NORTHERN ILLINOIS UNIVERSITY

How to Successfully Protest Your Ex-Employees' Claims for Unemployment Insurance Benefits

A Thesis submitted to the

University Honors Program

In Partial Fulfillment of the

Requirements of the Baccalaureate Degree

With University (Upper Division) Honors

Department of Management

by

Tammy Jo Petkus

DeKalb, Illinois

December, 1991
**ABSTRACT**

The purpose of this project was to present information on unemployment insurance (UI) law in Illinois which could be utilized by employers who wish to fight UI benefit claims by their ex-employees. The paper begins with a discussion of the mechanics of the Illinois UI Program. Then, I focus on one way in which an employee can be disqualified from receiving benefits: misconduct. I examine the definition of misconduct and apply it to case law and two actual hearings that I was able to attend at the Elgin Illinois Department of Employment Security office.

I met with a veteran hearing officer of the Elgin office on four different occasions and we talked three to four hours each time. I conducted the rest of my research by reading applicable sections of the Illinois UI Act, the Illinois Chamber of Commerce’s book entitled *Unemployment Insurance Law in Illinois*, and a lot of case law.

The definition of misconduct is very strict, and the employer bears a substantial burden in proving that an ex-employee should not receive benefits. When appropriate, an employer should fight claims for UI benefits or else he or she will be faced with a high UI tax rate. To help prove his or her case, an employer must have sufficient documentation and credible witnesses who can provide first-hand testimony. It is difficult for employers to prove ineligibility, but they can be successful if they have a sound knowledge of UI law.
AUTHOR: Tammy Jo Petkus

THESIS TITLE: How to Successfully Protest Your Ex-Employees' Claims for Unemployment Insurance Benefits

ADVISOR: Dr. C. Behrens


YEAR: December 1991

HONORS PROGRAM: University Honors Program

NAME OF COLLEGE: Northern Illinois University (College of Business)

PAGE LENGTH: 39

SUBJECT HEADINGS: (Choose 5 key words or phrases by which a reader could find your thesis)
1) Unemployment compensation
2) Misconduct
3) Employment Law
4) Termination of employees
5) Illinois Unemployment Insurance Law

ABSTRACT (100-200 WORDS): The purpose of this project was to present information on unemployment insurance (UI) law in Illinois which could be utilized by employers who wish to fight UI benefit claims by their ex-employees. The paper begins with a discussion of the mechanics of the Illinois UI Program. Then, I focus on one way in which an employee can be disqualified from receiving benefits: misconduct. I examine the definition of misconduct and apply it to case law and two actual hearings that I was able to attend at the Elgin Illinois Department of Employment Security Office. I met with a veteran hearing officer of the Elgin office on four different occasions and we talked three to four hours each time. I conducted the rest of my research by reading applicable sections of the Illinois UI Act, the Illinois Chamber of Commerce's book entitled Unemployment Insurance Law in Illinois, and a lot of case law. The definition of misconduct is very strict, and the employer bears a substantial burden in proving that an ex-employee should not receive benefits. When appropriate, an employer should fight claims for UI benefits or else he or she will be faced with a high UI tax rate. To help prove his or her case, an employer must have sufficient documentation and credible witnesses who can provide first-hand testimony. It is difficult for employers to prove ineligibility, but they can be successful if they have a sound knowledge of UI law.
Approved:  

Department of:  Management

Date:  12-12-91
INTRODUCTION

Employers need to control the potentially high costs of unemployment insurance contributions. It is not uncommon for small employers to go bankrupt because they are unable to make the high contributions that have resulted from their high unemployment insurance tax rate.

We begin by first looking at some basic information about the history of the federal-state unemployment insurance system, and the purpose and coverage of the Illinois Unemployment Insurance Act. Following this information, I will teach employers how to make the law work for them. Employers will learn how to protest an ex-employee’s claim for benefits, and how to prepare and conduct themselves at protest hearings.

Following this material, we will examine case law involving misconduct. If an employer can prove misconduct according to the Act’s definition, then the ex-employee will be denied benefits. Several cases are analyzed so that employers can begin to get a feel for what they need to do in order to prove an ex-employee is ineligible for benefits.

Although I look only at cases involving misconduct, much of the information which will be discussed and the employer tips that will be presented can be applied to any protest situation under Illinois Unemployment Insurance law. In addition to the book research I conducted, I also had the opportunity to work with a veteran hearing officer from the Illinois Department of Employment Security Office in Elgin who has been deciding state unemployment benefits claims for the past 16 years. I personally met with him on several occasions, and I also had the privilege of attending actual hearings conducted by him. I am very grateful to him for sharing his expertise with me and offering practical tips which employers can utilize to effectively deal
with claims for UI benefits.

I read a lot of material before working with the Referee, and this material literally came to life when I saw the system actually operating during my visits to the IDES. The combination of information from books and the real-life experience of being "inside" the system was an invaluable experience. I am glad I now have this opportunity to share my knowledge of the Illinois Unemployment Insurance program with the employers of Illinois.

Let's begin now by taking a look at the history behind unemployment insurance programs.

**History**

The Great Depression served as a stimulus for the enactment of many new laws. One such law was the Social Security Act of 1935 which provided a basic framework for a federal-state unemployment insurance system. With unemployment rates reaching crisis levels as high as 25%, the public became acutely aware of the fact that unemployment could befall anyone—not just those who lost their jobs due to their own fault. Unfortunately, workers could become unemployed through no fault of their own despite their willingness and ability to work. Some system of providing benefits to the jobless was desperately needed.

Compulsory unemployment insurance systems existed in Europe and ten other nations before the United States eventually adopted an unemployment insurance system of its own. Let's look at the evolution of the system adopted by the United States.

As early as 1916, a few states expressed an interest in developing their own unemployment insurance programs, but they were unsuccessful in enacting legislation. For example, in 1916, Massachusetts tried to get legislation passed, but failed. In 1921, New York also failed in its
pursuit of an unemployment insurance program. Most states, however, did not wish to adopt an unemployment insurance program because they knew their business communities would have to absorb the high costs of a program, and that this would allow those states not enacting an unemployment compensation program to gain an unfair advantage. Most states maintained this attitude even during the Depression. Thus, states were not doing much to help solve the national problem of unemployment. So, the federal government was forced to take matters into its own hands.

President Roosevelt believed that federal action was needed due to the failure of state initiative. In June 1934, President Roosevelt appointed a Committee on Economic Security to study the relationship of unemployment to the overall problem of economic instability. The Committee knew that federal action on social and economic problem such as unemployment compensation would face challenges of constitutionality. A system needed to be designed so that states did not feel their rights had been encroached upon by the federal government. Therefore, the Committee proposed a federal-state system. It was thought that states would be willing to accept a cooperative system. Under this system, states would be given much discretion in setting up their own unemployment insurance programs.

Once the need for a federal-state system had been agreed upon, the Committee needed to devise a way to induce state action. The Committee recognized that widespread unemployment insurance programs under a hybrid approach would become a reality only if federal legislation made them financially attractive for all states. A tax offset provision was the means used to get states involved.
The federal government imposed a uniform unemployment insurance tax on employers, but at the same time, it also incorporated a tax offset. With this tax offset, employers could receive a credit against the federal tax for paid state unemployment insurance taxes. States which chose not to adopt unemployment insurance programs or which adopted unemployment insurance programs that did not conform with federal regulations were denied credit against the federal tax. Therefore, these states would not pay a state unemployment insurance tax, but would pay the entire federal tax. Also, employees of the states without unemployment insurance programs would receive no benefits if they became unemployed. This tax offset provision proved to be successful. By July 1937, all states had enacted federally approved unemployment compensation programs. The basic framework created in 1935 has been very effective for the last 56 years.

**WHAT'S THE PURPOSE OF THE ILLINOIS UNEMPLOYMENT INSURANCE ACT?**

The basic purpose of the Illinois Unemployment Insurance ("UI") Act is to alleviate the menacing effects of involuntary unemployment. Individuals who are unemployed through no fault of their own and who are ready, willing, and able to accept suitable employment are entitled to benefits.

The Preamble to the UI Act uses the following language in stating the purpose of the Act:

**Economic insecurity due to involuntary unemployment** has become a serious menace to the health, safety, morals and welfare of the people of the State of Illinois. Involuntary unemployment is, therefore, a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family....It is the considered judgment of the General Assembly that in order to lessen the menace to the health, safety and morals of the people of Illinois, and to encourage stabilization of employment, **compulsory unemployment insurance** upon a statewide scale providing
for the setting aside of reserves during periods of employment to be used to pay benefits during periods of unemployment, is necessary. (emphasis added) [Ill. Rev. Stat. 1990, ch. 48, par. 300]

In fulfilling the purpose of the UI Act, the Act is to be liberally construed in favor of those individuals it was meant to protect (i.e., individuals who are unemployed through no fault of their own). Thus, benefits are more frequently awarded then denied.

**WHAT AGENCY ENFORCES THE ILLINOIS UNEMPLOYMENT INSURANCE ACT?**

The enforcer of the Illinois Unemployment Insurance Act is the Illinois Department of Employment Security (IDES). (This department used to be called the Illinois Department of Labor.) There are several IDES offices in Chicago and many others throughout Illinois.

**HOW ARE BENEFITS FUNDED AND WHO PAYS THEM OUT?**

The Illinois UI program is paid for entirely through employers' payroll contributions. Employers pay a state tax every quarter. No deductions are made from employees' wages. The tax money received from the employers goes into a fund from which benefits are dispersed to eligible individuals. The IDES, not the employer, writes checks and mails them.

How is the tax rate determined? The tax rate for each employer is primarily determined by the actual UI benefits paid to their ex-employees. This rate is termed the employer's "experience rating." It varies from employer to employer. It is based on the amount of UI benefits received by your ex-employees. The IDES sets up accounts for employers who are liable for contributions. (In the next section, we will discuss how employer liability is determined.) Each liable employer has an account number. When your ex-employees receive
UI benefits, these claims are charged to your account.

If you have benefits charged to your account, your UI rate with the IDES will eventually rise. You will receive UI tax bills that are much higher than what you were previously paying. These high tax bills can be devastating, especially to small employers. A high UI rate would be 6.5%; a low UI rate would be .68%. Currently, the wages on which the Illinois UI tax is based is the first $9000 paid to each employee in the calendar year.

The employer who is charged for the benefits paid is referred to as the "chargeable last employer." The chargeable last employer is the employer who last employed the worker for at least 30 days. These days may be consecutive or nonconsecutive.

**WHICH EMPLOYERS ARE LIABLE FOR CONTRIBUTIONS?**

Virtually all employers in Illinois fall under the coverage of the Illinois Unemployment Insurance Act. So, if you are an employer and are unsure of whether you are within the scope of the Act, you probably are a covered employer.

Employer liability is determined by the following rule: Employers of one or more in 20 weeks, or with a $1500 quarterly payroll. [Ill. Rev. Stat. 1990, ch. 48, par. 315] At first glance, this statement seems rather confusing, but if we take a closer look at it, we discover that it is actually quite an easy concept to grasp.

*One or more in 20 weeks:* Employers who have one or more employees on any one day within each of 20 or more weeks in any calendar year fulfill this rule. Let's look at some examples.

Imagine that you are the owner of a very small company. Since you do most of the work
yourself, you have only one employee. His name is Bob. You have Bob come in for only one day every other week to work for only one-half hour each time that he comes in. Thus, he works only one-half hour every other week. If he works for you for any 20 weeks in a year (the weeks don’t have to be consecutive), then you are liable for contributions for the entire year.

The number of hours Bob worked for you is irrelevant in determining your liability for contributions. Bob only needs to work on any one day within each of 20 or more weeks within a calendar year. So, an employer with an employee who only works for one-half hour, one day a week every other week for at least 20 weeks within a year meets the test just as much as would an employer with an employee who works five, eight-hour days per week for 20 consecutive weeks.

Let’s take our already extreme example of Bob and make it even more extreme to show the broad coverage of the UI Act. Suppose Bob works for you one-half hour per week, but he quits after working for a total of eight weeks. You now need someone to replace Bob, so you hire Carol. Carol works for one-half hour a week for a total of twelve weeks. Assuming this scenario took place within one calendar year, would you be liable for contributions?

The answer to the above question is "Yes." You had one or more persons in employment on any one day within each of 20 or more weeks (8 weeks from Bob plus 12 weeks from Carol). Thus, we see from this example that the law does not require the same individual to be employed within each of the 20 weeks.

*Quarterly Payroll of $1500 or More:* Any employer who does not meet the "one or more in 20 weeks" test, but who has paid wages of $1500 or more during any quarter of the year is liable for contributions. Therefore, if your payroll for January through March totals $1500 or
more, then you are liable for contributions for that year.

To summarize, there are two tests to determine whether an employer is covered by the Illinois UI Act: 1) One or more in 20 weeks, and 2) $1500 quarterly payroll. Passing either test results in liability for contributions. There are additional factors to consider in special circumstances (for example, when employer liability is incurred by acquiring another person's business). Also, different rules apply to non-profit organizations. For the purposes of this paper, however, it is sufficient to merely note that there are special circumstances which may not fall neatly into one the two above-mentioned tests. If you believe you are in a unique situation, review the UI Act's definition of an employer.

**How Does the Illinois UI Act Define an "Employee"?**

The definition of an employee makes a big difference in determining the number of employees you have, and in determining the quarterly taxable wages. The Act has delineated some exceptions as to what constitutes an employee. Currently, there are 16 exceptions. I have taken them directly from the Guide to the Illinois UI Act. [Illinois Department of Employment Security. *Guide to Illinois Unemployment Insurance Act*, 1990, pp. 6-8.] In general, the exceptions are as follows:

1. The owner or owners of an employing unit.
2. Directors of a corporation.
3. The owner's father, mother, spouse, and the owner's child under the age of 18.
4. Persons who do not perform any of their services in the State of Illinois.
5. Independent contractors. (Note: The definition of an independent contractor under Illinois UI law is extremely narrow. Independent contractor status is subject to a very
strict three-part test.)

6. Agricultural and aquacultural workers.

7. Some domestic workers in private homes, local college clubs, and local chapters of college fraternities or sororities.

8. Officers or members of the crew of a vessel which is not an American vessel or which is directed or maintained from an operating office outside the State.

9. Real estate salespersons under certain conditions.

10. Persons under the age of 18 who deliver newspapers.

11. Insurance agents who are paid solely by commission.

12. Persons considered to perform all of their services in another state even though some services are performed in Illinois.

13. Certain persons who perform services for non-profit organizations.


15. Certain direct sellers of consumer goods outside of a retail establishment.

16. Golf caddies who are full-time students under the age of 22 and who are paid directly by the club member or by the golf club as the agent for the member.

**IMPORTANCE OF FIGHTING CLAIMS FOR BENEFITS**

Managers need to control the high cost of unemployment claims. These claims can affect a company's bottom line. It is not uncommon for small employers to go bankrupt because they are unable to make the high contributions that have resulted from their high UI tax rate.

I have said that managers need to control the high cost of unemployment claims, but how?? They need to learn how to fight ex-employees' claims for benefits when appropriate by becoming knowledgeable about the Illinois UI Act so that they can keep their UI experience rating low. Knowledge, however, is not enough. Once managers have acquired an understanding of UI law,
they need to be aggressive and make the law work for them. The rest of this paper teaches employers how to fight UI claims for benefits.

**EMPLOYER NEEDS TO PROVE INELIGIBILITY**

The Act is liberally construed in favor of the claimant. Therefore, Illinois employers are correctly perceiving the situation when they complain that the Act favors the complainant. Since ex-employees are very often granted benefits, employers need to police the UI benefit claim system. If an employer is successful in demonstrating the ineligibility of the ex-employee, then his/her UI tax rate will not be affected which saves the company money. The dollar savings is often substantial.

**HOW DO YOU KNOW WHETHER YOUR EX-EMPLOYEE HAS FILED FOR BENEFITS?**

The unemployment insurance process is activated when an ex-employee goes to an unemployment insurance office to file a claim for benefits. Once an employee files, this individual is referred to as a "claimant." The claimant speaks to a "claims adjudicator." The claims adjudicator asks the claimant questions regarding where the employee worked, length of employment, the amount of money earned, etc. The claims adjudicator also asks for the reason for separation from the job. The claims adjudicator makes notes regarding this conversation on a form called an "Adjudicator Referral."

You will receive a form in the mail from the Illinois Department of Employment Security. This form is called BIS-32--Notice of Claim to: Chargeable Employer or Other Interested Party. This form is a very important document for the chargeable last employer. This form serves as
a turn-around protest document. Thus, if you wish to dispute the claim for benefits, you must complete this form, and have it postmarked and in the mail within 10 days after the form was mailed from the IDES. The Department’s address appears on the form. Be sure to mail your protest to that address and not to any other UI office. Returning the protest to a different UI office may cause your protest to be late. The 10-day deadline is strictly enforced. If you don’t meet the 10-day requirement, you lose your right to protest. There are three main sections of this form:

First Section: There is a long, narrow message box entitled "Chargeability Indicator." The text above the box reads: "The above-named individual has filed a claim for unemployment insurance benefits. As a former employer, your chargeability status for this claim is indicated in the box below." If you are the chargeable last employer, the Department will state so in this box. This form is not only sent to the chargeable last employer, but also the "actual" last employer (the last employer, but the employee worked less than 30 days for this employer) and to other former employers during the year. Oftentimes, the form is sent to these interested parties for their records only, or sometimes, to request information.

Second Section: Below the chargeability box, there is another section entitled, "Claim Protest." This section contains 13 possible reasons for why you believe the claimant does not qualify for benefits. Next to each statement there is a box, and you are to check the appropriate box(es). The following is a list of the reasons for protest:

Section 601: Voluntary Leaving

Section 602A: Misconduct (This paper focuses on misconduct.)

Section 602B: Felony and Theft
Section 610: Vacation Pay

Section 611: Retirement Pay

Section 612: Academic Pay

Section 500C: Able, Available, Actively Seeking Work

Wages in Lieu of Notice

I did not employ the claimant for 30 days.

Claimant never worked for me.

Claimant is not unemployed (give nature of employment)

Other: Describe below.

Third Section: This portion of the form asks for a statement of facts. It reads: "Provide material reasons and facts in support of your protest. (Conclusions of law without reasons will be ruled insufficient.)"

What are conclusions of law? The best way to answer this question is to provide you with an example of a statement that the Department would classify as a conclusion of law: "The claimant should not receive benefits because he was discharged for misconduct." This statement by itself is insufficient. A sufficient statement of facts would include examples of actions the claimant took which constitute misconduct. For example, was the claimant fighting? If so, then you should write: "The claimant was discharged for misconduct connected with his work because he was fighting on the job." This represents a sufficient statement of facts. Be as specific as possible and include any documentation that demonstrates that the claimant was indeed fighting on the job. If you provide an insufficient statement of facts, the claims
adjudicator will rule that your allegation is insufficient, and you may lose your right to protest. Once the Department has received your protest, the Department will send you a letter acknowledging the receipt of your protest, and a ruling as to whether your allegation is sufficient. If your allegation is sufficient, the claims adjudicator will begin an investigation.

INVESTIGATION BY CLAIMS ADJUDICATOR

The claims adjudicator will call the employer to get the initial facts. Employers typically do not handle this call properly. Company representatives of the employer are often unwilling to supply information, and they tend to "brush off" the claims adjudicator. This is a BIG mistake. I learned from the Referee that this is a disastrous approach. He stated: "The employer should always take the time to explain his business, personnel practices and policies, and the specific facts of the case to the adjudicator."

Being short with the claims adjudicator is a bad move because you are damaging your ability to win at the local office first. You have an opportunity to "nip it in the bud" by winning at this level. Keep in mind that the claimant has already spoken to the adjudicator, and presented his/her side. You now have the opportunity to present your side, so don’t blow it.

I cannot emphasize enough how crucial it is to establish your credibility as an employer. Cooperate, don’t antagonize. Supply the adjudicator with specific facts. The adjudicator is not aware of the facts surrounding your view of the discharge (except for the information you provided on the protest form). It is important that you take the time to explain all relevant information. If you follow this advice, you will enhance your credibility as an employer. The Referee commented: "The credibility of the company is KEY to local office level decisions."
Get to know the senior staff and management at the local office of your state unemployment insurance department. Become well known at the local office level."

Based on the facts collected during the investigation, the claims adjudicator will make a determination. This decision is sent to you from the local office in the form of a letter. If you do not agree with this initial decision, you may appeal for a hearing.

**HOW DO YOU APPEAL A DETERMINATION OF A CLAIM’S ADJUDICATOR?**

1. On company letterhead, send a letter to the UI office (indicated on the determination letter) which specifies which determination you are appealing, and simply ask for a hearing before a Referee.

2. Mail this letter of appeal within 30 days after the date the UI office mailed its determination letter to you.

   That's all there is to requesting an appeal. After the Department receives your letter, it will schedule a hearing date and time, and it will notify you of this information by mail. You will receive notice of this information at least seven days before the hearing date.

**PREPARATION FOR THE HEARING**

Before the hearing date, go to the UI office and examine their file on your ex-employee. You have the right to review this file, and it is in your best interests to do so. I had the opportunity to review several of these files during my time at the UI office. The documents are held in legal-sized file folders, and the folder contains all the documentation received thus far from the claimant and you. By reviewing the information submitted by the claimant, you will become aware of the claimant’s view of the discharge. By familiarizing yourself with this information, you will be able to anticipate what the claimant will say, and, therefore, you will
be able to prepare yourself more thoroughly for the hearing.

Be sure to assemble all relevant documentation. Examples of documentation include written warnings, time cards in absenteeism cases, etc. There are no formal rules of evidence in these hearings, so bring any information that supports your case.

Also, before the hearing, interview any managers, supervisors, or other employees with direct knowledge of the employee’s separation or other relevant knowledge. As long as you are not restricted by contract or grievance procedures, interview these individuals because they may be able to supply you with additional information. The Referee summed it up well when he said:

Employers should be sure to know their case. Discover all pertinent facts before the hearing. When an employer learns at the hearing that he/she has not prepared carefully enough and/or does not know all the circumstances, the employer’s case may be ruined beyond repair.

**IN-PERSON VS. PHONE HEARINGS: WHICH IS BETTER?**

You have the option of an "in-person" hearing or a telephone hearing (unless the Referee decides to require you to attend in person). If you choose a phone hearing, be sure to submit any additional documentation to the Referee by the hearing date. My advice to you is to attend the hearing in person if at all possible. Credibility is a major factor throughout the entire process. It is much easier to convince the Referee of your credibility if you appear in person.

Employers often want a phone hearing because it is less expensive since it takes less time out of their schedules. It is viewed as the easy way out. The Referee I spoke with doesn’t like phone hearings because he is concerned about "coaching." With a phone hearing, the Referee knows that the boss can easily be whispering into the supervisor’s ear while the supervisor is
speaking, telling the supervisor what to say. Also, a person on the phone can be speaking from a prepared list. The Referee feels he can more thoroughly exhaust your recollection if you are present at the hearing. If you have nothing to hide, then it’s much easier to demonstrate your credibility if you are in person because the Referee doesn’t have to wonder if you are being coached or reading from a list.

Also, suppose the claimant, in support of his case, wants to demonstrate that you are a violent person and it is difficult to deal with you. If you come in with a calm and relaxed manner, it will be hard for the claimant to prove his/her accusation (unless of course you are a violent person and lose your temper at the hearing!). The Referee will be more persuaded of your credibility if he has an opportunity to view your pleasant disposition in person.

**WITNESSES**

Company representatives with direct knowledge of the separation or with other relevant knowledge should attend the hearing. First-hand testimony is vital to the success of your case. If you are accusing the claimant of using illegal drugs on the job, then the supervisor who actually saw the claimant using the drugs better come to the hearing. The Referee is not interested in a company manager who comes in and says, "The employee’s supervisor saw the incident and he told me about it." This type of evidence is considered hearsay, and it is not the type of evidence on which the Referee can base a decision. If it’s the supervisor who saw the violation, then that supervisor better be present at the hearing.

Also, affidavits do not impress a Referee because the party is absent and can’t be questioned. Affidavits are usually regarded as hearsay evidence. A Referee attaches much more
weight to evidence presented in person by the person who witnessed the violation. You want a co-worker who saw the violation, not a manager or supervisor that heard about it. The Referee attaches much more weight to these first-hand witnesses because they can be questioned and cross-examined.

Obviously, it may not be possible for all company representatives with relevant knowledge to attend the hearing in person. These representatives, however, may be "present" via the phone. All representatives who can attend, however, should do so.

**THE HEARING**

The typical hearing is held in a small room (approximately 15 feet x 10 feet). This room is also the Referee’s office. In this room, there is a desk for the Referee. In front of this desk, there is a rectangular-shaped table with a couple of chairs on each side. The claimant sits on one side, and the company representatives sit on the other side. On the Referee’s desk, there is a tape recorder because all hearings are taped. Also, there is a phone with a conference button for the purpose of phone hearings.

The Referee turns on the tape recorder and begins the hearing with some background information. Some of the information he reads into the record includes the docket number, date, name of appellant, and name of appellee. Then, the Referee swears in the witnesses with the standard statement of "Do each of you solemnly swear to tell the whole truth..." The Referee then goes on to explain that the party filing the appeal is obligated to proceed first. That party will present his case without any interruptions from the other party. After that party is done presenting his/her case, then the other party may question him/her. After both parties have had an opportunity to present their cases and ask questions of the other, each may make a closing
statement. The Referee then states that a decision will be mailed to the parties and then he closes the hearing and turns off the tape recorder. The Referee shakes hands with the parties, thanks them for attending, and the parties exit. The Referee then calls the witnesses for the next hearing.

Who has the burden of proof? This depends on the issue. For example, with a voluntary quit, the claimant has the burden, and he/she must prove that he/she left for good cause. With misconduct cases, the employer must prove that the claimant engaged in behavior that constituted misconduct.

Cross-examination of claimant: When the employer has the opportunity to cross-examine the claimant at the hearing, the employer should ask questions that can be answered in one or two words. You want to stay on the issue and not bring up irrelevant points. Sometimes, the employer gets long-winded and says things that should not have been said. For example, with misconduct cases, if the employer mentions that the claimant did not get along well with management, the Referee may be led to believe that the claimant was discharged for reasons other than misconduct. Don’t talk for the sake of talking. Keep the following advice in mind:

When a claimant has given an answer that makes a point in your favor, resist the urge to push for further clarification. There are times when a continued pursuit can result in undoing the good that has been done. Once you have scored a point, don’t bring up irrelevant matters. [Hughes, Carol, ed. Unemployment Insurance in Illinois. Illinois State Chamber of Commerce, 1989, p. 40]

Staying calm: As an employer, you may be quite angry and upset that the Department granted benefits to one of your ex-employees who you truly feel should have been disqualified. Don’t display your anger to the Referee, however. It won’t help your case. Your anger will probably affect your concentration and you are likely to argue your case on emotion rather than
facts. The Referee I spoke with classified this type of employer as a "nice guy" employer. On this subject, he had the following comments:

Nice guy employers are often terribly offended when the local UI office has the nerve to grant benefits to one of their ex-employees. These nice guy employers slowly develop a very angry feeling toward the UI office. By the time the nice guy employer ends up at a benefits hearing, this employer is completely enraged and extremely defensive.

Because a nice guy employer is so angry by the time of the hearing, the employer absolutely forgets why he/she is there. Discussing the loan you made to your ex-employee for his grandmother’s surgery, for example, is not relevant to the resolution of your case. Nice guy employers who cannot concentrate on the facts will often lose.

**REFEREE’S DECISION AND CHANNELS OF APPEAL**

The Referee mails out his decision within three to six weeks. If you do not agree with his decision, you may appeal to the Board of Review. The appeal must be filed within 30 days from the date that the Referee mailed his decision. The Board reviews the transcript of the hearing to determine if the hearing was properly conducted. The Board typically upholds the decision of the Referee.

If you do not agree with the Board’s decision, you have yet another opportunity for appeal. This time you appeal to a Circuit Court. Legal documents must be filed with the Clerk of Court within 35 days from the date that the Board mailed its decision. The next step is the Appellate Court and then finally the Illinois Supreme Court, if that Court agrees to hear the case.

**ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY VS. NATIONAL LABOR RELATIONS BOARD**

For those of you who have had experience dealing with the National Labor Relations Board, you may have noticed a striking similarity between the National Labor Relations Board’s unfair labor practice (ULP) charge process and the UI claims process. I include the following
discussion because it will also serve as a review of the UI claims process which we briefly looked at above.

UI claims for benefits are investigated by a claims adjudicator, and ULP charges are investigated by a field examiner.

If you receive notice that your ex-employee filed for benefits and you believe he/she is ineligible, then you make a statement of facts on the protest form. The claims adjudicator rules on the sufficiency of your allegation. If your allegation is sufficient, you are automatically entitled to and will receive a hearing before a Referee. Similarly, if a ULP charge is found to have sufficient merit, the Regional Director issues a complaint. Complaints that are not withdrawn or settled are scheduled for a hearing before an Administrative Law Judge (ALJ). Referees and Administrative Law Judges are both neutral hearing officers.

The hearings in both arenas are where the facts are made—the fact pattern is established at the hearing. In his intermediate report, the ALJ makes findings of fact and recommendations of law and issues his report to the parties involved. This report is then reviewed by the 5-member adjudicative Board. Similarly, the Referee makes a determination and issues his decisions to the parties. Decisions of ALJ’s and Referees may be appealed to the respective 5-member Boards. Reviews of both ALJ & Referee decisions are usually upheld by the respective Boards.

The next step of appeal for ULP charges is the federal appellate court. This is usually the last step of appeal unless the United States Supreme Court grants certiorari. For UI claims, the next step of appeal is the Circuit Court serving the county in which the appellant lives or in which his principal place of business is located. Orders of the Circuit Court may be reviewed
by the Appellate Court. Rulings by the Appellate Court may then go to the final step of appeal which is the Illinois Supreme Court. The Illinois Supreme Court does not have to hear all cases appealed to it. It can pick and choose which cases it wishes to hear.

One final similarity involves the concept of a primary and exclusive enforcement agency. The National Labor Relations Board and the Illinois Department of Employment Security can both be classified as primary and exclusive enforcement agencies. You must go to these agencies first (primary), and you have no place else to go (exclusive). These agencies represent your only avenues to pursue.

----------------------------------------

Now that you have an understanding of the mechanics of the Illinois UI claims process, let’s turn our attention to a specific disqualification—misconduct. If an employee engages in misconduct associated with work, the IDES will not grant benefits to the employee.

**MISCONDUCT DEFINED**

The definition of misconduct falls under Section 602A of the Illinois Unemployment Insurance Act. The definition is very strict. Employers often believe misconduct has occurred when in fact it has not occurred, according to UI law. Misconduct used to be defined in a way that made it easier for employers to show that the worker should not get benefits because he/she was guilty of certain behavior. On January 1, 1988, however, the definition of misconduct was altered in such a way that it is now extremely difficult to show that a worker should not get benefits because of some bad behavior on the worker’s part.

Keep in mind that the Act is liberally construed in favor of the claimant. Thus, the
employer has the burden of proving that the claimant’s behavior violated the Act. The definition of misconduct is rather long, consisting of several significant phrases. The definition of misconduct is as follows:

1) Deliberate and willful violation
2) Of a reasonable rule or policy
3) Of the employing unit, governing the individual’s behavior
4) In the performance of his work

Provided...

5) Such violation has harmed
6) The employing unit or other employees

Or...

7) Has been repeated by the individual, despite a warning or other explicit instruction from the employing unit. [Ill. Rev. Stat. 1990, ch.48, par. 432]

The definition of misconduct does not include carelessness, negligence, incapacity, inadvertence, or inability to perform assigned tasks. [Siler v. Department of Employment Security (1989), 192 Ill. App. 3d 971, 549 N.E.2d 760] The legislative intent of this definition was to provide benefits regardless of carelessness or negligence.

The previous definition of misconduct included language similar to the willful and deliberate wording, but it included careless or negligent behavior in the definition of misconduct. Thus, with the old definition, careless or negligent behavior could constitute misconduct. The new definition, however, makes no reference to carelessness or negligence of any degree.

Examples of topics which deal with issues of misconduct include absence, attitude toward
employer, dishonesty, insubordination, intoxication, manner of performing work, neglect of duty, and tardiness.

Under the new definition, misconduct is strictly limited to conduct which is deliberate and willful. Employers have the substantial burden of proving that the employee's conduct was deliberate and willful. In assessing what is meant by deliberate and willful, let's look at what conduct is not deliberate and willful by looking at an inability to perform case that came before the Court in 1988. [Loveland Management Corp v. Board of Review, (1988), 166 Ill. App. 3d 698]

The employer hired a maintenance man for her complex of 91 apartments and 30 townhouses. The employer eventually discharged the worker because he neglected several of his duties. His neglect was resulting in damage to the buildings. For example, the employer directed him to have a sewer main rodded out. He did not do it, and consequently, three apartments were flooded by sewage. Other examples of neglected duties included the following:

- Not removing lint collected behind clothes dryers.
- Not taking out all the garbage; leaving some garbage near a furnace.
- Not cutting the lawn.
- Not keeping the building lobby clean and neat.

The claimant was able to provide convincing testimony that demonstrated he had responsibility for such a large number of duties that is was impossible for him to keep up with all the duties. He also correctly pointed out that after he was discharged, the employer hired two people to replace him. Did misconduct occur?

The Court upheld the Board’s decision to grant the claimant benefits. The reason it found
no misconduct was because the employer failed to prove that deliberate and willful conduct had occurred. The claimant tried his best to perform his job, but his numerous work assignments were beyond his capability. A showing of deliberate or willful conduct is not accomplished by showing an inability to perform. The primary concern in a case of this type is whether the claimant was capable of doing better. As the Board explained in 1984:

Care must be exercised to distinguish between those cases where the claimant knowingly failed to perform to the best of his/her ability, and those cases where the work assignments were beyond the claimant’s capability. [Bd. of Rev., Dec. No. 84-BRD-1589, Jan 31, 1984]

When an assignment goes beyond the claimant’s capability, no misconduct has occurred. The fact that no misconduct has occurred does not, however, mean that the employer was not justified in discharging an employee who is not capable of performing his/her work. The IDES does not second guess the employer as to whether or not he/she shouldn’t have fired the employee. This decision rests solely with the employer. The IDES only looks at whether benefits should be allowed. An employer may have a very good reason for discharging an employee, but that does not equate to "misconduct" to deny unemployment insurance benefits.

With the maintenance man case, I’m sure the employer believed she was justified in firing the worker. After all, apartments were flooding and safety violations were being discovered by fire inspectors. However, this conduct does not automatically translate into "misconduct" to deny UI benefits.

When I first read this case, I was shocked that the Department granted benefits to someone whose neglect was resulting in damage. I thought that it was unfair to charge this claim to the employer’s account. After my initial reaction, however, I stepped back and viewed the situation
in a different perspective.

This one employee was expected to perform numerous duties for 91 apartments and 30 townhouses. At one point, he was so overwhelmed that he wanted to quit, but decided to continue after the employer persuaded him to do so. Logic would seem to dictate that this job was too burdensome for one worker, and he shouldn’t be penalized by being denied benefits. If the employer was not previously aware of this fact, she should have been cognizant of it when the worker expressed his desire to quit. If the employer had been practicing good management, she would have seen the need to hire an additional maintenance person. Yes, there would have been another salary to pay, but it would have been worth it. The tenants would have been happier, apartments would have less likely been damaged, etc. These dollar savings could have been applied to the salary of an additional maintenance worker.

MISCONDUCT CASES INVOLVING WORKER PERFORMANCE

Cases regarding work performance are tough for the employer to win. Often, the employee just can’t do the job, but this is not misconduct because it is not deliberate and willful. As the Referee told me: "It’s not against the law to be stupid." Yes, you may fire an employee for being stupid as long as it does not violate a statute, contract, or tort, but the Department may still grant benefits. Every justifiable discharge does not disqualify the discharged employee from receiving unemployment benefits. Recall that the purpose of the UI Act is to provide benefits to job seekers who are unemployed through no fault of their own. If a worker is not too bright or capable, it is not his fault. Since it is not his fault, he/she deserves benefits. Denying these individuals benefits would be violating the purpose of the Act.
CASES INVOLVING ABSENTEEISM OR TARDINESS

Misconduct cases involving absenteeism or tardiness occur frequently. Let's look at a fact pattern. Assume you have an employee who is excessively tardy. You warn him that his next absence will result in discharge. He is tardy again.

On the surface, it appears as though misconduct has occurred. The employee repeated his behavior despite a warning from the employer. It appears that the conduct is deliberate and willful since the employee should have known that another violation would result in discharge.

However, before misconduct can be determined, we need more facts. We need to focus on the "last act" prior to the termination. We need to look at the reason for the tardiness to determine whether this last act constituted misconduct. What if the reason the claimant gives is that his bus was delayed due to bad weather? The IDES has viewed reasons like this one as deliberate and willful conduct. The claimant knew his job was in jeopardy. Therefore, he should have taken extra precautions to avoid being late. He should have had other alternatives previously arranged so that he could have been assured of arriving on time.

Now, let's look at a different reason for the last tardy. What if the claimant was late because his son was ill and he had to drop off his wife and son at the doctor's office because they had no other mode of transportation to the doctor’s office available? The claimant knew he had time to do this before work. He even took a short cut on his way to work to be sure he arrived on time. But, on his way, he got a flat tire. He opened the trunk to get the spare. (He periodically checked this spare to be sure it had a sufficient amount of air. When threatened with dismissal, he foresaw the possibility of getting a flat tire, so he took the precaution of periodically checking the spare.) However, when he went to take out the spare, he noticed that
the spare was flat too. He was on a deserted country road where there were no phones so he could not call his employer. By the time he finally arrived at work, he was late. Has misconduct occurred?

The answer to the above question is "No." We must focus on this last tardy. The claimant knew his job was in jeopardy, and as a result, he took precautions to prevent future tardiness. The claimant’s last tardy was unavoidable. He did everything in his power to arrive at work on time, but nevertheless was unsuccessful. The Department would grant benefits to this claimant because his tardy was not a deliberate and willful violation.

If you were the employer in this case, you should have questioned the employee as to the reason for his tardy. Just because you warned him that the next tardy would result in discharge does not mean that the IDES will deny him benefits. You want to discharge the employee after a tardy for which he has no overwhelming reason. It is possible that the employee will give you a poor reason when you request one, and then at the hearing, he develops an intricate story for why he was late. If the Referee believes the claimant is credible, then he will award benefits. For your sake, hopefully the Referee will find a flaw in the claimant’s story. Build your case to the best of your ability so you won’t be surprised by a clever story from the claimant. Document everything. If you plan well, and if the employee really is willfully and deliberately abusing your warnings, then you increase your likelihood of proving your case.

One of the hearings I attended during my study involved absenteeism. The claimant and her supervisor attended in person. The claimant also had her young child with her. The claimant had been absent from work several times. She was going through a divorce, and her husband was harassing her. The claimant was scheduled to work on Sunday, but she failed to report to
work because of an encounter she had with her husband. She did not call in to say she would not be coming in. Her supervisor called her later that day.

According to the claimant, the supervisor terminated her during that call, and told her that if she had any questions to come in to his office at 10:00 a.m. on Monday. She didn’t have any questions, so she didn’t go in on Monday. The claimant said that if she had known that she may be able to keep her job by coming in on Monday, she would have come in.

The supervisor contended that he did not call to fire her, but rather was directing her to attend a counseling session on Monday to discuss her absences, and work out the problem. When she didn’t show up on Monday, she was discharged.

In analyzing this case, we need to focus on the last incident--her failure to come in on Monday. The Referee and I discussed the case and determined that the main issue is whether the claimant engaged in willful and deliberate behavior. If we believe the claimant’s story about not reporting to work on Monday because she thought she was already fired, then her conduct probably is not misconduct. If, however, the supervisor is telling the truth, then misconduct did occur because the claimant would have knowingly refused an opportunity to rectify the situation.

During the course of the hearing, both parties held firmly to their respective views. The supervisor did not have any documentation of his call to the claimant to support his version of the facts. He also didn’t have any witnesses to his phone conversation with the claimant. The employer didn’t build his case well. The employer has the burden of proof. Evidence is crucial to building a case.

It comes down to one party’s word against the other’s. The employer had to prove by a preponderance of the evidence that the claimant willfully and deliberately chose not to attend the
counselling session. The Referee's decision will most likely allow benefits for the claimant when the decision is issued since the employer did not fulfill his burden of proving ineligibility. (Note: The Referee's decision has not yet been issued.)

Absence without Notice: A recent case was decided which appears to tip in favor of the employer on the issue of absence without notice. [Thomas v. Board of Review, Ill. App. Ct., 6th Division (1991), No. 1-90-0955; Commerce Clearing House UI Reporter, Vol 4, p. 16773, para. 8411]

In this case, the claimant left work without informing his employer that he was leaving and would not return. The reason he left was because he was ill since he had used heroin the day before. He left work and went directly to a hospital to seek admission for drug treatment. He claims to have tried to phone his supervisor, but that he wasn't able to leave a message because the employer's answering machine was not working.

The Board of Review denied benefits, ruling that an employee must give some notice of an absence. The Illinois Appellate Court affirmed the Board's decision and reversed the Circuit Court's decision to grant benefits. Improper notification of an absence harms the employer because the employer does not have the opportunity to adjust schedules and reassign work. The claimant's conduct was misconduct, and he was accordingly denied benefits.

**MY ATTENDANCE AT A SECOND HEARING**

I had the opportunity to attend a second hearing. This case involved forgery. When the personnel department distributed the paychecks, the claimant's paycheck was missing. The person distributing the paychecks told the claimant that she would try to locate the missing
paycheck. After a few hours, the claimant had not yet heard any information concerning her paycheck. So, she went to the personnel department and asked that they issue her another paycheck. Personnel issued her a new check. After work that day, the claimant cashed the check at a local bank.

When the employer received its canceled checks, there were two paychecks that had been cashed by the claimant—the original "missing" paycheck plus the check issued to replace the missing paycheck. The claimant contends that the signature appearing on the original check is not her signature. She claims that someone must have forged her signature. Prior to this incident, the claimant filed a harassment suit, and consequently, she believes the employer was looking for a way to get rid of her.

The employer obtained an affidavit from the bank teller at the bank at which the original check was cashed (a bank different from the bank at which the check issued to replace the original was cashed) as evidence. The affidavit stated that it was indeed the claimant who cashed the check (i.e., the original "missing" check).

After the hearing, the Referee and I discussed the facts. We determined that the employer had not built a case strong enough to prove the ineligibility of the claimant. First of all, the affidavit was essentially worthless because it could not be cross-examined. The Referee would have needed to actually speak with this bank teller in person. The Referee can't determine the credibility of an affidavit, but he can determine the credibility of a person who he can cross-examine.

The employer representative brought copies of the two canceled checks to show the similarity of the signatures. He didn't bring the actual canceled checks—he brought copies.
How do we know that the employer didn’t manipulate the copy of the original paycheck. He could have gotten the claimant’s signature from another document on file and substituted this signature for the signature which actually appeared on the original check. The employer’s evidence creates too many doubts. If the employer is telling the truth, he should have brought the actual canceled checks with him so the Referee could compare signatures. To build his case further, the employer could have had a handwriting analyst examine the signatures. If the analyst thought the signatures were the same, the employer could have had this expert witness testify.

The distributor of the paychecks walked to each employees’ desk and handed the employee his/her paycheck. It is possible that the claimant’s paycheck dropped to the floor in the process of handing out paychecks. A co-worker could have picked up the paycheck and cashed it to get the extra money. Also, the claimant had been having some trouble with her co-workers, and it is possible that one of these co-workers found the check and cashed it to purposefully make the claimant look guilty. With these possibilities in mind and because of the employer’s weak evidence, the Referee and I concluded that the claimant should be granted benefits.

If the claimant really was responsible for cashing two paychecks, the employer could have proved his case if he had submitted better evidence. The employer must always keep in mind that he/she needs to actually prove that the claimant is ineligible. Evidence is therefore crucial to the employer’s case.

**Illegal Drug Usage**

Another misconduct issue concerns intoxication and the use of intoxicants. Employers often
this level poses a danger. During a routine physical, one of your truck drivers tests positive for 50 nanograms of marijuana. You fire him, and he applies for benefits. Do you think this claimant will be granted benefits.

The answer to the above question depends on what type of evidence you have to support your allegation. It's true that a worker is ineligible for UI benefits if he is discharged for using illegal drugs on the job, or for reporting to work in an impaired condition which affects his ability to perform. [Profice v. Board of Review, 481 N.E. 2d 1229 (1985)] In order to prove ineligibility, however, you must present competent evidence. If you come to the hearing with the drug test results, and if you have no other supporting evidence, you will lose your case. Why? Because drug test results by themselves are hearsay. (Hearsay are statements made outside of the hearing room.) The Referee may review the results, but he cannot use the results as the sole basis for denying the claimant benefits. On one occasion, when the Referee and I were reviewing some files, we came across a file with drug test results. He held the document up and said he didn't really care about it. He said, "Hearsay." I was rather surprised to learn how little weight he was going to attach to the test results. However, he explained that he could not cross-examine these results; he can only cross-examine people.

If the person who administered the drug test attends the hearing as a witness for the employer, and if this person testifies on laboratory procedures and establishes that the specimen belonged to the claimant, then the employer will have a case.

An even better case would be where an employer also has a supervisor who observed the claimant smoking marijuana on the job. This supervisor could attend the hearing and testify to his observations of the violation. Now, the employer has an excellent case. This additional
evidence overcomes the hearsay defects. Test results by themselves, however, will not disqualify an individual for benefits.

Let's take a slightly different perspective on this fact pattern. What if you did not administer a drug test, and therefore, have no test results? Assume further that the supervisor saw the claimant using the illegal drug during work. If the supervisor is a credible witness, the you can make your case. Drug test results are not required. Observations of illegal drug use can provide the Referee with a sound basis for denying the claimant benefits.

**VIOLATION OF A COMPANY RULE**


The claimant was an administrative secretary for St. Bernard Hospital. She was supposed to attend, tape record, and take notes of a meeting. During this meeting, the claimant violated a company rule of no sleeping of the job when she fell asleep for 30 minutes. She had never before fallen asleep on the job. Also, prior to this incident, she had never received a poor performance review. She said she fell asleep because of an aspirin she had taken right before the meeting began.

The Board of Review denied the claimant benefits ruling she purposely took a nap during the meeting. The Board said that if she had fallen asleep for only a few minutes her conduct would not be considered misconduct because it would not have been deliberate and willful. It
would have been an accident. However, the Board reasoned that since she felt asleep for 30 minutes, she willfully and deliberately disregarded the Hospital's rule.

The Court, however, ruled that the length of time the claimant was asleep does not automatically indicate willful and deliberate conduct. There was no evidence to prove her conduct was deliberate and willful. Rather, it appeared as though she accidentally, not intentionally, feel asleep. Yes, she violated a reasonable company rule, but she did so accidentally. Misconduct is limited to acts that are intentional. Thus, the claimant was granted benefits.

As I read this case, I couldn't help but wonder why no one awakened the claimant. Assuming someone saw that she was sleeping, it seems as though this whole situation could have been avoided if somebody tapped her on her shoulder to wake her up.

**ELEMENT OF HARM**

Misconduct includes an element of harm. To prove harm, the employer must be able to quantify the damage incurred as a result of the conduct. Harm comes in many forms, but it usually ends up as a dollar figure. For example, if an employee caused you mental anguish as a result of his/her behavior, you better have doctors' bills to demonstrate harm.

Harm does not include potential future injury. For example, in a recent case, a maintenance worker mistakenly disposed of two uniforms. The employer was able to retrieve the uniforms. The Board of Review argued that "the plaintiff should not be exonerated from his actions because of the fortuitous intervention of the employer." [Charles Adams v. DES and Wm. Wrigley Jr. Co., Ill. App. Ct., 6th Div. (1991), CCH UI Reporter, Vol. 4, page 16746, para. 8405] Thus, the Board believed that the potential for harm existed because the employer might
not have been able to retrieve the uniforms. The Circuit Court and the Illinois Appellate Court, however, found that harm can’t be found in a potential injury. You must experience actual damage which you can quantify in order to prove the harm element of misconduct.

**THE AUTHOR’S COMMENTARY ON ILLINOIS UNEMPLOYMENT INSURANCE LAW**

Overall, I believe the Illinois Unemployment Insurance program is fair to employees and employers. However, I do have one main criticism that I would like to discuss. This criticism concerns the definition of misconduct. In particular, I am concerned that the definition does not include carelessness or negligence of any degree.

The Illinois Department of Employment Security relies very heavily upon the "deliberate and wilful" language of the definition, and consequently, this Department will grant benefits to individuals who have exhibited gross carelessness or negligence, as long as it was not deliberate or wilful. I realize that this was the intent of the Legislature when it modified the definition as of January 1, 1988. However, I believe the current definition of misconduct conflicts with the purpose of the UI Act.

The purpose of the Act is to provide benefits to those individuals who have lost their jobs through no fault of their own. When an individual engages in careless or negligent conduct (even though it is not done in a deliberate and wilful manner), how can we say that this conduct was not his or her fault? The UI Act is to be liberally construed in favor of the claimant, but I believe the IDES has gone to an extreme. The IDES is expecting too little of employees. This Department is sending a message to employees. Employees know they can get away with a lot and still collect benefits. Employees are learning how to play the game.
With today's definition of misconduct, an employee can disregard an employer's rule. The rule may be extremely important, but as long as the employee didn't intentionally disregard the rule, he or she will still be granted benefits. Yes, the employer may discharge the employee for violating the reasonable rule thereby getting rid of the problem employee, but the employer is then faced with the problem of an increased UI tax rate. The employer finds himself in a no-win situation.

Earlier in the paper, I discussed an absenteeism case involving the man with the flat tire. This man had a record of excessive absenteeism. The employer, however, if he wants to protect his UI rate, must ascertain the reason for this man's last absence to determine whether it was deliberate and wilful misconduct. I don't believe the employer should have this burden placed upon him. To me, if an employee is absent 20 times, this record of conduct is deliberate and wilful, and the reason for the last absence shouldn't negate the prior record of absenteeism.

I do agree with the exclusion of inability to perform the job from the definition of misconduct. If an employee simply is not able to perform his or her job, and he or she is discharged for his inability, then this individual should receive benefits because he has lost his job through no fault of his own. This type of case fits within the purpose of the UI Act.

Prior to January 1, 1988, misconduct was defined as:

Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. [Jackson v. Board of Review (1985), 105 Ill. 2d 501, 475 N.E.2d 879]

I believe we should return to the Act's previous definition because it better fulfills the
purpose of the Act. Under this previous definition, carelessness or negligence could constitute misconduct.

I would like to raise one other point which isn't necessarily a criticism but rather is more of a revelation for me. I am referring to the role that credibility plays in the hearing process. As I have attempted to emphasize in this paper, credibility is a major issue in these hearings. One of the Referee's primary jobs is to determine who is lying less. Making this type of determination is a part of all judicial proceedings. However, as an actual attendee at these hearings and through my conversations with the Referee, I became more consciously aware of the importance of credibility. It became quite clear to me that a good actor could be lying, but he or she could be convincing enough to persuade the Referee of his or her story. This is especially true considering there are no formal rules of evidence in UI protest hearings.

**FINAL NOTES**

As employers, you face an uphill battle as you fight claims for UI benefits, but this doesn't mean that you shouldn't try. You must not "lay down and die." It is up to employers to police the UI system so that employees are denied benefits when appropriate.

The tips revealed in this paper should help you successfully protest your ex-employees' claims for benefits. In addition to studying this paper, be sure to study the Illinois Unemployment Insurance Act. You can easily obtain a copy by calling any UI office. I received my copy from the Chicago office on State Street. The phone number there is 312-793-2333. Just ask for a copy of the Illinois Unemployment Insurance Act, and they will be happy to mail you one, free of charge.
As an employer, you have a substantial burden in showing that the employee you discharged is ineligible for benefits. Documentation and witnesses are crucial to your case. You must carefully build your case. Yes, it is a large burden, but rather than complaining that the system is unfair, be positive and work within the system. You can be successful in fighting UI claims for benefits. Good Luck!