligible for Extended Benefits (EB), a claimant's current unemployment insurance claim may not include any unpurged disqualification imposed as a result of a discharge for misconduct or voluntary leaving, or a suitable work refusal.

B. Purge of Disqualification

Law: AS 23.20.379(d)

Regulation AS 85.095(a)

A claimant who has been disqualified from receiving benefits because of voluntary leaving work without good cause, misconduct in connection with the work, or failure to apply for or to accept suitable work is not eligible for EB. The claimant can purge the disqualification by returning to work during the disqualification period and earning eight times their weekly benefit amount, or possibly through a timely appeal process. No other factors or circumstances may be considered (98 0622, April 7, 1998.)

C. Filing from another State

Law: AS 23.20.406

If a claimant is filing from another state during a time in which Alaska is in an EB-on period the claimant may only receive two weeks of EB unless:

- The state where the claimant is filing from is in an EB-on period; or
- The claimant returns to Alaska; or
- The claimant moves to another EB-on state.

Example: A claimant filed for benefits from California during a period in which Alaska was in an extended benefit period and California was not. The Tribunal held that he was only eligible to receive two weeks of extended benefits. (98 1039, May 21, 1998)

160.1 Work Search

Law AS 23.20.406

A. Work Search Requirement

While receiving EB, claimants are required to furnish "evidence in writing to the department that the individual has engaged in a systematic and sustained effort to obtain work during that week." Claimants are therefore required to make a minimum of one documented work search each week while on EB.

> Example: A claimant while receiving extended benefits did not make weekly work searches. The Tribunal held that he was properly denied benefits for those weeks and until either he received a new claim or until he had gone back to work and earned four times his weekly benefit amount. (98 1045, July 6, 1998)

Claimants who travel may be required to report more work searches than if they do not travel.

The following are considered valid work searches:

- contact with a person who has the authority to hire;
- submitting an application or resume to an employer (need not be in-person); or
- if in Alaska, applying for a job online in the AlaskaJobs System

Per federal regulation (20 CFR 615.2(o)(8)), the following work searches can be made in addition to those listed above but **are not considered valid** while on EB:

- work searches made at a state employment service office;
- private employment agency where a fee is charged; or
- unions and hiring halls;

Additionally, calls to the UI Claim Center or seeking self-employment are not valid work searches.

Claimants who do not meet the requirements are not required to claim benefits for the week. However, claimants may not withdraw the week in question once it has been filed.

> Example: A claimant did not show sufficient work searches. She asked to have her claim for the week in question withdrawn. The Tribunal held that this was not permitted by the statute. (97 1363, July 17, 1997)

B. Exceptions to Work Search Requirement

a) Jury duty

Claimants who are serving on a jury are excused from the extended benefit work search requirement. However, the compensable status provision still applies, and the claimant who is not in compensable status may not be paid.

b) Hospitalized for an emergency or life-threatening condition

Claimants who are hospitalized for an emergency or life-threatening condition are excused from the EB work search requirement. This only applies to the claimant's hospitalization.

> Example: A claimant did not show sufficient work searches because she was concerned about her grandmother who was hospitalized for an emergency injury. The Tribunal held that only the claimant's own emergency or life-threatening condition qualified for the exemption from the work search. (97 1363, July 17, 1997)

A claimant, who is unable to work due to an illness or injury and qualifies for a waiver of availability from the Department, must still make a work search during the week unless hospitalized for an emergency or life-threatening condition.

c) In approved training

A claimant who is in vocational training approved under AS 23.20.382, is excused from the EB work search requirement.

d) Working part-time

A claimant who works for an employer during the week has met the EB work search requirement.

160.2 Suitable Work

Law: AS 23.20.406

A. Work Prospects "Good"

A claimant who is able to show a return-to-work date within two weeks is considered to have good work prospects and is held only to the suitable work standards of AS 23.20.385.

B. Work Prospects "Not Good"

A claimant who is not able to show a return-to-work date within two weeks is considered not to have good work prospects and is required to accept any work that is within the person's capabilities, pays at least the minimum wage and at least the claimant's weekly benefit amount, meets the standard definition of acceptability, and is either offered in writing or listed with Employment Services.

a) Within the individual's capabilities

For a claimant to be denied under the extended benefits program for failure to accept suitable work, the job must have been within the claimant's capabilities; that is the claimant must be mentally and physically able to do the work. The fact that the work is at less than the claimant's usual skill level is immaterial.

b) Minimum pay

For a claimant to be denied under the extended benefits program for failure to accept suitable work, the job must pay:

- more than the weekly amount of the claimant's benefits; **and**
- at least the state or federal minimum wage, **whichever is greater**.

c) Work meets standard definition

a) The opening may not be vacant due to a strike, lockout, or labor dispute;

b) The wages, hours, and conditions of work must be prevailing for similar work in the locality; and

c) The worker may not be required to join a company union or to resign from or to refrain from joining a bona fide labor union.

d) Offered in writing

For a claimant to be denied under the extended benefits program for failure to accept suitable work, the job must have been offered to the claimant in writing;

or

e) Listed with employment services.

260 INTERSTATE RELATIONS

Law: AS 23.20.090

The Alaska Department of Labor has entered into agreements and contracts with similar agencies of other states, Canada, and the federal government that allow for reciprocal activities.

Clients may file claims for unemployment compensation benefits against any state or Canada from (and in) any state or Canada. The liable state is the state or agency against which the claims are made, while the agent state is the state through which the client files the claim. The claims taken by the agent state are forwarded to the liable state for processing and determination. Increasingly, states are permitting the direct filing for benefits by telephone while the claimant is living in another state, thus bypassing the agent state activities. **In addition, the wages earned in one state may be combined with those from other states (but not with those earned in Canada) to make an eligible claim.** These wages are computed according to the laws regarding coverage and computation period in the state in which the wages are earned and then used by the paying state according to its laws regarding base period and benefit calculations.

> Example: A claimant earning wages on a fishing boat that were covered in Washington could use those wages as part of establishing an Alaska claim, even if the fishing wages earned in Alaska are not covered.
>
> Example: Alaska would transfer and Washington would use wages earned in Alaska in a Washington alternate base period claim although they might not be in the base period of a claim filed in Alaska.
>
> Example: A claimant requested that wages earned and hours worked between June 16 and 30, but not paid until after July 1, be transferred to Washington as second quarter wages to establish sufficient Washington hours for a valid claim. Since Alaska law requires that wages be credited when paid rather than when earned, the hours and wages could not be transferred. (890001, March 8, 1989)

Claimants must show the same standard of proof for the existence of usable wages to be combined on an interstate claim as they must for wages used for a claim filed based on earnings in a single state.

> Example: A claimant filed an appeal for missing wages for his Washington claim. His proof of his earnings had been lost in a fire and the employer had no records. Based on his lack of written substantiation of any kind, the Tribunal denied the transfer of wages. (891009, August 30, 1989)

If a claimant earned wages for the same employer from work in more than one state in the same base period, the wages are credited to an appropriate state through laws that

are the same in each state, so that claimants can be assured of similar treatment, no matter in which state the claim is originally filed.

340 OVERPAYMENTS

340.1 Fraud or misrepresentation

Law: AS 23.20.387

Law: AS 23.20.485

A. Distinction Between AS 23.20.387 and AS 23.20.485

The distinction between AS 23.20.387 and AS 23.20.485 is one of agency policy. Cases carried forward under the provisions of AS 23.20.485 are pursued in the criminal courts by the Benefit Payment Control Section.

B. Statute of Limitations

Law: AS 09.10.120

In the case of fraud, the six-year statute of limitations begins at the point when the fraud was discovered, regardless of when it was committed (97 0842, August 12, 1997.)

C. General

A claimant who, to obtain or increase benefits, misrepresents a material fact by making a false statement or withholding information may be denied benefits.

a) Evidence to be documented

The evidence of misrepresentation must be documented. A purely verbal misrepresentation may not be used; there must be written evidence.

b) Material misrepresentation

The misrepresentation must involve a material fact. The Court explained in Charron vs. State (3PA92-208CI, February 23, 1993) that a material fact is one that is "relevant to the determination of a claimant's right to benefits; it need not actually affect the outcome of that determination."

Example: A claimant (97 0600, June 1, 1997) gave as her reason for separation from her last employer that she had been laid off, when she knew that in fact she had been discharged for theft of more than $50. In finding that she had committed fraud, the Tribunal pointed out that the Unemployment Insurance Handbook, which she had

received, specifically gave that as an example of fraud, and the finding in that matter was already final, even though Ms. Renfro contended that she had not committed the act.

Example: A claimant failed to report that he was attending academic schooling. In finding that he had committed fraud, the Tribunal pointed out that the Unemployment Insurance Handbook, which he had received, specifically gave that as a matter to report. (97 0842, June 4, 1997)

Example: A claimant did not report employment and earnings because he only worked one day and believed that he did not have to report wages below the $50 threshold as they were not significant. The Tribunal held that the wages (and the separation from the employer) were material and that false answers to the clear questions of the weekly claim certification were willful intent to defraud. (97 1755, August 29, 1997)

c) Willful misrepresentation

The misrepresentation must be shown to be willful by a preponderance of the evidence.

Example: In Charron vs. State (above), the claimant did not report work and earnings. The Court found his argument that he did not know what his earnings were to be unpersuasive, since he did not go back to report the earnings after he knew what they would be.

Example: In 9121667, December 6, 1991, the claimant pre-dated his claim and sent it in without showing the work and earnings for the week. The Commissioner held that the pre-dating did not absolve him of error, on the grounds that "A claimant is just as responsible for truthfully completing an improper claim as one that is properly filed." The Commissioner further held that "confusion and misunderstanding . . . mitigate a determination of fraud," but in this case, neither was shown.

Example: 912999 deleted.

Example: A claimant (97 0842, August 12, 1997) failed to report that his earnings because he was working on a volunteer basis and did not know if he would be paid. The Commissioner upheld the Tribunal in finding that this was persuasive in the first instance, but thereafter he should

have expected the payment to continue, and reported the wages, so that he was guilty of fraud after that time.

Example: A claimant (97 1658, August 18, 1997) claimed benefits for weeks in which he significantly under-reported his earnings. He claimed that he was advised by others on how to fill out his claim form as he had insufficient command of English to read the forms himself. However, he was able to compute, and did understand the relationship between the earnings that he reported and the benefits he received. In holding that the misrepresentation was willful, the Tribunal said, "[I]nability to read does not confer automatic immunity from providing accurate information on unemployment insurance claim certifications."

Example: A claimant (97 2395, November 21, 1997) did not report work and earnings because she did not think she had to as the jobs were brief and temporary. In finding that she had committed fraud, the Tribunal held that the weekly claim certification gave no reason to make such distinctions.

Example: A claimant (97 2352, November 21, 1997) completed her claim form showing that she had been laid off from her job when she had in fact been fired. She was on medication for schizophrenia, and had poor reading skills, so her mother filled out her claim form for her. In finding her not guilty of misrepresentation, the Tribunal held that the combination of circumstances kept her action from being willful.

Example: A claimant (99 0076, February 10, 1999) filed through VICTOR. She stated that she reported that she had worked, and the hours that she worked. The Tribunal held that she knew, or should have known, when she continued to receive her full weekly benefit amount that there was something wrong, as she was earning more than $200 per week. The tribunal concluded that she had committed fraud.

If a misrepresentation is both willful and knowing, the claimant's reason for making it is generally immaterial.

Example: A claimant (9425684, April 4, 1994) concealed his earnings on his claim form in order to recoup benefits in November and December of 1992 which he had not been paid and which he felt were due to him. The Commissioner held that the reasoning was unjustified and found that he had claimed fraudulently.

d) Misrepresentation to obtain benefits

There must be evidence that the claimant intended misrepresentation to obtain benefits. **Usually the evidence is simply that the claimant made a false statement or misrepresentation, received the money for the week in question, and did not report to the Department that the money was received in error.**

The Commissioner stated in Morton (79-H-149, September 14, 1979,) "A presumption of intent to defraud arises on the basis of a falsified claim instrument itself. The division's claim form has but one purpose. It is the instrument executed by an individual desirous of receiving unemployment insurance benefits for a specific week. To this end, it contains clear and unambiguous language detailing the material factors upon which the division will base its decision to pay or not to pay. In addition, the individual completing the form certifies as to the truth of the answers and as to his understanding that legal penalties otherwise apply. Thus, once established that a claim instrument has been falsified, the burden of proof shifts to the individual [to establish there was no intent to defraud.]"

Example: In the case of 9325383, (February 4, 1994), a claimant, while filing for benefits, reported over a period of time less earnings than she actually made. She stated that she did so because she did not know at the time she filed her weekly report what her actual earnings would be. The Commissioner confirmed the Hearing Officer in finding that her failure to correct the errors was a preponderance of evidence of willful intent to defraud.

Example: However, a claimant (97 1062, August 12, 1997) estimated her earnings because in the past she had done so, and the agency had billed her for any discrepancies in their favor. The agency representative testified that this was no longer their practice. As her first language was not English, and she had followed this method in the past without penalty, the Commissioner held that she had not misrepresented her earnings in order to obtain benefits.

Example: In 97 0395, (March 18, 1997,) the claimant gave power of attorney to a friend who was living with him. After he left to return to work, the friend continued to file for benefits, cashed the checks, and kept the money. The claimant believed that the power of attorney had expired. In any case, the Tribunal held that the power of attorney did not allow the agent to operate for her own profit. He was not responsible for the actions of the agent when she was acting

for her interest and not his. Misrepresentation was not shown.

Example: In 98 2612, (December 23, 1998.) a claimant went to Oregon to work. His girlfriend continued to file claims in his name and deposit the money in their joint bank account. Although there was no sufficient evidence to show that the claimant knew of the fraudulent filing, he benefited by having the money available to him in the joint account. The Tribunal therefore held that he was liable for the repayment of the benefits, although he had not received the money fraudulently.

340.2 Restitution

Law: AS 23.20.390

Regulation: 8 AAC 85.220

A. General

A claimant who has been overpaid must repay any benefits paid in error.

a) Claimant's personal liability for restitution

The claimant must repay the benefits; no third party may be required to do so. Nor can the claimant claim restitution on the basis of the claimant's voluntary failure to file for previous eligible weeks.

> Example: A claimant argued that, since she had been overpaid due to a back payment award from the Post Office, that employer should be liable to repay the overpayment. The Commissioner disagreed. (9229937, January 28, 1993)

> Example: A claimant suggested that, as he had not filed for weeks for which he had been eligible, those unfiled weeks be used to offset his later overpayment, as he had voluntarily declined to file for them because he did not need the money. Although the Commissioner commended his behavior in not filing, he found that Mr. Brandt's suggestion was not viable, as it was too late for him to claim the weeks in question. (9227069, October 22, 1992)

The claimant must repay the full amount, even if part of the benefits were paid to a third party, such as the Internal Revenue Service or Division of Child Support Enforcement.

> Example: A claimant was overpaid benefits. Part of the money was paid to the Internal Revenue Service on his behalf. He was required to repay the full amount. (97 1281, July 11, 1997)

b) Repayment required in full

Claimants who receive benefits because of misrepresentation must repay them in full, even if the misrepresentation only affected part of the payments.

> Example: In Charron vs. State, (3PA92-208CI, February 23, 1993) the claimant argued that he should not have to repay

the full amount of the benefits as his (unreported) earnings would have caused only a partial reduction. The Court held that the law completely disqualifies an applicant who withholds a material fact.

c) Penalty for fraud

Claimants who knowingly misrepresent material facts are subject to pay an additional penalty of 50% of the amount of benefits received by the misrepresentation.

Example: A claimant filed fraudulent claims for benefits for weeks ending October 4 through December 20. She filed for waiting week credit for week ending October 4. She was paid for the week ending December 27, which, if she had filed correctly, would have been the waiting week. The Commissioner held that the penalty applied to the waiting week as well as the weeks actually paid. (98 1091, January 14, 1999)

d) Without fault

The claimant is without fault if the claimant gave truthful information, and if the claimant did not know, nor reasonably should have known, that the claimant had received benefits without being entitled to them.

a) Provision of complete and truthful information

The information the claimant gives must be truthful, both in what it actually says and by the inclusion of all necessary facts.

Example: In Credo v. Department of Labor (1JU-89-1619-CI, Superior Court, April 9, 1990), the claimant stated that he was not able to work for the week ending April 8, 1989. After that date, he said that he could work, although for the same period he had applied for social security disability, worker's compensation, and other benefits, stating that he was not able to work. Mr. Credo said that his mental state was such that he was not able to realize that he had been overpaid. The Commissioner, upheld by the Court stated (Credo, 8924953, October 13, 1989), The claimant “was able to file rationally for full disability benefits, he knew that his doctor had told him that he must quit two of his three jobs, and he knew, when he filed for unemployment insurance benefits, that he was not able to go back to work."

Based on this same reasoning, the Court held that he should have known he was misstating his availability and upheld the requirement that he repay the improperly paid benefits.

b) Receipt in good faith

The claimant must meet the even more stringent criterion of receiving the benefits in good faith. The latter may be compared to a person who files an Income Tax return and receives a refund of one million dollars. Although the person filed a truthful return, the person did not receive the refund in good faith, as the person knew, or should have known, that the refund should not be of that magnitude.

Example: In another case the claimant correctly reported that she had left her last job, but it was not adjudicated as a voluntary quit without good cause until she reopened her claim eight months later. She had no way of knowing that she was not eligible for the extended benefits she had received in that period. The Commissioner held that she had received the benefits in good faith. (9224925, May 27, 1992),

Example: A claimant reported that he worked fulltime for two weeks, but was paid benefits for those weeks in error. He cashed the checks, although he knew that he was not entitled to the money. The Tribunal held that he knowingly defrauded. (98 1941, September 25, 1998)

B. Restitution through Offset

a) General

Claimants who are currently filing can repay improperly paid benefits simply by filing for additional weeks. The division automatically credits the owed benefits against the debt until it is satisfied. Thus, a claimant who for a week was incorrectly paid in February and claimed a week in April for the same weekly benefit amount has the money withheld to satisfy the overpayment. In any case, the claimant may request a waiver of the overpayment within 30 days from the date the determination becomes final.

b) 50% offset

If a claimant was without fault in the receipt of improperly paid benefits, the claimant may request that the offset be at the rate of 50% of the benefits, if there was sufficient balance in the claim to repay the total amount at that rate at the time the overpayment was established.

C. Request for Waiver of Overpayment Liability

a) General

A claimant may request a waiver of the restitution of the overpayment. Two factors determine whether this waiver may be granted:

- First, the claimant must be without fault in having received the benefits.
- Second, even if the claimant was without fault, the claimant must show:
    - that it creates a hardship to make restitution, or
    - that to require the claimant to make restitution would be against equity and good conscience.

b) Restitution requirement against equity and good conscience

If a claimant was without fault, and received benefits improperly, in most cases requiring the claimant to make restitution is against equity and good conscience. This is especially the case when the claimant has limited financial resources with which to make the restitution.

> Example: A claimant properly reported his pension income, which was not however deducted through an agency error. The Commissioner held that it was against equity and good conscience to require him to repay the incorrectly paid benefits. (96 0890, July 19, 1996)

c) Restitution would create great hardship

Even if the claimant received the benefits in good faith, the claimant must also show that restitution of the benefits would create great financial hardship, including the income of all family members of the household and all necessary expenses.

> Example: A claimant received a disability pension from her last employer which was given to her retroactively, creating an overpayment. As she had told the ES representative that she expected to receive the disability payment, she had

received her benefits in good faith. She did not mention, because she did not know, that she would receive retroactive payments. However, since her income was sufficient to cover the repayment of the overpayment, it would not create great hardship for her to make the monthly repayments, and therefore the Commissioner upheld the Tribunal's denial of the request for the waiver of overpayment. (98 0623, July 2, 1998)

d) Waiver may not exceed benefits due

The director cannot waive the overpayment in such a manner as to allow the claimant to receive either a greater weekly benefit or a greater total benefit amount than the claimant was originally entitled to receive.

Example: A claimant requested a waiver of her overpayment. Although she had received the benefits in good faith, there was no hardship shown in her repayment. Further, were the waiver to be given, she would have received benefits in excess of her total benefit amount. The Tribunal therefore denied the waiver. (97 2531, December 17, 1997)

e) Waiver of Overpayment Penalty

Per AS 23.20.390(f) the penalty assessed due to fraud or misrepresentation may not be waived.

375 RECEIPT OF OTHER PAYMENTS

375.05 General

A. Payment for Services

For a discussion of allocation of wages, see MS 60.1 Allocation of Wages.

Generally, receiving payments from a past or present employer will not cause claimants to be denied benefits unless the statute itself specifically mentions the type of such payment as disqualifying. However, some of these payments may indicate factors affecting a claimant's willingness to work or availability for work.

a) Wages

AS 23.20.530(a) defines the term "wages" as any remuneration that a claimant receives for the performance of services.

The formulae in AS 23.20.505(a) and AS 23.20.360 are equivalent. Under either provision, the claimant is allowed earnings of up to $50 without deduction. After subtracting the first $50 from the earnings, the benefits are reduced by three- quarters of the claimant's earnings, until the point where the wages for the week equal the deduction.

> Example: If a claimant earned $170 in wages, subtract $50, leaving $120. The deduction is three-fourths of that, or $90.

Wages are deducted from a claimant's unemployment insurance benefits for a week claimed, only if, during the week, the claimant performed services for which wages are due.

b) Comp time reimbursement

Employees, including some State of Alaska employees, may accrue comp time instead of being paid for overtime hours worked. In some cases, seasonal employees are paid the comp time balances at the end of their season on a prorated basis. After lay-off, these employees continue to be paid according to the normal pay schedule as long as the comp time balance lasts. The state employees earn service time and are paid holiday pay, if they received comp time pay for the day before or the day after a holiday. The comp time is not deductible, because it is payment for work already done; however, any holiday pay is deductible the week received. See B.2. Holiday pay, in this section.

B. Deductible Income Other than Wages

For a discussion of pensions or retirement payment, go to MS 375.3, Pensions. For a discussion of severance, termination payment or wages in place of dismissal notice; go to MS 375.15, Wages in Place of Notice.

If the claimant receives payments **from a base period employer** the deductible income below is deducted dollar-for-dollar from the claimant's weekly benefit amount. If the payment was not from a base period employer, it is not deductible.

a) Vacation and sick leave

Deduct payment for **unused** lump sum vacation and sick leave in the week it is received. Deduct payment for **used** vacation and sick leave in the week it is used.

Example: A claimant (97 0780, April 21, 1997) received a vacation payment from a base period employer for unused vacation pay. The payment was deducted dollar-for-dollar from his benefit amount in the week received.

Example: A claimant (97 0664, April 8, 1997) received accrued vacation pay. As it was not from a base period employer, it was not deductible.

Example: A claimant (97 0483, March 26, 1997) received pay for unused vacation time. She argued that it should have been attributed to the weeks immediately following her unemployment. The Tribunal held that she had no authority to go contrary to the clear wording of the statute.

b) Holiday pay

a) When an individual is still employed and receives payment for a holiday as part of the next regularly scheduled pay period, the payment is attributed to, and deducted in the week of the holiday (97 2559). It is considered a “regular” payment, not a lump sum payment.

1) If a claimant works part of a week and is also paid for a holiday in that week, both the wages earned and the holiday pay are deducted in that week. The wages are deducted as described in MS 375.05 A.1 Wages, using the earnings formula, and the holiday pay is deducted dollar-for-dollar.

Example: A claimant works December 22, 23, and 24, and is paid holiday pay for December 25. The three days of earnings reduce benefits as earnings, and the holiday pay is deducted on a dollar-for-dollar basis.

2) A claimant while on leave, may accrue holiday pay that is paid on the next regular scheduled pay day. This is attributed to and deducted in the week of the holiday. Even though on leave, the claimant is still part of an on-going employer-employee relationship.

Example: A school bus driver (99 0030) was on leave from December 21, 1997 until January 5, 1998. He was paid holiday pay for December 24 and December 25 on January 2. The Tribunal ruled the payment deductible in week ending December 27, the week of the holiday, because it was paid on the next regular payday.

b) If an individual has separated from his employer and receives holiday pay, it is considered a lump sum payment and is deductible in the week received. This type of payment may occur at the time of separation or at a scheduled time during the year.

1) If a claimant receives payment for multiple holidays, as is the case with SE Stevedores, this is considered a lump sum and is attributed to the week received.

2) A worker on comp time or overtime conversion may continue to receive holiday pay while being paid comp time. This worker has separated from employment, the holiday payments are considered lump sums attributed to the week received (98 0421).

3) If a claimant receives payment that cannot be attributed to a specific holiday, deduct the payment the week it is received (98 0421).

3. Mergers and Takeovers

When one company takes over the assets and liabilities of another, they should be considered one entity for unemployment insurance purposes. The name on the wage file for base period earnings may not reflect the merger. If severance, vacation pay, etc. is received under the new name of the employer, and the old name is listed as a base period employer, this money is considered to have been paid by a base period employer.

Example: A Safeway employee received a check for vacation pay, but only had Carrs in the base period. This would be deductible because Safeway purchased Carrs,

Example: A claimant retired from Wells Fargo and received a lump sum pension check. The only employment in his base period was National Bank of Alaska (NBA). Since Wells Fargo acquired NBA, consider the payment to be from a base period employer.

C. Other Types of Payment

"Bonus," which was formerly 1. below has been moved (see MS 375.075 Back Pay, Bonuses, Commissions, Loans and Draws, C. Bonuses).

"Commission," which was formerly 2. below has been moved (see MS 375.075 Back Pay, Bonuses, Commissions, Loans and Draws, D. Commission).

a) Expenses

a) Subsistence for employee

The payment that an employer pays to a claimant for expenses while the claimant is working away from the claimant's normal residence which does not exceed the claimant's actual expenses is not remuneration for services, and therefore, the payment is not wages (8925794, March 8, 1990.) It does not matter whether the claimant receives the payment in advance or as a reimbursement.

Example: A claimant traveled from Juneau to Anchorage as a sales representative for an employer. The employer paid transportation costs and reimbursed the claimant for hotel and meals. The payment was not wages, and did not need to be deducted from benefits.

However, the payment that an employer pays to a claimant as an allowance for the time that it takes a claimant to travel to work is considered as remuneration for services, and therefore, the payment is considered as wages.

Other expenses for which the employer reimburses the claimant, such as purchase of materials or mileage, are not wages, and are not deductible (98 0771, June 24, 1998.)

b) Business expenses in self-employment

A person who is self-employed may deduct reasonable business expenses, but not depreciation.

b) Gratuity or tip

A tip (or gratuity) that a claimant receives in the course of the claimant's service is remuneration for service and therefore, the tip is wages. The claimant's employer does not need to report it as wages for tax purposes unless the claimant reports the tip to the employer. However, the claimant must report the tip as wages, regardless of whether the claimant reports it to the employer.

c) Honorarium

An honorarium that a claimant receives in the course of the claimant's service is considered as wages.
An honorarium that a claimant receives as a simple gift without regard for services performed and not in the course of the claimant's service, is not considered as wages (Sealaska Heritage Foundation, 88H-TAX-239, November 24, 1989.)

"Loans and Draws," which was formerly 6. below has been moved (see MS 375.075 Back Pay, Bonuses, Commissions, Loans and Draws, E. Loans and Draws).

d) Retainer

A retainer is a payment that an employer makes to a person in order to be able to call upon that person to perform services, and to insure that the person does not offer services to a competitor. Therefore a retainer is a payment for services and is deductible as wages.

e) Royalty

A royalty is a payment for the permissive or lawful use of a property right. Therefore, the payment that a claimant receives as a royalty is not considered as remuneration for services, and not considered as wages.

6. Rental income

Money received from rental income is not considered deductible. The money is received due to “ownership of an asset” rather than “performance of a service”.

7. Supplemental unemployment insurance benefit payments

Some employment contracts contain a provision in which a claimant can receive supplemental unemployment insurance benefit payments to augment the claimant's unemployment insurance benefits. Supplemental unemployment insurance benefit plans established for the purpose of supplementing unemployment insurance benefits are not disqualifying as long as the employee does not have a vested interest in the plan (makes contributions), and is only eligible for payment under the employer's plan if they are laid off by the company.

D. Remuneration in a Medium Other Than Cash

a) General

Remuneration in a medium other than cash that a claimant receives as compensation for services is considered as wages (86H-UI-149, June 11, 1986.)

b) Board and room

However, according to a 1981 United States Supreme Court decision, room and board furnished as a convenience to the employer on the premises of the employer are not considered wages. "As a convenience to the employer" includes both cases where the worker is **required by the employer** to live on the premises, and cases where the worker is **required by the inaccessibility of the job site** to live on the premises. In neither case is the free room and board considered as wages.

> Example: An employer at a remote fish processing plant maintains rooming facilities and gives them at no cost to the workers so that the workers may be available when there is work. The value of the rooms is not considered as wages in the weeks in which the worker is not fully employed.
>
> Example: Workers on a floating processor do not have the value of the board and room counted as wages.

The free or reduced rent that an apartment manager or property caretaker receives is almost always a matter of mutual convenience for the employer and the employee. **Thus, the difference between the normal rental value and the actual amount, if any, paid by the employee is deductible as wages under the provisions of** 8 AAC 85.390**.**

In any case, the amount of room and board deducted must be reasonable and without profit to the employer.

The employer must pay the worker at least the minimum wage for the hours worked, and the room and board may not be used to fulfill the minimum wage requirement.

> Example: An apartment manager works an average of 10 hours per month and receives an apartment valued at $500 per month for $250 per month. The manager must be paid at least the minimum wage in addition to receiving the value of the apartment.

c) Subsistence or per diem

A subsistence or per diem payment that an employer pays to a claimant for expenses while the claimant is working away from the claimant's normal residence which does not exceed the claimant's actual expenses is not considered as wages and is not deductible. See MS 375.05 C. Other Types of Payment, 1 Expenses, above.

d) Value of remuneration

a) If the value of the apartment or other lodging is fixed by a **specific agreement** between the employer and the employee, consider that value as the amount of the wages.

b) If the rental is reduced by a specific amount, consider that value as the amount of the wages.

c) If there is no specific agreement as to the value of the apartment or other lodging, use the value specified in the regulation as the amount of the wages.

d) If live-in partners share the services, apportion the wages equally between them, unless there is a specific agreement to the contrary.

375.075 Back Pay, Bonuses, Commissions, Loans and Draws

Law: AS 23.20.530(a)

A. General

Back pay, bonuses, commissions, loans and draws are all considered wages. They have in common that the claimant may receive them in one time period, while they may be allocated to another period altogether.

B. Back Pay Awards

Both back pay for work already done and back pay awards are credited to the period in which the work was actually done or would have been done.

a) General

Back pay awards are considered as wages under AS 23.20.530(a) (9427447, July 29, 1994.)

> Example: In the case of Henderson v. Employment Security Division, Ak. Supreme Ct., Op. No. 282, January 15, 1986, the Commissioner was upheld by the Court in stating, "(I)n the case of back pay awards, the award received must be considered as remuneration for services as if the claimant had performed those services."

b) Allocation of back pay awards

Law: AS 23.20.530(a)

Back pay is allocated to the same time period both for the purpose of establishment of a benefit year and for the purpose of deduction of wages. Once the claimant's wages are allocated to a particular period, then determine whether the claimant was unemployed during that period and eligible for unemployment insurance benefits.

Allocate a back pay award to the weeks or quarters in which the claimant would have earned the wages. The back pay award is deducted by the computer system as wages under AS 23.20.360 (95 2545, November 20, 1995.) In Henderson v. ESD, Sup. Ct. 3JD No.3PA82-835 Civ, 01/15/86; digested at CCH UI Rept. AK §1201.05 & 8101.44, the Court upheld the lower court's decision that a back pay award was a form of compensation and to treat it otherwise would be a "windfall" unsupported by the statute.

> Example: A claimant (8913026, February 13, 1989) received a check from his previous employer in November for work

that he had done in September and for which he had been underpaid. The payment was attributed to the week in which he had performed the service.

a) Full award

When the claimant receives a full award, divide the back pay award by the number of weeks covered by the back pay award to determine the weekly wages that are deductible.

b) Partial award

If the back pay award is in the form of a settlement which is less than the full back pay award, first determine the period of time covered by the settlement. To do this, first determine the claimant's hourly or daily wage, and then divide that amount into the amount of the settlement. The period of time that results determines the period of allocation.

Example: An employer discharged a claimant, and the claimant did not work for 15 weeks. The claimant had earned $10 per hour, 40 hours per week. Although the full amount of wages lost was $6,000 ($10 x 40 hours x 15 weeks = $6,000), the claimant accepted a settlement from the employer of $4,000.

- First find the number of hours for which the claimant was paid in settlement by dividing the claimant's hourly wage of $10 into the $4,000, giving 400 hours.
- Then find how many weeks are covered by dividing the total hours paid by the hours the claimant worked per week. In this case, divide the 400 hours by 40.
- The answer --- in this case 10 --- is the number of weeks of back pay that the claimant received.
- Therefore, allocate $4,000 in equal amounts to the first 10 weeks of unemployment following the last date that the employer paid the claimant at the time of the separation.

c) Award for damages

In addition to the back pay award, a claimant may receive an award from the employer for damages, such as damages because of the employer's failure to pay the claimant's wages when due. This payment to the claimant is not wages, because the claimant did not receive the payment

for service, and therefore it does not affect the claimant's unemployment status.

C. Bonuses

Bonuses are defined as wages under AS 23.20.530(a). Under AS 23.20.360 wages are deducted as earned. Bonus awards are considered as payments for work already performed and are attributed back to the period of work.

The Commissioner has ruled a bonus should be allocated to the weeks of service saying “Reallocation of bonuses is also consistent with the letter of the law. There is no reason to read the reallocation requirement in AS 23.20.530(a) as though it applied to regular wages only. It applies to all wages. Likewise, 8AAC85.075(a) simply directs that wages paid at greater than monthly intervals be allocated to the weeks of service. Bonuses are wages and therefore allocable.” (97 0192, May 19, 1997)

a) When a bonus is issued, the period in which it was earned needs to be determined. There is no allocation of a bonus to weeks in which the claimant did not work.

> Example: A claimant (03 0439, March 21, 2003) received a bonus for work she did in 2002. She only worked 43 weeks during 2002. The Tribunal ruled that “A bonus based on service cannot be applied evenly through the year if the worker did not work the entire year or in any given week.”

b) To allocate the bonus to the weeks in which the claimant earned the wages, divide the amount of the bonus by the number of weeks in which the claimant worked. This will give the amount attributed to each week.

> Example: A seafood processor was paid a bonus in the fall based on an adjustment in the price of fish processed during the season. The claimant was paid a $500 bonus and was employed from June 1 through August 30, 13 weeks. Five hundred dollars divided by 13 weeks, results in a potential addition of $38 for any week the claimant filed during the period, June 1 through August 30.

3. There is no issue if a claimant does not file for benefits during the period the bonus was earned.

D. Commission

A commission is a fee or percentage paid to an individual for services rendered. Commissions are considered wages under AS 23.20.530(a) and should be deducted as earned. To determine what period of time to deduct a commission, identify the week or weeks in which the claimant earned the commission. Both workers and those self-employed may be paid on a commission basis.

a) Sales Commission

A sales commission may be paid for a specific sale or for accumulated sales over a specific period. Allocate the payment over the week or weeks in which the work leading to the sale was performed.

b) Completion of Contract

Sometimes a commission is paid upon completion of a contract or when an item is sold. The claimant must allocate the earnings on a reasonable basis to the weeks in which the claimant performed the services leading to the payment.

See MS 375.5 B. Payment for Service for more information about self-employed working or selling on a commission basis. See MS 375.075 E. Loans and Draws for information on deducting advances made against future commission payments.

E. Loans and Draws

Loans and draws are wages and are credited to the time the money was received.

A drawing account is an advance payment made to a worker on a future commission or salary. The payment that a claimant receives from an employer on a drawing account is considered as wages under AS 23.20.530(a) (9227517, September 22, 1992.) **Deduct** the payment from the claimant's weekly benefit amount because the claimant received the payment for performing services. For tax and wage base purposes **allocate** the drawing account payment to the weeks in which the claimant actually earned the payment.

Example: The employer paid the employee in advance, which was not deducted from his paycheck, and which he repaid in cash the following year. The payment was considered to have been made at the time it was received. (87EB-2395, October 27, 1987)

375.1 Disability Compensation

A workers' compensation payment is not considered as remuneration for services, and therefore, the payment is not considered as wages and is not deductible.

Payments received from disability insurance, or a similar plan, even if funded by the employer, are not deductible. Examples include the Jones Act, Fisherman's Fund, state or union disability plans, etc. In 01 1666, (September 28, 2001), the Tribunal ruled:

> "(T)he omission of the term "disability payments" from AS 23.20.362 meant it was not to be included as deductible income. Not only is the term omitted from the statute, the payment of disability is not based on service years or earnings."

VA disability benefits are not deductible, because the award is based on the percentage of disability and not the amount of wages (98 0399, March 25, 1998.)

On the other hand, a disability retirement payment to which the employer contributed is deductible.

> Example: In 97 1499, (August 25, 1997), the claimant argued that, since the statute does not specifically require that disability retirement payments be deducted, that they should be exempt. In holding to the contrary, the Tribunal stated, "Since the regulation fails to specify disability payments as exempt, they are deductible provided the employer contributes to the plan. Since Mr. Olson's employer contributes to and maintains the fund, the employer's contribution percentage is deductible."
>
> Example: In 98 0399 (above), a claimant received disability retirement pay from the U.S. Air Force, a base period employer. He also filed for Veterans' Administration disability pay, which, when he received it, replaced and augmented the disability payments. He argued that, since the VA payments retroactively augmented the disability payments, that they should be considered as operating from the beginning. The Tribunal held to the contrary, stating that the disability retirement pay was deductible, but the VA disability pay was not, even though it replaced the disability retirement.

Disability severance payments are also deductible, if received from a base period employer.

Receipt of disability compensation payments do not of themselves make a claimant ineligible for benefits. However, the receipt of disability payments may create a question as to the claimant's ability to work.

375.15 Wages in Place of Notice; Separation Allowance

Law: AS 23.20.362

Regulation: 8 AAC 85.140

(a) A monthly payment from a pension, annuity, or similar periodic payment plan that is deductible under AS 23.20.362 will be multiplied by 12 and then divided by 52 to determine the weekly amount to be deducted.

(b) A lump sum payment for severance, termination, wages paid in place of dismissal notice, sick leave, holiday or unused vacation, or a pension or annuity will be attributed to the week in which the payment is received. Pension or annuity payments that are part of a non-taxable rollover distribution are not considered deductible income.

(c) Repealed 1/18/97.

(d) The weekly amount determined in (a) of this section will be multiplied by the percentage of the insured worker's contribution to the pension plan. The resulting amount is attributable to contributions of the insured worker under AS 23.20.362(b) and is not deductible from benefits for the week. If the insured worker contributed to a pension paid under the Social Security Act, no part of a payment from that pension is deductible from benefits for the week.

(e) A payment is not deductible from benefits under AS 23.20.362 unless it is paid
(1) by a base period employer of the claimant; or
(2) from a fund contributed to or maintained by a base period employer of the claimant.

A. General

Claimants who receive, or who expect to receive, payment of wages instead of severance, termination, wages paid in place of dismissal notice, sick leave, holiday, or unused vacation are denied benefits under 8 AAC 85.140 **for the week in which they receive the payment, if the payment is from a base period employer.**

The payment is deducted in the week in which it is received. If the severance pay is paid periodically, it is deducted on each occasion in which it is paid.

B. Wages Affected

The deduction applies only to any benefit year which includes base period wages from the employer paying the separation payment.

A severance or termination payment is not considered "wages" under AS 23.20.530(b)(8), unless the employer is legally required to pay as put forth in the hiring contract. The payment does not affect a claimant's unemployment status under AS 23.20.505 during the period in which the claimant receives the payment because the claimant earned the payment during a prior period of service. These payments are deductible under AS 23.20.362(c) in the week in which they are received. However, an adjudicator would only deduct the payments if the payments made to the claimant are from an employer in the claimant's base period (95 2425, December 15, 1995).

C. Definitions

a) Wages in place of notice

The term "wages in place of notice" means wages paid by an employer as a substitute for continued employment, instead of previous notice of termination.

b) Upon separation or termination

In 9298924, February 28, 1990, the Commissioner clarified **the term "upon separation (or termination)" as meaning "because of termination."**

> Example: In 9121192, October 31, 1991, there was controversy about the date the claimant received his separation payment. The Commissioner held that the April 1990 simplification of the statute did not change its essential meaning that the payments were to be deducted in the weeks immediately following the termination of employment.

D. Subsequent Employment

Subsequent employment does not remove these payments from the category of deductible income. A claimant was paid a one-time, lump-sum termination payment. He then went to work for a second employer. The Commissioner held that the subsequent employment had no bearing. (Note: In this case, the payments were deducted on a weekly basis, but the principle remains the same --- the deduction of severance or termination payments is not abrogated by subsequent employment. (9225441, July 27, 1992)

E. Identification of Severance Payments

a) Manner of computation

Payments are identifiable as severance by the manner of computation. **If the payments are computed based on prospective earnings of the**

person receiving them, whatever the name given to the payments, they are separation payments.

Example: In the case cited above, the claimant was paid a one-time, lump-sum special payment, in addition to his wages, in return for which the claimant released the employer from all liabilities resulting from his termination. The Commissioner held that the payment was termination payment, and that this fact could be determined in the way that the payment was computed, in that it represented a proportion of the wages that the claimant could have earned from the date of termination until his earliest date of retirement.

b) Purpose of payment

A payment, however titled, that is made to induce an employee to separate from employment or to compensate the employee for not remaining employed with the employer, is a separation payment.

Example: The Federal Aviation Administration instituted an early retirement system and compensated workers taking advantage of it with an incentive payment. The Court held in the case of Wilson vs. State of Alaska, Department of Labor, Employment Security Division, 3AN-94-9572 CI, October 3, 1995 that the incentive payment was a severance payment.

Example: A worker was dismissed from employment and paid two weeks' salary instead of being given notice. The payment was a severance payment.

F. Permanence of Separation

The separation need not be permanent. An employee on a definite layoff is not considered separated from the employer-employee relationship. But, where the layoff is indefinite, the employee is considered separated.

Example: A claimant was given a definite layoff from his position, and later received sick-leave pay that had been converted to a cash pay-out. Although the personnel rules required a year's separation before the layoff was considered permanent, the Commissioner held that the Employment Security Act and its definitions are controlling in Employment Security matters, and that the layoff was a separation as so defined. (9298924, February 28, 1990)

375.2 Compensation for Loss of Wages

Payments by an employer, or another, as compensation for loss of wages during a period that claimants are not performing services are not usually deductible from unemployment compensation benefits, since the statute provides for deduction only of wages for services performed. Generally, such payments are made as damages. If the claimant is unemployed and is not receiving any remuneration for services performed in the week, the receipt of damages for loss of wages does not deny benefits.

> Example: A claimant (97 1499, August 25, 1997) argued that his disability payments were a compensation for loss of wages, as the amount of the compensation was reduced by the amount of any wages earned. The Tribunal disagreed.

375.3 Pensions
Law: AS 23.20.362

Regulation: 8 AAC 85.140

(a) A monthly payment from a pension, annuity, or similar periodic payment plan that is deductible under AS 23.20.362 will be multiplied by 12 and then divided by 52 to determine the weekly amount to be deducted.

(b) A lump sum payment for severance, termination, wages paid in place of dismissal notice, sick leave, holiday or unused vacation, or a pension or annuity will be attributed to the week in which the payment is received. Pension or annuity payments that are part of a non-taxable rollover distribution are not considered deductible income.

(c) Repealed 1/18/97.

(d) The weekly amount determined in (a) of this section will be multiplied by the percentage of the insured worker's contribution to the pension plan. The resulting amount is attributable to contributions of the insured worker under AS 23.20.362(b) and is not deductible from benefits for the week. If the insured worker contributed to a pension paid under the Social Security Act, no part of a payment from that pension is deductible from benefits for the week.

(e) A payment is not deductible from benefits under AS 23.20.362 unless it is paid
(1) by a base period employer of the claimant; or
(2) from a fund contributed to or maintained by a base period employer of the claimant.

A. General

Pensions paid periodically, excluding Social Security, are deductible from benefits on a dollar-for-dollar basis to the extent that they are paid for by a base period employer. Thus, if a claimant receives a pension from an employer not in the claimant's base period, there is no deduction.

A pension or retirement payment is not considered as wages, and, while deductible, does not affect employment status.

Military Voluntary Separation Incentive Payments (VSI) are not pensions, but are separation payments (95 2425, December 15, 1995.) For a discussion of separation payments see MS 375.15 Wages in Place of Notice; Separation Allowance.

a) Social Security

Social Security is not deducted.

Example: A claimant (97 1499, August 25, 1997) argued that, since his Federal disability retirement payment would be reduced by the amount of any Social Security benefits to which he was entitled, the payment should be considered as Social Security and not deducted. The Tribunal held that the statute specifically exempts only Social Security and she had no authority to extend the exemption further.

b) Pension not affected by later work for the employer

In some cases a retired person receives a pension from the base period employer or from a plan maintained by a base period employer and later returns to work for that employer. If the base period work does not affect the eligibility for the pension or the amount of the pension, the pension is not deductible. This usually occurs when an employee returns to the former employer in a temporary or on-call position.

Example: Although the federal government is considered a single employer, whether the work is done in the military service or as a civilian employee, pensions from prior military service are not deducted from base period UCFE claims because the military pension is not affected or increased by the UCFE work.

B. Deduction of Employer's Share

AS 23.20.362 does not make a distinction for amounts contributed as pension or retirement plan payments as a result of a collective bargaining agreement. Even though an employer contributed money to the claimant's pension plan that the claimant might, under a different agreement, have received as wages, this does not change the employer's contribution into the claimant's contribution. If the employer actually makes the contribution, then it is an employer contribution. Only the portion of the pension that the claimant contributed from wages is not deductible under the statute.

The amount contributed by the employer is deductible whether it is the entire pension or merely serves to increase the amount of the pension.

Example: A claimant (97 0666, April 9, 1997) received a federal pension contributed to by his base period employer which increased the amount of his pension. The full amount contributed by the employer was deductible.

a) Amount contributed by claimant not deducted

The part of the pension paid for by the employer is deducted; the part of the pension paid for by the claimant is not deducted.

Example: A claimant worked for the city of Kenai, but not long enough to be vested. When she left that employment, the money she had paid into the retirement system was returned to her. There were no employer contributions to that amount. The Tribunal held that the amount returned to the claimant was not deductible income. (99 0013, February 10, 1999)

Pensions paid for by a base period employer are deducted on a dollar-for-dollar amount.

Example: A claimant (9225424, July 22, 1992) had his benefits reduced by one-half the amount of his pension, as he had contributed half the amount of the pension and his employer had contributed half. Although Mr. Miller argued that he had contributed to the pension over many years, and therefore ought only to have the portion deducted that had been contributed in his base period, the Commissioner held that the deduction could not be altered from that prescribed by the law.

Example: A claimant (98 0346, March 13, 1998) had contributed 42% of his pension and his employer 58%. He contended that, since over his expected lifetime he would receive between 1.3 and 1.5 million dollars, of which he contributed about $150,000, while his employer contributed about $200,000, that the deduction should be based on the ratio between his contribution and the total amount he could expect to receive. The Tribunal held that this latter ratio was not controlling.

Example: A claimant (95 1440, June 28, 1995) argued that he should not have his pension deducted because he was forced to take an early retirement by his employer. The Commissioner held that the reason was unallowable by the statute, and that the employer's portion was deductible.

Example: In the case of Chvilicek v. State, 3PA 92-117, Superior Court, August 4, 1993, the Court found that the claimant was receiving a pension solely supported by his employer's contribution. Accordingly, the entire amount was deducted from his benefits.

b) COLA adjustments to the pension

COLA adjustments to the pension, if not paid for by the claimant, are deducted in the same manner as the original pension.

> Example: A claimant (97 0696, July 17, 1997) received a pension which included COLA. He argued that the COLA should not be deducted, as he would not receive it if he moved from Alaska. The Commissioner upheld the Tribunal decision that, since the COLA was contributed by the employer, it was deductible.

c) Gross amount deductible

The gross amount of the employer's share of the pension is deductible. A deduction for such circumstances as taxes or to make child support payments or to repay an overpayment from the pension is not considered in computing the amount of the pension to be deducted. Disregard deductions for taxes or any other purpose not connected to the computation of the claimant's actual pension or retirement payment in the determination of the amount deducted from the claimant's unemployment insurance benefits. However, if there is a deduction from the gross pension amount as the result of a recalculation of both the credited service and the pension amount actually available to the claimant, then do not use this deduction in the determination of the pension amount.

> Example: A claimant (9029256, March 12, 1991) argued that his taxes, a garnishment for a debt repayment, and a deducted repayment of a previous retirement benefit should not be considered as part of the amount of his pension. The Commissioner held, "Deductions for taxes or any other purpose not connected to computation of the actual retirement benefit should be disregarded in determining the amount to be deducted from the pension. In such cases the gross pension amount should be deducted. It is an entirely different matter when the so-called 'deduction' is actually the result of a recalculation of both the credited service and the pension amount actually available to the claimant. In such cases the claimant is not, in any real sense, 'receiving' the gross pension amount." The claimant's taxes and debt repayment were part of the pension to be deducted. The matter of the repayment of the previous pension was remanded for further investigation. After the remand (9120386, May 30, 1991) the Commissioner found that the repayment of the separation payment amounted to a recalculation of his pension amount based on his previous service and previous payment, and therefore should not be deducted.

d) Court-awarded portion of pension given to spouse not deductible

The court-awarded portion of a pension that goes directly to an ex-spouse belongs to the ex-spouse and is not considered as part of the claimant's pension. Child support payments are a part of the gross pension, but pensions are marital property, and therefore the ex-spouse's portion belongs to the ex-spouse, not to the claimant (96 0500, May 7, 1996.)

5. IRA rollover not deductible

In order for a payment to be deductible, it must be "received" by the claimant. In UIPL 22-87, Change 1, a rollover from a qualified plan that goes directly into a claimant's IRA has not been "received". These direct rollovers are not subject to Federal income tax. However if any portion of a distribution is subject to Federal income tax, that amount is considered to be "received".

> Example: In (05 2201, January 6, 2006) upon separation from his employment with Alaska Native Tribal Health Corporation, Mr. Craft rolled funds from his employer's 403(B) account into his personal IRA. The Tribunal ruled that the rollover was not deductible because the claimant never received the funds.

Distributions that are paid directly to an individual are taxable and deductible unless they are rolled into a qualified plan within 60 days (UIPL 10-09). If the distribution is rolled into a qualified plan within 60 days, it becomes a "non-taxable event" and will not be deducted. If the claimant has the funds sent directly to them, we would deduct the employer portion in the week received. If they later roll the funds into a qualified plan, we would issue a redetermination at that time. It does not become non-taxable (and non-deductible) until it is rolled over into a qualified plan.

6. IRA distributions

Payments from an IRA are considered a "pension" for UI purposes (per UIPL 22-87). When a claimant starts receiving distributions (payments) from an IRA, those payments **may** be deductible if the IRA includes contributions from a base period, employer-funded retirement account. As with any pension, we would need to determine the percentage of employer contribution to the IRA to determine the deductible amount of the payments.

> In 97 0815, the claimant rolled money from her State of Alaska, SBS account into an IRA. Shortly after that, she began making withdrawals from that IRA. The Tribunal ruled

that while she did not “receive” any payments when the funds were “rolled over”, her UI payments were subject to a reduction once she began withdrawing funds from the IRA.

Withdrawals from an IRA that is 100% claimant funded, or funded from employers outside the base period are not deductible.

375.4 National Guard or Naval Militia

Law: AS 23.20.530(b)(11)

Payment for inactive service in the National Guard or Naval Militia cannot be deducted from the claimant's benefit amount. This payment is specifically excluded from the definition of wages under AS 23.20.530. Therefore, claimants engaged in such duty are eligible under AS 23.20.505 if they serve less than full-time during a week. The amount of payment does not affect the claimant's unemployment status.

375.5 Self Employment

A. Employment or Self Employment

Before the question of deduction of wages for self-employment is considered, there are two considerations to be addressed:

a) Was the person actually self employed?

Any wages earned are deducted in the same manner whether or not the person was self-employed. However, if it is a question of the usability of the wages, the question of whether the work was self-employment must first be determined.

Not all designations of self-employment are actually so under the law. For a complete description of what is and is not self-employment, see the Tax Policy Manual, AS 23.20.525(a)(8). Summarized, a person is not self-employed unless the service is performed:

- Without the direction and control of the recipient of the services; and
- Outside of the usual course of business or place of business of the recipient of the services; and
- As part of an ongoing business by the self-employed person.

b) Was the person employed in the week?

For a full discussion of whether a person is employed, see TPU 415 Self-Employment.

B. Payment for Services

Many self-employed persons receive payment irregularly upon the completion of a contract, or when they sell articles or commodities. However, this does not entitle a claimant to allocate earnings only to the week in which the earnings are received. The claimant must allocate self-employment earnings on a reasonable basis to all weeks during which the claimant performed the services. A claimant who receives no payment when filing a Week Claimed Certification must estimate the amount of earnings for the week based on probable receipts.

Self-employed claimants are advised to report their “net income”. This is calculated by taking the total **earnings** for the week, whether paid or not, and subtracting their operating expenses for the week. For unemployment

insurance purposes, depreciation of capital investment is **not** included in "operating expenses". Examples of "expenses" may include, but are not limited to:

Supplies, items purchased for resale, business use of a vehicle, licenses and other items purchased and consumed directly for use in the business. Monthly expenses such as rent, insurance, utilities (phone, heat, electric) may be deducted **only** to the extent that they are **directly** attributable to the business. A person working out of their house with only one phone cannot deduct "local phone service" as an expense, as this would be considered their "home phone". Monthly expenses should be prorated and deducted on a weekly basis.

C. Types of Self Employment

When possible, self-employment earnings should be reported **as earned**, not as received. At times, this is not possible or practical. The following examples provide some guidance for those types of situations:

a) Business operators

The amount of self-employment income that is wages for any week is the gross receipts for the week minus all ongoing expenses for that week. Expenses do not include the depreciation of original capital investment, although the prorated weekly portion of a monthly business loan payment is considered expenses for the week.

b) Contract artists or artisans

An artist or artisan who is contracted to make a particular object for someone else must prorate the payment over the week or weeks in which the work was done.

c) Artists or artisans

The artist or artisan who makes something with no immediate buyer in view, but aimed at a particular sale date, such as a pre-Christmas mall showing, should pro-rate the earnings at the sale, less booth rental space and the cost of the materials, over the weeks in which the work was done.

The artist or artisan, who simply creates, where the sale is irrelevant, should take any deduction as a one-time payment, unless the creation can clearly be attributed to another time.

410 SEASONAL EMPLOYMENT

410.1 Employment with an Educational Institution

Law: AS 23.20.381

A. General

Academic employers are reimbursable employers and are only billed when unemployment insurance benefits are paid out to employees with academic wages in question. Determining eligibility will involve reviewing the claimant's employment status, type of work or services performed, outlook for work in the following academic year or terms.

An **academic term** (or simply "**term**") is a portion of an **academic** year, specifically the time during which an educational institution holds classes. The summer may or may not be part of the academic year. If the employee only worked in the summer, you must determine the dates of employment and that specific educational institution's academic year or term.

Claimants may choose to file for unemployment while their academic employer's traditional school term or year requires seasonal breaks (holiday, spring, or summer breaks). Wages based on professional and non-professional employees of an educational institution are **potentially subject to a reduction or denial of benefits** between terms **and must be examined.**

B. Prerequisites to Deny Between Terms Wages:

- they worked in the first of two academic years or terms; and
- the break from service is scheduled; and
- the claimant has been offered employment in the next school term or academic year by a person with authority to hire. The offer must be written, oral, or implied; and
- the position offered is in the same capacity (Professional vs. Non-professional) as services performed in the previous academic year or term; and
- the compensation offered must be **equal to, or not "considerably less" than** the prior term's compensation package

Reasonable attempts to receive the information supporting these prerequisites is required. The burden of proof to deny benefits between terms rests on both the claimant and employer. Due process must be given to both in order to properly determine the use of wages.

If the claimants' **circumstances do not meet all prerequisites stated above**, the between term reduction or denial **does not apply** and the use of academic wages are allowable between the breaks.

C. Examining Academic Break(s) and Academic Schedules

a) First of two academic years or terms

The "**first of two academic years**" refers to the entire year and does not require service for the full time period.

> Example: A substitute teacher, worked only one day in one of the two terms. She had reasonable assurance of working in the next term. The Commissioner held the denial of use of her school wages was in order. (9228580, December 8, 1992)

The two academic terms need not be successive; however, the two academic years must be.

> Example: A tutor worked in the 1996-97 school year, and then took an unpaid leave of absence for the 1997-98 school year. She was guaranteed her position in the 1998-99 school year, if she chose to return. The Commissioner ruled she did not have reasonable assurance of work in the 1997-98 school year, the year of her negotiated leave, and did not perform services in two successive years. The use of her academic wages was allowed. (97 2180, January 6, 1998)

b) Closure of school

The school closure **must be scheduled** in order for a claimant to be denied benefits based on school wages. If a school closes for other reasons, such as fire, flood, or labor dispute, employees are not subject to the between terms provision.

> Example: If a school is closed for a period in the school year due to flooding in the area, any staff or substitutes are eligible for benefits based on the school wages for that period.

c) Year-round employee

An employee who works year-round, whether part-time or full-time, is not subject to the between-terms denial

> Example: A claimant worked as an on-call clerical employee. She was a twelve-month employee and not subject to a required recess. Because she was not off work due to a scheduled school break, she was allowed the use of her between-terms wages. (97 1591, September 22, 1997)
>
> Example: A lifeguard works for the school district in a part-time position, both while the school is in session and during vacations and breaks. The wages are usable whenever the lifeguard is otherwise eligible due to partial earnings.

d) Employment during school closure

Even if the worker works part of the time that the school is in recess, the between-terms denial of the use of wages still applies if the worker is required to take any substantial time off during the vacation or holiday break.

> Example: A woman had worked as a clerk for Alaska Vocational Technical Center. For two years her contract had required her to take twenty-one days of leave without pay during the time that the school was not in session. She was not eligible for use of those wages in that time period. (9323735, August 19, 1993).

If a claimant has previously worked during the between terms period, but the employment is not part of the regular contractual arrangement, the between-terms denial applies during the period of the closure of the school.

> Example: A custodian previously worked during the summer doing maintenance work at the school. The maintenance work was not part of her regular contractual work, but was offered to the custodial staff when available. When there was no summer maintenance work available due to budgetary constraints, the Commissioner held she was subject to the between terms denial as a school employee, “her present unemployment was directly due to the recess period of the District”. The summer work was not part of her regular employment. (9428046, August 30, 1994)

Example: A teacher worked for the Fairbanks North Star School District as a substitute. Part of her work was for the Fairbanks Youth Facility, which operated year-round. The claimant held that her work during times when the school was not in session should exempt her from the denial of the use of the wages from the educational institution. In upholding the denial, the Tribunal stated, "AS 23.20.381(h) and (i) refer to 'education institution' as a whole without providing a means for exempting individual programs within the institution from statutory requirements. The statute provides no exemption for a particular program that might operate on a schedule that does not coincide with the overall calendar of the education institution. " (97 1516, August 4. 1997)

e) Holiday or recess

AS 23.20.381(i) provides for denial of benefits based on wages from an educational institution for a week that begins during an established and customary vacation period or holiday recess if the person performed those services in the period immediately before the vacation period or holiday recess and has reasonable assurance of performing the services in the period immediately following the vacation or recess.

In regards to this section of law, the phrase “immediately before” is the term or semester leading up to the holiday or vacation period. “Immediately following” is the term or semester (or balance of the term or semester) in which the holiday or vacation period falls. For the denial to occur, the person must have worked in the term or semester leading in to the holiday or vacation. In addition, there must be reasonable assurance of working in the term or semester either following the vacation or holiday, or, if the vacation or holiday falls within a term or semester, have reasonable assurance of working in the balance of the term or semester.

Remember, this applies only to the holiday and vacation periods such as Christmas or spring break, not the summer break. There is no disqualification for Thanksgiving, for instance, because the vacation is not for a full week.

D. Examining Base Period Wages

a) Base period wages

Only wages earned from employment for an educational institution is in jeopardy. If a claimant has other qualifying wages, the claimant may

receive benefits based on those non-academic wages during the disqualifying period.

> Example: A substitute teacher, employed by a school district, also worked for a store in the base period. The teacher is eligible for $58 a week, based on the employment for the store alone, and for $98 a week based on both the store and the educational wages. During the Christmas vacation, with reasonable assurance of returning to the school, the teacher can receive $58 a week in benefits, and the following week when school is again in session, will receive $98 a week if otherwise eligible and not employed.

On the other hand, use of all wages earned for any educational institution is denied, **even if the reasonable assurance for employment is with an academic employer that is not a base period employer**.

> Example: A claimant had worked for two educational institutions in the preceding year and had reasonable assurance of returning to work in the same or similar capacity with only one. She was denied use of the wages based on her services for both institutions. In denying benefits the Commissioner held that **the legislative intent was to deny between-terms benefits to all employees who received wages based on services for an educational institution**. (88H-UI-225, January 31, 1989)

AS 23.20.526, states that wages earned from an educational institution by an attending full time student are not considered covered employment for UI purposes. These wages should not be reported by the employer for UI tax purposes, and should not appear on the claimant's wage record. See MS 60 Benefit Computation Factors for more information.

E. Liable Educational Institutions

a) Included Institutions

1) General

An educational institution, for the purposes of this statute, is a public or not-for-profit institution in which students receive organized courses of study or training in knowledge or skills under the guidance of instructors. It is permitted to operate as a school

by a state department of education, or is operated by the Federal Government. A publicly-operated correspondence school meets this definition.

The term "educational institution" includes governmental or nonprofit elementary and secondary schools, colleges or universities, and trade or technical schools.

Example: A claimant worked for Cook Inlet Academy, a nonprofit licensed religious school, licensed by the State. The Tribunal held that it met the definition of an education institution under the statute. (98 1582, August 11, 1998)

2) Educational service agency (ESA)

An educational service agency is a governmental agency or governmental entity that is established and operated exclusively for the purpose of providing services to one or more schools.

Example: An intermediate school district is formed by two or more school districts to furnish services to the member districts. The intermediate district administers no schools of its own, but hires teachers and other personnel to furnish services such as remedial, counseling, or vocational to the other districts.

ESA's exist in several states, but, to our knowledge, there are no such agencies in Alaska. Treat ESA wage credits as school wage credits.

b) Excluded Educational Institutions

1) General

The definition does not include private schools operated for a profit, such as beauty schools, private business colleges, private elementary or secondary schools, and the like.

2) Head Start

Under UIPL 40-79, Head Start employees are generally not considered school employees unless:

- the program is operated by a school board as an integral part of a school;
- Head Start employees are subject to direction and control of the board; and
- The employees work under the same conditions of employment as other school employees.

3) Johnson-O'Malley programs

Johnson-O'Malley program workers are not employees of schools, even though their services are usually performed in schools.

> Example: A claimant worked as a Tlingit language instructor for the Johnson-O'Malley program. The Tribunal held that, like Head Start programs, which were specifically exempted in UIPL 40-79, Johnson-O'Malley programs were not considered to be educational institutions. (790-311, November 1, 1979)

F. Professional vs. Non-professional Services

Professional employees are those employed in instructional, research, or administrative capacities. The terms "professional" and "nonprofessional" are used for convenience only. **The duties performed by the person rather than the title determines the service.**

a) Professional Service

Professional employees generally provide services in instructional, research, or administrative capacities.

Professional service generally includes a contract of employment which establishes high probability of returning to work in the next academic year. **If the offer of work at professional capacity does not include a non-contingent, enforceable contract, reasonable assurance must be looked at prior to making a decision**.

Professional Services Include:

a) Persons employed in an instructional capacity

Persons employed in an instructional capacity include not only persons who teach in formal classroom and seminar situations, but also claimants who teach in less formal arrangements such as teachers' aides or tutors, or those who teach non-academic subjects, such as handicrafts, or direct students in independent research and learning.

> Example: A teacher aide worked principally as a library assistant. She was not employed in an instructional capacity. (81B-1253, August 5, 1981)
>
> Example: A teacher's aide who tutors individual students in reading is employed in an instructional capacity.

b) Persons employed in research

Persons employed in research are those who direct a research project and the professional research staff directly engaged in gathering, correlating, and evaluating information and making findings. Support personnel such as typists, clerks, and craftspeople who install or repair equipment, are not considered as employed in research.

c) Persons employed in principal administrative categories

Persons employed in principal administrative categories include such positions as officials of the institution, deans, comptrollers, and any other position, with or without a title, with administrative authority.

> Example: A community schools coordinator was responsible to two principal administrators for his actions and decisions. He did not exercise principal administrative authority. (82UI-1684, August 4, 1982)

d) Varied duties

When the person performs a variety of duties, apply the "50% rule." If the person **spends at least 50% of the time performing instructional,** research or principal

administrative services, then consider **all of the service as professional.** If **less than 50%** is professional**, then consider the services as nonprofessional.**

Example: In the case of Okakok v. Employment Security Division, No 2BA-82-139 Civil, (Alaska Superior Court, 2d JD October 19, 1983) the claimants were teacher aides who worked approximately 75% in actual instruction. Their duties were considered totally instructional.

Services identified as either professional or non-professional after applying the 50% rule above will then be examined to determine if the capacity or services offered in the following term or year **meets the requirement of being offered at the "same or similar capacity".**

The service(s) performed may vary, **but after looking at the percentage and establishing the type**, based on that single definition the claimant may then be assessed for a "crossover" situation.

b) "Crossover" situations

When an employee is offered work that changes the type of service performed during the preceding terms or years (professional to non-professional or vice-versa), there is no reasonable assurance. If the work offered is not in the same or similar capacity, we do not need to explore the "economic conditions".

Example: A counselor (nonprofessional) loses his job due to funding, but is offered a position the following school year as a full-time teacher (professional). There is no reasonable assurance because the work is "different in type".

c) Non-Professional Service may Include:

a) Janitorial Services
b) Lunch Aide
c) Maintenance Service
d) Recess Monitor

A non-professional employee is determined based on the services they provide, and are excluded from this category if the services are instructional for more than 50% of the total service performed.

Example: A substitute works on-call for the school district and substitute teaches for two classes (2 hours) during the entire work day, and provides instruction during this time. The work day is 8.5 hours total, which the claimant remains onsite for needs elsewhere.

The remaining work is performed as a kitchen aide during the lunch hour (1.5 hours), and a variety of non-instructional or non-administrative work (hall monitoring, transportation, etc.). The claimant's service is considered non-professional based on the majority of service.

G. Examining Economic Conditions of the Offer of Continued Employment

Confirm that the wages are **within the base period**, that the claimant **worked in the first of two academic years**, and that the offer **was made by a person with authority to hire**.

The services performed during the prior term or year should be confirmed as either professional or non-professional prior to reviewing the compensation package offered.

The economic compensation must establish that the work offered is **not considerably less** than the compensation in prior term or year.

a) Compensation "Considerably Less" than Prior Year or Term

The federal definition of "considerably less" in reference to economic conditions, **requires that the term or year must provide compensation that is not less than 90% of the compensation for the prior term or year.** If the offered compensation package is less than 90%, the between term reduction or denial does not apply.

Example: A full-time teacher in the previous year was offered work as a substitute in the following year at the same daily wage. The teacher will be placed at the top of the substitute list, and the school district says that those at the top of the list are usually able to work five days a week. Because the wage is the same and the teacher will probably work the

same number of days, the teacher has been offered the same or similar work.

Example: An Indian education teacher (98 1468, July 29, 1998) worked six hours per day tutoring students. She was informed that due to budget cuts, her position was reduced to two hours per day. Although the district told her that they would try to find additional hours for her elsewhere, the Tribunal held that the reduced hours were not a "same or similar position" and allowed use of her wages earned for an educational institution.

Example: A part-time custodian is laid-off from her job. She is offered a job as a cook at the same wage and the same number of hours. Since the economic conditions (pay and hours) are not less favorable than the previous year, she has reasonable assurance because the “type” of work has not changed; both jobs are “nonprofessional”.

Example: Because the school district had to lay off some regular custodians, they were placed at the top of the on-call list. This substantially reduces the number of hours that an on-call substitute custodian may be called. The substitute custodian does not have an offer of the same or similar work.

H. Establishing that Reasonable Assurance Exists

Establishing reasonable assurance is the last factor necessary to making a determination to deny/reduce or allow benefits during the between terms period. The offer of continued employment may exist in two capacities – professional or non-professional.

a) Contract

A **contract** is a non-contingent offer of employment in the succeeding academic year, following the scheduled break. A contract is usually offered to claimants that provide services at a professional capacity. A **non-contingent** contract means that the job offered i**s not subject to conditions controlled by the employer such as, course programming, decisions on how to allocate available funding, final course offering, program changes, and facility availability.**

A contract is established based on the following requirements:

- The contract is enforceable; and

- The offer is non-contingent; and
- The contract applies to the entire academic year or annual basis

A contract may indicate that the claimant works nine months of the year, is subject to the summer break, but receives nine payments during the working months only. Although the contract terms do not specify that compensation is an "annual salary," professional employees are generally paid salary which compensates for the entire year.

Tenured employees automatically return to work at the beginning of each term, and **we assume a contractual agreement if there is no definite evidence to the contrary**.

When a claimant has not actually signed a contract because of collective bargaining negotiations, an implied contract exists, as both the employer and employee intend to continue their relationship when negotiations are resolved.

> Example: A claimant had been employed as a custodian for the school district. The union was in the process of negotiating with the school district and the custodians were working without a contract. The Tribunal held that Mr. Baker had an implied agreement that he would return to work and therefore there was reasonable assurance of employment. (98 1744, August 25, 1998)

Most union agreements stipulate that the school must notify employees whom it does not intend to rehire by a definite date, usually before the close of school in the spring.

b) Reasonable Assurance

The determining factor in whether the claimant has "reasonable assurance" is the availability of a job to the claimant in the following academic term or year.

Prerequisites to Deny Between Terms based on Reasonable Assurance:

- the offer **does not** include contingencies within the employer's control; and

- the circumstances show that there is a high probability there will be a job available in the next year or term; and

- the totality of circumstances establishes high probability that contingencies outside the employer's control will be met

c) Reasonable Assurance Contingencies

Reasonable assurance usually depends on contingencies that will concretely determine job availability in the following term or year. If there are any contingencies in the offer that are **within the employer's control reasonable assurance does not exists**. Contingencies based upon circumstances such as funding for a specific class or course, student enrollment, or a claimant's seniority status are examples of contingencies not within the employer's control.

A pattern can be established showing the program is likely to be funded in the second year, even if later notification arrives later and nothing indicates an unusual threat to the funding then the **offer of work is bona fide and reasonable assurance exists, based on the totality of circumstances.**

> Example: A claimant worked one year as a noon duty attendant. At the end of the school year, the principal who had hired her, retired. The new principal did not communicate to her whether she had a job the following school year. When contacted by the agency, the school district reported "possibly if needed." The Commissioner ruled that since she had received no notification from the school, reasonable assurance did not exist. (03 1505, October 7, 2003)

> Example: In another instance, the Superior Court ruled (Kenai Peninsula School District v. State of Alaska, Department of Labor, AK. Superior Ct., 3rd JD, 3KN-95-878, July 22, 1996) that a claimant who had worked for four years as a substitute custodian did have reasonable assurance, even though the communication from the school district said "possibly". In this case, the claimant had a history of working and there was an implied agreement that she could return in the same capacity. There had been no change in the circumstances from her employment in previous years.

On the contrary, only a ***possibility*** of employment exists if the contingencies **are not within the employer's control.** A possibility generally does not guarantee job availability, but the totality of circumstances must be reviewed in order to determine with certainty.

> Example: Employment for a part time instructor with the University of Alaska depended upon the number of students who signed up for her courses. The Commissioner allowed benefits based on her school wages because she did not have reasonable assurance of teaching in the succeeding term, but only the possibility. (8924680, December 1, 1989)

Example: An adjunct instructor taught three English 101 classes during the spring semester for ten consecutive semesters even though the offer to teach the course was contingent on student enrollment. There was no information indicating enrollment would decline in the fall semester, and once the spring semester commenced, the instructor was offered to teach three English 101 classes during the fall semester contingent on enrollment. Because the educational institution made an offer to the claimant, and the offer was in the same capacity, and the economic terms and conditions of the job are not considerably less, even though the offer was not within the employers' control because it was contingent on enrollment, due to the weight of the contingent offer, it is highly probable the enrollment contingency would be met and therefore the between terms denial applied. (USDOL, UIPL 15-17)

If the work is funded from an outside source and the school has had no notification of the following year's funding, the circumstances under which the teacher is employed are not within the school's control.

Example: A recreation director was offered a position depending upon the availability of funding in the following year. There was no reasonable assurance, and benefits based on his school wages were granted. (9323826, November 23, 1993)

d) Reasonable Assurance Special Circumstances

1) Voluntary Quit with an Offer of Continuing Academic Employment

When an offer of continuing employment is made by the academic employer in which the claimant voluntarily quit for work related or personal reasons, reasonable assurance must be further examined.

If the claimant's reason for quitting establishes good cause, the offer of employment **is not considered reasonable assurance.**

Federal law provides states with the discretion to decide how to apply reasonable assurance in this scenario. **Examine the issue only when a quit is adjudicated for the academic employer offering reasonable assurance**. If the academic employer is not the "last employer" for the purpose of unemployment, establishing the existence of good cause or lack thereof, is not necessary.

Example: At the end of the academic year a teacher informs the school that his wife, an officer in the United States Army, has been transferred to a new duty station in another state. He will be accompanying her to her new assignment and therefore will not be able to accept an offer to teach for the school system during the next school year.

Are benefits payable between terms?

Answer: Yes. Even though the claimant had an offer to perform services in the same capacity for the next academic year, the separation from employment was a voluntarily quit with established good cause and is the last employer for the week subject to the between terms potential disqualification.

2) Discharge or Voluntary Quit without Good Cause

A claimant who was discharged from or has quit a position with an educational institution **no longer has reasonable assurance**. However once they have gained reasonable assurance from ANY educational institution, the appropriate provisions of AS 23.20.381 once again apply. The separation issue is adjudicated under the applicable misconduct or voluntary quit provisions of the law.

Example: A librarian resigned her position with the school district in February of 1998. Even though she began looking for a new job with the school district in June, she did not have reasonable assurance because no job had been offered. (98 1533, August 24, 1998)

3) Relocation

An employee of an educational institution who has relocated outside the reasonable commuting area of that institution no longer has reasonable assurance of returning to that job even if all other factors for reasonable assurance are present. However, the adjudicator should be certain that the relocation is permanent.

Example: A substitute teacher was given reasonable assurance by the Anchorage school district that she could return to work following the spring break. However, in the meantime she had relocated to California. The Tribunal found that reasonable assurance did not exist. (97 0960, May 17, 1997)

4) Seeking other work (non-academic)

The fact that an employee of an educational institution is seeking and will accept other work does not affect the employee's reasonable assurance of returning to the job.

Example: A substitute teacher on the district's substitute list for the following year is seeking full-time work over the summer and, if the person finds such work, would not return to the school. Nevertheless, the teacher has reasonable assurance of returning to the school, and is denied benefits based on the school wages over the summer.

5) Failure to sign up on the substitute's list

In the case of a substitute, if the person knows that returning to work only involves signing up on the substitute list, the person cannot evade reasonable assurance by failing to re-sign up on the substitute list.

Example: In Kenai Peninsula School District vs. State (3KN-95-878, July 24, 1996), the substitute teacher knew that she could return to work if she chose, but had not yet put her name on the list. The Court held that "In some cases, an implied agreement to work exists even where the substitute has not yet been placed on the list. This is especially true where the decision whether to remain on the list is vested solely in the substitute." The Court held that the two elements of "reasonable assurance" had been met: the school district had communicated with the Division, and the teacher knew that she could serve as a substitute if she chose. She was denied between-terms benefits based on her school wages.

I. Disqualification Period

AS 23.20.381 provides, in part, that benefits based on academic wages be denied “during the period between two successive academic years” if the claimant has reasonable assurance.

Regulation 8 AAC 85.010(b) defines “between academic years or terms” as:

An established and customary vacation period or holiday recess in which student are not in attendance

a) Weeks involved

The beginning and ending dates of the potential disqualification are based on the dates that students attend school.

a) Beginning date

The disqualification period begins with the Sunday immediately following the week the academic year ends or holiday recess begins.

If a claimant who originally had no reasonable assurance of reemployment later receives such assurance, the denial of benefits begins with the Sunday of the week in which the claimant received the notification of reasonable assurance.

b) Ending date

The disqualification period ends Saturday of the last week that is partially or wholly between terms. Consider that the between-terms period ends the last regular working day before the academic year resumes.

> Example: If the academic year resumes on a Monday, the disqualification ends the preceding Saturday. If the academic year resumes on a Tuesday, the disqualification ends the following Saturday. (06 0199, May 18, 2006)

If a claimant's reasonable assurance is later rescinded, the disqualification period for that claimant ends with the Saturday of the week in which the assurance was rescinded. If the claimant in this situation is nonprofessional, the previous weeks are re-determined and allowed, and any weeks that were filed timely and are otherwise eligible are allowed and paid.

b) Multiple Employers

The educational institution(s) involved and the claimant are always interested parties to these decisions. When multiple educational institutions are involved, each institution is considered an interested party. A separate non-monetary determination will be issued to each institution addressing the reasonable assurance with their institution regardless if the decision is allowed or denied.

J. Retroactive Allow for Benefits

a) General

If teachers, researchers, and administrators are at first given reasonable assurance of reemployment, and it is later retracted, they are not paid retroactively for any earlier weeks denied. However, if non-professional employees later are not re-employed, they can be paid the benefits based on the school wages retroactively for any week that they have filed.

> Example: A teacher was originally offered a position, but the offer was later rescinded. As a professional employee, the teacher was not eligible for retroactive payment, although in like circumstances a nonprofessional employee would have been.

b) Reasonable Assurance Gained During the Break

Benefits from wages based on school employment are allowed from the time that the claimant is no longer working until the claimant receives assurance of work in the following school year.

> Example: A teacher was laid off and without reasonable assurance until she was offered a contract on June 18. She was allowed benefits based on the school wages until she was offered the contract. (9121496, October 28, 1991)

Although benefits may be paid retroactively for non-professional employees, if the reasonable assurance is lost, **in no case are they denied** retroactively. Benefits are denied only from the time the claimant gains reasonable assurance, not from the beginning of the between terms period (97 1987, September 26, 1997).

1) Refusal of offer of reemployment

If a nonprofessional employee of an educational institution is offered employment, but refuses it, the employee is not eligible for retroactive payment.

2) Holidays and vacations

Weeks claimed during the **between terms or school years period** are eligible for retroactive payment.

Weeks claimed during the **holiday and vacation breaks** (Christmas and spring breaks) are not eligible for retroactive payment.

K. Related Issues

a) Contractual leave

a) Sabbatical leave

Sabbatical leave is granted to a professional employee under a contract that allows for a term or more of paid, or partially paid, or unpaid leave, but with continued employer-funded benefits, in order to study, write, or do research. Employees on sabbatical leave are denied benefits for the period of the leave plus any between-terms period that falls between the beginning or end of the sabbatical leave and the end or start of the school. The claimant is also in almost all cases unavailable for full-time work.

b) Leave without pay

A claimant who takes a period of leave without pay for the same purposes is not on sabbatical leave because the claimant is not under contract with the educational institution and receives no wages or employer-provided benefits from it. However, the between-terms denial would still apply as appropriate.

410.2 Employment in Sports

Law: AS 23.20.381(a)

Persons whose wages are based on services for participation or training in sports or athletic events are denied benefits between seasons if:

- they earned substantially all of their wages in the base period participating in sports or athletic events, and
- performed services in the first of two seasons, and
- have a contract or reasonable assurance of returning to the same or a similar position in the following season.

Use the same definitions of "reasonable assurance" and "between seasons" as are used in the case of educational employees between terms. See MS 410.1. F Reasonable Assurance. However, the difference between this statute and that of school employees is that if the person earned substantially all of the wages in professional sports, **all use** of the wages is denied in the off season, not merely that from the professional sports.

"Substantially all" in this statute means 90% or more of the wages. If the person did not earn substantially all the wages in the base period in professional sports, this section of the statute does not apply (98 1126, June 10, 1998.)

If the person earned substantially all the wages in professional sports, examine whether the person has a contract or reasonable assurance of returning to the same or a similar position in the following year.

420 SPECIAL CIRCUMSTANCES

420.1 Corporate Officer or Employee

A. General

In every case involving corporate officers there are several problems that are unique to the situation. First, not all corporate officers have covered wages. Second, separation from employment raises issues different from other separation considerations. Availability also may be different for a corporate officer. And finally, a corporate officer may also receive payment for attending corporate meetings. **Each of these issues must be addressed in every case.**

B. Coverage

Law: AS 23.20.526(a)(19)

Law: AS 23.20.325

The presence or absence of wages on the BB01 screen is not determinative. Many employers report wages in error, without having elected coverage. Other employers erroneously omit to report wages of persons who are corporate officers, but who perform no executive functions.

C. Separation

Issues of voluntary leaving or misconduct are treated no differently with corporate officers from those of any other employees, although it would be very unusual for a true executive corporate officer to be discharged for misconduct. In cases where the corporate officer was laid off for lack of work, there is one important principle to remember: **A corporation is a legal "person," and a person employed by a corporation, no matter who owns it, is considered as if the worker were employed by an unconcerned third party.** In other words, Bill, a corporate officer may lay himself off, but it is in actuality the corporation who lays him off, not Bill himself.

D. Availability

a) Fully unemployed

When the claimant is an owner, officer, or even employee in a family-held corporation, the question of the claimant's genuine availability arises if the corporation is still operating or has only temporarily suspended business. In these cases, if generally employers in this field would not hire a member of a competing business, the claimant may not choose to work only in the same narrow field but must immediately broaden the work search area to include non-competitive employers.

Example: An incorporated tour company closes for the winter season, and the family members who own and operate it become unemployed. The wife is the company bookkeeper. Other tour companies will not hire a competitor as a bookkeeper in their business. To be considered available for work, she must look for work in her field of expertise with other types of employers.

b) Partially unemployed

Law: AS 23.20.505(a)

If the corporate officer is devoting full-time to work for the corporation, even though the person receives no wages, the officer is not unemployed.

If the business is ongoing and the claimant is working for it part time, the claimant's wages must be reported. The wages must be commensurate with the amount of time and effort put into the business, and may not be considered as stock or as put back into the business without first passing through the hands of the claimant.

E. Payment for Meetings

Corporate officers may be paid for attending officers' meetings. Although the circumstances must always be examined, in most cases this payment is per diem, rather than wages.