National Association of Unemployment Insurance Appeals Professionals

Navigator Spring 2021

A Balancing Act

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The U.S. Department of Labor's Lower Authority Appeals Quality criteria require hearing officers to control the hearing by reducing repetitive or irrelevant testimony and controlling interruptions. Yet regulating how parties behave during hearings can have a direct effect on whether the parties feel heard, and whether they can feel satisfied with the outcome of the hearing.

Criterion 12 states that hearing officers should control repetitive or irrelevant testimony to keep the hearing moving toward a conclusion, and "should not ask, or allow any party to ask, questions that are repetitive or that address irrelevant matters, and should keep the witness(es) from providing irrelevant, immaterial, and/or unduly repetitious testimony." See ET Handbook No. 382, 3rd Edition, at 30 (March 2011). Criterion 14 states that hearing officers should "effectively respond to interruption of testimony and/or disruptive individuals at the hearing. This also means the hearing officer should refrain from inappropriate and unnecessary interruptions." See ET Handbook No. 382, 3rd Edition, at 33 (March 2011).

The manner in which a hearing officer chooses to conduct and control the hearing with respect to repetitive and irrelevant testimony, or controlling interruptions, directly correlates to whether parties can leave our hearings feeling that they have been heard, and, by extension, whether the hearing was fair and the hearing officer's order was correct.

It is important that the hearing officer keep the hearing moving forward by restricting parties from repeatedly offering the same information or trying to testify about matters irrelevant to the hearing. The hearing officer has a choice about how to accomplish that, however. For example, in a hearing with professional or attorney representatives, a hearing officer could simply state, "Asked and answered." Professional and attorney representatives will probably understand what that means and might then move forward with their other questions. A lay party or self-represented claimant or employer, however, might not understand what the hearing officer means by "asked and answered" and might continue to try to ask the same question because they do not understand they were directed to stop. A lay party might need the hearing officer to explain more fully that the question the party is trying to ask has already been asked, or that the hearing officer has already heard the information the party is trying to ask about, and that the party should move on to their next question. The hearing officer might, in some circumstances, also assist lay parties to formulate questions that are not unduly repetitive or irrelevant.

Likewise, it is important that the hearing officer control interruptions. Again, however, the manner in which a hearing officer chooses to control the hearing with respect to interruptions directly correlates to whether parties leave hearings satisfied that they have had the opportunity to tell their side of the story and that the hearing officer will consider their testimony when reaching a decision.

For many parties, the administrative hearing about their unemployment insurance benefits might be their first personal experience with a formal legal proceeding. While they might have watched TV programs depicting legal proceedings, they might not associate an unemployment insurance hearing teleconference with those legal proceedings. Under those circumstances, parties need some pre-hearing explanation from the hearing officer to understand that even though they are, for example, calling into a hearing teleconference from their living room while wearing pajamas and caring for their children, the rules about interrupting are the same as they would be in a courtroom.

Parties need to be advised before the hearing begins that although the hearing might seem informal, it is actually a formal proceeding and interruptions are prohibited. In jurisdictions that allow parties to make legal objections, the parties should be advised of that fact before the hearing begins, and for lay parties, the hearing officer should provide definitions or examples of what a legal objection is.

Despite pre-hearing preparations, parties might still interject their opinions while someone else is speaking. The fact

that unemployment insurance hearings can seem somewhat informal can lead parties to feel that they are having a conversation with the hearing officer rather than a formal hearing. It is not unusual in a conversational forum for people to interject or disagree while someone else is talking, not out of disrespect or insubordination, but because that is how some conversations naturally flow. If that occurs, hearing officers must do more than just tell the parties not to speak.

When a lay party repeatedly interjects while another person is testifying, it might cause frustration to hearing officers, especially those who already explained to the parties that interruptions are not allowed. Hearing officers must refrain from allowing that frustration to show. A party who interjects and is told, for example, to put their hand over their mouth will likely leave the hearing less satisfied than a party who is politely asked to wait until their turn to testify, and feels assured that they will have the opportunity to tell their side of the story and explain why they disagree with the opposing party.

While hearing officers have an obligation to conduct and control the hearing in a manner consistent with the criteria set forth in Handbook 382, the hearing officers also have choices about how to execute that obligation. It is important that the hearing officer take time before the hearing begins to explain their expectations of the parties' behavior, and exercise patience with parties during the hearings. While giving grace to parties who might be excitable during the hearing or prone to going off on tangents is not required, it goes a long way toward conducting hearings that parties feel are fair.

Managing Remote Workers

By J. S. Cromwell
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"I'm here live, I'm not a cat." R. Ponton

Many offices have transitioned staff from working on-site to teleworking as a response to the COVID-19 pandemic in an effort to keep staff safe. From video conferencing filters, to emoji use in meeting chats, and meeting everyone's cats, managing remote workers has unique challenges. Remote working is new to many of our staff, but since some amount of telework is likely here to stay it is worth the investment of time and effort to help ourselves and our staffs successfully transition. Here are some things to think about when managing by remote.

OVER-COMMUNICATE

The advent of widespread teleworking has challenged traditional communication paths. It used to be that a manager could walk around the office a couple times a day or quickly check in with employees about how they are doing while walking past each other in a hallway. Employees can no longer tell if their manager is busy by peeking into their offices and might feel reluctant to instant-message or video-call to ask their manager for a quick opinion or instruction. It is important to maintain open lines of communication with teleworking staff about your expectations, and, when in doubt, over-communicate.

- Set clear expectations.
- Let your staff know when and how you are available to them, for example, keeping your calendar up to date and sharing it with your staff or setting "office hours" when you are available for a quick IM or call.
- Consider reaching out to your staff with an IM a couple times a day to ask if they need assistance or support.
- Clearly communicate how staff need to notify you about planned and unplanned absences, including whether and how to notify you about brief absences during the workday to answer the door or quickly help a child with an issue.
- Open up to your staff about distractions you have experienced while teleworking and encourage open lines of communication with staff so that they feel comfortable talking with you about distractions they experience while teleworking; be prepared to offer suggestions for minimizing those distractions.
- Set clear expectations with staff about work hours and productivity.

PERFORMANCE STANDARDS

It is more important than ever to communicate clear performance expectations for your teleworking staff. Some staff thrive working independently; others work better with regular supervision. Consider figuring out how each of your team works best and adapt your management style to optimize their performance.

- Set performance targets so your team will understand what they need to accomplish in a given period.
- Set objective measures – because you are not on-site to "get a feel" for how successfully your team is performing, it is more important than ever to make sure that the performance measures you set are objective rather than subjective, or based upon observation.
- Consider setting SMART goals for your team – goals that are Specific, Measurable, Attainable, Relevant, and Time-Bound.
- Make sure to set aside time to give feedback to your team and ensure that they can provide feedback to you.
- Managing by remote is hard work and it is an acquired skill; consider pairing inexperienced managers with "pros" who can help mentor them.

EQUIP YOUR TEAM FOR SUCCESS

Successful teleworking requires more than just shipping staff out the door with a laptop and a VPN connection. Equip staff for success by ensuring that they have everything they need.

- Before sending staff out to telework, ensure that they have the appropriate infrastructure to support teleworking, such as home internet or wifi, sufficient internet speed, and phone lines.
- Be prepared for the possibility that you will need to support on-site work for employees who lack the infrastructure to telework.
- Talk to your employees about what their home work set-up is like, and whether they have a quiet and secure place they can work without interruption and with minimal distraction.
- Send your staff home with sufficient equipment to support successful teleworking. For example, employees who used two or three monitors in the office will have a difficult transition if they are deployed to telework without any monitors. Consider allowing your employees who are transitioning to full-time telework to take their entire work setup home.
- Make sure to track what equipment each employee is taking home; if a separation from employment occurs while the employee is teleworking it is helpful to know which agency equipment they have at home.
- Clearly communicate to your staff what types of "normal" office activity is or is not allowed; for example, let employees know if they are allowed to print at home or connect their work equipment to a home network; if employees are allowed to print at home, provide them with guidelines for securely destroying work-related documents.

STAY CONNECTED

Staying connected to your employees on a human level is just as important as ensuring they can connect to the work network. Make a special effort to maintain the human connection with your staff, and encourage them to maintain the human connection with each other.

- Consider providing your staff with laptops that have an integrated webcam or provide them each with a webcam to allow for face-to-face meetings.
- Have daily "stand-up" check-ins with small groups of staff to talk about the day's goal or what everyone has planned for the day.
- Have quick daily videoconference check-ins with your direct reports.
- Encourage your staff to videoconference with each other sometimes instead of always relying on emails or IMs.
- Set aside time each week to have a 1:1 videoconference check-in with each of your direct reports.
- Encourage open lines of communications with staff. Encourage them to discuss their challenges, setbacks, and successes teleworking; even encourage them to spend a little time talking about their hobbies, pets, or favorite TV shows, just to promote the human connection among your team members.
- Try scheduling team breaks, where the only item on the agenda is not talking about work.

START PLANNING FOR THE FUTURE

2020 was a rough year, and 2021 is off to a rocky start for many of us. Many of us are feeling anxious or unsure about what the future holds, both personally and professionally, new hires and veteran staff alike. Start thinking about what the future of teleworking will look like for your agency. Ask your teams to talk about their experiences, and what might make teleworking easier in the future. It's never too early to start planning for what comes next!

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PRESIDENT'S COLUMN

By Paul Fitzgerald, Chairman, Board of Review
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Decisions, Decisions

Recent research by psychologists and neuroscientists into decision-making emphasizes the sheer number of daily choices we are each compelled to make. Every day, we are incessantly confronted with hundreds of decisions about what to eat, wear, buy, read, and in general do. Most of these daily decisions require little deliberation because the consequences are ephemeral. However, in our work life as administrative appeal professionals, we are daily called upon to make decisions which have significant consequences on the lives of the parties before us. This has particularly been the case during the COVID-19 pandemic. Over the past year, more and more claimants and employers have depended on us to consistently and expeditiously make fair and competent decisions. Given the significance of our professional decisions, we should continually evaluate and refine our deliberative procedures and processes in order to enhance our deliberative skills. In our work we face the additional challenge of being fair and capable deliberators while still meeting timely first payment and other federal time lapse standards.

The quest to be competent and fair deliberators is as old as human history. Throughout history humankind has sought to develop and promote the "practical wisdom" that leads to the best kind of deliberation. Towards this end, since ancient times, thinkers have devised "rules" to follow when we need to make decisions of any size. We should not ignore this Ancient Wisdom. I think there is real value in considering and applying these "rules" when making decisions in our personal and professional lives. I would like to highlight four deliberative rules from antiquity, which I think are always relevant to us as unemployment appeal professionals.

The first and perhaps most important of these ancient rules is "don't deliberate in haste." Impulsiveness has no place in good deliberation. In our work, we need to engage in serious and competent deliberation with some speed. But we must not let our business need to timely decide appeals lead to impulsive deliberation. There are three other ancient rules, which I think can help us avoid impulsiveness in our decision making. One of these rules is "to verify all information." A correct decision can never result from incorrect knowledge. In conducting our administrative deliberations, we need to take the time to ask all the right and relevant questions and carefully evaluate and verify the information presented by the parties. A corollary rule is "to consult and listen to others." Our professional colleagues possess a wealth of collective knowledge and experience of which we should avail ourselves. Taking a few minutes to consult with a colleague can often clarify our understanding and thinking, which in turn enhances our deliberative process. The last rule is "to examine and consider relevant precedent." We should always remember that prior decisions contain a body of practical, tested knowledge and wisdom. When we take the time to consider and apply precedent to the facts before us, we guard against impulsive deliberation.

We all know from our personal and professional lives that acquiring practical wisdom is cumulative, and perfecting the art of deliberation takes experience. I think that reflecting upon, and applying the "ancient wisdom" discussed above, can aid all of us in carrying out our important decision-making responsibilities. I hope that all of you remain happy and healthy in the days ahead. Please know that the work we do as administrative appeal professionals is vitally important in these challenging times. I look forward to seeing many of you when we are next able to gather at a Training Conference.

Oregon HB 2302: Emergency Benefits for Independent Contractors Fund

By J. S. Cromwell
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Oregon's 2021 Regular Legislative Session began on January 19, 2021. Among the legislation introduced and pending before the Oregon Legislature is House Bill 2302, to establish the Emergency Benefits for Independent Contractors Fund. If enacted into law, House Bill 2302 would establish a fund, and create a new program within Oregon's unemployment insurance division, to provide worker-funded benefits for independent contractors in the event of a Governor-declared state of emergency.

The bill contemplates paying benefits to unemployed independent contractors during a state of emergency on similar terms to those under which employees receive traditional unemployment benefits. As drafted, independent contractors would be subject to the same eligibility requirements as employees under the regular unemployment insurance program, and must be able to work, available for work, and actively seeking work. Likewise, independent contractors would be subject to disqualification from benefits because of a disqualifying work separation, job refusal, or refusal to apply for work. The independent contractors would also have the same protections under Oregon law as recipients of regular benefits who have had a work separation for compelling family reasons, have impaired availability for work due to childcare, or are affected by domestic violence, stalking, harassment, sexual assault, or intimidation.

If enacted, the Oregon Employment Department would examine the independent contractors' wages and establish their weekly benefit amounts in the same manner as for the regular benefits programs. Independent contractors registered for the emergency benefits program would be required to keep records of their work contracts, hours and wages, and any other information the Director of the Employment Department prescribed, as well as file reports containing that information with, and make quarterly payments to, the Oregon Department of Revenue.

In sum, independent contractors would be entitled to emergency benefits if they:

- Are an independent contractor;
- Are unemployed for a reason related to the state of emergency;
- Would be considered "unemployed" if they were not an independent contractor;
- Are not eligible for regular benefits or similar federal or state programs, but would be if the independent contractor were an employee;
- Have made quarterly payments as required by HB 2302; and
- File a valid claim for emergency benefits.

Under House Bill 2302, the Oregon Department of Revenue would be required to deposit independent contractors' quarterly payments into the Emergency Benefits for Independent Contractors Fund, which is designated for that purpose. The Department must deposit recovered overpaid emergency benefits, including interest and penalties, into the Fund. The Fund could only be used for payment of emergency benefits to unemployed independent contractors and the actual costs incurred by the Employment Department in administering the Emergency Benefits for Independent Contractors benefits program. Independent contractors meeting each of the requirements set forth in the bill would be eligible for 26 weeks of benefits every four years, during Governor-declared states of emergencies only. Individuals would have the right to appeal adverse determinations.

It is still early days in Oregon's Legislative Session. As of this writing, House Bill 2302 has been introduced, the first reading is complete, and the bill has now been referred to the House Committee on Business and Labor. The bill has not yet been scheduled for a public hearing or a committee work session, and it is not possible to predict whether this bill will become law. A lot can happen between now and Oregon's June 27, 2021 Sine Die; in the meantime, we will be watching closely to see what happens with this bill.

Spotting Forged Documents In Hearings

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In 2004, the CBS news show *60 Minutes Wednesday* aired a segment that questioned George W. Bush's military service. The report, aired two months before the presidential election, said that a handful of memos written in 1972 and 1973 by Bush's commander in the Texas Air National Guard, the late Lt. Col. Jerry Killian, had now been obtained, and the memos showed that Bush had tried to shirk his National Guard duties and received special preferences.

CBS made the documents available on its website, and Internet bloggers, forensic document experts, and others quickly pointed out that the documents appeared to be fake, likely to have been typed on a modern computer, not a typewriter in the early 1970's. Curved apostrophes, superscripted abbreviations (such as "th"), and the use of proportionally spaced fonts all appeared in the memos and were all uncommon for typewriters at the time. Other information then surfaced, casting further doubts. The network conceded a few days later that it had made a mistake in determining whether the documents were authentic. Shortly afterward, Dan Rather announced his resignation as anchor and managing editor of "CBS Evening News." Several others were fired.

As hearing officers, we sometimes confront similar questions about the authenticity of documents offered into evidence. Ruling on the admissibility of a document requires making a preliminary determination about whether the document is what it purports to be. But the inquiry goes beyond deciding whether the low threshold for admissibility is met, since the hearing officer's task also includes resolving factual disputes and ultimately making findings of fact (a role usually reserved to the jury in trial court). Most documents offered into evidence are genuine, but occasionally, parties offer documents that have been altered in some way or forged entirely. In two-party hearings, an adverse party might raise an objection to a document submission because of questions about its authenticity and might have information that will assist the hearing officer in determining whether the document is genuine. But in single-party hearings, the task of determining whether a document is genuine falls entirely to the hearing officer.

In Minnesota, an unemployment insurance hearing officer is not "bound" by statutory and common law rules of evidence; however, the rules of evidence may be used as a guide in determining the quality of evidence offered.[1] Minnesota Rule of Evidence 901 (which is based on the Federal Rule of Evidence 901) provides a non-exhaustive list of authentication methods, including:

- **Testimony of witness with knowledge:** Testimony that a matter is what it is claimed to be

- **Nonexpert opinion on handwriting:** Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation

- **Comparison by trier or expert witness:** Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated

- **Distinctive characteristics and the like:** Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances[2]

Here, we share some examples that illustrate the use of these and other methods by hearing officers.

Types of Documents that Might Be Forged

From our own recollections and those of our colleagues, here are some of the types of documents we've seen that we realized were likely altered or forged by a party:

- Timecards
- Phone records
- Travel itineraries
- Receipts/invoices
- Emails
- Contracts
- Doctor's notes
- Funeral programs/obituaries
- Employee "file notes" or internal memoranda

How Do You Determine Whether Evidence is Fake?

The first step in authenticating a document is usually testimony from a witness who has knowledge about what the document is and where it came from. But when such testimony still leaves questions about authenticity, additional information is needed. For example, a claimant might offer her phone records as evidence that she properly notified her supervisor that she would need a day off due to illness. She might testify that she downloaded her cell-phone bill showing her call history from her phone service provider's website, by signing into her online account on that website. The bill might have distinctive characteristics that make it appear genuine (such as the phone company's logo and contact information; an account number; the plan subscriber's name; the date and amount of the bill and the period for which the person is billed; the date, time, and duration of each call; "incoming"/"outgoing" call status; phone numbers to which calls were made; etc.). It might show a phone call made on a certain date from the claimant's phone number to the supervisor's phone number. But what if the supervisor testifies that she received no such call or missed call on that date, and introduces her own phone bill / call history showing no incoming call (with its own distinctive characteristics that indicate genuineness)? Close scrutiny of each document may reveal some clues as to whether it was altered (inconsistencies in font or spacing, for example). But if nothing on the face of each document indicates forgery, the hearing officer could rely on testimony from the claimant about the content of the phone conversation and other circumstantial evidence, or subpoena the parties'

phone records directly from the phone companies, to resolve the factual dispute.

Sometimes, a straightforward way to confirm whether a document is genuine is to compare the information in the document to other information in the record, or, in the case of altered documents, even within the document itself. For example, one might notice that a date within a contract is not consistent. In that type of scenario, subpoenaing the other party to the contract to also submit a copy of the contract may help establish whether there was an error in the real contract or the contract first submitted had been altered.

In a hearing about whether an applicant had underreported earnings while claiming benefits, a hearing officer noticed that the timecards submitted by a party were mathematically inconsistent with paystubs that were also submitted. When the parties were questioned about why the numbers in the timecards did not line up with the numbers in the paystubs, it eventually came out that the timecard records were created long after the dates in question (and both parties were in on it).

One hearing officer had a party submit photographs that purportedly showed the result of a task that was performed improperly. The hearing officer asked a few foundational questions before admitting the photographs, such as: who took these photos, when were they taken, how do you know who performed the task? The hearing officer was not expecting these questions to be difficult to answer, but quickly found none of the participants (and there were several) for the party who submitted the photographs could answer them, leading the hearing officer to conclude that what was shown in the photographs may have been staged.

In another case, a claimant who said she quit because of unsafe working conditions, submitted an air-quality report purportedly showing the hazardous air quality of the plant where she worked. The report purportedly showed the air-quality readings from a device that was mounted within the plant building and that measured levels of air pollution and temperature. The hearing officer noticed that the report made references to readings taken in "our house" while "cooking [on] the gas cooktop we have". When the hearing officer questioned the claimant about this, the claimant testified she had received the report from another employee, who had received it from yet another employee, and none of those employees were present at the hearing to testify. Because of the uncertain origin and suspect content of the document, the hearing officer continued the hearing and then had a reverse image search conducted on Google for some images included in the report. The "report" turned out to be a selective printout of a review an Internet user had posted on a website devoted to consumer gadgets after installing a non-commercial version of the device in his home. In a case involving absenteeism, a party submitted auto repair invoices to show their attendance issues were caused by car trouble outside of their control; however, the purported invoices contained spelling errors, no part numbers were listed, there was an image on the documents that looked like clip art, and there was no business address for the repair shop. To confirm that the invoices were not genuine, the hearing officer asked questions like, "Where is this repair shop located? Do you have an address and phone number for them? Do you have any objection to me searching for this business online?"

A hearing officer should bear in mind, however, that just because evidence looks amateurish or questionable, that does not necessarily mean that it is fake. In another attendance case, a party submitted a doctor's note that had no clinic letterhead, was not professionally written, and had no signature. But that particular doctor's note was legitimate, which the hearing officer figured out by having an employee of the clinic confirm that someone from the clinic had actually created the doctor's note.

In sum, a hearing officer must keep a sharp eye on the evidence submitted by parties and think a bit like an investigator. Does anything about the document look off? Are there inconsistencies in the information presented? Does this document look like something anyone with a computer or smart phone could have produced? To figure out what to do about a questionable piece of evidence, the hearing officer should think about all available tools, such as questioning the parties, calling additional witnesses, subpoenaing other evidence, or even continuing the hearing and having other UI staff do some investigative work and summarize their findings in an affidavit or testimony.

[1] Minn. R. 3310.2922.

[2] Minn. R. Evid. 901.

TO VAX OR NOT TO VAX?

When is it misconduct for an employee to refuse to be vaccinated?

By Ana Maria Price

As of the date of this article, there are two vaccines that have received Emergency Use Authorization (EUA) from the Food and Drug Administration and one manufacturer seeking approval.[3] Separations involving the issue of whether an employee properly refused to be vaccinated under an employer's mandatory vaccination policy may pass before your state's hearing officers.[4] This article seeks to provide an overview of the main issues involved with mandatory vaccine policies that hearing officers may encounter from jurisdictions across the country.

On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) updated its pandemic guidance to explain that under the Americans with Disabilities Act (ADA) and Title VII, employers may implement mandatory vaccine requirements.[5] Also, the Occupational Safety and Health Act (OSHA) regulations present controlling authority, where applicable, by imposing "a general duty" upon certain employers to maintain the workplace free of recognized hazards likely to cause death or serious physical harm to employees. Occupational and Safety Hazard Act, 29 U.S.C. § 654(a)(1). OSHA regulations only apply to a handful of states. 29 C.F.R. § 1902.1 (explaining that this federal agency only has jurisdiction over states that submit a plan for the enforcement of state occupational and safety standards. For example, Mississippi has not developed such standards or submitted such a plan). However, OSHA regulations would apply to the federal system, to federal contractors, to private employers and in the 29 states and territories which have their own occupational safety standards for public and/or private employers commonly known as "mini-OSHA" plans.

Therefore, public and private employers may legally implement a mandatory COVID-19 vaccination policy.[8] Employers have the option to adopt plans with less than a 100% mandate for vaccinations. The challenge in analyzing any full or partial mandatory vaccination plan will involve the available exemptions under the vaccination policy and the accommodations offered by the employer to the employee.

AVAILABLE EXEMPTIONS

The law recognizes several specific reasons as the basis for a valid request for an exemption from a mandatory vaccine policy. The EEOC articulates these reasons as (1) having a disability and (2) a firmly held religious objection.[9] Federal circuit courts of appeals have upheld the refusal to submit to a vaccination on the grounds of firmly held beliefs in veganism[10] but so far have not upheld general anxiety/objections to vaccines or political beliefs as valid reasons for an exemption. *See Welsh v. U.S.*, 398 U.S. 333, 90 S.Ct. 179, 226 L.Ed.2d 308 (1970)[12]; *Fallon v. Mercy Catholic Medical Center of Southeastern Pennsylvania*, 877 F.3d 487, 492 (3rd Cir. 2017) (holding that a belief that one should not harm one's body did not constitute a protected religious belief because it "did not occupy a place in the plaintiff's life similar to that [of]… a traditional faith"). If an employer's vaccine policy tends to disadvantage workers with *disabilities, the employer must show that an unvaccinated employee* would pose a direct threat due to a *"significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."* EEOC, *What You Should Know*, at K.5 citing 29 C.F.R. 1630.2(r) (emphasis added). In the context of the COVID-19 pandemic the EEOC has explained that the COVID-19 qualifies as a "direct threat." *Id*. at A.6 & A.8. Once that threshold is met, as the EEOC explains, a case-by-case evaluation must occur for each exemption request. *Id*. at K.5. Even if the results of the evaluation determine that the individual cannot remain in the workplace, the employer's first option may not be a lawful termination at this point. *Id*.

1.The Mechanics of a Disability Exemption

Employers must provide reasonable accommodations to qualified covered individuals under the Americans with Disabilities Act (ADA). Under the ADA, absent undue hardship, employers must make a reasonable accommodation for a qualified employee with a disability. During this pandemic, the EEOC has defined having COVID-19 or the symptoms of COVID-19 as a direct threat to the health and safety of others in the workplace. EEOC, *What You Should Know*, at A.8.

Under the ADA, a "disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2) (2006). To be a "qualified individual with a disability" entitled to the protection of the ADA, an individual with a disability as defined by the ADA, must also be capable of performing "the essential functions of the job with or without reasonable accommodation." 42 U.S.C.A. § 12111(8). A person is disabled for purposes of an accommodation claim if he or she has "[a] physical or mental impairment that substantially limits one or more of the major life activities of such individual" or has "record of such an impairment." 29 C.F.R. §1630.2(g)(1)(i) and (ii). Then the individual must also show that the employer was aware of the disability and failed to make a reasonable accommodation for the known limitations of the individual. *Feist v. Louisiana Department of Justice, Office of the Attorney General*, 730 F.3d 450, 453 (5th Cir. 2013). The Fourth Circuit Court of Appeals explains that the employer can require the employee undergo a medical exam for cases in which a direct threat to his or her own safety or the safety of co-workers would result if the employee were to perform the essential functions of his or her job with the disability. *Equal Employment Opportunity Commission v. McLeod Health, Inc.*, 914 F.3d 876, 2019 A.D. Cas. (BNA) 31445 (4th Cir. 2019).

If the employer has a vaccination policy and the person has established a disability, the person should present the facts surrounding the request for the exemption from the vaccine and whether there was an ultimate refusal to take the vaccine. Once a qualified covered individual refuses a vaccine, the employer must engage in an interactive assessment with that individual to determine if

a reasonable accommodation in lieu of the vaccination is possible without "undue hardship" upon the employer. 29 C.F.R. § 1630.2(o)(3).[13] Cases will arise where employers and employees fail to reach an agreement on an accommodation.

2. Reasonable Accommodation Negotiations

In the context of a vaccination policy, the EEOC explains that once the employer is aware of the individual's disability, the employer must engage in an individualized evaluation based upon the following four factors "(1) duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood the harm will occur; and (4) the imminence of the potential harm." *Id*. at K.5. The EEOC concludes

> "that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, …cannot [result in the employer's] exclud[ing] the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk, so the unvaccinated employee does not pose a direct threat."

Id.

Yet even the option of removing the individual from the workplace does not end the evaluation. **The employer must consider all possible options including off-site and other alternatives for accommodations such as telework and enhanced personal protective equipment, even available leave options**. *Id*. at K.5. The EEOC advises that "[t]he prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration." *Id*. A disabled employee is entitled only to a reasonable accommodation, not the employee's preferred accommodation, and has no right to a promotion or to choose a job assignment. *Griffin v. United Parcel Serv., Inc.*, 661 F.3d 216, 224 (5th Cir. 2011).

a. Undue Hardship

In practical terms, the employer must offer an accommodation that does not impose an undue hardship for the employer. Factors to weigh include the expense of the accommodation; the facility's resources and number of employees; the type of work performed; and the impact of the accommodation on either the employer's operations, on other employees or both. 29 C.F.R. §1630.2(p)(1) & (2) (April 4, 2012). The primary cases explaining the parameters of "undue hardship" occur in the healthcare sector though not involving vaccination policies.[14]

b. Disability & Vaccine Cases

Cases involving vaccine refusals show that the specific facts of each case control. The Eighth Circuit Court of Appeals held that chemical sensitivities and garden-variety allergies did not present a "disability" to require an accommodation in a refusal of a vaccine matter. *Hustvet v. Allina Health Sys.*, 910 F.3d 399 (8th Cir. 2018). In *Ruggiero v. Mount Nittany Med. Ctr.*, 736 F. App'x 35, 36 (3d Cir. 2018) (unpublished), the Third Circuit Court of Appeals held that a plausible argument existed that employer failed to engage in the interactive process when it refused to respond to the individual's counteroffer of either an exemption from the vaccine requirement or permission to wear a mask. This court found that the employee in this case had established plausible facts of the elements of an ADA discrimination claim based on job termination in her complaint. While the court did not rule directly on this issue, it permitted the suit on the job termination to move forward.

3.The Mechanics of a Title VII Exemption – Religious Grounds

Terminated employees find that Title VII provides the most advantageous grounds for suit against employers in the context of vaccine refusal. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2. The Fifth Circuit recently summarized the Title VII process for a claim of discrimination on religious grounds:

> Title VII makes it unlawful for an employer to discriminate against an employee on the basis of religion. 42 U.S.C. § 2000e-2(a)(1). "An employer has the statutory obligation to make reasonable accommodations for the religious observances[15] of its employees, but it is not required to incur undue hardship." *Weber v. Roadway Exp., Inc.*, 199 F.3d 270, 273 (5th Cir. 2000). "Title VII does not restrict an employer to only those means of accommodation that are preferred by the employee." *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 501 (5th Cir. 2001). Once an employer has established that it offered a reasonable accommodation, **even if that alternative is not the employee's preference**, it has satisfied its obligation under Title VII as a matter of law. *Id*. The employer's offer of a reasonable accommodation triggers an accompanying duty for the employee: "An employee has a duty to cooperate in achieving accommodation of his or her religious beliefs and must be flexible in achieving that end." *Id*. at 503.

Horvath v. City of Leander, 946 F.3d 787, 791 (5th Cir. Jan. 13, 2020) (emphasis added).[16]

The facts of this case prove instructive to the issue at hand. In this case, Mr. Horvath served as a firefighter with the City of Leander [hereinafter, "City"] as well as an ordained Baptist minister. In 2014, Mr. Horvath requested a religious exemption from the City's infection control policy which mandated personnel receive flu vaccines annually because it violated a tenet of his religion. The City conditioned the exemption upon Mr. Horvath's "use [of] increased isolation, cleaning, and personal protective equipment to prevent spreading the flu virus to himself, co-workers, or patients with whom he may come into contact as a first responder." *Id*. Mr. Horvath received the same exemption in 2015. In 2016, the City implemented a new policy mandating "that all personnel receive a TDAP vaccine, which immunizes from tetanus, diphtheria, and pertussis or whooping cough." *Id*. Mr. Horvath again requested an exemption based upon religious grounds. The City proposed an accommodation offering him two options:

(1) he could be reassigned to the position of code enforcement officer, which offered the same pay and benefits, weekly hours from 8-5, Monday to Friday, and did not require a vaccine, [plus] the City would cover the cost of training; or (2) he could remain in his current position **if he agreed to wear personal protective equipment**, including a respirator, at all times while on duty, submit to testing for possible diseases when his health condition justified, and keep a log of his temperature.

Id. (emphasis added). Mr. Horvath declined the proposal and presented a counterproposal in which he would accept all elements

of the second option except he offered to wear the respirator only when "encountering patients who were coughing or had a history of communicable illness." *Id*. The City declined the counterproposal and gave Mr. Horvath seven (7) calendar days to either to decide whether he "agree[d] to the accommodations as presented or [would] receive the vaccines." *Id*. Prior to the deadline, Mr. Horvath submitted another modified counterproposal, offering to accept option 2 but, on the condition, that he would wear the respirator when he determined it was medically necessary. No further communication occurred between the parties. The seven-day deadline passed without a specific answer from Mr. Horvath to the City's accommodation proposal. *Id*. After the deadline passed, the City determined that Mr. Horvath qualified for termination for violating the City's Code of Conduct on the grounds of insubordination by "failing to obey a directive from a supervisor." Id. at 791. The City terminated Mr. Horvath. *Id*.

The court found that Mr. Horvath met his burden of establishing a prima facie case of religious discrimination. *Id*. (citing *Davis v. Fort Bend Cty*., 765 F.3d 480, 485 (5th Cir. 2014). The burden then shifted to the City "to demonstrate either that it reasonably accommodated the employee, or that it was unable to [do so] without undue hardship." *Davis*, 765 F.3d at 485 (quoting *Antoine v. First Student, Inc*., 713 F.3d 824, 831 (5th Cir. 2013)). Mr. Horvath argued that the lateral transfer option offered to him by the City was not reasonable because the code enforcement position would result in the loss of income from his outside job which was impaired by the daily work schedule as opposed to his former position's shift schedule. The Court cited *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d at 502 n.23, for the holding that an accommodation can be reasonable even if it results in a significant reduction in salary.

The Fifth Circuit held on these facts that summary judgment for the City was proper because the employer offered two reasonable accommodations to Mr. Horvath. *Id*. at 792. The Court noted that usually reasonableness involves an issue of fact. However, the facts weigh so heavily in favor of the City that as a matter of law, no reasonable juror could find otherwise. *Id*. at 792. Thus, the City demonstrated a right to terminate Mr. Horvath without a trial.

4. Vaccine Cases & Religious Exemption in Other Jurisdictions

Currently no published cases exist regarding implemented accommodations for employees refusing a COVID-19 vaccination; therefore, case law with the seasonal flu vaccine may prove helpful. Hospitals have at least ten years of experience with mandatory flu vaccine policies.[17] The most common accommodation requires those employees qualifying for an exemption to wear a facemask for the entire flu season as determined by the CDC guidelines.

Just over four years ago, under a consent decree, the EEOC clarified that an employer could no longer deny an employee's request for a religious exemption to its mandatory flu vaccination policy on any of the following grounds: (1) a disagreement with the employee's belief; (2) any determination that the employee's belief was unfounded, illogical, or inconsistent[18] ; or (3) the opinion that the employee's belief does not comport with an official teaching of any recognized religion or denomination. In this case, the employer had received 20 requests for exemptions. The employer granted the 14 requests for exemptions because of disability but denied all 6 exemptions requests on religious grounds. 2016 WL 7438696 (E.E.O.C.) (reporting on U.S. *EEOC v. Stain Vincent Health Center*, C.A. No. 1:16-cv-234, (W.D. Pa. 2016)). *See also Robinson v. Children's Hospital Boston*, No. 14-10263-DJC, 2016 WL 1337255 at *7 (D. Mass. April 5, 2016) (stating that "'any reasonable accommodation' by an employer is sufficient to meet its legal obligation").

This article should provide guidance for the key facts to consider when faced with a separation involving an employer's mandatory vaccine policy. Employees establishing a disability or sincere belief may qualify for an exemption. As discussed above, accommodations involve negotiations that require reasonableness from both parties. If you have additional questions or comments, I would love to hear from you at aprice@mdes.ms.gov.

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[3]The Food and Drug Administration will consider the application of Johnson and Johnson on February 26, 2021.

[4] Note: If an employer has a unionized workforce, section 7 of the National Labor Relations Act likely obligates that employer to engage in collective bargaining regarding operation of a vaccine policy.

[5] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* [hereinafter, *What You Should Know*], EEOC, December 16, 2020 at K.2 citing 29 C.F.R. 1630.2(r)(stating the ADA allows an employer to have a qualification standard that includes "a requirement that an individual *shall not pose a direct threat to the health or safety of individuals in the workplace*").

[6] OSHA has provided guidance and advice regarding protecting workers from COVID-19 (SARS-CoV-2) but has not issued a specific COVID-19 rule or regulation on this matter. https://www.osha.gov/coronavirus/hazards.

[7] These states are Alaska, Washington, Oregon, Hawaii, California, Nevada, Utah, Arizona, New Mexico, Wyoming, Minnesota, Iowa, Illinois*, Michigan, Indiana, Kentucky, Tennessee, South Carolina, North Carolina, Virginia, Maryland, New Jersey*, Connecticut*, New York*, Vermont, and Maine*, Puerto Rico, American Samoa (federal only) and the United States Virgin Islands*. *These states' and territory's plans cover only state and local government workers.

[8] *Page v. Cuomo*, No. 1:20-CV-732, 2020 WL 4589329, at *8 (N.D.N.Y. Aug. 11, 2020) (internal citation omitted) (on appeal) (citing *Jacobson v. Massachusetts*, 197 US 11 (1905) which recognized as still good law the holding that the states have the power to place the good of the public over personal liberties in the context of vaccine mandates).

[9] Courts have held that sincerely held non-religious beliefs may present a valid objection to an employer's vaccination policy. *See infra* p. 5.

[10] *Chenzira v. Cincinnati Children's Hospital Medical Center*, 2012 WL 6721098, at *4 (S.D. Ohio Dec. 27, 2012); (denying a hospital's motion to dismiss a Title VII religious discrimination claim brought by terminated employee who refused to take a flu vaccine because of her veganism finding it plausible that the employee subscribed to veganism "with a sincerity equating that of traditional religious views" at an early stage of litigation); see also *Brown v. Our Lady of Lourdes Med. Ctr., Inc.*, 2016 WL 5759654, at *3-4 (N.J. Super. Ct. App. Div. Oct. 3, 2016) (holding that the employee failed to establish a prima facie case that medical center's flu vaccination policy, which only provided for religious exemptions, constituted religious discrimination by failing to include exemption for non-religious reasons).

[11] *Welsh v. United States,* 398 U.S. 333, 339, 90 S.Ct. 1792, 1796, 26 L.Ed.2d 308 (1970); *United States v. Seeger,* 380 U.S. 163,176, 85 S.Ct. 850, 859, 13 L.Ed.2d 733 (1965); Slater v. King Soopers, Inc., 809 F. Supp 809, 810 (D. Colo. 1992) (holding that active membership in the Klu Klux Klan is political activity that Title VII does not encompass).

[12] The Supreme Court explained "religious beliefs" in the context of analysis of claim for conscientious objector status as "beliefs that are purely ethical or moral in source and content but that nevertheless impose…a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by * * * God' in traditionally religious persons. Because the claimant's beliefs function[ed] as a religion in his life," they operated as the equivalent of "religious beliefs" sufficient to support conscientious objector status. 398 U.S. at 340.

[13] *Bruff v. Northern Mississippi Health Services, Inc.*, 244 F.3d 495, 499 (5th Cir. 2001) (analyzing the employer's options under a vaccine exemption: (1) if the employer permitted the employee an exemption and to continue her patient-focused job, the employer placed the health of vulnerable patients at risk; (2) the alternative of transferring the employee from her patient-focused work would have forced the Hospital to arrange its workflow around uncertain factors. *Id.* at 501 (citing *Bhatia v. Chevron USA Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984). Thus, the court held, granting this employee an exemption would have been an undue hardship because it would have imposed more than a de minimis cost upon the employer. *Id.* at 502 (citing *Cloutier v. Costco Warehouse Corp.*, 390 F.3d 126, 134 (1st Cir. 2004) (holding that the employer had a legitimate interest in presenting its workforce to customers that was, in the employer's view, reasonably professional in appearance, cashier had regular interaction with customers in her position, and determination that facial piercings detracted from professional image was within the employer's discretion) (based upon Title II of the Civil Rights Act of 1964, §701 et seq, 42 U.S.C.A. §2000e et seq. M.G.LA. c 151B §4, subd. 1A).

[14] *Bruff v. Northern Mississippi Health Services, Inc.*, 244 F.3d 495, 499 (5th Cir. 2001)(transferring the employee would have caused a disruption in the employer's workflow); *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 134 (1st Cir. 2004) (holding that the employer was not required to abandon its professional dress code as an accommodation) (*citing Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977) (de minimis costs not undue hardship); *United States v. Bd. of Educ.*, 911 F.2d 882, 887 (3d Cir. 1990); *see also EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir. 1988) (noting costs include non-monetary expenses).

[15] See discussion *infra* at note 4.

[16] See In *Walden v. Centers for Disease Control & Prevention*, 669 F.3d 1277, 1294 (11th Cir. 2012) (a vaccine case), the Eleventh Circuit found that the employer need only present a reasonable accommodation, not the most obvious or the employee's preferred option. The court held the offered accommodation reasonable because the employer encouraged the employee to seek another position and provided financial support to obtain it. *Id*.

[17] Rene F. Najera & Dorit R. Reiss, *First Do No Harm: Protecting Patients Through Immunizing Health Care Workers*, 26 Health Matrix 363, 374 (2016).

[18] *Scherr v. Northport-East Northport Union Free School Dist.*, 672 F. Supp. 81, 92 (E.D.N.Y. 1987) (explaining that under a New York state statute, the beliefs need not conform to a specific identifiable religion just that they be "genuinely and sincerely held." This Court looked at objective facts to conclude that for 6 years the plaintiffs had consistently opposed immunizations in the context of prenatal, pediatric, and dental care.) *See Int'l Society for Krishna Consciousness, Inc. v. Barber,* 650 F.2d 430, 441 (2d Cir. 1981) (explaining the balancing between evaluating the sincerity of beliefs versus the legitimacy of those beliefs.)

One UI Appeals Attorney's Journey to a New Career

By Kimberly Moore Green

With local unemployment offices closed and libraries closed, in 2020 some claimants had no way to access their claims. People needed people, and our systems could not provide enough of them. Claimants should not have to suffer for months, lose their homes, and feel absolute desperation while waiting to receive their benefits. People have told me stories that will forever scar my heart.

Since 2007, I had worked at the Commission / higher authority level. Many of those who knew I worked there contacted me for help. The truth was, in some ways I did not know how to help them. The CARES Act was a lot for all of us to take in. I no longer recognized the unemployment system. I dove into the UIPLs and did the best I could to answer people's questions. For anything about the system or the claiming or adjudication process, I solely relied on my amazing co-worker, Jana, who had worked her way up in the system for 35 years.

I noticed that people kept asking the same questions over and over again. As we all know, it's very easy to run out of gas trying to help so many people, especially with so few being able to understand what we're even saying when we answer. Eventually, I realized I could more efficiently answer the common questions by just sending them a link to a video on each subject.

Around the beginning of August, I paid for an online course to teach me how to do just that. Yet, I knew that I could not make videos for the general public and retain my job. There was a lot of soul-searching, second-guessing myself, fear of the unknown, and friends and family telling me that I was crazy for even considering quitting my job in the midst of a pandemic. In the spiritual sense, I knew that I was put in a position to help people at a time of tremendous need, and everything would be okay. It required faith, obedience, and trust.

A friend of mine told me about a third-party contractor that was providing support services to another state, and I soon accepted a temporary position with them in October 2020, that was scheduled to end on December 31, 2020. I had no idea what I would do after that.
I could now work for one state while providing help to people in my home state. It was terrifying and exhilarating at the same time. From October through December 2020, I was able to work as an adjudicator. That experience gave me a greater perspective, and I truly respect our resilient and dedicated adjudicators.

Out of the blue, a complete stranger offered to help me with my videos. Jason was a professional videographer, and we spent two weekends on just two videos. It was so much more complicated than I had ever expected. He laughed at me when I told him I wanted to make three videos a day. Now, I understand why.

In mid-October, I posted my first two videos. My first two videos were about Lost Wage Assistance and the exhaustion of benefits. The latter explained how a claimant moves from UI to PEUC to EB and on to PUA. It explained who would receive PUA and the number of weeks available on each program under the CARES Act. I then did several videos, which are no longer visible, on legislative updates. I tried to keep claimants updated as to the progress with the CARES Act. Once it passed, I did videos on PUA, PEUC, and EB, explaining the new rules and extensions. Once I accepted new employment, I did a video telling claimants how to help themselves and find answers to their questions. I attached the claimant handbooks from all 50 states, with links, and added links to the relevant UIPLs. Obviously, I could not continue spending a whole weekend making a single video. I was going to have to give up some quality for quantity. So many things were time-sensitive, and there were many topics to cover. I decided to just record myself talking, with no clue how to edit. People still watched.

I needed to find the balance between quality and quantity. My videographer friend again came to the rescue, telling me about cartoon-making software. I was not sure how cartoons would be received, but people loved them. By February 2021, my channel had over 89,000 views. Crazy!

One person who loved the cartoon videos offered me an amazing job working for his company, making videos about unemployment. With lots of help from my friend and some training courses provided by my new employer, I entered the world of professional videography, including animation and motion graphics. I can now create and edit multiple types of audio-visual media. It is amazing to me that I am being paid to do something that I had been doing for free. Best of all, I'm having fun!

In just three short months, I went from an attorney with no videography skills whatsoever, to providing professional video creation and editing services. As Zig Ziglar said, "You can have everything you want in life if you just help enough people get what they want in life." When we relinquish our control and trust our own spiritual guidance, things work out far better than they would if we tried to control the outcome ourselves. I was able to help people, and instead of that being a detriment to my career, it launched a completely new career path for me that is exciting, fulfilling, and very humbling. I'm beyond grateful.

Two examples of K. Green's videos:

https://youtu.be/D0CI-bfoOIU

https://youtu.be/2NIFZ5JwciU

New York Implements Partial UI

By Jayson Myers

On January 18, 2021, New York State revised its unemployment insurance system to permit partial unemployment benefits based on hours of work, rather than days of work, in a given week, enabling many more part-time workers to receive benefits. The new system took effect for the week beginning January 18, 2021. It will inject more money into New York's economy while helping businesses fill part-time positions. To accomplish this immediately, an emergency rule was promulgated. Legislation submitted with the Executive Budget will permanently enact a Partial UI program to incentivize unemployed New Yorkers to assume a part-time job as they search for full-time work, with a revised calculation made possible by technological improvements currently underway.

Part-time workers can work up to 7 days per week and still be eligible for some unemployment benefits for that week if they work 30 hours or fewer and earn $504 or less in gross pay excluding earnings from self-employment. Benefits will be reduced in increments based on total hours of work for the week. Under the prior system, unemployed New Yorkers' weekly benefits were reduced by 25 percent for each day an individual worked, regardless of the number of hours worked in that day – unfairly penalizing those who accepted part-time jobs. Anyone who worked four or more days – even if they only worked one hour per day – would have to forfeit their entire weekly benefits. This predicament also affected voluntary separation cases. Claimants who lost their full-time jobs were sometimes left with part-time work that blocked any receipt of UI benefits and, due to resulting financial hardship, were constrained to voluntarily leave the part-time employment. The Unemployment Insurance Appeal Board found those voluntary separations to be with good cause if the claimant suffered financial hardship by retaining the part-time job. The institution of Partial UI in New York is a much-welcome change.

New York's emergency rule (12 NYCRR 470.2) reads as follows:

(h) Day of Total Unemployment

- For the purpose of calculating the number of effective days in a week to determine a claimant's weekly benefit entitlement in accordance with Labor Law § 590, a claimant shall experience a "day of total unemployment" or "full day of total unemployment" on each day that is not a day of employment.

- The total number of "day(s) of employment" in a week shall be calculated by adding the total number of hours worked in a week of employment, provided however that no hours in excess of ten are included per calendar day, dividing the total number of hours by ten, and rounding up to the nearest whole number. If the total number of hours worked in a week is equal to or less than four hours, no day of employment will have occurred. For example, a claimant who works a total of 3 hours in a week shall be deemed to have engaged in zero days of employment, a claimant who works a total of 8 hours in a week shall be deemed to have engaged in one day of employment, and a claimant who works a total of 13 hours in a week shall be deemed to have engaged in two days of employment, except that if the 13 hours occurred on one calendar day, such claimant shall be deemed to have engaged in one day of employment.

- A claimant who is employed on a shift continuing through midnight is deemed to have been employed on the day beginning before midnight with respect to such shift, except where night shift employees are regularly scheduled to start their work week at seven post meridiem or thereafter on a Sunday night, their regularly scheduled starting time on Sunday shall be considered as starting on Monday."

Here is another way to gauge the practical applications of the new rule:

4 or fewer hours of work = 0 days worked: No reduction in weekly benefit rate

4.1 – 10 hours of work = 1 day worked: 75% of weekly benefit rate

10.1 – 20 hours of work (unless contained within one day) = 2 days worked: 50% of weekly benefit rate

20.1 – 30 hours of work = 3 days worked: 25% of weekly benefit rate

Over 30 hours of work = 4 days worked: 0% of weekly benefit rate

Claimants who are eligible for Pandemic Unemployment Assistance (PUA) benefits will report their days of work using the new calculation method. Unlike regular UI benefits (or extended benefits), PUA claimants must report earnings in self-employment over $504 as per federal requirements.

COMPARISON TO OREGON

For comparison purposes, here is how Oregon approaches this issue:

The two relevant Oregon statutes:

657.100 Unemployment; rules. (1) An individual is deemed "unemployed" in any week during which the individual performs no services and with respect to which no remuneration for services performed is paid or payable to the individual, or in any week of less than full-time work if the remuneration paid or payable to the individual for services performed during the week is less than the individual's weekly benefit amount.

(2) For the purposes of ORS 657.155 (1), an individual who performs full-time services in any week for an employing unit is not unemployed even though remuneration is neither paid nor payable to the individual for the services performed; however, nothing in this subsection shall prevent an individual from meeting the definition of "unemployed" as used in this section solely by reason of the individual's performance of volunteer services without remuneration for a charitable institution or a governmental entity.

(3) The Director of the Employment Department shall prescribe rules as the director deems necessary with respect to the various types of unemployment. [Amended by 1981 c.77 §3]

657.150 Amount of benefits; length of employment and wages necessary to qualify for benefits; rules.

***

(6) An eligible unemployed individual who has employment in any week shall have the individual's weekly benefit amount reduced by the amount of earnings paid or payable that exceeds whichever is the greater of the following amounts:

(a) Ten times the minimum hourly wage established by the laws of this state; or

(b) One-third of the individual's weekly benefit amount.

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An Oregon Senate bill passed September 1, 2020 temporarily allows claimants to earn $300 before their benefits are reduced, as long as they do not earn > their WBA or work full-time (40+ hours):

Senate Bill 1701 (September 1, 2020)

Temporarily allows a claimant to earn $300 before it reduces their weekly benefit. However, they still cannot work more than 39 hours or earn equal to or more than their weekly benefit amount. This change applies to all benefit programs and is effective September 6, 2020 through January 1, 2022. The Senate Bill, enrolled, is at this link:

https://olis.oregonlegislature.gov/liz/2020S2/Downloads/MeasureDocument/SB1701/Enrolled