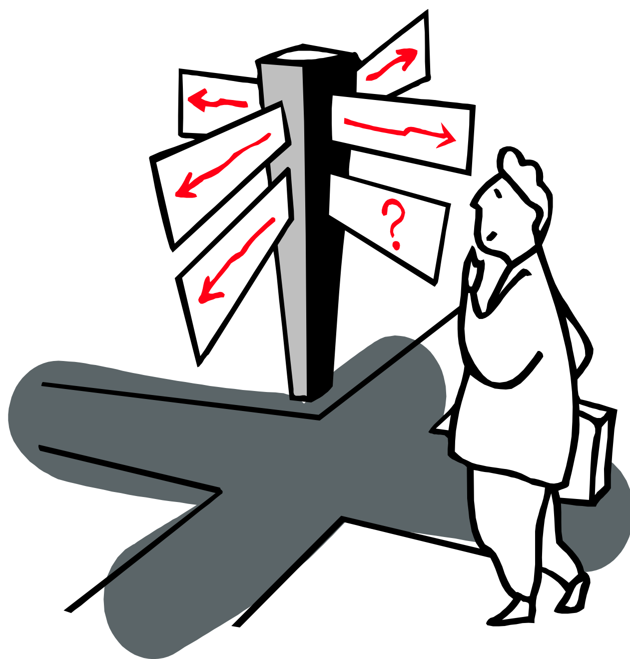
HOW TO REPRESENT YOURSELF IN AN UNEMPLOYMENT INSURANCE HEARING



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GENERAL OVERVIEW OF UNEMPLOYMENT INSURANCE

A. WHO IS ELIGIBLE FOR UNEMPLOYMENT BENEFITS?

In order to be eligible for Unemployment Insurance, you must:

- Have adequate past earnings
- Be currently unemployed
- Be unemployed through no fault of your own
- Be actively seeking reemployment

Once you have applied for Unemployment Benefits either by telephone or online, the Department of Labor will make a decision regarding your eligibility. If you do not meet one of the above criteria, you can be denied benefits. Even if you start receiving checks, your employer may still contest your benefits if he or she believes you quit without a good reason or were fired for misconduct. If your employer contests your benefits, the Department of Labor will investigate the circumstances surrounding your unemployment. As part of their investigation, the DOL will generally send you a questionnaire asking for your side of the story.

If the DOL agrees with your employer that you quit without good reason or were fired, your benefits will be denied. At that time, a "Notice of Determination of Ineligibility or Disqualification" will be mailed to you telling you the reasons for the denial. This notice will also explain for what period of time benefits are being denied, how to re-qualify, and how to ask for a hearing. Always read the back and the small print on the Notice of Determination and all other documents from the Department of Labor.

B. WHAT IS A HEARING?

A hearing is an informal trial held before an Administrative Law Judge in a hearing room. Based on the evidence presented at the hearing, the judge will decide whether you are entitled to unemployment insurance benefits. At the hearing, you, your employer and any witnesses for either side may testify. The testimony will be recorded. Either side can also present papers or other physical evidence.

You, or your employer, may request a hearing on any determination affecting your rights to benefits. Your hearing request must be made in writing and received by the Department within 30 days of the date the determination was mailed. Make sure you include your Social Security number on your hearing request letter. You will be notified of the date, time and place of the hearing by the Administrative Law Judge shortly after you request a hearing. **Even if you think you might later abandon your claim, you should request a hearing immediately.**

Do not wait until you get your Notice of Hearing to start preparing your case, because you may receive the notice of hearing only a few days before the hearing is scheduled.

WHAT TO DO WHEN YOU RECEIVE A NOTICE OF DETERMINATION

A. REQUEST A HEARING IN WRITING WITHIN 30 DAYS

1. Send in a written request for a hearing as soon as you receive a notice of determination. **Do Not Miss the Deadline!** The DOL must *receive and file* the written request within the 30-day deadline.
2. Your request letter should include: your full name, case number, social security number, and your current address, and should state that you disagree with the determination (see sample letter, p. 15).
3. Keep a photocopy for your files in case your letter gets lost in the mail.
4. If you require a Spanish or Mandarin/Cantonese Interpreter, include a request for the interpreter on your letter requesting the hearing. If you require translation for any other language, you can either bring someone with you to translate or the DOL will use a telephone service called Language Line to communicate with you during the hearing.

B. PREPARE YOUR CASE

1. **Review your case file.** Your case file contains statements from your employer as well as documents your employer may try to introduce at your hearing. Reviewing your file will help you understand what your employer might argue.
    a. Case files are located at Department of Labor, 9 Bond Street (between Fulton and Livingston), Brooklyn, New York 11201. It is open Monday-Friday, 8:45am - 4:45pm.
    b. You can copy up to 10 pages from your file. Copies are $0.25 cents per page, but the DOL accepts only checks or money orders, **not cash**. Bring a notepad and take notes about the pages you do not copy.
2. **Gather evidence to prove your eligibility.** This may include pay stubs, bank statements, phone bills, warning letters, performance evaluations, arbitration decisions, collective bargaining agreements, employee handbooks or manuals, doctors' notes, and photographs.
3. **Speak to any relevant witnesses and ask if they will testify** (either in person or on the phone).
4. **Outline the points you want to make at the hearing.**
    a. Keep it simple and focus on the day or issue in question. If your employer is alleging misconduct, focus on the date of the last alleged instance of misconduct.
    b. Outline the sequence of events in chronological order. Make note of important dates, like the dates of any relevant incidents (absences, warnings, tardiness), the date you started working, the date you last worked, and the date you filed for benefits.
5. **Research the law to help prepare your argument.** The law is laid out in simple language and is broken down by major topic areas in the Unemployment Insurance Interpretation Index.
    a. If you have internet access, go to http://www.labor.state.ny.us/ui/aso/interpservice.shtm
    b. If you do not have internet access, go to the DOL library at 9 Bond St.

WHAT TO DO IF YOU ARE NOT READY ON THE DAY OF THE HEARING

If possible, ask for an extension, or an "adjournment" ahead of time in writing or by calling the Administrative Law Judge Section. If the adjournment is not granted in advance, you must go to your hearing to request the adjournment in person. If you cannot go yourself, you may send a representative along with a signed letter explaining why you are unable to attend.

At the hearing, you can ask for an adjournment in order to look for legal representation or gather evidence. The Administrative Law Judge may grant you an adjournment, but is more likely to hold you in "default." A default is when a party is unable to make a court appearance. If you are held in default, you may reopen your case, after you have had an opportunity to gather the evidence or meet with a legal representative, by sending in a written request asking for a new hearing date. (see sample letter, p. 16).

If you do not attend the hearing, the Judge can hold the hearing without you and will decide your case without hearing your side of the story.

If you miss a hearing for a good reason (for example, a medical emergency), you should request that your case be reopened. (see sample letter, p. 16).

If the Administrative Law Judge turns down your request and you do not want to have to reopen the default, you can decide to go ahead at the hearing.

WHAT TO EXPECT ON THE DAY OF THE HEARING

A. ARRIVE EARLY AND BE PREPARED

1. Arrive at least 30 minutes prior to your hearing so you can review your case file. It is not advisable to look at your file for the first time on the day of your hearing, but it is important to look at the file to see if your employer has added any new statements.
2. Bring all of the following with you to the hearing:
   a. a pen and paper to write on
   b. all documents you have received from the DOL
   c. the original and 2 photocopies of all other documents supporting your case.
3. Dress appropriately; try to look neat and avoid casual or flashy dressing.
4. Drop off your notice of hearing in the reception basket when you arrive and wait until your case number gets called.
5. Enter the hearing room with confidence; breathe deeply; and do your best to remain calm. Getting angry with the employer or the Administrative Law Judge will not help. Speak clearly because the hearings are recorded.
6. Address the Administrative Law Judge in a respectful manner. Refer to him/her as "your honor."

B. THE HEARING PROCESS

1. The Judge should start by asking if you are ready to proceed, if you are not ready, you may ask the Judge for an adjournment in order to seek legal representation or to find witnesses or other evidence (see explanation on p. 5).
2. The Judge may ask you or your employer background questions.
   a. While the Judge asks your employer questions, listen carefully to what the employer says and take notes. Do not interrupt or make comments while your employer is testifying.
   b. When the Judge asks you questions, stick to the facts, and answer the questions directly.
3. The Judge generally cannot consider issues outside those listed on your Notice of Determination, but he or she may do so with your consent. If you are not prepared to discuss new issues, you have a right to get more time to prepare for the hearing.
4. If your employer attends the hearing s/he will have an opportunity to cross-examine you and any witnesses.
   a. Again, try to remain calm and stick to the facts.
   b. The employer may choose not to attend the hearing. If that is the case, the Judge will hold the hearing and decide your case without hearing your employer's side of the story.

PRESENTING YOUR CASE AT THE HEARING

A. Present your Evidence

1. When telling your story, be sure to stick to the facts and focus on the date or issue in question.
2. Do not make any false statements. If you do make a false statement, you may be subject to penalties, including forfeiture for up to 80 days of future benefits, or an order requiring repayment of benefits already received.
3. If you need to present a document as evidence, say “Your honor, I ask that [describe the document] be marked into evidence as Claimant’s Exhibit #1.” For each other additional document that you need to present as evidence make the request using the same statement, but simply change the number e.g. for the second document say “Claimant’s Exhibit #2.”
4. If you can't get necessary witnesses or documents because the person who has them refuses to give them to you, you can request that the Judge have them brought in under subpoena.

B. Cross-Examine Your Employer

1. You will have a chance to cross-examine the employer and their witnesses, if any. Try to ask questions that have answers that help your side of the story. For example, if your employer claims you were fired for being *late* to work, you might ask: “Wasn’t the warning you gave me on [date], a warning regarding unexcused *absences*?”
2. Do not ask questions like “isn’t it true that you are lying?” Even if the witnesses were lying, they would not admit it.
3. If you have trouble phrasing the questions, or if your employer is not answering the questions directly, you can ask the Judge to help you.

C. Give a Brief Closing Argument

1. You should try to prepare a “closing argument,” or a brief recap of your main points, before you go to your hearing.
2. Remember to focus on the day or issue in question.
3. Explain in your closing statement why the testimony and evidence presented at the hearing support your side.

WHAT TO DO AFTER THE HEARING

A. CONTINUE TO CERTIFY

1. You should receive a "notice of decision" in the mail within 2-3 weeks after the hearing.
2. In the meantime, continue to certify for benefits each week by phone at 1-888-581-5812 or online at https://ui.labor.state.ny.us/UBC/home.do.
3. If you do not continue to certify, you will forfeit the benefits for that period even if you win the hearing. Therefore, it is important that you continue to certify.

B. KEEP TRACK OF YOUR BENEFITS

1. If you win, keep track of the benefit checks that come to you.
2. If you have trouble receiving all the benefits you are owed, call the claims center at 1-888-209-8124. The claims center is available from 8:00am to 5:00pm, Monday through Friday.

C. DECIDE WHETHER TO REQUEST AN APPEAL

1. When you do receive the decision, read it carefully. If you disagree with the decision, you may request an appeal.
2. Pay Attention to the Deadline! The DOL must *receive* your written request for an appeal within 20 days after you receive the decision.
3. See p. 17 for a sample letter requesting an appeal.

COMMON ISSUES AND ARGUMENTS

When you receive your Notice of Determination, read it carefully to find out why you are being denied benefits. Some of the common issues that arise at Unemployment Insurance Hearings are:

A. Failure to timely request a hearing
B. Voluntary quit without good cause
C. Misconduct
D. Overpayment
E. Penalty for Willful False Statements

This section is designed to give you a general explanation of the legal standards for each of those common issues. Again, this information is not legal advice. Please consult an attorney for legal advice, which is dependent upon the specific circumstances of each situation. You may find further information about the legal standards either online at http://www.labor.state.ny.us/ui/aso/interpservice.shtm, or at the DOL library at 9 Bond Street.

A. FAILURE TO TIMELY REQUEST A HEARING

In order to contest a denial of benefits, you must request a hearing in writing within 30 days of a Notice of Determination. The DOL's position is that the request is timely only if it is *received* by the DOL within the 30-day period. If you do not have a valid excuse for a late request, the DOL will not permit you to challenge the denial of your benefits.

If you failed to request a hearing within the 30-day deadline, *it is very difficult to show a valid excuse for a late request*. Because it is so difficult to show a valid excuse for an untimely request for a hearing, it is very important to pay attention to the deadlines set by the DOL.

To excuse an untimely appeal, you must be able to show that you were incapacitated due to physical injury or mental illness, or that you did not receive the notice of determination either because of post office error or other conditions outside your control. New York Labor Law §620(1)(a).

Late requests for hearings have **not** been excused where the claimant was illiterate, *see Claim of Davis*, 192 A.D.2d 1000, 597 N.Y.S.2d 222 (N.Y.A.D. 3 Dept. 1993); where the claimant wanted to wait for the outcome of a union arbitration, *see Claim of Hightower*, 169 A.D.2d 922, 564 N.Y.S.2d 641 (N.Y.A.D. 3 Dept. 1991); where the claimant was confused by multiple notices from the DOL, *see Claim of Jowers*, 295 A.D.2d 734, 743 N.Y.S.2d 210 (N.Y.A.D. 3 Dept. 2002); or where the claimant was ill but not hospitalized or bedridden, *see Claim of Gomez*, 219 A.D.2d 767, 631 N.Y.S.2d 196 (N.Y.A.D. 3 Dept. 1995).

B. VOLUNTARY QUIT WITHOUT GOOD CAUSE

In general, to qualify for benefits, a claimant who voluntarily leaves employment must have had a compelling reason for leaving and must have made a reasonable attempt to resolve the problem.

Simply failing to get along with your supervisor or co-workers is not good cause for leaving, but the Appeal Board has found that there is good cause to quit if:

- an employer makes false accusations of the employee
- an employer fails to pay wages on time
- an employer discriminates against its employees
- a supervisor continuously uses abusive profanity
- an employee faces constant harassment by co-workers that causes him/her to become physically ill

You may also be able to show good cause for quitting if you did so because you had to care for your sick child at home and you were not able to make changes in your hours or arrange a leave of absence. *See* A.B. 6184-41; A.B. 414,684; and A-750-2057.

New York law also provides that you may show good cause for quitting if the reason for quitting was related to circumstances resulting from your being a victim of domestic violence. New York Labor Law § 593(1)(a).

C. MISCONDUCT

Misconduct means, "intentionally ignoring your employer's rules or interests." It does not include firing because your boss did not like you or thought you were not doing a good enough job. Discharge for misconduct can be based on many different kinds of acts, for example: lateness; absenteeism; criminal conduct outside of work; or insubordination. To understand what your employer is claiming you have done that constitutes misconduct, you should review your case file at the DOL.

Warnings: You may be qualified for benefits even if you engaged in the act that your employer alleges, if you had not been previously warned either orally or in writing of the consequences of that type of behavior. For example, if you were warned only about tardiness, but your employer states she fired you for absences, you may still be eligible for benefits.

Lateness: If your employer claims that you were discharged for lateness, it may not be misconduct if you can show a compelling reason for your actions, or you can show that you had not been previously warned about the consequences of being late. The compelling reason must be something beyond your control that caused you to be late or prevented you from calling. If you had been previously warned about being late, and your employer had instructed you to leave earlier, you would need to explain that you left early but there were still unavoidable delays.

Absences: If your employer claims you were fired for excessive absences, but your last absence was due to a verified illness, and you have a letter from the Doctor, it is not misconduct even if you had previously agreed that any future absence would be cause for immediate dismissal. See A.B. 408,972; and A-750-2044.

Carelessness: If the claimed misconduct is limited to a single act of carelessness, it may not constitute misconduct, so long as there is no evidence that you were dishonest. *See Figueroa v. Levine*, 50 A.D.2d 998, 376 N.Y.S.2d 259 (N.Y.A.D. 3 Dept. 1975).

Violating Rules: If your employer claims that you violated a company rule, but you can show that you did so with the consent of your supervisor, you might be able to show that it was not misconduct. *See* A.B. 664-39 (Appeal Board ruled it was not misconduct where a hotel handyman performed work for a tenant without prior notification to management). However, the consent of a supervisor will not always excuse a violation of the company rules. *See* A.B. 53,843-55; and A-750-1408 (Appeal Board ruled it was misconduct where the employee falsified records to signify usual closing time of a store rather than an actual earlier closing, even where there was consent of the supervisor).

Assault: Fighting on the job in violation of an employer rule is misconduct regardless of who initiates the fight, but it may not be misconduct if you were acting only in self-defense.

Dishonesty: Submitting false time cards or stealing from your employer is considered misconduct. However, giving false information about your age or "puffing up" your prior employment history on a job application *may* not be considered misconduct, as long as the false information did not harm your employer's interests.

D. OVERPAYMENT

You are not obligated to refund overpayments if you accepted them in good faith (you believed you were entitled to the benefits), you did not make any false statements, AND you did not willfully conceal any pertinent fact in connection with your claim for benefits. New York Labor Law § 597.

You can be required to refund overpayments if you made a false statement of fact in connection with your claim for benefits, even if the false statement was inadvertent. For example, you could be required to refund benefits if you made an incorrect statement about the amount of your base period earnings and weeks of employment, even if it was an accident. A.B. 257,498; and A-750-2106.

If you made a statement that was an "error of law," but was not a false statement of fact you cannot be required to refund the benefits. For example, if you reported a total lack of employment, but it is later determined that you were doing activities that actually constituted employment, your statement may not be a false statement of fact if an ordinary person would not have considered him/herself employed under those

circumstances and you in fact did not realize that your activities were 'employment.' *See Claim of Valvo*, 57 N.Y.2d 116, 440 N.E.2d 780, 454 N.Y.S.2d 695 (1982).

If the false statement was made inadvertently (i.e., you did not know it was false), the DOL will collect the overpayment by collecting 50% of your future benefits. 12 NYCRR § 470.5.

E. PENALTY FOR WILLFUL FALSE STATEMENT

If you provide false information that you know at the time to be false, in order to receive any benefit, your benefits can be forfeited for at least 4 days, but not more than 80 days.. A failure to provide information can also be considered a willfully false representation.

If you provide information that you believed was true but that turns out to be incorrect, there should be no penalty applied. For example, if you can show that an error regarding a date or an amount of wages was inadvertent and not deliberate, you might be able to avoid penalties for willful false statements. *See Claim of Forbes*, 181 A.D.2d 956, 581 N.Y.S.2d 472 (N.Y.A.D. 3 Dept. 1992). However, you would likely still be responsible for refunding any overpayment.

Although you can be penalized for failing to state the facts truthfully, you will not be penalized if you can show that your false statement was an error of law. As explained above, for example, if you did not think that your activities constituted employment, and an ordinary person would not have understood that they constituted employment, reporting total unemployment may not be a willful false statement of fact. *See Claim of Barber*, 121 A.D.2d 767, 503 N.Y.S.2d 179 (N.Y.A.D. 3 Dept. 1986).

RESOURCES

WHERE TO SEND CORRESPONDENCE:

1. Request for a Hearing (see sample letter, p. 15):
   NYS Dept. of Labor
   Central Support
   PO Box 15131
   Albany, NY 12212-5131

2. Request for an Interpreter:
   The DOL office where your hearing will be held.

3. Request to Re-open Your Case (see sample letter, p. 16):
   NYS Dept of Labor
   PO Box 15126
   Albany, NY 12212-5126

4. Notice of an Appeal of the Administrative Law Judge's Decision (see sample letter, p. 17):
   NYS Dept. of Labor
   Central Support
   PO Box 15130
   Albany, NY 12212-5130

   OR

   Unemployment Insurance Appeal Board
   PO Box 15126
   Albany, NY 12212-5126

   You may fax your request for an appeal to: (518) 402-6208

WHERE TO GO:

1. To look at your case file, go to:
   New York State Department of Labor
   9 Bond Street
   Brooklyn, New York 11201

2. On the date of your hearing, report to:
   New York State Department of Labor
   9 Bond Street
   Brooklyn, New York 11201
   (remember to drop off your notice of hearing in the box by the receptionist)

3. To learn more about hearings and appeals, visit: http://uiab.labor.ny.gov
   (Click on the Resources tab and on the Frequently Asked Questions tab).

WHERE TO RESEARCH THE UNEMPLOYMENT INSURANCE LAW:

1. New York State Unemployment Insurance Interpretation Service:
   http://www.labor.state.ny.us/ui/aso/interpservice.shtm

2. Unemployment Insurance Appeals Board Decisions:
   NYS DOL Library
   9 Bond Street
   Brooklyn, New York 11201

WHERE TO LOOK FOR INFORMATION ABOUT NEW CLAIMS AND BENEFIT CHECKS:

1. To file a new claim, file for extended benefits, or claim weekly benefits online, go to:
   https://ui.labor.state.ny.us/UBC/home.do

2. For more information about Unemployment Insurance, go to:
   http://www.labor.state.ny.us/ui/ui_index.shtm

3. To inquire about back or present benefits, call:
   UI Claims Center: (888) 209-8124.

4. To inquire about delayed benefit payments, call:
   (888) 581-5812 or go to www.labor.ny.gov and click on "Unemployment Assistance", then click on "Check Payment History"

SAMPLE LETTER REQUESTING A HEARING

NYS Dept. of Labor
Central Support
PO Box 15131
Albany, NY 12212-5131

Re: *Name:* ______________________________
Social Security: ______________________________
Case Number: ______________________________

Dear New York State Department of Labor,

I am requesting a hearing because I disagree with the decision in the Notice of Determination mailed on ________________.

[I am also requesting that a (Spanish) (Mandarin/Cantonese) language interpreter be present at my hearing.]

Thank you.

Sincerely,

______________________________ ________________
Your Signature *Date*
____
Your Name (please print)
____
Your Address *City, State, Zip*

SAMPLE LETTER APPLYING TO REOPEN A CASE

Unemployment Insurance Appeal Board
P.O. Box 15126
Albany, NY 12212-5126

Re: *Name:* ______________________________
Social Security: ______________________________
Case No: ______________________________

Dear Appeal Board,

I am requesting that my unemployment insurance case be reopened. At my original hearing on ____________________, I was unable to proceed and I have good cause for the default because:

I did not receive notice of the hearing

I was still seeking legal representation

A witness on my behalf was unavailable

Other: ____

I am now prepared to pursue my case. Thank you.

Sincerely,

______________________________ ____________________
Your Signature *Date*
____
Your Name (please print)
____
Your Address *City, State, Zip*

Supporting documents are enclosed.

SAMPLE LETTER REQUESTING AN APPEAL

Unemployment Insurance Appeal Board
P.O. Box 15126
Albany, NY 12212-5126
Fax: (518) 402-6208

Re: *Name:* ______________________
Social Security: ______________________
A.L.J. Case No: ______________________

Dear New York State Department of Labor,

I am writing to request an appeal. Thank you.

Sincerely,

______________________ ______________
Your Signature *Date*

____
Your Name (please print)

____
Your Address *City, State, Zip*

This handbook is a product of the Workplace Justice Project of MFY Legal Services, Inc. The Workplace Justice Project provides free comprehensive employment law services for low-wage workers throughout New York City. Staff attorneys, paralegals, law students and volunteer lawyers provide consultation, advice, advocacy and direct representation to individuals facing a variety of job related abuses.

If you have any employment law questions, please call the

Workplace Justice Project Phone Intake Line

212-417-3838

MONDAYS AND TUESDAYS

2:00 P.M. to 5:00 P.M.

MFY LEGAL SERVICES, INC
299 Broadway, 4th Floor
New York, NY 10012
(212) 417-3700
www.mfy.org

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