

# I. Covered and Non-Covered Employment

## A. “Employer” defined: R.C. 4141.01(A)(1)

1. “Employer” means:
  - a. The state, its instrumentalities, its political subdivisions, and their instrumentalities
  - b. Indian tribes
  - c. Any individual or type of organization including:
    - 1) Partnership:
      - a) General partners are not employees of a general or limited partnership. General partners shall not be considered in determining the total number of individuals in the employment of a firm, and wages received by the general partners do not constitute remuneration. {Ohio Adm.Code 4141-1-03}
      - b) Limited partners are employees to the extent that their pay is in a form other than a share of profits for services performed for the limited partnership. {Ohio Adm.Code 4141-1-04(B)}
    - 2) Limited liability company
      - a) The determination as to whether individuals are in employment with limited liability companies for the purposes of Chapter 4141 of the Revised Code shall be determined based on the limited liability company's tax classification for federal income and unemployment tax purposes. {Ohio Adm.Code 4141-1-04(C) and (D)}
    - 3) Association
      - a) Members of a limited partnership association are employees if performing services for remuneration for the association. {Ohio Adm.Code 4141-1-04(A)}
    - 4) Trust
    - 5) Estate
    - 6) Joint-stock company
    - 7) Insurance company
    - 8) Corporation (domestic or foreign)
    - 9) Receiver, trustee in bankruptcy, trustee, or successor thereof
    - 10) Legal representative of a deceased person
2. Payroll requirements
  - a. For-profit organization: {R.C. 4141.01(A)(1)(a) and (b)}
    - 1) Had at least 1 employee (need not be the same person each day) working for some portion of a day in each of 20 weeks in current or preceding calendar year  
OR

- 2) Had paid wages of \$1,500 or more in any calendar quarter in either the current or preceding calendar year
- b. Nonprofit organization: {R.C. 4141.01(A)(1)(a) and (b)}
  - 1) Had at least 4 employees (need not be the same person each day) working for some portion of a day in each of 20 weeks in either the current or preceding calendar year
  - 2) No earnings requirement
- c. Domestic service: {R.C. 4141.01(A)(1)(c)}
  - 1) Employment in domestic service in a private home or in a local college club, fraternity, or sorority
  - 2) \$1,000 or more in wages in any calendar quarter in the current or preceding calendar year
  - 3) Wages paid to or employment of an individual performing domestic services may not be used to determine status as an employer under R.C. 4141.01(A)(1)(a) or (b)
  - 4) A local college club, fraternity, or sorority or private home employing an individual in domestic service is not an “employer” under this section unless the entity also meets the requirements of R.C. 4141.01(A)(1)(a),(b), or (d)
- d. Farm operator or crew leader: {R.C. 4141.01(A)(1)(d)}
  - 1) Paid \$20,000 in wages during any calendar quarter in the current or preceding calendar year OR
  - 2) Had at least 10 employees (need not be the same person each day) working in 20 different calendar weeks in either the current or preceding calendar year
    - a) Does not include agricultural workers who are aliens temporarily admitted to the United States to perform agricultural labor pursuant to 8 U.S.C.A. 1101(a)(15)(H)(ii)(a)
- e. Political subdivisions and Indian tribes: {R.C. 4141.01(A)(1)(f)}
  - 1) Had at least 1 individual in employment
  - 2) No earnings requirement
- f. Employers not otherwise covered may elect coverage by written election with approval by the director: {R.C. 4141.01(A)(4) and (5)}

**B. “Employment” defined: R.C. 4141.01(B)(1)**

- 1. Service performed for remuneration under any contract of hire
  - a. Contract may be written or oral.
  - b. Contract may be express or implied.
  - c. Can include service performed in interstate commerce and service performed by an officer of a corporation (*See* Ohio Adm.Code 4141-1-05).

2. Employment does not include services performed as an independent contractor
  - a. An individual is an independent contractor if the individual has been and will continue to be free from direction or control over the performance of such service
  - b. Factors to consider in determining whether an individual is under the direction or control of an employer are set forth generally in Ohio Adm.Code 4141-3-05(B). The common law rules identify twenty factors or elements, designed only as guides, and must be considered in totality:
    - 1) The worker is required to comply with the instructions of the person for whom services are being performed, regarding when, where, and how the worker is to perform the services
    - 2) The person for whom services are being performed requires particular training for the worker performing services
    - 3) The services provided are part of the regular business of the person for whom services are being performed
    - 4) The person for whom services are being performed requires that services be provided by a particular worker
    - 5) The person for whom services are being performed hires, supervises or pays the wages of the worker performing services
    - 6) A continuing relationship exists between the person for whom services are being performed and the worker performing services that contemplates continuing or recurring work, even if not full time
    - 7) The person for whom services are being performed requires set hours during which services are to be performed
    - 8) The person for whom services are being performed requires the worker to devote himself or herself full time to the business of the person for whom services are being performed
    - 9) The person for whom services are being performed requires that work be performed on its premises
    - 10) The person for whom services are being performed requires that the worker follow the order of work set by the person for whom services are being performed
    - 11) The person for whom services are being performed requires the worker to make oral or written progress reports
    - 12) The person for whom services are being performed pays the worker on a regular basis such as hourly, weekly or monthly
    - 13) The person for whom services are being performed pays expenses for the worker performing services
    - 14) The person for whom services are being performed furnishes tools, instrumentalities, and other materials for use by the worker in performing services

- 15) There is a lack of investment by the worker in the facilities used to perform services
  - 16) There is a lack of profit or loss to the worker performing services as a result of the performance of such services
  - 17) The worker performing services is not performing services for a number of persons at the same time
  - 18) The worker performing services does not make such services available to the general public
  - 19) The person for whom services are being performed has a right to discharge the worker performing services
  - 20) The worker performing services has the right to end the relationship with the person for whom services are being performed without incurring liability pursuant to an employment contract or agreement
- c. Similar criteria are specifically set forth in R.C. 4141.01(B)(2)(k) for construction industry workers, and there is a presumption that the employer has the right to direct and control if at least ten of the twenty factors apply.
  - d. Under R.C. 5104.01(UU), Type B family day-care home is a permanent residence of the provider in which child care is provided for one to six children at one time and in which no more than three children are under two years of age at one time. Whether type B daycare home providers are independent contractors or employees will be determined under R.C. 4141. {R.C. 5104.03(K)(1) and (2)}
  - e. Whether deputy registrars and their employees are independent contractors or employees will be determined under Ohio Revised Code Chapter §4141. {R.C. 4503.03(C)(2)}

**C. “Employment” includes: R.C. 4141.01(B)(2)**

1. Service in the employ of the state, or any political subdivision thereof or any instrumentalities thereof. {R.C. 4141.01(B)(2)(a)}
2. An agent or commission driver distributing:
  - a. Meat, vegetables, fruit, bakery products
  - b. Beverages other than milk
  - c. Laundry or dry-cleaning services, R.C. 4141.01(B)(2)(e)(i)
3. Traveling or city salesperson who:
  - a. Serves on a full-time basis
  - b. Solicits orders from
    - 1) Wholesalers
    - 2) Retailers

- 3) Contractors
  - 4) Hotels and restaurants
  - 5) Similar establishments
  - c. Is not working on a one-time transaction
  - d. Does not have a substantial investment in facilities used, other than transportation
  - e. Performs substantially all of the services personally, R.C. 4141.01(B)(2)(e)(ii)
4. An individual's entire service performed within or both within and without the state IF:
- a. The service is localized in Ohio
  - b. The service is not localized in any state, but some of the service is performed in Ohio and either:
    - 1) The base of operations or control is in Ohio, OR
    - 2) The base of operation or control is not located in any state where service is performed, but the individual's residence is in Ohio, R.C. 4141.01(B)(2)(f)
5. Service performed entirely outside of Ohio, and no contributions for unemployment are required to be paid by any other state, the Virgin Islands, Canada, or the United States, IF:
- a. The individual is a resident of Ohio AND the Director approves the election of the employer (*See Ohio Adm.Code 4141-7-03(A)*); OR
  - b. The individual is not a resident AND the place of direction or control is in Ohio, R.C. 4141.01(B)(2)(g)
6. Service performed by a U.S. citizen, working for an American employer, outside of the United States (except in Canada and Virgin Islands) IF:
- a. The employer's principal place of business in the U.S. is in Ohio, OR
  - b. The employer has no place of business in the U.S., AND:
    - 1) The employer is an individual who is a resident of Ohio
    - 2) The employer is a corporation organized under the Laws of Ohio OR
    - 3) The employer is a partnership or trust and majority of partners or trustees reside in Ohio OR
  - c. The employer has elected coverage in Ohio. {R.C. 4141.01(B)(2)(h)(iii)}
7. Service performed by an individual in the employ of an Indian tribe, including any subdivision, subsidiary, or business enterprise wholly owned by an Indian tribe provided:
- a. The service is excluded from employment under the Federal Unemployment Tax Act ("FUTA") AND
  - b. The service is not excluded under R.C. 4141.01(B)(3). {R.C. 4141.01(B)(2)(l)}

**D. “Employment” does not include: R.C. 4141.01(B)(3)**

1. Agricultural labor, as defined in R.C. 4141.01(V), except as provided in R.C. 4141.01(A)(1)(d), R.C. 4141.01(B)(3)(a)
2. Domestic service that does not meet the requirements of R.C. 4141.01(A)(1)(c). *See also* Ohio Adm.Code 4141-5-02
3. Service performed for the state or a political subdivision as:
  - a. A publicly elected official
  - b. A member of a legislative body or the judiciary
  - c. A military member of the Ohio national guard
  - d. A temporary, unclassified state employee, serving in case of fire, storm, snow, earthquake, flood or similar emergency
  - e. An unclassified state employee serving in a position designated by law as "a major nontenured policymaking or advisory position" (*See also* Ohio Adm.Code 4141-5-06)
    - 1) An individual serves in "a major nontenured policymaking or advisory position" only IF:
      - a) The individual is an unclassified state employee AND
      - b) The individual was appointed as a member of a board or commission by the governor, subject to the advice and consent of the senate OR
      - c) The individual serves in a position designated under R.C. 121.03 or 121.05 (Administrative Department heads or Assistant Directors)
  - f. A policymaking or advisory position for which the performance of duties ordinarily does not require more than eight hours per week. {R.C. 4141.01(B)(3)(c)}
4. Service in the employ of any government unit or instrumentality of the United States, R.C. 4141.01(B)(3)(d)
  - a. In many cases, the U.S. government allows coverage under UCFE (“Unemployment Compensation for Federal Employees”)
5. Service in the employ of an educational institution or an institution of higher education IF:
  - a. Performed by a student
  - b. Who is enrolled AND
  - c. Regularly attending classes at the institution
    - 1) It must be shown that the student actually attended classes on a regular basis for this exclusion to apply. *See United Theological Seminary v. Admr., Ohio Bur. of Emp. Servs.*, 2d Dist. Montgomery No. CA 10509, 1987 Ohio App. LEXIS 9913 (Nov. 23, 1987).

6. Service as part of a work-study program IF:
  - a. The student is enrolled in a nonprofit or public educational institution
  - b. That normally maintains a regular faculty and curriculum AND has a regularly organized body of students AND
  - c. The student is in a full-time program taken for credit, which combines academic instruction with work experience IF:
    - 1) The service is an integral part of the program AND
    - 2) The program is not established for or on behalf of an employer or group of employers. {R.C. 4141.01(B)(3)(e)}
  
7. Service involving relatives: {R.C. 4141.01(B)(3)(f)}
  - a. Service in the employ of the individual's:
    - 1) son
    - 2) daughter OR
    - 3) spouse
  - b. Service by a child under the age of 18 in the employ of the child's father or mother
  - c. Service for a partnership IF the relationship of EACH partner to the worker meets R.C. 4141.01(B)(3)(f): {Ohio Adm.Code 4141-5-03(A)}
    - 1) Thus, a claimant employed by a partnership consisting of her husband and brother-in-law would be in covered employment because the relationship with the brother-in-law does not satisfy R.C. 4141.01(B)(3)(f)
    - 2) Service for a corporation cannot be excluded under R.C. 4141.01(B)(3)(f), even if family owned, Ohio Adm.Code 4141-5-03(B)
  - d. However, an Ohio Supreme Court decision appears to contradict the statute. The court held that a mother's employment by her son was covered because the son paid the required contributions for the years that the claimant was employed, the claimant worked long hours, and to hold otherwise would result in the state being unjustly enriched at the expense of the claimant. *Dixon v. Dixon*, 4 Ohio St.3d 160, 447 N.E.2d 756 (1983).
  
8. Service by an individual, paid on a commission basis, who is "master of his or her own time and efforts," and remuneration is wholly dependent on the effort he or she chooses to expend:
  - a. For example, an insurance agent or solicitor paid solely by commission, R.C. 4141.01(B)(3)(g)(i)
  - b. A home worker IF:
    - 1) Performs work according to the employer's specifications AND
    - 2) Performed on materials or goods furnished by the employer which are required to be returned to the employer. {R.C. 4141.01(B)(3)(g)(ii)}

9. Service in the employ of a church or convention or association of churches, or in an organization operated, supervised, controlled or principally supported by a church:
  - a. The organization must be operated primarily for religious purposes
    - 1) Employees of organizations operated for non-religious purposes, such as a church-run restaurant, would serve in covered employment
    - 2) Schools operated by a church can be primarily for religious purposes. *See Miller v. Sts. Peter & Paul School*, 126 Ohio App.3d 762, 711 N.E.2d 311 (11th Dist.1998) (holding that “the reason for creating and operating a school affiliated with a religious denomination is to offer a learning experience dominated by a religious environment, a situation distinctly different than that offered in public schools.”)
    - 3) Service performed for an elementary or secondary school that is operated primarily for religious purposes and is exempt from federal income taxes is not covered employment. {R.C. 4141.01(B)(3)(x)}
  - b. Includes employment by a duly ordained, commissioned, or licensed minister of a church in the exercise of the individual’s ministry or by a member of a religious order in the exercise of duties required by such order. {R.C. 4141.01(B)(3)(h)(i)-(ii)}
10. Service by an individual receiving rehabilitation in a facility conducted for the purpose of rehabilitating individuals whose earning capacity is impaired EITHER:
  - a. by age OR
  - b. by physical or mental deficiency or injury. {R.C. 4141.01(B)(3)(h)(iii)}
11. Service which would entitle a person to unemployment compensation under Railroad Unemployment Insurance Act. {R.C. 4141.01(B)(3)(i)}
12. Service for an organization exempt from income tax under section 501 of the Internal Revenue Code IF:
  - a. Pay does not exceed \$50 in any calendar quarter OR
  - b. Service is in connection with the collection of dues or premiums for a fraternal beneficial society, order, or association and is performed away from the home office or is ritualistic service in connection with any such society, order, or association. {R.C. 4141.01(B)(3)(j)}
13. Service as casual labor not in the course of employer's trade or business
14. Casual labor includes incidental service performed by an officer, appraiser, or member of a finance committee of a bank, when the remuneration for such service exclusive of directors' fees does not exceed \$60 per calendar quarter. {R.C. 4141.01(B)(3)(k)}
15. Service for a voluntary employees' beneficial association IF:

- a. admission to membership must be limited to employees of a municipal or public corporation, of a political subdivision of the state or the United States AND
  - b. no part of net earnings, other than through such payments, may benefit any private shareholder or individual. {R.C. 4141.01(B)(3)(l)}
16. Service in the employ of a foreign government. {R.C. 4141.01(B)(3)(m)}
17. Service as a student nurse IF:
- a. The student nurse works for a hospital or nurse's training school AND
  - b. The student nurse is enrolled and regularly attending classes
18. Service as a medical intern IF:
- a. The intern is employed by a hospital AND
  - b. The intern has completed a four years' course in medical school. {R.C. 4141.01(B)(3)(p)}
19. Service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution. {R.C. 4141.01(B)(3)(q)}
20. Service by a member of a band or orchestra, so long as that service is not the individual's principal occupation. {R.C. 4141.01(B)(3)(s)}
21. Service as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of the state or political subdivision, thereof, by an individual receiving the work-relief or work-training. {R.C. 4141.01(B)(3)(aa)}
- a. OAC 4141-5-05 provides criteria for such a program to qualify as excluded
22. Service at a day camp whose camping season does not exceed twelve weeks per year and which service is not subject to the "Federal Unemployment Tax Act." {R.C. 4141.01(B)(3)(t)}
23. Service for a hospital that is performed by a patient of the hospital. {R.C. 4141.01(B)(3)(t)(i)}
24. Service for a prison, penal, correctional or custodial institution by an inmate thereof. {R.C. 4141.01(B)(3)(t)(ii)}

25. Service as an election official or worker if the amount of remuneration received during the calendar year for such services is less than \$1,000. {R.C. 4141.01(B)(3)(w)}
  
26. Service performed for an Indian tribe:
  - a. As a publicly elected official
  - b. As a member of an Indian tribal council
  - c. As a member of a legislative or judiciary body
  - d. In a position designated by Indian tribal law as “a major nontenured policymaking or advisory position” where the performance of duties ordinarily does not require more than 8 hours per week
  - e. A temporary employee, serving in case of fire, storm, snow, earthquake, flood or similar emergency. {R.C. 4141.01(B)(3)(z)}

## **II. Filing an Application for Determination of Benefit Rights**

### **A. Filing in Ohio:**

1. An individual may file an Application for Determination of Benefit Rights in Ohio if one or more of the following factors apply:
  - a. The individual had Ohio employment as defined in R.C. 4141.01; OR
  - b. The individual is physically present in Ohio at the time of the application. {Ohio Adm.Code 4141-27-01(A)}
  
2. Combined-Wage Claims (“CWC”): 20 C.F.R. 616.7
  - a. Any unemployed individual who has had employment covered under the unemployment compensation law of two or more States, whether or not the individual is monetarily qualified under one or more of them, may elect to file a Combined-Wage Claim. The individual may not so elect, however, if the individual has established a benefit year under any State or Federal unemployment compensation law and:
    - 1) That benefit year has not ended, AND
    - 2) The individual still has unused benefit rights based on such benefit year.
      - a) However, if a claimant had an application allowed in another state and has exhausted those benefits, he can open a valid Ohio application IF he can meet the monetary requirements in Ohio without using any wages from the other state (including wages transferred from Ohio to that other state).
  - b. The individual must have Ohio wages in the quarters that are actually being used in order to establish monetary eligibility for a CWC in Ohio.
  - c. The claimant may choose in which state to file a CWC. Alternatively, a claimant may elect to file an Ohio-only application and forgo a CWC.
  - d. If an individual cannot file a CWC in Ohio, ODJFS must provide general information on how to contact the other states where the individual can file.
  - e. An application in Ohio may be backdated to the original filing date in another state.
  - f. The Hearing Officer can modify the number of weeks based upon testimony, but cannot alter wages reported by an employer to another state.
  - g. Ohio may not determine an issue which has previously been adjudicated by a transferring state.

### **B. Statutory Requirements: R.C. 4141.01**

1. The individual must be unemployed, either partially or totally, at the time of filing:
  - a. An individual is totally unemployed in any week during which the individual performs no services and, with respect to such week, no remuneration is payable to the individual. {R.C. 4141.01(M)}

- b. An individual is partially unemployed in any week if, due to involuntary loss of work, the total remuneration payable to the individual for such week is less than the individual's weekly benefit amount. {R.C. 4141.01(N)}
    - c. The employer-employee relationship can be permanently severed, such as a quit or a discharge, or the separation can be the result of a layoff that is indefinite or for a definite period of seven or more days.
    - d. Commission policy permits filing on a Sunday following a week of unemployment which precedes a return to work on a Monday.
2. The individual must have worked in covered employment in at least 20 qualifying weeks within the base period. {R.C. 4141.01(R)(1)}
3. In such weeks, the individual must have earned OR been paid remuneration at an average weekly wage of not less than 27.5 percent of the statewide average weekly wage. {R.C. 4141.01(R)(1)}
  - a. The statewide average weekly wage is calculated annually by the director.
4. For an individual who is filing an application after the termination of a previous benefit year, the individual must ALSO have worked in six weeks of covered employment and earned three times the average weekly wage for the previous benefit year, since the beginning of the individual's previous benefit year.
  - a. Ohio Adm.Code 4141-27-01(G) states that this requirement cannot be met by using compensation paid to an individual which is not for services performed, including, but not limited to, back pay. In addition, severance and vacation pay may not be used to satisfy this requirement.
  - b. Money paid in a settlement agreement may not be used to satisfy this requirement. The court held that a \$20,000 payment as part of a release and settlement of a discharge grievance could not be used to satisfy the requirement that an individual work in six weeks of covered employment since the beginning of the individual's previous benefit year because it was not for "service performed" in exchange for wages or remuneration. *Ray v. Board*, Ross C.P. No. 91CI 244 (May 16, 1994), unreported.
5. The reason for the individual's most recent separation from employment cannot be disqualifying under R.C. 4141.29(D)(2) or 4141.291. {R.C. 4141.01(R)(2)}
  - a. Note, a claimant would have an allowed application if the claimant is held to be disqualified for benefits based upon a labor dispute, disciplinary layoff, or leave of absence, because this provision is limited to disqualifying separations.

## C. Definitions: R.C. 4141.01

1. “Remuneration” R.C. 4141.01(H):
  - a. Includes all compensation for personal services, including:
    - 1) Commissions and bonuses.
    - 2) Tips: Gratuities customarily received by an individual in the course of employment, from persons other than the employer, is remuneration ONLY IF accounted for by the individual to the individual's employer.
    - 3) Holiday pay. {Ohio Adm.Code 4141-9-05}
    - 4) Retroactive or back pay awards. Such awards may result in the adjustment of base period earnings and may be allocated to specific weeks by the parties. If the parties do not allocate the award, the Director will allocate the award in equal weekly amounts for the period addressed. {Ohio Adm.Code 4141-9-14}
    - 5) Sick pay and disability payments received by an individual are remuneration. *See Shepherd v. Wearever-Proctor Silex, Inc.*, 75 Ohio App.3d 414 (4th Dist.1991)
      - a) UNLESS such payments are received under a workers' compensation law. {See 26 U.S.C. 3306(b)(2)(A)}
      - b) Any sick pay and disability payments, (or medical or hospitalization expenses in connection with sickness or accident disability) are only considered to be “remuneration” during the first six calendar months following the month in which the employee last worked for the employer making the payments. Any such payment received after the expiration of six months is not remuneration. {26 U.S.C. 3306(b)(4)}
    - 6) Reimbursement for any travel expenses which exceed costs actually incurred by the individual. {Ohio Adm.Code 4141-9-12(A)}
    - 7) Cash value of compensation received in any medium other than cash, including: {Ohio Adm.Code 4141-9-04(B)}
      - a) Goods.
      - b) Clothing.
      - c) The fair market value of automobiles and other vehicles provided by an employer when used for personal use by an individual. {Ohio Adm.Code 4141-9-12(B)}
      - d) Meals are remuneration UNLESS the meals are furnished on business premises of employer, AND the meals are furnished for the convenience of the employer.
      - e) Lodging is remuneration UNLESS the lodging is furnished on the business premises of the employer, the lodging is furnished for convenience of employer, AND the employee is required to accept such lodging as a condition of employment. *See Ohio Adm.Code 4141-9-09* for valuation of meals and lodging.

- f) In the case of agricultural or domestic service, remuneration includes only cash.
- b. "Remuneration" does not include:
  - 1) Cash value of parking facilities at the place of employment, furnished by the employer. {Ohio Adm.Code 4141-9-04(C)}
  - 2) Cash value of entertainment, medical services, and courtesy discounts provided by an employer to its employees are not remuneration IF: {Ohio Adm.Code 4141-9-04(C)}
    - a) they are of relatively small value, AND
    - b) they are furnished by the employer as a means of promoting the health, goodwill, contentment or efficiency of its employees.
  - 3) Remuneration in lieu of notice (a continuation of wages for a designated period after termination of employment), separation or termination pay, and vacation pay are only remuneration for purposes of establishing a qualifying week and a benefit year. {R.C. 4141.31(A)(5) and Ohio Adm.Code 4141-9-08}
  - 4) Earnings deposited into flexible-spending accounts for reimbursement of medical costs under an employer's cafeteria plan do not qualify as "remuneration" for purposes of determining unemployment compensation eligibility. *Bernard v. UCRC*, 136 Ohio St.3d 264, 2013-Ohio-3121.
    - a) A cafeteria plan is a written benefit plan maintained by an employer for the benefit of its employees in which all participants are employees and each participant has the opportunity to select from among two or more benefits consisting of cash and qualified benefits. {26 U.S.C. 125(d)(1)}
- 2. "Qualifying week" R.C. 4141.01(O)(1):
  - a. A qualifying week is any calendar week in an individual's base period with respect to which the individual earns or is paid remuneration in covered employment.
  - b. If an individual earns remuneration in a week, but the payment is not made within the base period, the week may be considered a qualifying week when necessary for the individual to qualify for benefit rights.
  - c. The number of qualifying weeks in a calendar quarter shall not exceed the number of calendar weeks in the quarter.
- 3. "Average weekly wage" is the individual's total remuneration for all qualifying weeks in the base period divided by the number of qualifying weeks. If the result is not a multiple of one dollar, the result shall be rounded to the next lower multiple of one dollar. {R.C. 4141.01(O)(2)}
- 4. "Weekly benefit amount" is the amount of benefits an individual is entitled to receive for one week of total unemployment. {R.C. 4141.01(P)}

- a. An individual's weekly benefit amount is 50 percent of the individual's average weekly wage EXCEPT that the weekly benefit amount shall not exceed the maximum amount for the individual's dependency class. The maximum amount for each dependency class is set by the Director every year. {R.C. 4141.30(B)}
  - b. The maximum weekly benefit amount for each dependency class shall be adjusted based on the statewide average weekly wage, which is based on the average weekly earnings of all workers in employment during the preceding twelve-month period ending the thirtieth day of June. {R.C. 4141.30(B)(3)}
  - c. Total benefits payable to an individual in a benefit year shall not exceed the lesser of:
    - 1) An amount equal to 26 times the individual's weekly benefit amount; OR
    - 2) An amount equal to the sum of 20 times the individual's weekly benefit amount for the first 20 base period qualifying weeks PLUS one times the individual's weekly benefit amount for each additional qualifying week beyond the first 20 qualifying weeks in the base period. R.C. 4141.30(D)
5. "Base period" R.C. 4141.01(Q):
- a. The regular base period is the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year.
  - b. The alternate base period is the four most recently completed calendar quarters preceding the first day of an individual's benefit year.
    - 1) The alternate base period is ONLY used if the individual does not have sufficient qualifying weeks and wages in the regular base period to qualify for benefit rights.
    - 2) If the information on weeks and wages for the most recent quarter of the alternate base period is not available from the employer's regular quarterly reports of wage information:
      - a) The Director may base the determination of eligibility on a claimant's affidavit regarding the weeks and wages (claimant shall furnish available payroll documentation);
      - b) The determination shall be amended if the employer's quarterly report of wage information is timely received AND causes a change in the determination.
  - c. No calendar quarter used in a regular or alternate base period can be used to establish a subsequent benefit year.
  - d. For purposes of determining the weeks that comprise a completed calendar quarter, only those weeks ending at midnight Saturday within the calendar quarter shall be utilized. {R.C. 4141.01(Q)(4)}

6. "Benefit year" is the 52-week period beginning with the first day of the week that claimant first files a valid application. {R.C. 4141.01(R)}

#### **D. Dependency Class: R.C. 4141.30(E)**

1. Each eligible and qualified individual shall be assigned a dependency class.
  - a. Class A:
    - 1) No dependents, OR
    - 2) The individual has insufficient wages to qualify for more than the Class A's maximum weekly benefit amount; OR
    - 3) If both a husband and wife qualify for benefit rights with overlapping benefit years, only one of them may qualify for a dependency class other than Class A.
  - b. Class B: One or two dependents.
  - c. Class C: Three or more dependents.
2. Dependents include the individual's:
  - a. natural child, stepchild, or adopted child. At the beginning date of the benefit year, the child MUST be EITHER:
    - 1) under 18 years of age, OR
    - 2) unable to work because of permanent physical or mental disability.
    - 3) If the child is born after the benefit year beginning date, or becomes a stepchild or adopted child after that date, such child cannot qualify as a dependent.
  - b. legally married wife or husband. At the beginning date of the benefit year, the wife or husband MUST:
    - 1) Have an average weekly income not in excess of 25 percent of the claimant's average weekly wage; AND
    - 2) Be living with the individual. The Review Commission has ruled that a husband and wife are living together unless separated judicially or by agreement. *In re Bennett*, Unemp. Comp. Rev. Comm. No. B89-01032 (1989).
    - 3) Same-sex marriage was legalized by the U.S. Supreme Court in *Obergefell v. Hodges*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). Legally married individuals are considered in the computation of benefits and dependency classes. Per ODJFS policy, proof of marriage is not required.
  - c. The individual must supply more than one-half of the cost of the child's or spouse's support:
    - 1) for at least 90 consecutive days immediately preceding the current benefit year; OR
    - 2) for the duration of the marital or parental relationship if that relationship existed for less than 90 days.

- 3) An individual need not document actual cost of support if it can be shown that the individual is current in court-ordered child support payments.
- 4) A signed statement by a claimant's ex-wife provided credible evidence of the cost of support for their child. *Haynes v. Administrator*, 8th Dist. Cuyahoga No. 52370, 1987 Ohio App. LEXIS 5597 (Jan. 22, 1987)

## **E. Seasonal Employment: R.C. 4141.33**

1. "Seasonal employment" means employment of individuals hired primarily to perform services in an industry which because of climatic conditions or because of the seasonal nature it is customary to operate only during regularly recurring periods of 40 weeks or less in any consecutive 52-week period.
2. "Seasonal employer" means an employer as determined by the director of job and family services, whose operations and business, with the exception of certain administrative and maintenance operations, are substantially all in a seasonal industry.
  - a. "Substantially all" is not defined in the statute.
    - 1) An employer's operations were not "substantially all" in a seasonal industry where only 509 out of 1,012 employees were seasonal. *Cleveland Metroparks Sys. v. Ohio Bur. of Emp. Servs.*, 94 Ohio App.3d 750, 641 N.E.2d 809 (10th Dist.1994).
    - 2) An employer's operations were *not* "substantially all" in a seasonal industry where only 60 percent of the employees were seasonal. *City of Columbus v. Ohio Unemp. Comp. Bd. of Rev.*, 91 Ohio App.3d 548, 632 N.E.2d 1344 (10th Dist.1993).
    - 3) Permanent administrative and maintenance workers must be excluded from the total number of employees before computing the number of seasonal employees. *Muskingum Watershed Conservancy Dist. v. Ohio Bur. of Emp. Servs.*, 10th Dist. Franklin No. 96APE03-307, 1996 Ohio App. LEXIS 4068 (Sep. 19, 1996).
  - b. The court has never held that a department, such as the Recreation and Parks Department of a municipal corporation (not a separate legal entity), constituted an individual employer for purposes of determining seasonal employment. For example, the City of Columbus, which operates continuously for 52 weeks per year, is not a seasonal employer. *City of Columbus, supra*, at 551.
3. No industry or employer shall be deemed seasonal until the Director has determined:
  - a. whether the industry is seasonal; AND
  - b. the seasonal period for the employer.

- c. An employer who claims to have seasonal employment in a seasonal industry may file, with the Director, a written application for classification of such employment as seasonal.
4. The Director shall establish:
  - a. the proportionate number of weeks of employment and earnings required to qualify for seasonal, as opposed to regular, benefits;
  - b. the proportionate number of weeks for which seasonal benefits may be paid.
5. Benefits shall be payable to a claimant ONLY during the longest seasonal periods which the best practice of such industry will reasonably permit.
6. An individual whose base period employment consists of only seasonal employment for a single seasonal employer, and who meets the Director's proportionate employment and earnings requirements:
  - a. will have benefit rights determined in accordance with the seasonal employment provisions
    - 1) EXCEPT benefits shall not be paid for any week between two successive seasonal periods (This disqualification applies regardless of whether or not there is any reasonable assurance);
  - b. Benefit charges for such seasonal employment shall be computed and charged in accordance with R.C. 4141.24(D).
7. The individual whose base period employment consists of either seasonal employment with two or more seasonal employers OR both seasonal and non-seasonal employment:
  - a. Will have benefit rights determined in accordance with the regular provisions of R.C. 4141.01(R) and 4141.30.
  - b. The total seasonal and non-seasonal benefits during a benefit year cannot exceed 26 times the weekly benefit amount.
  - c. An individual who performs services that “significantly” consist of services performed in seasonal employment shall not be paid benefits for those services for any week in the period between two successive seasonal periods if those services were performed in the first of the seasonal periods and there is reasonable assurance that the individual will perform those services in the later of the seasonal periods.
    - 1) “Significantly” means 40 percent or more of the base period which consists of services performed in seasonal employment.
    - 2) “Reasonable assurance” means a written, verbal, or implied agreement that the individual will perform services in the same or similar capacity during the ensuing sports season or seasonal period.

- d. Benefits shall not be paid on the basis of any services, substantially all of which consist of participating in sports or athletic events or training or preparing to so participate, for any week which commences during the period between two successive sport seasons, or similar periods, IF those services were performed in the first of the seasons, or similar periods, AND there is reasonable assurance that the individual will perform those services in the later of the seasons, or similar periods.

**F. Aliens: R.C. 4141.29(J)**

1. An alien shall not be paid benefits UNLESS the alien:
  - a. Had been lawfully admitted to the United States for permanent residence at the time the services were performed; OR
  - b. Was lawfully present for purposes of performing the services; OR
  - c. Was otherwise permanently residing in the United States under color of law at the time the services were performed.
2. A determination that benefits are not payable because of an individual's alien status requires a preponderance of evidence that the individual had not been lawfully admitted to the United States. R.C. 4141.29(J)(2).
  - a. The Immigration Reform and Control Act allows aliens to receive work authorization even when lawfully admitted for temporary residence only.
3. All applicants for benefits shall be uniformly required to submit any data or information required to determine whether benefits are payable because of alien status. R.C. 4141.29(J)(1).

### **III. Functions of the Review Commission: R.C. 4141.281**

#### **A. Appeal to Director: R.C. 4141.281(A)**

1. Any party notified of a determination of benefit rights or a claim for benefits determination may appeal within twenty-one calendar days after the written determination was sent to the party or within an extended period as provided by law.

#### **B. Redetermination: R.C. 4141.281(B)**

1. Within twenty-one days after receipt of the appeal, the director of job and family services shall issue a redetermination or transfer the appeal to the unemployment compensation review commission.
2. A redetermination under this section is appealable in the same manner as an initial determination by the director.

#### **C. Review Commission**

1. Ohio Adm.Code 4146-31-01 Ethics Policy:
  - a. It is essential that the public has confidence in the administration of the unemployment compensation review commission. This public confidence depends in a large degree on whether the public trusts that employees of the commission are impartial, fair, and act only in the interest of the people, uninfluenced by any consideration of self-interest, except those inherent in the proper performance of their duties.
  - b. Each employee, of whatever position, should maintain the highest standards of personal integrity, because the public often judges the actions of an employee as reflecting the standards of the employing agency. Each employee, of whatever position, should be willing to accept restrictions on their conduct that may not be necessary of public employees in other agencies, who are not in similar position of trust. Each employee, of whatever position, must avoid not only impropriety, but also the appearance of impropriety.
2. Jurisdiction: R.C. 4141.281(C)(1)
  - a. The commission shall provide an opportunity for a fair hearing to the interested parties of appeals over which the commission has jurisdiction.
  - b. The commission has jurisdiction over an appeal on transfer or on direct appeal to the commission.
  - c. If the commission concludes that a pending appeal does not warrant a hearing, the commission may remand the appeal to the director for redetermination.

- d. The commission retains jurisdiction until the appeal is remanded to the director or a final decision is issued and appealed to court, or the time to request a review or to appeal a decision of a hearing officer or the commission is expired.
3. Conduct of Hearings: R.C. 4141.281(C)(2)
    - a. Hearings before the commission are held at the hearing officer level and the review level.
    - b. The principles of due process in administrative hearings shall be applied to all hearings conducted under the authority of the commission.
    - c. Hearing Officers shall control the conduct of the hearing, exclude irrelevant or cumulative evidence, and give weight to the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of serious affairs.
      - 1) Hearing Officers have an affirmative duty to question parties and witnesses in order to ascertain the relevant facts and to fully and fairly develop the record.
        - a) Transcripts and other materials from outside litigation may be admitted as evidence with respect to Unemployment Compensation claims.
      - 2) The Hearing Officer is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure.
        - a) Hearsay evidence may be considered persuasive even in the face of sworn hearing testimony. *Todd v. Admr., Ohio Dept. of Job & Family Servs.*, 4th Dist. Scioto No. 03CA2894, 2004-Ohio-2185; *But see Taylor v. Bd. of Rev.*, 20 Ohio App.3d 297, 485 N.E.2d 827 (8th Dist.1984) (Where the sworn testimony of a witness is contradicted only by hearsay evidence, to give credibility to the hearsay statement and to deny credibility to the claimant testifying in person is unreasonable)
        - b) The due process hearing held, and the decision issued, by the Review Commission can cure procedural errors previously made in the matter by ODJFS. *Cohen v. Toledo Pub. Schools*, 6th Dist. Lucas No. L-04-1056, 2004-Ohio-6889, discretionary appeal not allowed, *Cohen, supra*, 105 Ohio St.3d 1545, 2005-Ohio-2188, 827 N.E.2d 327.
      - 3) No person shall impose upon the claimant or the employer any burden of proof as is required in a court of law.
      - 4) The proceedings at hearings shall be recorded by mechanical means (electronically) or otherwise as may be prescribed by the commission.
        - a) All testimony in any cause under agency 4146 of the Administrative Code shall be under oath or affirmation. {Ohio Adm.Code 4146-7-01}
        - b) No other formal record of any proceedings by manual, mechanical, or electronic device shall be permitted. {Ohio Adm.Code 4146-7-01}

4. Hearing Officer Level: R.C. 4141.281(C)(3)
  - a. Hearing Officers are required to conduct our hearings impartially, free from both actual bias and the appearance of bias.
  - b. The hearings shall be *de novo* (a new hearing, not dependent on any prior proceeding), except that the director's file pertaining to a case shall be included in the record to be considered. {R.C. 4141.281 (C)(3) and Ohio Adm.Code 4146-7-01}
  - c. After considering all of the evidence, a hearing officer shall issue a written decision that sets forth the facts as the hearing officer finds them to be, cites the applicable law, and gives the reasoning for the decision. The hearing officer shall affirm, modify, or reverse the determination of the director. The decision shall be sent to all interested parties, and shall state the right of an interested party to request a review by the commission.
  - d. A request for review shall be filed within twenty-one days after the decision was sent to the party, or within an extended period allowed by law. The hearing officer's decision shall become final unless a request for review is filed and allowed or the commission removes the appeal to itself within twenty-one days after the hearing officer's decision is sent.
  
5. Review Level: R.C. 4141.281(C)(4)
  - a. The commission may affirm, modify, or reverse previous determinations by the director or at the hearing officer level.
  - b. The commission may affirm, modify, or reverse a hearing officer's decision or remand the decision to the hearing officer level for further hearing.
    - 1) The commission shall consider an appeal when an appeal is required to be heard initially at the review level; when the commission on its own motion removes an appeal to itself within twenty-one days after the hearing officer's decision is sent; when the assigned hearing officer refers an appeal to the commission before the hearing officer's decision is sent; or when an interested party files a request for review with the commission within twenty-one days after the hearing officer's decision is sent.
  
6. Commission Examination and Review Procedure: R.C. 4141.281(C)(5) and (6)
  - a. The commission shall consider a request for review by an interested party, including the reasons for the request.
  - b. The commission may allow or disallow the request for review.
    - 1) If the commission allows a request for review, the commission shall notify all interested parties of that fact and provide a reasonable period of time in which interested parties may file a response.
    - 2) The commission may affirm the decision of the hearing officer; provide for the appeal to be heard or reheard at the hearing officer or review level; provide for

the appeal to be heard at the review level as a potential precedential decision; or provide for the decision to be rewritten without further hearing at the review level.

- 3) When a further hearing is provided or the decision is rewritten, the commission may affirm, modify, or reverse the previous decision.
  - c. The disallowance of a request for review constitutes a final decision by the commission. Any interested party may appeal the decision of the commission to the court of common pleas. {R.C. 4141.282}
  - d. Waiver: R.C. 4141.281(D)(2)
    - 1) Interested parties may waive, in writing, a hearing at either the hearing officer or review level. If the parties waive a hearing, the hearing officer shall issue a decision based on the evidence of record.
7. Telephone Hearings: R.C. 4141.281(D)(3)
  - a. Hearings may be conducted in person or by telephone.
  - b. An interested party whose hearing would be by telephone may elect to have an in-person hearing, provided that the party agrees to have the hearing at the time and place the commission determines pursuant to rule.
    - 1) A request for an in-person hearing must be filed no later than 10 days after the notice that an appeal has been transferred by the Director to the Review Commission was mailed.
8. Evening Hearings: R.C. 4141.281(D)(4)
  - a. Where a party requests that a hearing be scheduled in the evening because the party is employed during the day, the commission shall schedule the hearing during hours that the party is not employed.
  - b. If a conflict concerning a request for an evening hearing and an in-person hearing arises, the commission shall schedule the hearing by telephone during evening hours.
9. Dismissals (No Appearance – Appellant): R.C. 4141.281(D)(5)
  - a. If the appealing party fails to appear at the hearing, the hearing officer shall dismiss the appeal.
  - b. The commission shall vacate the dismissal upon a showing that written notice of the hearing was not sent to that party's last known address, or good cause for the appellant's failure to appear is shown to the commission within fourteen days after the hearing date.
    - 1) Good cause is not defined in the statute, but good cause for failing to appear at a hearing normally means a substantial reason put forth in good faith that is not unreasonable, arbitrary, or irrational and that is sufficient to create a reasonable excuse for an act or a failure to act

- 2) Working at the time of the hearing is not good cause for failing to appear, because a party has the opportunity to ask for a postponement, or an evening telephone hearing, to accommodate a work schedule.
  - 3) Failure to receive a response to a request for an "in-person" hearing is not good cause for failing to appear for a telephone hearing.
  - 4) Failure to receive a response to a request for a postponement is not good cause for failing to appear for a hearing *See Russell v. State Unemp. Comp. Bd. of Rev.*, 8th Dist. Cuyahoga No. 52898, 1987 Ohio App. LEXIS 9784 (Nov. 25, 1987).
  - 5) Not having enough money to purchase a phone card for a cell phone is not good cause for failing to appear for a hearing *See Wilson v. Dir., Ohio Dept. of Job & Family Servs.*, 8th Dist. Cuyahoga No. 94692, 2010-Ohio-5611 (finding that the claimant's lack of funds to purchase a phone card for her cell phone and her lack of access to a land-line phone did not constitute good cause for failing to appear for a telephone hearing because the Commission provided 2 toll-free numbers, and the claimant had more than 10 days from the notice of hearing to make arrangements to use a land-line)
  - 6) A party who fails to appear for a hearing because a Department employee advised that appearance at the hearing was not required does not have good cause to fail to appear for a hearing. *See Altizer v. Bd. of Rev.*, 10th Dist. Franklin No. 95APE10-1310, 1996 Ohio App. LEXIS 951 (Mar. 12, 1996).
- c. If the commission finds that the appealing party's reason for failing to appear does not constitute good cause for failing to appear, the commission shall send written notice of that finding, and the appealing party may request a hearing to present testimony on the issue of good cause for failing to appear.
  - d. The appealing party shall file a request for a hearing on the issue of good cause for failing to appear within ten days after the commission sends written notice indicating a finding of no good cause for failing to appear.
10. No Appearance – Appellee: R.C. 4141.281(D)(6)
- a. If the appellee fails to appear at the hearing, the hearing officer shall proceed with the hearing and shall issue a decision based on the evidence of record.
    - 1) The absence of a non-appealing party does not automatically result in a decision in favor of the appealing party.
  - b. The commission shall vacate the decision upon a showing that written notice of the hearing was not sent to the appellee's last known address, or good cause for the appellee's failure to appear is shown to the commission within fourteen days after the hearing date.

11. Agent: R.C. 4141.281(D)(7)
  - a. Any appeal or request for review may be executed on behalf of any party or any group of claimants by an agent.
  - b. At any proceeding before a hearing officer or review commission, any interested party may appear personally, by counsel, or an authorized representative. {Ohio Adm.Code 4146-19-01}
  - c. The commission may authorize persons other than ones who are admitted to the practice of law also to appear before the commission in any kind of proceeding as representatives of employers or claimants. {R.C. 4141.07(A)}
  - d. Attorneys are not required, and appearance at Commission hearings or proceedings by an authorized representative who is not an attorney does not constitute the unauthorized practice of law. *Henize v. Giles*, 22 Ohio St.3d 213, 490 N.E.2d 585 (1986).
  - e. Unless approved by the review commission in writing, no person representing an interested party in a case before the hearing officer and the review commission shall charge fees in excess of twenty five percent of the amount of benefits involved in the case. {Ohio Adm.Code 4146-19-03}

#### **D. Disqualification: Ohio Adm.Code 4146-11-01**

1. No hearing officer or member of the review commission shall participate in proceedings in any case in which the hearing officer or member has an interest which might prevent the hearing officer or member from conducting a fair hearing or reaching an impartial decision.
  - a. R.C. 4141.06 states that “no commission member shall participate in the disposition of any appeal in which the member has an interest in the controversy.”

#### **E. Challenges: Ohio Adm.Code 4146-11-02**

1. A hearing officer or member of the review commission may be challenged by any interested party at any time prior to the disposition of the appeal by the hearing officer or the review commission, whichever is the subject of the challenge.
2. A challenge to a hearing officer may be presented orally at a scheduled hearing and made a part of the record, or a written challenge shall be filed with the review commission. Such challenges to hearing officers shall be decided by the review commission.
3. Challenges to members of the review commission shall be directed to the secretary of the advisory council. The chairman of the advisory council shall decide challenges to members of the review commission. If the challenge is sustained, or a member withdraws, the

chairman of the advisory council shall so advise the governor, who shall then proceed to appoint a member of the advisory council to act for the member of the review commission.

**F. Public records: 2012 Ohio Atty.Gen.Ops. No. 2012-028**

1. Information that is (1) maintained by the Ohio Department of Job and Family Services and provided to the Unemployment Compensation Review Commission by the Department and (2) placed in a director's file, review file, or decision of the Commission is not a public record that must be made available for public inspection and copying under R.C. 149.43.
  - a. The opinion also sets forth a limited exception to the above.

## IV. Functions of the Director: R.C. 4141.28

### A. Prior Determinations

1. The United States District Court held that the Director and the Review Commission cannot re-litigate the reason for a claimant's separation in a second benefit year if that same separation has already been ruled upon in a determination issued in a previous benefit year. *Morrison v. Steinbacher*, 880 F.2d 415 (6th Cir.1989)
  - a. Determinations in two consecutive benefit years must be consistent with respect to a separation.
  - b. The only way to reverse a decision on separation in the second benefit year is by appealing the determination on separation made in the previous benefit year.
  - c. The Director must be consistent on a separation in a second benefit year even while the determination in the previous benefit year is under appeal.
  - d. The Director is authorized to reopen a claim in a second benefit year, even if neither party appealed, to make the determination consistent with a determination from the previous benefit year.
  - e. *Morrison* does not apply in cases where there has been a change in the reason for unemployment since the determination in the previous benefit year became final, such as where a disciplinary layoff has been converted to a discharge, or a subsequent period of employment and new separation.
2. *Res judicata* – “ ‘The doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.’ ” *Quality Ready Mix v. Mamone*, 35 Ohio St.3d 224, 227, 520 N.E.2d 193 (1988), quoting 30 American Jurisprudence, 908, Section 161.
  - a. A prior judgment will not be afforded *res judicata* effect where the later proceeding to which it is sought to be applied involves different issues and different parties. *Quality Ready Mix* at 227.
3. *Morrison*, *res judicata*, and the U.S. Constitution's Full Faith and Credit Clause prohibit the Director from issuing a determination that is inconsistent with a final unemployment compensation determination issued by another state. *In re Wheatley*, Unemp. Comp. Rev. Comm. No. B90-01805 (1990).
4. In making determinations, the director shall follow decisions of the unemployment compensation review commission which have become final with respect to claimants similarly situated. {R.C. 4141.28(H)}

## **B. Outside Litigation**

1. Unemployment compensation determinations are not bound by findings or results of outside litigation, arbitration, or other administrative proceedings. *See, e.g. Youghiogheny & Ohio Coal Co. v. Oszust*, 23 Ohio St.3d 39, 491 N.E.2d 298 (1986), *McConnell v. Ohio Bur. of Emp. Servs.*, 10th Dist. Franklin No. 95APE03-262, 1995 Ohio App. LEXIS 4424, at \*12 (Oct. 5, 1995)
2. No finding of fact or law, decision, or order of the Director, Hearing Officer, Review Commission, or a reviewing court, is binding upon any proceeding other than Unemployment Compensation proceedings. *E.g. Sexton v. Oak Ridge Treatment Ctr. Acquisition Corp.*, 167 Ohio App. 3d 593, 594, 2006-Ohio-3852, P1, 856 N.E.2d 280, 281 (4<sup>th</sup> Dist.). {R.C. 4141.281(D)(8)}
3. No agreement by an employee to waive his or her right to benefits is valid, nor shall benefits be assigned, released, or commuted. {R.C. 4141.32}

## **C. Incorrect Advice from State Employee**

1. Statutory provisions must apply even when individuals rely on incorrect information provided by state employees.
  - a. The Ohio Supreme Court has repeatedly “refused to apply principles of estoppel against the state, its agencies or its agents, under circumstances involving an exercise of governmental functions.” *Griffith v. J.C. Penney Co.*, 24 Ohio St.3d 112, \*113, 493 N.E.2d 959 (1986).
  - b. The doctrine of estoppel did not apply against the state to extend the time within which a claimant had to file an administrative appeal, where the claimant was properly notified in writing by the state agency of the time limit for filing an appeal, but subsequently received and relied upon the mistaken advice of a state employee that the time limit could be extended. *Griffith, supra*.

## **D. Corrected Determination: R.C. 4141.28(G)**

1. The Director shall issue a corrected determination within the benefit year of an allowed application or within 52 weeks of the filing of a disallowed application when:
  - a. A determination is wrong due to an error in an employer's report OR
  - b. A determination is wrong due to any typographical or clerical error in the determination OR
  - c. Correct remuneration information is received by the Director.

2. Determinations regarding an alternate base period: {R.C. 4141.01(Q)(2)}
  - a. Determinations relying on the alternate base period shall be corrected only if the initial basis for the determination of eligibility for benefits was based on claimant's affidavit:  
AND
    - 1) the employer's quarterly report is timely received, AND
    - 2) the employer's wage information would change the initial monetary determination.
  - b. Any benefits already paid, and any benefits already charged to the employer's account, shall be adjusted effective as of the beginning of the claimant's benefit year.
3. The corrected determination shall take precedence over and void the prior determination of the Director.
4. The Director shall not issue a corrected determination when the Review Commission, or a court, has jurisdiction over that determination.

#### **E. Child Support Obligations: R.C. 4141.284**

1. The director shall deduct and withhold from unemployment compensation payable to an individual who owes child support obligations.
2. The amount of unemployment compensation subject to being withheld is that amount that remains payable to the individual after application of any recoupment provisions for recovery of overpayments and after deductions that have been made for deductible income received by the individual.

#### **F. Eligibility Notice: R.C. 4141.28(F)**

1. Any base period or subsequent employer of a claimant who has knowledge of specific facts affecting such claimant's right to receive benefits for any week, may notify the Director of such facts:
  - a. Must be in writing
    - 1) While the Director has specific eligibility notice forms, failure to use the prescribed form shall not preclude the Director's examination of any notice.
    - 2) Must contain a statement that identified either:
      - a) A source who has firsthand knowledge of the information, or
      - b) An informant who can identify the source
    - 3) Must provide specific and detailed information that may potentially disqualify the claimant
    - 4) Must provide the name and address of the source or informant

- 5) Must appear to the Director to be reliable and credible
- b. Must be received by the Director or post-marked within 45 calendar days of the end of the week being challenged
  - 1) The Director shall consider the information contained in the eligibility notice, together with other facts, and the Director shall issue a determination to all interested parties
  - 2) The Director must give notice of the issue to the claimant:
    - a) The claimant shall have a minimum of five business days to respond
    - b) The claimant may request a fact-finding interview
- c. The Director must issue a determination on whether the challenged claim is allowed or disallowed.

## **G. Mutualization of Employer Charges**

1. If the director determines that an application is valid, the director shall notify all interested parties which includes base period employers.
2. Contributory v. Reimbursing employers: See generally R.C. 4141.24, 4141.241 4141.242, and Ohio Adm.Code 4141-1-01.
  - a. "Contributory employers" are employers liable for the payment of contributions via quarterly unemployment taxes based upon their experience rates.
  - b. "Reimbursing employers" elect to make payments in lieu of contributions and therefore are relieved of the obligation to pay quarterly taxes in exchange for the agreement to pay any allowed claims dollar for dollar.
    - 1) Only public entities, Indian tribes, and nonprofit organizations who have elected to do so may be Reimbursing employers.
      - a) Reimbursing employers can be identified by their UI Account numbers, which always begin with the number 8.
3. The determination issued to each chargeable base period employer shall include the total amount of benefits that may be charged to the employer's account. {R.C. 4141.28(D)}
  - a. If the claimant was separated from that base period contributory employer under disqualifying conditions, those charges may be transferred instead to the mutualized account and the employer is relieved of charges. {R.C. 4141.29(H)}
  - b. The "mutualized account" and the contributory scheme for that account is set forth in R.C. 4141.25.
4. The account of a base period, contributory employer will be mutualized if:
  - a. The claimant quit employment without just cause OR
  - b. The claimant was discharged for just cause in connection with work OR

- c. The claimant quit employment to marry, or because of a marital, parental, filial, or other domestic obligation OR
  - d. The claimant became unemployed by reason of commitment to any correctional institution OR
  - e. The claimant was separated from employment for the purpose of entering the armed forces of the United States OR
  - f. The claimant left employment to accept a recall from a prior employer, left to accept other employment, or left or was separated from concurrent employment OR
  - g. The claimant refused an offer of suitable work, or refused or failed to investigate a referral to suitable work, because the claimant was attending a training course approved by the Director
  - h. When its wages have been sent to another state as a Combined Wage Claim, and the charges would have been mutualized had the claim been under Ohio law. {Ohio Adm.Code 4141-35-06}
  - i. Charges to a base period employer, with whom the claimant is employed part-time at the time of the application, will be mutualized if:
    - 1) The claimant also worked part-time for the employer during the base period of the claim;
    - 2) The claimant is unemployed due to loss of other employment; AND
    - 3) The employer is not a reimbursing employer. {R.C. 4141.24(D)(1)}
5. Neither ODJFS nor the Review Commission may transfer potential charges assessed to a reimbursing employer. Charges to the account of a reimbursing employer may only be transferred to the mutualized account if it finally is determined by a court on appeal that the employer's account is not chargeable for the benefits. {R.C. 4141.24(D)(2)}

## **H. Interested Parties: R.C. 4141.01(I)**

- 1. "Interested party" means the director and any party to whom notice of a determination of an application for benefit rights or a claim for benefits is required to be given under R.C. 4141.28.
  - a. On a first claim for benefits, or an additional claim, the interested parties are: the Director, the claimant, the most recent separating employer, and any other employer involved in the determination. {R.C. 4141.01(I) and 4141.28(E)}
  - b. Separations prior to the claimant's most recent separation shall not be examined if: {Ohio Adm.Code 4141-27-01(B)}
    - 1) the claimant was employed in covered employment for six or more weeks with the most recent separating employer; AND
    - 2) the claimant earned, or was paid for such weeks, a total of six times 27½% of the state average weekly wage as calculated and adjusted annually by the Director.
  - c. On a continued claim, the interested parties are: the Director, the claimant, and any employer who has filed a valid Eligibility Notice.

## V. Filing an Appeal: R.C. 4141.281

### A. General Requirements

1. Any interested party notified of a determination of benefit rights or a claim for benefits determination may appeal.
2. An appeal must comply with the requirements of the statute. *Miller v. Cuyahoga Cty. Aud., Office of Human Resources*, 8th Dist. Cuyahoga NO. 76050, 1999 Ohio App. LEXIS 3310 (July 15, 1999).
3. An appeal may be filed with:
  - a. The Director;
  - b. The Review Commission;
  - c. Any state or federal employee who has the duty of accepting claims; OR
  - d. Any employee of the Unemployment Insurance Commission of Canada who has the duty of accepting claims. {R.C. 4141.281(D)(1)}
4. Appeals may be filed in person, by mail, or submitted through the use of electronic means including, but not limited to, a facsimile device, electronic network, or the internet. {Ohio Adm.Code 4141-19-01(A)}
5. The appeal must be in writing and express a desire to appeal the decision.
6. The appeal must be transmitted to the correct address or electronic device of the entity receiving the appeal.
  - a. This may not be the exact address provided on the decision. However, so long as the appeal is sent to an address or electronic device of the entity it may be considered received.
  - b. An appeal that is mailed to an address or electronically transmitted to an address unaffiliated with the entity to which the appeal was to be sent does not constitute the filing of a valid appeal.
7. When a statute confers a right of appeal, the appeal can only be perfected in the manner prescribed by that statute. *See, e.g., McCruter v. Bd. of Rev.*, 64 Ohio St.2d 277, 415 N.E.2d 259, 279 (1980); *Holmes v. Union Gospel Press*, 64 Ohio St.2d 187, 188, 414 N.E.2d 415 (1980); *Zier v. Bur. of Unemp. Comp.*, 151 Ohio St. 123, 125, 84 N.E.2d 746 (1949); *Griffith v. J.C. Penney Co.*, 24 Ohio St.3d 112, 113, 493 N.E.2d 959 (1986).

8. The appeal must be filed within twenty-one calendar days after the written determination was sent to the party except when specific, statutorily provided, circumstances warrant an extension of that period. {R.C. 4141.281(A)}

## **B. Determining When an Appeal was Filed**

1. Filing in Person
  - a. If notice of appeal is delivered, it must be received before the closing time of the office on the last day of the appeal period. {Ohio Adm.Code 4146-13-01}
  - b. If an appeal is filed in person, it is deemed to be filed on the date it is received by the entity. {Ohio Adm.Code 4146-13-01(E)}
2. Filing by U.S. Mail
  - a. If an appeal is delivered through the U.S. Mail, the enclosing envelope must have a postmark date or postal meter postmark that is on or before midnight of the last day of the specified appeal period; and where the postmark is illegible or missing, the appeal is timely filed if received not later than the end of the fifth calendar day following the last day of the specified appeal period. {R.C. 4141.281(D)(1) and Ohio Adm.Code 4146-13-01}
  - b. Private meter postmarks imprinted under license from the United States Postal Service are presumptively valid and accurate for the purposes of determining whether an appeal was timely. *Bowman v. Admr., Ohio Bur. of Emp. Servs.*, 30 Ohio St.3d 87, 507 N.E.2d 342 (1987)
    - 1) The United States Postal Service requires the date shown on private meter postmarks to be the actual date of deposit of mail (or the next scheduled collection day). (United States Postal Service Domestic Mail Manual (“DMM”) Section 144.471)
    - 2) If the wrong date appears, a .00 postage meter impression with the correct date is stamped on the envelope by the post office.
  - c. Other postage meter mail will be considered to have been received by the department on the date appearing on the meter imprint. If postage meter mail is received by the department more than five calendar days after such date, the director may request that additional evidence verifying the meter imprint date be provided and consider such evidence in determining the date of receipt. {Ohio Adm.Code 4141-19-01(B)(2)(b)}
    - 1) The fact that an appeal may have been delivered to a postal clerk or placed in a mailbox prior to the filing deadline is not sufficient to establish that an appeal was timely filed. *See, e.g., Bd. of Rev. v. Roppo*, 61 Ohio App.2d 220, 401 N.E.2d 481 (8th Dist.1979). *See also McNamara v. Dir., Ohio Dep’t of Job & Family Servs.*, 8th Dist. Cuyahoga No. 95226, 2010-Ohio-5619 (Courts have refused to accept assertions of incompetence by the postal service resulting in a lost appeal or in a late postmark as sufficient grounds to extend the statutory

deadline). *See also DiSalvo v. Bd. of Rev., Ohio Bur. of Emp. Servs.*, 10th Dist. Franklin No. 92AP-1206, 1992 Ohio App. LEXIS 6777, at \*7-8 (Dec. 24, 1992) (A U.S. Postal clerk is not recognized as an individual that has the duty of accepting unemployment claims or appeal).

- 2) A previously mailed appeal that was returned to sender due to errors, such as insufficient postage, does not justify an extension of the appeal period if a second attempt to file an appeal is made. *Lasky v. Bd. of Rev.*, 8th Dist. Cuyahoga NO. 45073, 1983 Ohio App. LEXIS 12885 (Feb. 17, 1983).
  - d. Placing an appeal with a private delivery service, such as Federal Express, does not constitute filing. An appeal delivered by such service is filed on the date the appeal is delivered to the office of one of the enumerated entities discussed above.
3. Use of "Electronic Means"
- a. If an appeal is delivered by electronic means, it must be received by a facsimile device, electronic device, or at an electronic address designated, operated and maintained by the director; and be confirmed by the director to have been received within the statutorily prescribed time frame. {Ohio Adm.Code 4141-19-01(B)(3)(a)}
  - b. "Electronic means" includes, but is not limited to, a facsimile device, electronic network, or the internet. {Ohio Adm.Code 4141-19-01(D)(4)}
  - c. If an appeal received electronically is unintelligible or incomplete, the director may disregard it. {Ohio Adm.Code 4141-19-01(B)(3)(b)}
  - d. If filed by facsimile device or other electronic means it must be received by midnight of the last day of the appeal period. {Ohio Adm.Code 4146-13-01}
    - 1) A confirmation report produced by the sender's fax machine that shows the appeal transmission was successful is sufficient to establish that the appeal was received.
  - e. An appeal may be filed via the internet at an electronic address designated, operated and maintained by the director.
    - 1) An Appeal sent online is not received until submitted to the system and a documented confirmation is provided to the sender.
    - 2) The ODJFS system undergoes regular maintenance during which time it will not accept appeals. An appeal that is submitted outside of the appeal period because the ODJFS system was unable to accept appeals is not timely.
4. Independent Verification
- a. Where ODJFS or the Review Commission has not received, has disregarded as unintelligible or incomplete, or is unable to locate an appeal, said appeal will be considered to have been received timely if the sender provides independent verification to demonstrate that the appeal was mailed, submitted electronically or

filed in person within the statutorily prescribed time frame: {Ohio Adm.Code 4141-19-01(C)}

- 1) The court held that claimant's appeal was not timely because she could not provide a confirmation page showing that her appeal was submitted by fax within the appeal period. Although, the claimant's facsimile log indicates a fax transmission to the agency fax machine, there is no evidence – direct or circumstantial – that the dates and times indicated on the log are reliable. Even if the log accurately indicates that a fax was sent, there is no evidence beyond claimant's statement that the document that she allegedly faxed on that date was, in fact, her appeal from the decision at issue. *Brown v. Ohio Dept. of Job & Family Servs.*, 2d Dist. Montgomery No. 26109, 2014-Ohio-4956.
- 2) Absent such independent verification, a missing fax or internet message cannot be considered as a timely appeal. *See Adams v. Review Commission*, Cuyahoga C.P. No. 535781 (Dec. 29, 2004), unreported.

### **C. Extending the Time for Filing an Appeal**

1. When the last day of an appeal period is a Saturday, Sunday, or legal holiday, the appeal period is extended to the next work day after the Saturday, Sunday, or legal holiday. {R.C. 4141.281(D)(9) and Ohio Adm.Code 4146-13-01(A)}
2. When a party provides certified medical evidence stating that the party's physical condition or mental capacity prevented the party from filing an appeal within the appropriate twenty-one-day period, the appeal period is extended to 21 days after the end of the physical or mental condition. {R.C. 4141.281(D)(9) and Ohio Adm.Code 4146-13-01(B)}
  - a. The physical or mental condition must have prevented the party from filing an appeal during the entire appeal period, not merely on the last day.
  - b. Certified medical evidence must be presented demonstrating both the condition and that the condition actually prevented timely filing of the appeal. *See Keller v. Dura Temp Corp.*, Lucas C.P. No. CI04-3045 (Dec. 27, 2004), unreported (“mild short-term memory issues” did not prevent timely filing).
  - c. An inability to read or write well is not a condition which will extend the time for filing an appeal. *See Mussetter v. Davon*, Clinton C.P. No. 63 CVD-265 (Feb. 2, 1994), unreported.
3. When the Director or Review Commission finds that the party did not actually receive the determination or decision within the applicable appeal period, then the appeal period is extended to 21 days after the party actually receives the determination or decision. {R.C. 4141.281(D)(9) and Ohio Adm.Code 4146-13-01(C)}

- a. When a determination or decision was mailed to the party's last known address, there is a rebuttable presumption that the party received the determination or decision within the appeal period. *See U.A.W. v. Giles*, N.D. Ohio No. C-81-415 (1982), unreported.
    - 1) The evidence to establish that the party did not actually receive the determination or decision may consist of testimony from the party. {R.C. 4141.281(D)(9) and Ohio Adm.Code 4146-13-01(C)}
  - b. If the Director or Review Commission finds that the party received the determination or decision on the last day of the 21-day appeal period, the appeal period is extended to 21 days after the party actually receives the determination or decision (per agreement with the Legal Aid Society of Ohio)
4. When the determination or decision is not mailed to the party's correct address, but the party receives the decision, per Commission policy:
    - a. A party must act within the appeal period if the decision is received on or before the 16th day of the appeal period
    - b. If received after the 16th day, the party has 21 days from the date of receipt in which to file a timely appeal

#### **D. Timeliness cases involving e-mail notification**

1. Notifying employer of contribution rate: {R.C. 4141.26}
  - a. In order for the director to acquire jurisdiction to reconsider a rate determination, the employer must apply for reconsideration within 30 days after the mailing of a notice of the rate determination or, if no mailing occurred, the delivery of a notice of the rate determination. {R.C. 4141.26(D)(2)}
  - b. A notice of a revised determination, sent to the employer by e-mail, which does not include an attachment, makes no mention of the rate revision, and only informs the recipient of a new message “regarding your ODJFS Unemployment Compensation Tax account,” and included a link that opened to the Department’s website to access the account and view messages, does not trigger the beginning of the 30-day period. The court held that, because the determination was never mailed to the employer—either by mail or email—it cannot qualify as a “mailing” under R.C. 4141.26(D)(2). *Hason USA Corp. v. Dir., Ohio Dept. of Job & Family Servs.*, 10th Dist. Franklin No. 16AP-150, 2016-Ohio-8273.

#### **E. Appeal to Court: R.C. 4141.282**

1. Any interested party, within 30 days after written notice of the final decision of the unemployment compensation review commission was sent to all interested parties, may appeal the decision of the commission to the court of common pleas. {R.C. 4141.282(A)}

- a. When an interested party provides evidence, which evidence may consist of testimony from the interested party, that is sufficient to establish that the party did not actually receive a decision within the 30-day appeal period, and a court of common pleas finds that the interested party did not actually receive the decision within that 30-day appeal period, then the appeal period is extended to 30 days after the interested party actually receives the decision. {R.C. 4141.281(D)(9)}
2. The appeal shall be filed with the court of common pleas of the county where the appellant: {R.C. 4141.282(B)}
  - a. if an employee: is a resident or was last employed
  - b. if an employer: is a resident or has a principal place of business in the state
  - c. if none of the above apply, then the appellant shall file in Franklin County.
3. The timely filing of the notice of appeal shall be the only act required to perfect the appeal and vest jurisdiction in the court. The notice of appeal shall identify the decision appealed from. {R.C. 4141.282(C)}
4. The commission shall provide on its final decision the names and addresses of all interested parties. The appellant shall name all interested parties as appellees in the notice of appeal. The director of job and family services is always an interested party and shall be named as an appellee in the notice of appeal. {R.C. 4141.282(D)}
  - a. A decision listing the parties who will receive a copy of the commission's decision—without expressly identifying them as interested parties—does nothing to advise a potential appellant and falls well short of the mandate in R.C. 4141.282(D) that the decision provide the names and addresses of all interested parties. *Pryor v. Dir., Ohio Dept. of Job & Family Servs.*, 148 Ohio St.3d 1, 2016-Ohio-2907, 68 N.E.3d 729.
5. The commission, within 45 days after a notice of appeal is filed or within an extended period ordered by the court, shall file with the clerk a certified transcript of the record of the proceedings. {R.C. 4141.282(F)(1)}
  - a. If the commission cannot file the certified transcript of the record of proceedings, then the court shall remand the matter to the commission for additional proceedings, which may include a new hearing, in order to complete the record on appeal. {R.C. 4141.282(F)(2)}

## VI. Weekly Eligibility Criteria

### A. Procedural Requirements

1. In addition to filing an application for determination of benefit rights, an individual must file a weekly claim for any week in which he or she wishes to receive benefits.
  - a. In order to receive benefits, a claimant must:
    - 1) File a valid application for determination of benefit rights and
    - 2) Satisfy specific eligibility criteria for each week being claimed.
  - b. A claim for benefits shall be filed weekly or biweekly, in a manner prescribed by the director.
    - 1) An individual shall provide any necessary information to determine that person's eligibility for benefits for the week claimed.
2. A claim is considered to have been filed on the date it is received by ODJFS. {Ohio Adm.Code 4141-27-05}
  - a. The first weekly claim allowed by the director is a "waiting week."
  - b. No benefits are payable during this waiting week.
  - c. An individual is required to serve one waiting week per benefit year.
3. A weekly claim must be filed no later than the end of the third calendar week immediately following the week being claimed.
  - a. In exceptional cases, when it is shown to the satisfaction of the director that an individual has been deterred by circumstances beyond the individual's control from filing a claim as prescribed in this rule, the director may extend the time limitations to file. {Ohio Adm.Code 4141-27-05(B)} *See, e.g., Feim v. Bd. of Rev.*, 56 Ohio App.2d 175, 178, 381 N.E.2d 1340 (10th Dist.1978).
  - b. An individual's failure to file claims due to ignorance of the regulations is not grounds for the extension of time to file an appeal. *Id.* at 178.

### B. Registration

1. The claimant must be registered with ODJFS, employment office, or other registration place as designated by the Director. {R.C. 4141.29(A)(3)(a)}
  - a. The Director shall prescribe the time limits, frequency, and manner of registration.
    - 1) An individual is deemed to be registered upon: {R.C. 4141.29(A)(3)(b)}
      - a) Filing an application for benefit rights;
      - b) Making a weekly claim for benefits;
      - c) Reopening an existing claim following a period of employment or nonreporting.

- b. Registration continues for a period of three calendar weeks, including the week during which the applicant registered. {R.C. 4141.29(A)(3)(c)}
  - 1) However, an individual is not registered during any period in which the individual fails to report, as instructed by the director, or fails to reopen an existing claim following a period of employment.
    - a) "Report" means contact by phone, access electronically, or be present for an in-person appointment, as designated by the director.
- c. The Director may extend the specified period of registration for good cause. {R.C. 4141.29(A)(3)(d)}
- d. If the Director finds claimant ineligible under R.C. 4141.29(A)(5) because claimant had a week of earnings followed by a week of no earnings, evaluate the issue as a failure to register.

### **C. Involuntary Unemployment**

- 1. An individual's unemployment must be involuntary.
  - a. An individual who is on a voluntary leave of absence is not entitled to benefits.
  - b. An unpaid corporate officer, who also works in covered employment with the corporation as a carpenter, is involuntarily unemployed if the corporation lays off all of its carpenters. *Belkin v. Bd. of Rev.*, 8th Dist. Cuyahoga No. 40365, 1980 Ohio App. LEXIS 13802 (Feb. 7, 1980).

### **D. Weekly Eligibility Criteria**

- 1. Able to work
  - a. An individual must be physically and mentally able to work during each day of the week to be eligible for benefits. {R.C. 4141.29(A)(4)(a)}
    - 1) An individual who was physically or mentally unable to work for even one day during the week claimed would not be entitled to benefits for that week.
    - 2) An individual who is unable to work in his or her usual trade or occupation may still be eligible for benefits if he is able to work in any other trade or occupation for which he is reasonably fitted. *Hinkle v. Lennox Furnace Co.*, 84 Ohio App. 478, 83 N.E.2d 903 (3rd Dist. 1948), *aff'd*, 150 Ohio St. 471, 83 N.E.2d 521(1948). *Accord City of Akron v. Dir., Ohio Dept. of Job & Family Servs.*, 9th Dist. Summit C.A. No. 27489, 2015-Ohio-5376.
  - b. Social Security Disability Benefits.
    - 1) In order to qualify for Social Security Disability Benefits, an individual must have a physical or mental impairment that, for at least one year, is expected to prevent the individual from engaging in "substantial gainful activity (SGA)."
      - a) "Substantial gainful activity (SGA)" is defined by federal regulations and varies depending on the national average wage index.

- b) Applying this definition, some courts previously held that an individual receiving Social Security Disability Benefits could not be physically able to work under R.C. 4141.29(A)(4)(a). *Collins v. Administrator*, 5th Dist. Stark No. CA-7001, 1987 Ohio App. LEXIS 6333 (Mar. 30, 1987).
    - 2) However, while retaining the above definition, Social Security law now permits individuals to enroll in work incentive programs, and earn the SGA amount per month, and still collect Social Security Disability Benefits.
    - 3) The Commission has held that receipt of Social Security Disability Benefits creates a rebuttable presumption that the individual is not physically able to work.
  - c. Worker's Compensation Benefits.
    - 1) Award is only premised on a conclusion that the individual is unable to work in the individual's previous occupation.
    - 2) An individual can receive certain types of workers' compensation benefits (ie. permanent total disability, temporary total disability, permanent partial disability) and still be physically able to work (apply same standards as in any other case where a claimant is under medical restrictions).
    - 3) Claimant's receipt of TTD benefits did not render him unable to work. Claimant could not perform strenuous physical labor at his previous employment but was able to perform sedentary and supervisory work. *See Wright v. Dir., Ohio Dept. of Job & Family Servs.*, 10th Dist. Franklin No. 13AP-1048, 2014-Ohio-2663.
2. Available for suitable work
  - a. An individual must be available for work in order to be eligible to receive benefits. {R.C. 4141.29(A)(4)(a)}
  - b. Availability requires an indication of readiness and willingness to work without interference. *Galluzzo v. Administrator*, 2d Dist. Champaign No. 95-CA-6, 1995 Ohio App. LEXIS 5238, at \*12 (Nov. 29, 1995).
  - c. There is "no hard and fast rule as to what constitutes availability for work". The evaluation depends on the facts and circumstances of each case. In general, the availability requirement of the statute is satisfied where a worker is able and willing to accept suitable work at a point where there is an available labor market, which work he does not have good cause to refuse. *Leonard v. Unemp. Comp. Bd. of Rev.*, 148 Ohio St. 419, 421, 75 N.E.2d 567 (1947).
    - 1) Generally, a claimant is expected to be ready and willing to accept suitable full-time employment on any shift for any day of the week.
    - 2) When the facts of a case indicate that this general expectation is unreasonable, the evaluation as to whether an individual is available for suitable work is based on whether the individual has placed undue barriers or restrictions to his or her availability.

- d. The claimant must be available for suitable work.
  - 1) Is claimant qualified to perform the work sought (ie., experience, training, licenses, tools, etc.)?
  - 2) Is claimant's availability unduly restricted so that it prevents him or her from working in suitable employment? (ie., inadequate transportation, inadequate child care arrangements, unreasonable minimal acceptable rate of pay, unwillingness to work all customary hours, unwillingness to commute within customary labor market area).
    - a) A claimant is generally expected to be willing to make adjustments to controllable restrictions on his or her availability. (ie., altering restrictions or job search efforts, arrangements for transportation or child care problems)
    - b) Consideration is also given to claimant's circumstances in light of the current labor market conditions. (ie., employment opportunities claimant can expect given his or her particular circumstances, whether claimant is on temporary or seasonal layoff, prevailing rate of pay, customary shifts/hours, area's commuting patterns, availability of job opportunities in claimant's customary occupation)
- e. Specific issues:
  - 1) Religious objection:
    - a) Must establish that a personal religious belief is basis for claimant's inability to work on his or her Sabbath (purely personal preference is insufficient as valid reason).
    - b) Must offer convincing evidence of a change in viewpoint if claimant was engaged in work on his or her Sabbath day (last employment).
  - 2) Relocation:
    - a) Generally, claimant is considered unavailable for work during week engaged in changing residence from one local area to another.
      - i. Generally, moving residence within the immediate area is not disqualifying.
    - b) A claimant who voluntarily moves from a locality with reasonable possibility of obtaining work to locality with no work has generally become unavailable for work, unless he or she can establish efforts to obtain work in nearby locality with available work.
  - 3) Absence from locality:
    - a) A claimant meets the availability requirement if he or she can establish that primary reason for leaving area was for the purpose of seeking work.
    - b) A claimant who leaves the area for compelling personal reasons (ie., sickness or death in family) does not meet the availability requirement.

- c) A claimant who is out of the area for the primary purpose of vacation, visiting relatives or friends does not meet the availability requirement.
  - d) Absence from the locality over the weekend does not raise an availability issue unless the claimant's normal work week includes the weekend (Saturday and Sunday).
  - e) Temporary plant shutdowns (45 days or less):
    - i. Claimant must be available to regular employer for any temporary suitable work during shutdown. (ie., employer be able to contact claimant anytime it is necessary to request the return to work)
    - ii. If claimant leaves local area, employer must be able to contact claimant for recall to work before scheduled return date and be available to return to work without undue delay.
- 4) Lack of transportation:
- a) A claimant is not available for work if he or she has no transportation to any available work.
  - b) Separation from employment was due to lack of transportation (non-disqualifying separation):
    - i. If claimant does not have available transportation (including public transportation) to other employment or other employment areas, he or she is not available for work until transportation is secured to an area in which employment may be available.
- 5) Family circumstances (care of children, family illness):
- a) A claimant is not available for work if he or she places a definite restriction on availability that materially reduces the opportunity to obtain employment (makes positive statement, not just an expression of preference).
- 6) Jail or other legal detention:
- a) Effective May 20, 2016, a claimant is not considered available for work if he or she is held in legal detention for over 24 hours in a calendar week.
- 7) Leave of absence:
- a) A leave of absence is a reason for unemployment, not a reason for separation (employer/employee relationship has not been severed, and both parties anticipate claimant's return to work on a date that may or may not be known).
    - i. Involuntary
      - (1) A claimant may be entitled to benefits if it can be established that he or she is unemployed due to an involuntary leave of absence and that he or she is otherwise able to work and available for work. (ie., employer's policy will not permit claimant to work under certain conditions, even though claimant is willing and able to do so)

- ii. Voluntary
  - (1) A claimant is not entitled to benefits if he or she has voluntarily withdrawn from work for personal reasons and expects to return at a future date. (ie., the employer allows the claimant's request for time away from work to resolve an ability or availability issue)
- iii. Indefinite duration
  - (1) Leave usually ends when condition causing the leave no longer exists. (ie., claimant now able to work)
    - (a) If employer agrees condition no longer exists (ie., agrees claimant is able to return to work), but there is no work available, the leave is considered terminated when claimant reported back to the employer (as of that date, claimant is deemed unemployed due to a lack of work).
- iv. Definite duration
  - (1) Leave is granted for specified period of time (all weeks claimed during said period will be denied).
    - (a) If duration period is changed by either party, the entitlement to benefits will be determined based on the latest agreement between the parties as to when leave is to be terminated.
- f. Available for part-time employment only
  - 1) When an individual's base period employment has consisted of part-time employment, and there is a compelling reason why the individual is not available for full-time work, this availability for part-time employment may satisfy the availability requirement. *Gilbert v. Dir., Ohio Dept. of Job & Family Servs.*, 1st Dist. Hamilton No. C-030902, 2004-Ohio-4663. (Claimant previously worked part-time and had restricted availability due to caring for a special-needs child)
  - 2) Individual who could only work on the weekend due to her enrollment in an unapproved, out of town, training class made herself unavailable for work. The court held the extraordinary circumstances in Gilbert did not exist in this case. *Cecela v. Dir., Ohio Dept. of Job & Family Servs.*, C.P. No. 11CVF-10-12915, 2012 Ohio Misc. LEXIS 5284 (Jan. 18, 2012).
- g. Self-Employment
  - 1) "[T]he mere fact that a claimant is working does not automatically render the claimant ineligible for benefits." *Silberstein v. Admr., Ohio Bur. of Emp. Servs.*, 10th Dist. Franklin No. 89AP-303, 1989 Ohio App. LEXIS 3740, at \*4 (Sep. 26, 1989).
  - 2) Considerations in determining whether a self-employed claimant has met the availability requirement may include:

- a) The amount of time per week that claimant is dedicating to self-employment. *See May v. Bd. of Rev.*, 9th Dist. Summit C.A. No. 9406, 1980 Ohio App. LEXIS 14138 (Jan. 9, 1980). Claimant working 40 hours per week in self-employment rendered him unavailable for work.
      - b) The similarity between the self-employment and claimant's prior work. *See, e.g., Silberstein v. Admr., Ohio Bur. of Emp. Servs.*, 10th Dist. Franklin No. 89AP-303, 1989 Ohio App. LEXIS 3740 (Sep. 26, 1989), *Galluzzo v. Administrator*, 2d Dist. Champaign No. 95-CA-6, 1995 Ohio App. LEXIS 5238 (Nov. 29, 1995).
      - c) Whether or not an individual received income from self-employment may be considered in establishing claimant's willingness (and therefore the claimant's availability) to accept other work. *See, e.g., Rieth v. Admr., Ohio Bur. of Emp. Servs.*, 43 Ohio App.3d 150, 153, 539 N.E.2d 1146 (8th Dist.1988), *MacMillian v. Unemp. Comp. Bd. of Rev.*, 10 Ohio App.3d 290, 462 N.E.2d 177 (2d Dist.1983).
    - h. Participation in an approved training course
      - 1) An individual who is restricted as to what days or shifts he or she is able to work because of participation in a training course approved by the Director meets the availability requirement if:
        - a) Participation in the training course was recommended by the Director, and
        - b) The individual is regularly attending the course and making satisfactory progress. {R.C. 4141.29(A)(4)(c)}
      - 2) The individual will continue to meet the availability requirement for up to eight consecutive weeks between academic terms or during holiday recess periods of that training.
    - i. School
      - 1) An individual who becomes unemployed while attending a regularly established school, and whose base period qualifying weeks were earned in whole or in part while attending that school,
      - 2) Meets the availability and active search for work requirements if:
        - a) The individual regularly attends school during the week and
        - b) The individual is available on at least one shift of hours for suitable employment. Generally, the individual is available on at least one shift of hours for suitable employment. *Halco v. Admr., Bur. of Emp. Servs.*, 41 Ohio App.2d 228, 325 N.E.2d 255 (8th Dist.1974).
3. Actively seeking suitable work
- a. A claimant must act in good faith and make a reasonable effort to find suitable employment. Mere registration with and reporting weekly to the local unemployment bureau, without such reasonable effort, does not make the claimant "available." A

person is "available for suitable work and is actively seeking such work" if, under the circumstances of his particular case, he has acted to relieve his unemployment in good faith and in a reasonable way. *Nelson v. Van Horn Const. Co.*, 45 O.O. 378, 102 N.E.2d 57 (C.P.1951).

- b. The director will instruct the claimant as to the efforts that he or she must make in the search for suitable work as well as any mandatory reemployment services or activities that the claimant must participate in. R.C. 4141.29(A)(4)(b)(i).
  - 1) Generally, a claimant is required to actively seek suitable work during each week claimed;
  - 2) If working part-time, an individual may still be required to seek suitable full-time employment.
  - 3) In some circumstances, the director may waive the work search requirement.
- c. The work search instructions issued by the director may be subject to change during a claimant's benefit year. The director will notify a claimant of any changes to his or her work search requirements in writing.
- d. In most cases, a claimant will be required to apply for work with at least two employers per week.
  - 1) Claimants are required to apply for work. Merely contacting an employer to see if the company has open positions is not sufficient.
  - 2) A good faith search for work includes following the application process outlined by the employer. (If an employer's ad states apply online only, and claimant walks into the employer's facility and hands in a paper copy of a resume, this would generally not demonstrate a good faith effort on claimant's part.)
  - 3) Attending a job interview for a position that was applied for in a previous week may not be considered as an additional application for work during the week of the interview.
  - 4) Repeatedly applying for work with the same employer multiple weeks in a row does not demonstrate a good faith effort to search for work. Likewise, applying for different positions with the same company is not generally considered sufficient to meet the work search requirement.
  - 5) Completing one online application that will be considered for potential employment at multiple locations within the same company does not constitute applying for work with two employers for the purposes filing a weekly claim.
- e. The claimant must keep a written record of his or her work search efforts for each week that he or she claims benefits.
  - 1) Generally, this record should include: dates of job contacts, names and addresses of the companies or persons contacted, method of applying for work, the type of work sought, the outcome or results.
  - 2) That record shall be produced upon request from the director and in the manner and means prescribed by the director.

- f. In certain cases, these requirements may be waived or adjusted due to the claimant's specific circumstances.
- 1) Return to work within 45 days/ Mass Layoff Waiver – If an employer notifies the director that a claimant has been laid off but will return to work within 45 days from the last date worked, the work search requirement will be waived. If the claimant is not recalled within the 45 days, the waiver may be removed.
  - 2) Union/Member in “good standing” with a labor organization that refers individuals to jobs – A claimant who has identified as a member of a union or labor organization may be excused from the standard work search criteria if he or she meets the following criteria:
    - a) Claimant is a member in good standing (meaning that the individual must qualify for job placement by the union).
    - b) The identified union refers individuals in good standing to jobs.
    - c) ODJFS must receive verification of claimant's union status before claimant may qualify. If verification is not received or is not timely, the individual will be required to follow the general work search requirement of applying for work with at least two employers per week claimed.
  - 3) Student status
    - a) A claimant who is enrolled in “approved” training or school will not be required to complete any work search or reemployment activities while enrolled.
    - b) A claimant who was attending school at the time he or she became unemployed and who earned any base period wages while attending such school are considered to have met the work search requirements. (claimant must be available to their most recent or any base period employer on any shift of hours)
    - c) If the claimant completes schooling or training while claiming benefits, or if the student's break period exceeds eight consecutive weeks, this waiver may be removed.
  - 4) Future employment – A claimant who secures employment that will start within two weeks may contact ODJFS and request a waiver of the work search requirement during that period. If the waiver is granted, the claimant is not required to continue his or her work search for those two weeks, but they must still complete the reemployment requirements.
  - 5) Work search waivers are not retroactive and only take effect once claimant has been issued written notice that there has been a change to his or her work search requirements.

4. Must participate in reemployment services, such as job search assistance services, if it is determined that the individual needs reemployment services pursuant to the profiling system established by the Director: {R.C. 4141.29(A)(6)}
  - a. Ineligibility for failure to participate in reemployment services under this section shall be for the week or weeks in which claimant was scheduled and failed to participate without justifiable cause.
  - b. Unemployment Compensation Reemployment Services (UCRS) program (commonly referred to as “profiling”):
    - 1) For claimants who are likely to exhaust regular compensation, who are unlikely to return to a previous job or occupation (ie., declining industry), and need job search assistance.
    - 2) Claimants may be ineligible for benefits for any week he or she fails to participate unless he or she:
      - a) Is attending or have completed same or similar services within prior 12 months;
      - b) Has justifiable cause for not participating; or
      - c) Is waived from participation. (ie., return to workforce or change in work search requirements)
    - 3) Claimants who failed to attend or complete UCRS services and do not have justifiably compelling reason for the failure and are not exempt or waived from participation, will be denied for the week the session was scheduled.
  
5. Must participate in the reemployment and eligibility assessment program, or other reemployment services (includes job search assistance activities, skills assessments, and the provision of labor market statistics or analysis), as required by the Director: {R.C. 4141.29(A)(7)}
  - a. Reemployment Services and Eligibility Assessment (RESEA) program (replaced Reemployment and Eligibility Assessment (REA) program):
    - 1) Claimants may be ineligible for benefits until completion of required RESEA services unless he or she:
      - a) Is attending or have completed same or similar services within prior 12 months;
      - b) Has justifiable cause for not participating; or
      - c) Is waived from participation. (ie., return to workforce or change in work search requirements)
  - b. House Bill 2 Reemployment activities (passed October 2013)
    - 1) Specific reemployment activities required to be completed in OhioMeansJobs.com each benefit year by specified deadline. (dates are fixed and remain the same for the life of claim)
      - a) Resume

- i. Must mark resume “active” and must remain in active status
      - ii. Can upload existing resume or use agency’s “resume builder” to help with creating one
    - b) Career profile assessment
    - c) Claimant maintains eligibility for the week so long as he or she uploads the resume or completes the profiling assessment some time in that week.
  - 2) Not required to participate (waived):
    - a) Completed same/similar service within prior 12 months
    - b) Affected by mass layoff returning to work within 45 days
    - c) Separating employer verifies return to work within 45 days
    - d) Director approved work search waiver
    - e) Verified member of labor union/organization
    - f) Verified student in approved training program
6. Unable to obtain suitable work - No individual is entitled to a waiting period or benefits for any week unless the individual is unable to obtain suitable work.
- a. A claimant who refuses an offer of suitable, short-term, work (generally one week or less - calendar week ending at midnight Saturday) without good cause is not unable to obtain suitable work, and is ineligible for benefits during the week claimed.
    - 1) No duration suspension of benefits will be imposed.
    - 2) The disqualification is not imposed if the individual is not required to accept an offer of work according to the terms of a labor-management contract or agreement. R.C. 4141.29(D)(2)(b)(i). *Bockover v. Ludlow Corp.*, 23 Ohio St.3d 190, 492 N.E.2d 149 (1986).
    - 3) If the job was to last more than one week, the issue will be addressed as a refusal of work.
  - b. Temporary agency workers
    - 1) An individual who is provided temporary work assignments by the individual’s employer under agreed terms and conditions of employment, and who is required pursuant to those terms and conditions to inquire with the individual’s employer for available work assignments upon the conclusion of each work assignment, is not considered unable to obtain suitable employment if suitable work assignments are available with the employer but the individual fails to contact the employer to inquire about work assignments. {R.C. 4141.29 (A)(5)}
    - 2) The statute is silent as to whether the temporary agency must be the most recent separating employer or merely a base period employer.

7. Disqualification – Other examples:
  - a. Claimant, who became unemployed due to illness/injury, and did not return to a former employer when able to work and his or her former job was still available. (claimant must have been instructed by ODJFS to report to former employer)
    - 1) Exception: Claimant can establish that it would be injurious to his or her health to return to that type of employment or to that place of employment.
  - b. Claimant, who is given a definite layoff date by the employer, quits to accept other employment before the layoff date, and files for unemployment compensation benefits between the date that he or she quit and the layoff date.
  - c. Claimant failed to file an additional or reopen application when he or she has a week of earnings is followed by a week of no earnings. (amount is irrelevant)
    - 1) The application is required to determine if a separation from subsequent employment has occurred.
      - a) If claimant fails to respond to notice that an additional or reopen claim application is required, he or she cannot maintain that suitable work is not available.
      - b) Disqualification of benefits will be applied to the week in which claimant had no earnings and will continue until satisfactory evidence establishes that no issue exists and claimant is otherwise eligible.

## **E. Between Terms Disqualification for Institutions of Higher Education or Educational Institutions**

1. For an individual whose base period employment was serving in an instructional, research, or principal administrative capacity for an institution of higher education or an educational institution, benefits shall NOT be paid for any week: {R.C. 4141.29(I)(1)(a)}
  - a. DURING the period between two successive academic years or terms, during a similar period between two regular but not successive terms, OR during a paid sabbatical leave provided for in the individual's contract;
  - b. IF the individual performs such services in the first of those academic years or terms AND has a contract or a reasonable assurance that the individual will perform services in any such capacity for any such institution in the second of those academic years or terms.
  - c. Retroactive benefits is NOT an option for these employees.
2. For an individual whose base period employment was serving in OTHER than an instructional, research, or principal administrative capacity for an institution of higher education or an educational institution, benefits shall NOT be paid for any week: {R.C. 4141.29(I)(1)(b)}
  - a. DURING the period between two successive academic years or terms;

- b. IF the individual performs such services in the first such academic year or term AND there is a reasonable assurance that the individual will perform those services for any educational institution or institution of higher education in the second of such academic years or terms.
  - c. Retroactive benefits IS an option for these employees.
    - 1) IF the individual is NOT offered an opportunity to perform those services for any educational institution or institution of higher education in the second of such academic years or terms, THEN the individual is entitled to a retroactive payment of compensation for each week for which the individual timely filed a claim.
    - 2) An application for retroactive benefits shall be timely filed IF received by the Director within or prior to the end of the fourth full calendar week after the end of the period for which benefits were denied.
  - d. Please note that, while this section does not refer to a “contract,” an employee with a valid contract for the next term would meet the criteria for having reasonable assurance.
3. Vacation/Holiday period: For an individual whose base period employment was serving for an institution of higher education or an educational institution, benefits shall NOT be paid for any week which commences during an established and customary vacation period or holiday recess: {R.C. 4141.29(I)(1)(c)}
- a. IF the individual performs any services for an institution of higher education or an educational institution in the period immediately before the vacation period or holiday recess;
  - b. AND there is a reasonable assurance that the individual will perform any such services in the period immediately following the vacation period or holiday recess.
4. Important Notes:
- a. None of the above disqualifications will be imposed UNLESS the Director or Review Commission has received a written statement from the institution of higher education or educational institution that the individual has a contract or a reasonable assurance of reemployment for the ensuing academic year or term. {R.C. 4141.29(I)(2)}
    - 1) This written statement must explain the manner in which the employee was given a contract or reasonable assurance; it often is, but does not have to be, the actual offer of employment.
    - 2) This written statement should be used in the analysis, but alone does not conclusively demonstrate that a claimant has a “reasonable assurance.”
  - b. The “period between two successive academic years or terms” would include the summer quarter of an academic year at an educational institution. *Univ. of Toledo v. Heiny*, 30 Ohio St.3d 143, 507 N.E.2d 1130 (1987).

5. Combined educational and non-educational employment. IF an individual has employment during the base period with both an institution of higher education or an educational institution and a non-educational employer, THEN the individual may be eligible for benefits during the between-term or recess disqualification period based on the employment performed for the non-educational employer. {R.C. 4141.29(I)(3)}
  - a. The noneducational employment must be sufficient to qualify the individual for benefit rights separately from the benefit rights based upon school employment.
  - b. The weekly benefit amount and maximum benefits payable during the disqualification period shall be computed based solely on the nonschool employment.
  
6. Definitions
  - a. An institution of higher education is fully defined in R.C. 4141.01(Y). The term includes all Ohio colleges and universities.
  - b. An educational institution is fully defined in R.C. 4141.01(CC). The term includes a school which has received governmental approval, charter, or permit to offer an organized course of study or training which is academic, technical, trade, or preparation for gainful employment in a recognized occupation. It covers all primary and secondary schools.
  - c. A county Mental Retardation and Developmental Disabilities Board IS an educational institution and has academic terms. *Cty. of Summit Bd. of Mental Retardation & Dev. Disabilities v. McAlister*, 9th Dist. Summit C.A. NO. 16142, 1993 Ohio App. LEXIS 5070 (Oct. 13, 1993).
  - d. Head Start Programs. Under Department of Labor policy:
    - 1) A Head Start program operated by a Community Action Group is NOT an educational institution.
    - 2) A Head Start program operated by a local Board of Education as an integral part of the school system, operated in the facilities of an educational institution and staffed by employees of the Board of Education, IS an educational institution.
  
7. "A contract or reasonable assurance"
  - a. Background:
    - 1) "A contract or reasonable assurance" is not defined by 4141.29.
    - 2) The last guidance in this area from the U.S. Department of Labor ("DOL") was provided in 1986 in the DOL's Unemployment Insurance Program Letter ("UIPL") No. 04-87, and that guidance did not specifically address institutions of higher education. Moreover, the employment model educational institutions follow has changed appreciably, particularly the significant increase in use of part-time instructors at institutions of higher education.

- 3) These changes, and the DOL's belief that states have been inconsistent in their interpretation of the term "contract or reasonable assurance," prompted the DOL to issue their new guidance in 2016, which is UIPL No. 5-17, and which supersedes UIPL No. 04-87.
  - 4) NOTE: the "contract or reasonable assurance" does not have to be with the same employer for whom claimant previously worked. However, if the "reasonable assurance" is with a different type of employer (e.g., from an educational institution to an educational service agency), please check with a supervisor. The UIPL states that other "crossover" UIPLs 30-85 and 18-78 must be followed (unable to locate these UIPLs).
- b. Prerequisites for a "contract" or "reasonable assurance" determination:
- 1) Before making a determination about whether there is a contract or reasonable assurance, the state must determine whether the employment offered in the following academic year or term, or remainder of the current academic year or term, meets three prerequisites:
  - 2) The offer of employment **MUST** be a genuine offer, that is, an offer made by an individual with actual authority to offer employment. NOTE: the offer may be written, oral, or implied.
  - 3) The employment offered in the following academic year or term, or remainder of the current academic year or term, **MUST** be in the same capacity—i.e., professional or non-professional—as the previous academic year's or term's employment.
    - a) NOTE: this determination must be made based upon the actual duties performed, not the job titles.
    - b) If you believe you have a situation that fails due to this factor, please check with a supervisor. The UIPL states that other "crossover" UIPLs 30-85 and 18-78 must be followed (unable to locate these UIPLs).
  - 4) The economic conditions of the job offered may not be considerably less in the following academic year or term (or portion thereof) than in the first academic year or term (or portion thereof). The offer is "considerably less" if the claimant will not earn at least 90 percent of the amount that the claimant earned in the first academic year or term.
    - a) If the job offered in the following academic year or term does not meet **ALL** three of these prerequisites, then the state agency **CANNOT** deny the claimant UC based on the between and within term denial provisions. No further inquiry is required.
    - b) If the job offered meets each of the three prerequisites, the state agency must next determine whether the offer is a contract.
- c. A "contract":
- 1) For the purposes of this provision, the term "contract" refers only to an:

- a) Enforceable
  - b) Non-contingent
  - c) Agreement that provides for compensation: either for an entire academic year, or on an annual basis, though the contract terms describing compensation do not have to be expressed specifically as an annual salary.
  - 2) If the offer meets ALL of the above definitions of a “contract,” then UC may NOT be paid based on the educational services subject to the between and within term denial provisions. No further inquiry is required.
  - 3) If the job offered does NOT meet ALL of the above definitions of a “contract,” the state agency must determine whether the claimant has a reasonable assurance to perform services in the following academic term or year.
- d. “Reasonable assurance.” The determining factor in whether a claimant has a “reasonable assurance” is “the availability of a job” to the claimant in the following academic term or year (or portion thereof). States MUST make the following three findings in determining if the claimant has a reasonable assurance. Unless all three findings can be made, the claimant does NOT have a reasonable assurance:
- 1) There are NO contingencies within the employer’s control:
    - a) The DOL considers contingencies such as course programming, decisions on how to allocate available funding, final course offerings, program changes, and facility availability to be within the control of the employer. In each of these contingencies, whether the contingency will be satisfied is determined by an exercise of the employer’s discretion in how best to allocate available resources.
    - b) The DOL considers contingencies that allow employers to retract the offer at their discretion are considered to be within the employers’ control.
    - c) The DOL considers contingencies based upon circumstances such as enrollment, an outside funding appropriation for a specific course, and seniority to NOT be in the employers’ control.
    - d) If the state agency determines that any of the contingencies are within the employers’ control, then the claimant does NOT have a “reasonable assurance” that a job is available and thus will be entitled to UC if otherwise eligible.
  - 2) Totality of circumstances shows it is highly probable that there is a job available for the claimant in the following academic year or term.
    - a) This element requires considering factors such as funding, including appropriations, enrollment, the nature of the course (required or optional, taught regularly or only sporadically), the claimant’s seniority, budgeting and assignment practices of the school, the number of offers made in relation to the number of potential teaching assignments, the period of student registration, and any other contingencies.

- b) When considering whether funding will be available, the state agency must consider the history of the educational institution's funding and the likelihood that the educational institution will receive the funding for a specific course and the individual claimant's likelihood of receiving an assignment.
  - c) NOTE: For a state agency to find that it is highly probable that a job is available does not require it to find that there is a certainty of a job.
  - d) If the state agency determines that it is NOT highly probable that there is a job available for the claimant in the following academic year or term, then the claimant does NOT have a "reasonable assurance" that a job is available and thus will be entitled to UC if otherwise eligible.
- 3) It is "highly probable" (ie., "very likely") that any contingencies will be met:
- a) For example, if a claimant has an offer that is contingent on outside funding, the state agency's analysis must consider the likelihood that the institution will have funding available to teach the course. This analysis could entail consideration of previous funding or appropriation levels, the likelihood of obtaining funding in the following term, and any other information that indicates whether the educational institution will have funding for the course in the following term.
  - b) The state agency must give primary weight to the contingent nature of the offer. So, if it is not highly probable the contingency will be met, there is NO reasonable assurance because the contingent nature of the offer outweighs any other facts indicating that the claimant has a "reasonable assurance."
- e. Other considerations:
- 1) Retroactivity: A claimant who initially had been determined to not have a "reasonable assurance" can subsequently become subject to the between and within terms denial provisions if the claimant later receives such "reasonable assurance." Similarly, a claimant who was originally determined to have a reasonable assurance may later be determined to not have a reasonable assurance.
    - a) We could occasionally see this, if ODJFS issued two different decisions on the issue at two different times.
    - b) More commonly, because time has passed between their decision and our hearings, we simply have additional evidence to weigh and are more likely to modify their decision to specify when there was and was not reasonable assurance.
    - c) Again, only non-professional employees can be paid for claims originally denied due to a later-reversed finding of a between-terms disqualification.

- 2) Multiple employers:
  - a) When the claimant provides services for more than one educational employer, the state agency may NOT determine that a claimant has a contract or “reasonable assurance” based solely on the finding that the claimant has a contract or “reasonable assurance” from one of the employers without further analysis.
  - b) The state agency must first determine whether the claimant has a contract or reasonable assurance with each of the educational employers.
    - i. If a claimant has reasonable assurance with all of the educational employers, the claimant has a reasonable assurance and UC may not be paid based on these services.
    - ii. Similarly, if a claimant has no reasonable assurance with any employer, the claimant does not have a reasonable assurance overall and UC must be paid based on these services.
    - iii. If the claimant has a contract or reasonable assurance with at least one but not all of the educational employers, Ohio looks at all of the services and determines whether, as a whole, the economic conditions prerequisite requirement—the 90% test from above—is met.
      - (1) If it is met, UC is NOT payable between or within terms based on any of these services.
      - (2) If the economic conditions requirement is not met, ALL of the services would be used to determine eligibility for UC. NOTE: If the employer is contributory, charges to the educational employers who provided a contract or reasonable assurance may be mutualized.
- 3) Voluntary quit for good cause. If a claimant quit educational employment for good cause, then the claimant does not have a reasonable assurance of employment in the next academic year or term from that employer.
- 4) Graduate students. If their services are not exempted from UI coverage, then the student must be treated the same as all other individuals covered under the state law.
- f. Professional Athletes: R.C. 4141.33(E) and Ohio Adm.Code 4141-29-03
  - 1) For an individual whose base period employment consisted “substantially all” (75 percent or more of total services) of participating in sports or athletic events, or training or preparing to so participate, benefits shall not be paid for any week:
    - a) During the period between two successive sports seasons, or similar periods if:
      - i. The individual performs such services in the first of the seasons, or similar periods, AND

- ii. There is a reasonable assurance that the individual will perform services in the later of the seasons or similar periods (with same employer or different athletic employer)
  - (1) “Reasonable assurance” means a written, verbal, or implied agreement that the individual will perform services in the same or similar capacity during the ensuing sports season or seasonal period. {R.C. 4141.33(A)(1)}

## VII. Reduction of Benefits

### A. Deductible Earnings

1. Benefits are payable to each partially unemployed individual otherwise eligible on account of each week of involuntary partial unemployment after the specified waiting period in an amount equal to the individual's weekly benefit amount less that part of the remuneration payable to the individual with respect to such week which is in excess of twenty per cent of the individual's weekly benefit amount, and the resulting amount rounded to the next lower multiple of one dollar. {R.C. 4141.30(C)}
2. Holiday pay: {Ohio Adm.Code 4141-9-05}
  - a. Holiday pay will be applied to the week during which the holiday occurs as specified by state or national declaration, regardless of when the pay is actually received. However, if there is a written labor-management agreement to observe a holiday on a date other than the one specified by state or national declaration, the holiday pay will be applied to the week during which the date specified in the agreement occurs. {Ohio Adm.Code 4141-9-05(A)}
  - b. Holiday pay is deductible, subject to the 20 percent exclusion, under R.C. 4141.30(C). {Ohio Adm.Code 4141-9-05(B)}
3. Retroactive pay award (Back pay): {Ohio Adm.Code 4141-9-14}
  - a. A "retroactive pay award" is any adjustment in the amount of remuneration paid to an individual as the result of the resolution of a dispute as to remuneration for services provided by the individual in the base period or benefit year, which was not considered remuneration for services performed in determining the validity of an application for benefits or in determining unemployment compensation amounts due based on his or her weekly claims for benefits. {Ohio Adm.Code 4141-9-14 (A)}
  - b. Retroactive pay awards may be allocated under the terms of the award or by agreement of the parties to the dispute to weeks in the base period or benefit year that is to be adjusted pursuant to the award. {Ohio Adm.Code 4141-9-14 (C)}
  - c. If there is no allocation, the director will allocate the total adjustment provided by the award equally among the weeks during the period for which the dispute with respect to remuneration was at issue. {Ohio Adm.Code 4141-9-14 (C)}
  - d. No employer shall deduct from a back pay award any benefits or reimbursements made when such payments are made for the weeks compensated by the payment of unemployment compensation. The director shall credit a contributory employer's account for any offset to which it may be entitled for weeks covered by the back pay award. {Ohio Adm.Code 4141-9-14 (D)}

- e. An overpayment order should be issued if unemployment compensation benefits were paid during the period covered by the award, even if the employer withholds what would ordinarily be paid as unemployment benefits.

## **B. Deductible Income**

1. Remuneration in Lieu of Notice: {R.C. 4141.31(A)(1)}
  - a. Benefits otherwise payable for any week shall be reduced by the amount of remuneration in lieu of notice which a claimant receives with respect to that week.
  - b. Remuneration in lieu of notice is a continuation of wages for a designated period after termination of employment. It constitutes wages for the designated payment period, is subject to contributions, and shall be deemed to be remuneration for the purposes of establishing a qualifying week and a benefit year. {Ohio Adm.Code 4141-9-08}
  - c. Payments made by an employer under the Worker Adjustment and Retraining Notification Act (WARN) constitute remuneration in lieu of notice of termination of employment. *Fegatelli v. Admr., Ohio Bur. of Emp. Servs.*, 146 Ohio App.3d 275, 765 N.E.2d 961 (8th Dist.2001).
2. Compensation for wage loss (Workers' Compensation): {R.C. 4141.31(A)(2)}
  - a. Unemployment compensation benefits otherwise payable for any week shall be reduced by the amount of compensation for wage loss under the workers' compensation law which a claimant receives with respect to that week as provided under R.C. 4141.31(A)(2). The workers' compensation law does not have a corresponding provision.
  - b. Compensation in case of temporary disability: Under Ohio workers' compensation law, an employee who suffers a wage loss as a result of returning to employment other than the employee's former position of employment due to an injury or occupational disease, or suffers a wage loss as a result of being unable to find employment consistent with the employee's disability resulting from the employee's injury or occupational disease, shall receive wage loss compensation. {R.C. 4123.56(B)}
3. Retirement payments or pension allowances: {R.C. 4141.31(A)(3) and 4141.312(A)}
  - a. Benefits otherwise payable for any week shall be reduced by the amount of remuneration or other payments a claimant receives with respect to such week as payments in the form of retirement, or pension allowances as provided under R.C. 4141.312.
    - 1) Except as otherwise specified in division (B) of R.C. 4141.312, the amount of benefits payable to a claimant or any week with respect to which the claimant is receiving a governmental or other pension, retirement or retired pay, annuity or any other similar periodic payment which is based on the previous work of the individual, shall be reduced by an amount equal to the amount of the pension,

retirement or retired pay, annuity or other payment which is reasonably attributable to that week, except that the requirements for this division shall apply to any pension, retirement or retired pay, annuity, or other similar periodic payment only if both of the following apply:

- a) The payment is under a plan maintained or contributed to by a base period or chargeable employer. *Nally v. Ohio Dept. of Job & Family Servs.*, Athens C.P. No. 04CI366 (Aug. 5, 2005), unreported (holding that this requirement is not met when an employer merely withholds and forwards a portion of an employee's pay to a union-maintained pension).
- b) In the case of a payment under a plan not made under the “Social Security Act,” 42 U.S.C. 401 et seq., or the “Railroad Retirement Act of 1974,” 45 U.S.C. 231 et seq., or the corresponding provisions of prior law, services performed for such employer by the individual after the beginning of the base period, or remuneration for such services, affect eligibility for, or increase the amount of, such pension, retirement or retired pay, annuity or similar payment. {R.C. 4141.312(A)}
  - i. The mere fact that the claimant received a payment from a base period employer is not sufficient to meet these criteria. *Marcus v. Dir., Ohio Job & Family Servs.*, 1st Dist. Hamilton No. C-150695, 2016-Ohio-4612, ¶ 15.
  - ii. Whether or not the claimant is retired is irrelevant. Rather, the “receipt of a stream of periodic payments connected to prior employment” is sufficient to constitute deductible income under this statute. *Cross v. Ohio Dept. of Job & Family Servs.*, 6th Dist. Lucas No. L-10-1187, 2010-Ohio-5643, ¶ 20.
  - iii. A Non-reoccurring lump-sum distribution from a pension, retirement plan, 401(k), or annuity, is not deductible. *Rich v. Dir., Ohio Dept. of Job & Family Servs.*, 6th Dist. Lucas Nos. L-09-1106, L-09-1108, 2009-Ohio-5623.
- b. Lump sum pensions (public or private), whether rolled over or not, are not deductible from unemployment compensation based upon the rescission of Ohio Adm.Code 4141-30-12 in October 2009. Periodic pension payments are still deductible from UC under R.C. 4141.312.
- c. Social Security Retirement benefits and Social Security Disability payments are not deductible. If a claimant has made a contribution to social security pursuant to the “Social Security Act,” 42 U.S.C. 42 et seq., and that claimant is receiving a retirement payment pursuant to that act, the claimant’s weekly benefit shall not be reduced by the amount of that retirement payment because the claimant contributed to social security. {R.C. 4141.312(B)}

- 1) The above rules apply to a public retiree whose base period includes the employer that contributed to the pension plan.
  - 2) For a public retiree who has returned to public employment while collecting a pension earned prior to the base period, Review Commission policy is that the claimant's current monthly payment must be increased by the most recent employment in order to be deductible. It is not enough that the claimant will see an increased pension payment at some future time based upon the most recent employment.
4. Separation or Termination Pay ("Severance Pay")
- a. Benefits otherwise payable for any week shall be reduced by the amount of separation or termination pay, paid to an employee at the time of the employee's separation from employment, which a claimant receives with respect to that week. {R.C. §4141.31(A)(4)}
  - b. Payments made to employees in return for their agreeing to a separation from employment shall be deemed to be separation pay, and shall be deductible under R.C. 4141.31(A)(4). Ohio Adm.Code 4141-30-01 *See Stoll v. Owens Brockway Glass Container, Inc.*, 6th Dist. Lucas No. L-02-1049, 2002-Ohio-3822.
    - 1) Buy-out plans
      - a) If the payment consists of both vested pension and an additional enhancement amount, the enhancement amount is separation pay.
      - b) If the payment consists of no vested pension, and is simply an enhancement amount, the entire payment is separation pay. *In re Erb*, Unemp. Comp. Rev. Comm. No. B94-00985 (1994).
    - 2) Agreements not to sue. The Review Commission generally views a standard agreement not to sue an employer as an agreement to a separation, and any payment conditioned on signing that agreement is still deductible separation pay. Where the individual already has pending legal action against the employer, the Review Commission is more likely to view the conditioned payment as non-deductible settlement pay.
  - c. Military severance, disability, or separation pay to a former member of the armed forces is not deductible. {R.C. 4141.31(D)}
  - d. Private unemployment benefits paid under arrangements or plans are not compensation for personal services, and benefits otherwise payable shall not be denied or reduced because of the receipt of private unemployment benefits under such arrangements or plans. R.C. 4141.36. *See* Ohio Adm.Code 4141-36-01 regarding Supplemental unemployment benefit plans.

## 5. Vacation Pay

- a. Benefits otherwise payable for any week shall be reduced by the amount of vacation pay or allowance payable under the law, terms of a labor-management contract or agreement, or other contract of hire, which payments are allocated to designated weeks, that a claimant receives with respect to that week. {R.C. 4141.31(A)(5)}
  - 1) The existence of a provision in the labor-management agreement, or in the employer's policy, providing that accumulated or unused vacation pay must be paid in a lump sum does NOT prevent that pay from being allocated.
  - 2) The fact that public employees earn vacation pay in statutorily controlled increments does NOT prevent that pay from being allocated.
  - 3) Employer shutdown periods
    - a) When a labor-management agreement requires a plant-wide vacation during a specific period and specifically authorizes the employer to allocate employee vacation pay to that period, the pay is allocated to that period.
    - b) The employer may not necessarily be able to allocate a payment to a shutdown period, when a labor-management agreement allows employees to select their vacation period or to receive a payment in lieu of vacation and does not specifically set aside vacation pay for the specified shutdown period.
    - c) The key issue in these circumstances is whether the employee agreed to accept vacation pay during the shutdown period. This agreement could either come through a collective bargaining agreement or the employee's approved request to use vacation time for the shutdown period.
    - d) *See, e.g., Budd Co. v. Mercer*, 14 Ohio App.3d 269, 471 N.E.2d 151 (6th Dist.1984), *Akzo Salt v. Ohio Bur. of Emp. Servs.*, 107 Ohio App.3d 567, 669 N.E.2d 250 (8th Dist.1995), *Nicolas v. Dir., Ohio Dept. of Job & Family Servs.*, 10th Dist. Franklin No. 04AP-771, 2005-Ohio-2635.

## 6. Cost Savings Days

- a. Benefits otherwise payable for any week shall be reduced by the amount of the determinable value of cost savings days which a claimant receives with respect to that week. {R.C. 4141.31(A)(6) and (E)}
- b. A "cost savings day" is any unpaid day off from work in which employees continue to accrue employee benefits which have a determinable value including, but not limited to, vacation, pension contribution, sick time, and life and health insurance. {R.C. 4141.01(DD)}
- c. The value of a cost savings day requires a mathematical computation of the individual's hourly rate multiplied by the number of hours taken, plus the determinable value of the employee's benefits. A framework for these calculations can be found in Ohio Dept. of Job and Family Services UC Tech Memo No. 05-09 (2009).

## 7. Bonuses

- a. Bonuses are remuneration. {R.C. 4141.01(H)(1)}
- b. Bonuses are not deductible. R.C. 4141.31(A) sets forth specific forms of remuneration which reduce the amount of benefits payable for any week: remuneration in lieu of notice; partial disability payments; retirement or pension allowances; separation or termination pay; and vacation pay or allowance. R.C. 4141.31(A) is silent as to whether bonuses are a specific form of remuneration which shall reduce the amount of unemployment compensation benefits otherwise payable. Therefore, bonuses, although remuneration, are non-allocatable to any specific week. *See Budd Co. v. Mercer*, 14 Ohio App.3d 269, 471 N.E.2d 151 (6th Dist.1984).

## C. Allocation

1. Unless there is a provision in the labor-management contract or agreement, or other contract of hire, which limits or prevents allocation, the employer may allocate that remuneration.
2. If the employer has the right to allocate, but does not do so, the Director or Review Commission shall allocate the remuneration:
  - a. in an amount equal to the individual's normal weekly wage (The term "normal weekly wage" means the gross amount an individual would earn during a full week, not including overtime pay);
  - b. to the first and each succeeding week following-not the week of-the separation from employment until the amount is exhausted.

## D. Miscellaneous Issues

1. Benefits otherwise payable for any week shall NOT be reduced by the amount of remuneration which a claimant receives with respect to that week in the form of Ohio National Guard drill or reserve pay for attending a regularly scheduled drill or meeting. {R.C. 4141.31(B)}
2. No benefits shall be paid for a week where an individual is receiving or is seeking UI benefits from another state or the federal government. This prohibition will not apply if it is finally determined that the individual is not entitled to the non-Ohio benefits. {R.C. 4141.31(C)}

3. Benefits payable for any week shall NOT be reduced by the amount of military severance, disability, or separation pay paid to an individual who is a former member of the armed forces of the United States. {R.C. 4141.31(D)}

## **E. Computation Rules**

1. Weekly payments. If a weekly payment is received, then that is the amount of payment deemed to be received in the week.
2. Monthly payments. If a monthly payment is received, then the amount of the remuneration deemed to be received in a week shall be computed by multiplying the monthly amount by twelve and dividing the product by fifty-two. {R.C. 4141.31(A)}
3. Rounding. If benefits for any week, when reduced, result in an amount not a multiple of one dollar, such benefits shall be rounded to the next lower multiple of one dollar. {R.C. 4141.31(A)}
4. Concurrent deductions. Each of the above types of deductible income is treated separately under R.C. 4141.31. Accordingly, more than one type of deductible income can be allocated to the same week.
  - a. Deductible income will NOT be allocated by the Director or Review Commission so that one type is totally exhausted before beginning to allocate another type.
  - b. When an individual has earnings and deductible income in the same week, the earnings are considered first to determine the amount of partial benefits otherwise payable, and then the deductible income is deducted from the partial benefit amount.

## VIII. Separations from Employment

### A. Generally

1. Each eligible individual shall receive benefits as compensation for loss of remuneration due to involuntary total or partial unemployment in the amounts and subject to the conditions set forth in R.C. Chapter 4141. {R.C. 4141.29} One of these conditions is that the claimant's most recent separation must have been non-disqualifying. {R.C. 4141.29(D)}
2. An individual is "totally unemployed" in any week during which the individual performs no services and, with respect to such week, no remuneration is payable to the individual. {R.C. 4141.01(M)}
3. An individual is "partially unemployed" in any week if, due to involuntary loss of work, the total remuneration payable to the individual for such week is less than the individual's weekly benefit amount. {R.C. 4141.01(N)}
  - a. Even if the individual remains employed on a part-time basis during the week, the individual is partially unemployed IF the individual's remuneration is less than the individual's weekly benefit amount.
  - b. If the individual is not working all available hours, then additional issues of voluntary unemployment and ability to obtain suitable work are raised.
4. In order to rule upon a separation, there must be an employer-employee relationship. *In re Peer*, Unemp. Comp. Rev. Comm. No. R92-17373 (1992).
  - a. Accordingly, the Director will NOT rule upon why an individual separated from self-employment as an independent contractor.
  - b. However, the Director WILL rule upon the reason why an individual separated from non-covered employment.

### B. Lack of Work

1. An individual who has become involuntarily separated from employment, either partially or totally, because the employer does not have sufficient work for that individual, will generally be considered to have been separated due to a lack of work. {R.C. 4141.29}
2. When an individual and an employer enter into a temporary employment contract for a specific term, a presumption exists that the employee separated for lack of work at the end of the term. The presumption may be rebutted by the employer testifying that it indeed had work but the employee left voluntarily. *Lexington Twp. Trustees v. Stewart*, 5th. Dist. Stark

No. CA-6766, 1986 Ohio App. LEXIS 6202 (Mar. 17, 1986); *Case W. Res. Univ. v. Ohio Unemp. Comp. Rev. Comm.*, 8th Dist. Cuyahoga No. 81773, 2003-Ohio-2047.

3. Satisfaction of an intermittent-employment contract does not create voluntary unemployment or a discharge sufficient to render an employee ineligible for unemployment benefits. There is no statutory requirement that an employee be formally terminated, separated, or laid off in order to receive benefits. *Lorain Cty. Aud. v. Ohio Unemp. Comp. Rev. Comm.*, 113 Ohio St.3d 124, 2007-Ohio-1247, 863 N.E.2d 133.
4. Generally, once an individual has been separated from employment due to a lack of work, that individual cannot be separated for a different reason (such as a quit or a discharge) unless the individual first returns to work. *Vineyard Wine Shoppe v. Weisent*, 133 Ohio App. 3d 268, 270, 727 N.E.2d 935 (8th Dist. 1999); *see also Distrib. II Transmanagement Corp. v. Howell*, 10th Dist. Franklin No. 86AP-507, 1988 Ohio App. LEXIS 5348, (Dec. 30, 1988). However, the result may be different if the layoff is only temporary in nature and there is a continuing employer-employee relationship. *Batavia Nursing & Convalescent Inn v. Kidd*, 12th Dist. Clermont No. CA85-12-113, 1986 Ohio App. LEXIS 7290 (June 23, 1986).
5. Vacation Shutdowns. If a collective bargaining agreement gives the employer the right to declare a vacation shutdown, then the employees agreed to such vacation and the employees are voluntarily unemployed. However, if the agreement does NOT give the employer the right to declare a vacation shutdown, then the employees are involuntarily unemployed due to a lack of work. *Budd Co. v. Mercer*, 14 Ohio App.3d 269, 471 N.E.2d 151 (6th Dist. 1984); *see also Akzo Salt v. Ohio Bur. of Emp. Servs.*, 107 Ohio App.3d 567, 669 N.E.2d 250 (8th Dist.1995), (the court held that vacation pay did not constitute "remuneration" under the unemployment compensation statute for those employees who did not plan their vacation for the layoff period. The employees who did not volunteer to take their vacations during the layoff period were entitled to full benefits).

## C. Quit

1. No individual may serve a waiting period or be paid benefits for the duration of the individual's unemployment IF the Director finds that the individual quit work without just cause. {R.C. 4141.29(D)(2)(a)}
2. Generally
  - a. There is not a slide-rule definition of just cause. Essentially, each case must be considered upon its particular merits. Traditionally, just cause, in the statutory sense, is that which, to an ordinarily intelligent person, is a justifiable reason for doing or not

doing a particular act. *Peyton v. Sun T.V. & Appliances*, 44 Ohio App.2d 10, 335 N.E.2d 751 (10th Dist.1975); *Irvine v. State, Unemp. Comp. Bd. of Rev.*, 19 Ohio St.3d 15, 17, 482 N.E.2d 587 (1985).

- b. Generally, employees who experience problems in their working conditions must make reasonable efforts to attempt to solve the problem before leaving their employment. Essentially, an employee must notify the employer of the problem and request it be resolved, and thus give the employer an opportunity to solve the problem before the employee quits the job; those employees who do not provide such notice ordinarily will be deemed to quit without just cause and, therefore will not be entitled to unemployment benefits. *DiGiannantoni v. Wedgewater Animal Hosp., Inc.*, 109 Ohio App.3d 300, 307, 671 N.E.2d 1378 (10th Dist.1996).
- c. Circumstances exist when an employee should not be required to give an employer notice of a problem and an opportunity to solve it. For instance, an employee who is subjected to physical sexual harassment by her employer and has no one to whom she can report the incident except the harassing employer may not need to give notice of the offensive conduct and wait for the employer to correct the problem before quitting. *See, e.g., Doering v. Bd. of Rev.*, 203 N.J.Super. 241, 496 A.2d 720 (Super.App.Div.1985). *But see, Krawczynsyn v. Ohio Bur. of Emp. Servs.*, 54 Ohio App.3d 35, 560 N.E.2d 807 (8th Dist.1988) (employee whose supervisor pinched and kissed her against her will on several occasions did not quit with just cause, since she did not pursue her employer's grievance procedures to correct the problem).
- d. The critical issue underlying whether an employee has quit with just cause is not whether notice of resignation was given, but rather whether an ordinarily intelligent person would have quit without giving notice under the circumstances of the case. As a general rule, an ordinarily intelligent employee will not quit his or her job over a problem with working conditions without first bringing that problem to his or her employer's attention, requesting that it be solved, and thus giving the employer an opportunity to correct it. *Irvine, supra*, at 17.

### 3. Medical Reason

- a. An employee must advise the employer of a medical condition and allow the employer to adapt the employment accordingly before a medical condition can constitute "just cause" for quitting under R.C. 4141.29(D)(2)(a). *Wilson v. Ohio Bur. of Emp. Servs.*, 9th Dist. Summit No. C.A. 12651, 1986 Ohio App. LEXIS 9678 (Nov. 19, 1986).
- b. An employee's voluntary resignation on the basis of health problems is without just cause within the meaning of R.C. 4141.29(D)(2)(a) when the employee is physically capable of maintaining a position of employment with the employer, but fails to carry her burden of proving that she inquired of her employer whether employment opportunities were available which conformed to her physical capabilities and same

were not offered to her by the employer. *Irvine v. State, Unemp. Comp. Bd. of Rev.*, 19 Ohio St.3d 15, 17, 482 N.E.2d 587 (1985).

- c. A person who is advised by his doctor to quit his employment because the working conditions are injurious to his health has just cause to quit his employment. A person having such just cause for quitting his employment should not be penalized for attempting to continue the employment under slightly different conditions but in a place where the basic problem involved is the same. The claimant's financial need to stay on the job despite a health threatening situation was not a rebutting factor. *Kulik v. Bd. of Rev.*, 14 Ohio App.3d 302, 471 N.E.2d 188 (8th Dist.1984).
- d. The fact that an individual suffers from the illness of alcoholism is a factor to be considered in determining whether there was just cause for terminating employment. The court held that since there was no disclosure of the medical problem (claimant did not specify alcoholism as the root of her "personal problems") to the employer and no acceptance of the accommodation (leave of absence) offered by the employer, there was no just cause for claimant to quit her employment. The court rejected claimant's argument that she felt confused, disoriented and on the verge of a nervous breakdown but was unaware of the consequences of her actions. "[W]e do not thereby pronounce that any impetuous, impulsive or irrational course of action embarked upon by one who is in the throes of a denial of reality, whether brought on by alcoholism or any other disease, physical or mental, must necessarily be acknowledged as an exception to the ordinary rule of just cause. The test remains whether an ordinarily intelligent person would find the action justified." *Jesse v. Steinbacher*, 1st Dist. Hamilton Appeal No. C-850660, 1986 Ohio App. LEXIS 7488 (July 9, 1986).

#### 4. Quit in Anticipation of Inevitable Discharge

- a. An employee who resigns in anticipation of an inevitable discharge must be judged by the same criteria as if the discharge had actually taken place. *Parks v. Health One*, 10th Dist. Franklin No. 88AP-982, 1989 Ohio App. LEXIS 3118 (Aug. 8, 1989). There is no requirement that an employee remain on the job, in a highly stressful situation, when a discharge from the employment is inevitable.
  - 1) In such cases, an employee had just cause to quit employment only if the employer did not have just cause to discharge the employee.
  - 2) If the employer did have just cause to discharge the employee, then the claimant quit without just cause. The court upheld the finding that claimant quit work without just cause when the evidence showed that he would have been discharged for just cause if he had not resigned. *Stallings v. Vanguard Joint Vocational School*, 6th Dist. Wood No. WD-94-114, 1995 Ohio App. LEXIS 3051 (July 21, 1995).
- b. The discharge must be inevitable when the employee decides to quit.

- 1) In *Parks*, the employee quit her job only after her employer told her attorney that it intended to terminate her employment irrespective of her job performance throughout the remainder of her probationary period.
- 2) An employee who is simply put on probation, or an employee who is told that discharge will be recommended, does not yet face an inevitable discharge. The court upheld the finding that claimant quit work without just cause when the evidence showed that she was on the first step of the progressive discipline process and did not face inevitable discharge. *Watts v. Community Health Ctrs. of Greater Dayton*, 12th Dist. Warren No. CA2015-07-068, 2015-Ohio-5314.
- 3) When a school employee (teaching or non-teaching personnel) is informed by the principal or superintendent that a recommendation will be made to the school board that they be discharged, or their contract not renewed, this is considered to be an inevitable discharge. This is because a school board rarely, if ever, goes against this type of recommendation.

## 5. Religious Beliefs

- a. Claimant was disqualified from receiving unemployment benefits because he refused to accept a temporary retail position involving Sunday employment. Claimant refused the employment because his belief as a Christian precluded him from working on Sundays. Claimant had been denied benefits by the lower courts because he was not a member of an established religious sect or church. The Supreme Court found that an individual need not be responding to the commands of a particular religious organization to claim the protection of the free exercise clause of the First Amendment, if he was acting on a “sincerely held religious belief.” *Frazee v. Illinois Dept. of Emp. Sec.*, 489 U.S. 829, 109 S.Ct. 1514, 103 L.Ed.2d 914 (1989).
- b. The First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired. The U.S. Supreme court held that the denial of unemployment compensation benefits violated the free exercise rights of the claimant, who was discharged after becoming a member of the Seventh Day Adventist Church and stating that she would no longer be able to work from sundown Friday to sundown on Saturday. The court held that infringement upon free exercise must be subjected to strict scrutiny and may be justified only by proof of a compelling state interest. *Hobbie v. Unemp. Appeals Com.*, 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987).
- c. Denial of unemployment compensation benefits to a Jehovah's Witness member who terminated his job because his religious beliefs forbade participation in the production of armaments (turrets for military tanks), constituted a violation of his First Amendment right to free exercise of religion. *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981).

- d. Courts have recognized "the possibility of charlatans unlawfully faking religious beliefs for their own nefarious purposes," and have stated that the determination of whether something is a sincerely held religious belief is a "difficult and delicate task." *See, e.g., Marvin v. Giles*, 11 Ohio App.3d 57, 463 N.E.2d 80 (1st Dist. 1983), fn. 2. (holding that a claimant quit with cause when he had a religious vision and was instructed by God to relocate to Alabama to help raise his deceased sister's six children).
- e. An employer that made reasonable efforts to accommodate an employee's religious beliefs was not required to violate the collective bargaining agreement to accommodate the employee by violating the seniority system. *TWA v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113, (1977).
- f. The Court held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes). In this case, the claimants' ingestion of peyote for sacramental purposes was prohibited under state law. The Court held that the prohibition was constitutional, and therefore the state could, consistent with the Free Exercise Clause, deny claimant's unemployment compensation when the dismissal from employment resulted from the use of peyote. *Emp. Div. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).
- g. The Religious Freedom Restoration Act of 1993 ("RFRA"), 107 Stat. 1488, 42 U.S.C. 2000bb et seq., was passed in response to *Emp. Div. v. Smith*. RFRA states that, "governments should not substantially burden religious exercise without compelling justification." It further restored the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), and guaranteed its application in all cases where free exercise of religion is substantially burdened. The Court held that RFRA was unconstitutional because by enacting this law, Congress had exceeded the scope of its enforcement power under the Fourteenth Amendment to the U.S. Constitution, Section 5. *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).
- h. In 2000, Congress amended RFRA through Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 114 Stat. 803, 42 U.S.C. §2000cc et seq. This imposes the same general test as RFRA but on a more limited category of governmental actions. RLUIPA also amended RFRA's definition of the "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Congress mandated that this concept "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." RLUIPA also removes any reference to the First Amendment.

- 1) Rules imposed by the US Department of Health and Human Services violated RLUPIA/RFRA when they required for-profit closely held corporations to provide health insurance coverage for methods of contraception that violated the sincerely held religious beliefs of the companies' owners. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014).

## 6. Sexual Harassment

- a. Sexual harassment is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964 (42 U.S.C. 1981 et seq.). *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).
  - 1) Federal case law interpreting Title VII is generally applicable to cases involving R.C. Chapter 4112, Ohio's anti-discrimination statute. *Hampel v. Food Ingredients Specialties*, 89 Ohio St.3d 169, 2000-Ohio-128, 729 N.E.2d 726.
- b. Sexual workplace harassment can occur in two ways:
  - 1) *Quid pro quo* sexual harassment claims involve the exchange of "tangible employment action" for sexual favors. *Burlington Industries v. Ellerth*, 524 U.S. 742, 753, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).
    - a) A "tangible employment action" constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Id.* at 761.
    - b) The alleged sexual advances must be "unwelcome." However, voluntary submission to sexual conduct will not necessarily defeat a claim of sexual harassment. The correct inquiry is whether the employee by her conduct indicated that the sexual advances were unwelcome. *Meritor, supra*, at 60.
    - c) In such cases, the employee need not prove that the conduct was severe or pervasive, because the tangible employment action itself is actionable. *Okoli v. City of Baltimore*, 648 F.3d 216, 225 (4th Cir.2011), citing *Burlington Industries, supra*, at 753.
  - 2) Hostile work environment sexual harassment claims involve conduct that does not result in a tangible employment action, but is nevertheless so "severe or pervasive" that it creates an offensive or hostile working environment. *Id.* at 754; *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir.1987).
    - a) Title VII forbids only behavior so objectively offensive as to alter the conditions of the victim's employment. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's purview." *Harris v. Forklift Sys.*, 510 U.S. 17, 21-22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

- b) Whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; the psychological harm to the employee; and whether it unreasonably interferes with an employee's work performance. No single factor is required. *Id.* at 23.
- c) Same-sex sexual harassment is actionable under Title VII.
  - i. Harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998); *La Day v. Catalyst Technology, Inc.*, 302 F.3d 474 (5th Cir.2002); *Dick v. Phone Directories Co.*, 397 F.3d 1256 (10th Cir.2005).
  - d) An employee may establish a sexual harassment claim with evidence of sex-stereotyping when the employee is harassed because he or she failed to conform to a traditional gender stereotype. *Nichols v. Azteca Restaurant Ents.*, 256 F.3d 864 (9th Cir.2001), applying *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).
- c. If the employer establishes a policy that may be utilized by employees to complain about sexual harassment, the employees must first utilize the company's procedures before being justified in quitting. *DiGiannantoni v. Wedgewater Animal Hosp.*, 109 Ohio App.3d 300, 671 N.E.2d 1378 (10th Dist.1996).
  - 1) However, an employee who is subjected to physical sexual harassment by her employer and has no one to whom she can report the incident but the harassing employer may not need to give notice of the offensive conduct and wait for the employer to correct the problem before quitting. *Id.* at 307-308.

## 7. Breach of Contract of Hire/Change in Terms of Employment

- a. Reduction in Wages. A substantial reduction in pay can be just cause for quitting employment. *Vitale v. Admr, Ohio Dept. of Job & Family Servs.* 8th Dist. Cuyahoga No. 51207, 1986 Ohio App. LEXIS 8880 (Oct. 30, 1986).
- b. Reduction in Hours
  - 1) A dramatic reduction in work hours can provide just cause for quitting. *Richards v. Giles*, 7th Dist. Mahoning No. 79 C.A. 78, 1980 Ohio App. LEXIS 11606 (Aug. 18, 1980).
  - 2) The determination as to whether the reduction in hours was substantial enough to provide the employee with just cause to quit is a factual one. The hours, and resultant pay, which decreased by 66% constitutes a substantial reduction in pay and almost equates to a constructive discharge. The reduction in hours was not

related to any fault by claimant. *Bainbridge Twp. v. Stellato*, 11th Dist. Geauga No. 95-G-1936, 1996 Ohio App. LEXIS 890 (Mar. 8, 1996).

- 3) A substantial economic hardship can provide the employee with just cause to quit her job. A factor taken into consideration is the travel expense. *Bethlenfalvy v. Ohio Dept. of Job & Family Servs.*, 8th Dist. Cuyahoga No. 84773, 2005-Ohio-2612. The court also considered the fact that the employer made frequent and unpredictable decisions to call claimant off when business was slow, which limited her attempts to seek full-time work because she could not schedule other appointments, even though she was not being paid.
  - 4) A certain level of reduced wages does not constitute, as a matter of law, just cause for quitting employment. "A reasonable reduction in work hours is certainly a key fact to be considered, but it may not be the only relevant fact in an unemployment compensation case." *Stapleton v. Dir., Ohio Dept. of Job & Family Servs.*, 163 Ohio App.3d 14, 2005-Ohio-4473, 836 N.E.2d 10 (7th Dist.) The court also held that claimant was "significantly responsible" for the situation that led to her reduced hours, and that this factor was properly considered. Claimant had failed to keep her employer informed about her health and work status while on medical leave, which contributed to the employer's decision to hire another employee.
  - c. Reduction in Duties or Responsibilities. Where a corporate executive has been employed under a contract setting forth specific contractual duties involving significant supervisory responsibilities intended to utilize his creative talents, where those responsibilities are then taken away from him to the extent that his status is reduced to that of a mere figurehead and he continues to hold his corporate title as a formality only, and where his employer continues to refuse to give him alternative responsibilities requiring a similar degree of skill and expertise to that for which he was initially hired, such an employee, upon terminating employment, shall be deemed to have quit with just cause. *Sachs Corp. of U.S.A. v. Rossmann*, 9 Ohio App.3d 188, 459 N.E.2d 227 (8th Dist.1983).
  - d. An employer's breach of the contract of hire may constitute just cause for an employee to quit employment only if the issue was of such significance that it was essential to the employee's continued employment. The court held that the fact that the employer failed to follow through with its promise to provide a company van did not constitute just cause to quit because it was not of such significance that it was essential to the employee's continued employment. *Hersh v. Rail Pass Express*, 10th Dist. Franklin No. 93APE11-1509, 1994 Ohio App. LEXIS 2402 (June 2, 1994).
8. Transportation. Unless there is a specific contractual agreement by employer to provide transportation to work, the duty to secure adequate transportation lies entirely with the employee. Without such agreement, when the sole reason that claimant left his employment

was a lack of transportation, the claimant will be considered to have quit without just cause. *Mullins v. Bd. of Rev.*, 5th Dist. Richland Case No. CA 2334, 1985 Ohio App. LEXIS 9944 (Dec. 16, 1985).

9. Quitting by Selling One's Business

- a. When an individual owns a business and is employed by that business, a separation occurs if that individual is no longer employed after selling the business to someone else.
- b. In such cases, the key question is whether or not the sale of the business was voluntary. If the sale of the business was voluntary, then the individual quit employment without just cause.
  - 1) The court held that claimant quit work without just cause because there was insufficient evidence to establish that claimant could not have continued her employment by retaining ownership of the corporation. The claimant was the sole owner of a corporation, for which she served as president and was employed as a manager. Although the business was unprofitable, it was not insolvent. Claimant sold the business by selling her shares of stock and resigning her position as an officer and director. Claimant did this with full knowledge that the sale of the business would result in her resignation being tendered to the new owner. *Neubauer v. Bec-Jon Corp.*, 2d Dist. Miami No. 84-CA-4, 1984 Ohio App. LEXIS 10525 (July 13, 1984).
  - 2) The court found that although claimant may have had personal reasons justifying the sale of his business, his actions were voluntary. The purpose of unemployment compensation is not to provide income to people who have ended their employment voluntarily. *Lawrence v. Ohio Credit Corp.*, Montgomery C.P. No. 78-1651 (Oct. 5, 1978), unreported.

10. Buyouts

- a. An individual will NOT be disqualified for benefits if the separation from employment is pursuant to a labor-management contract or agreement, or pursuant to an established employer plan, program, or policy, which permits the employee, because of lack of work, to accept a separation from employment. {R.C. 4141.29(D)(2)(a)(ii)}
- b. “An employee who elects voluntary termination under a plan or policy adopted by the employer to reduce the number of employees due to a lack of work in the employer's overall work force is entitled to unemployment compensation...” even if the employee would not otherwise have been laid off. *Ford Motor Co. v. Admr.*, 59 Ohio St.3d 188, 571 N.E.2d 727 (1991).

## 11. Military Service

- a. An individual will NOT be disqualified for benefits if the separation from employment was for the purpose of entering the United States armed forces, IF the employee is inducted:
  - 1) within thirty days of the separation; or
  - 2) within 180 days after separation if the individual's time of induction is delayed solely at the discretion of the armed forces. {R.C. 4141.29 (D)(2)(a)(i)}
- b. An employee has just cause to quit employment where he returns from active duty and the employer will not reinstate him to his former position or a substantially similar position. *Partridge v. Admr.*, Hamilton C.P. No. A-9803805 (Feb. 22, 1999), unreported.

## 12. Revocation of Resignation

- a. Public employment. A public employee may rescind or withdraw a resignation at any time prior to its effective date, so long as the public employer has not formally accepted the resignation. Acceptance occurs where the public employer or its designated agent initiates some type of affirmative action, preferably in writing, that clearly indicates to the employee that the resignation is accepted. In cases or controversies involving an oral tender, acceptance, or withdrawal of resignation, clear and convincing evidence must be proffered to support the validity of such actions. A memorandum or writing of any of the foregoing actions is not required, but is preferred. *Davis v. Marion Cty. Engineer*, 60 Ohio St.3d 53, 573 N.E.2d 51 (1991).
- b. Private employment. Unlike certain public employees in Ohio who do have constitutionally and statutorily protected employment under the Ohio civil service laws, an at-will employee in Ohio generally has no property interest in his or her continued employment. The employee has no legal right, and the employer no legal duty, to keep the employee in employment. Accordingly, a private employer is not required to accept a private employee's attempt to rescind a resignation. *Roberts v. Hayes*, 9th Dist. Summit No. 21550, 2003-Ohio-5903.

## 13. Domestic Obligations

- a. No individual may serve a waiting period or be paid benefits for the duration of the individual's unemployment if the Director finds that the individual has quit work to marry or because of marital, parental, filial, or other domestic obligation. {R.C. 4141.29(D)(2)(c)}
  - 1) A marital obligation would include an individual quitting work to move out of state with the individual's spouse. *Farloo v. Champion Spark Plug Co.*, 145 Ohio St. 263, 61 N.E.2d 313 (1945), cited by *Goodrich v. Ohio Unemp. Comp. Rev. Comm.*, 10th Dist. Franklin No. 11AP-473, 2012-Ohio-467. In *Goodrich*, the

court held that R.C. 4141.29(D)(2)(c) is not an unconstitutional violation of a claimant's rights to due process and equal protection.

- a) This disqualification also applies to individuals who move to accompany their spouse, who is a member of the armed forces, to his or her new duty station. *Deckard v. Giles*, 10th Dist. Franklin No. 82AP-218, 1982 Ohio App. LEXIS 13174 (Sept. 9, 1982).
- 2) An individual who quits work because a live-in babysitter resigned and the individual was away from home too much has quit employment due to a parental obligation. *Pangallo v. Steinbach*, 12th Dist. Clermont No. CA86-12-085, 1987 Ohio App. LEXIS 7398 (June 8, 1987).
- b. An individual who quits work to marry or because of a marital, parental, filial, or other domestic obligation is disqualified from receiving benefits until the individual becomes reemployed in covered employment and earns one-half of the individual's average weekly wage, or \$60.00, whichever is less. {R.C. 4141.29(G)}
  - 1) When the individual has quit work without just cause, an ordinary duration suspension will disqualify the individual from receiving benefits until the individual works in six weeks of covered employment, is paid remuneration equal to six times an average weekly wage of not less than 27.5 percent of the statewide average weekly wage. {R.C. 4141.29(G)}
  - 2) The claimant quit work in Ohio to marry, and thereafter was employed as a substitute teacher in Michigan. The court held that had the substitute teaching been done in Ohio, the claimant would not have been reemployed under the Ohio Act. However, reemployment in covered employment is satisfied so long as the employment is subject either to the Ohio Act, the unemployment compensation Act of another state or of the United States. *Fulton Cty. Bd. of Edn. v. Giles*, 56 Ohio St.2d 433, 384 N.E.2d 287 (1978).
  - 3) Effective March 20, 2019, R.C. 4141.29(D)(2)(a)(v) provides that no suspension of benefits shall be applied if "[t]he individual's spouse is a member of the armed forces of the United States who is on active duty or a member of the commissioned corps of the national oceanic and atmospheric administration or public health service, the spouse is the subject of a transfer, the individual left employment to accompany the individual's spouse to a location from which it is impractical to commute to the individual's place of employment, and upon arrival at the new place of residence, the individual is in all respects able and available for suitable work. For purpose of division (D)(2)(a)(v) of this section, "active duty" and "armed forces" have the same meanings as in 10 U.S.C. 101."
    - a) If a claimant is qualified for benefits under the 4141.29(D)(2)(a)(v) exception above, benefits that may become payable which are chargeable to the account of the employer, shall be charged to the mutualized account.

#### 14. Quitting to Accept Other Employment

- a. Quitting employment to accept other employment is a quit without just cause under R.C. 4141.29(D)(2)(a).
  - 1) The purpose of the law providing unemployment benefits is to provide economic relief to those who become unemployed involuntarily. Thus, quitting to take another job is a voluntary act not connected with work, and “claimant is not entitled to shift the results of his own risk upon the State of Ohio, or more particularly, his innocent former employer.” *See Hippert v. Bd. of Rev.*, 5th Dist. Stark Case No. CA 4771, 1978 Ohio App. LEXIS 9459 (Feb. 15, 1978).
  - 2) Generally, an employee who terminates employment in order to accept other employment quits without just cause and is not eligible for unemployment benefits, even if the employee leaves for a better paying job. *Nagle v. Bd. of Rev.*, 7th Dist. Mahoning No. 78 C.A. 120, 1979 Ohio App. LEXIS 8576 (Jan. 4, 1979).
  - 3) Quitting a job to accept a better paying job is deemed a quit without just cause, even though the first job was intended to facilitate finding work elsewhere. *Vinson v. AARP Found.*, 134 Ohio App.3d 176, 730 N.E.2d 479 (10th Dist.1999). As such, quitting a temporary agency to accept employment with the client is deemed quitting employment to accept other employment, and is therefore a quit without just cause. *Smith v. Lindsay Excavating & Concrete*, 5th Dist. Stark No. 2003CA00283, 2004-Ohio-986.
    - a) However, the court held that claimant quit employment with a staffing agency with just cause to accept employment with the client company, because he had only contacted the staffing agency after he inquired with the client company for work and was told that it did its hiring exclusively through the staffing agency. *Pierce v. Wayne Solutions, Inc.*, 9th Dist. Wayne No. 10CA0026, 2011-Ohio-2324.
- b. Removing the Suspension of Benefits
  - 1) Ordinarily, an employee who quits work to accept other employment is not entitled to unemployment compensation, and is given the normal "duration suspension" of benefits. {R.C. 4141.29(G)}
  - 2) However, pursuant to R.C. 4141.291(A)(2)-(3), the suspension of benefits will be removed if:
    - a) the individual obtains such employment while still employed OR commences such employment within seven calendar days after the last day of employment with the prior employer;
      - i. If this requirement is not met, even through no fault of the individual, the suspension of benefits will not be removed. *See, e.g., Malone v. Bd. of Rev.*, 3d Dist. Marion No. 9-79-25, 1980 Ohio App. LEXIS 10793 (June 20, 1980) (delay in start of employment caused by an

- "Act of God"); *see also Hauser v. Decko Prods., Inc.*, 6th Dist. Erie C.A. No. E-78-16, 1978 Ohio App. LEXIS 8726 (Oct. 20, 1978) (individual failed pre-employment physical).
- ii. Vacation or separation pay allocated to the end of employment extends the last day of employment with the prior employer and should be considered when determining if the claimant commenced work within seven days of leaving his or her former job. *See, e.g., Young v. Tortilla Flats*, 37 Ohio App.3d 41, 523 N.E.2d 519 (10th Dist.1987).
  - iii. Vacation or separation pay allocated to the end of employment extends the length of the subsequent employment and should be considered when determining if the claimant worked in three weeks of employment with the new employer. *See Radcliffe v. Artromick Internatl., Inc.*, 31 Ohio St.3d 40, 508 N.E.2d 953 (1987).
- b) AND subsequent to the last day of employment with the prior employer, the individual works three weeks in the new employment and earns wages equal to one and one-half times the individual's average weekly wage or \$180.00, whichever is less.
- i. An individual may use more than one employer in order to satisfy the requirement of working in three weeks. *See Brunson v. Bd. of Rev., Ohio Bur. of Emp.*, 11th Dist. Lake No. 8-122, 1981 Ohio App. LEXIS 14126 (Mar. 9, 1981).
- 3) The suspension of benefits will also be removed if the individual accepted a recall from a prior employer and establishes that the refusal or failure to accept the recall would have resulted in a substantial loss of employment rights, benefits, or pension, under a labor-management agreement or company policy. {R.C. 4141.291(A)(1)}
- 4) Any benefits which would be chargeable to the account of the employer from whom claimant quit to accept recall or other employment shall be charged to the mutualized account, unless the employer is a reimbursing employer per R.C. 4141.241 or 4141.242. {R.C. 4141.291(C)}
- c. Definite Layoff Date
- 1) When an individual has been issued a definite layoff date, and before the layoff date, the individual quits to accept other employment, no disqualification is imposed. {R.C. 4141.29(D)(2)(a)(iv)}
  - 2) However, if the individual fails to meet the requirements of R.C. 4141.291(A)(2), then the individual shall be deemed able to obtain suitable work, and therefore ineligible for benefits under R.C. 4141.29(A)(5), for each week of unemployment prior to the layoff date.
- d. Concurrent Employment. Pursuant to R.C. 4141.29(D)(2)(a)(iii), if an employee holds two jobs, a primary and a concurrent job, and the employee is separated from the

concurrent job at the time of the most recent separation from the primary job, or within six weeks prior, the employee will not be disqualified for benefits if:

- 1) The remuneration, hours, or other conditions of the concurrent employment were substantially less favorable than the individual's primary employment; and
- 2) Where the concurrent employment, if offered as new work, would be considered not suitable work under R.C. 4141.29(E) and (F). Factors to be considered when determining suitability are whether:
  - a) The individual would be required to join a company union, or to resign from or refrain from joining any bona fide labor organization, or would be denied the right to retain membership in and observe the lawful rules of any such organization.
  - b) The position offered is vacant due directly to a strike, lockout, or other labor dispute.
  - c) The work is at an unreasonable distance from the individual's residence, and involves expenses substantially greater than that required for the individual's former work, unless the expense is provided for.
  - d) The remuneration, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality.
  - e) Other factors to be considered are: the degree of risk to the claimant's health, safety, and morals, the individual's physical fitness for the work, the individual's prior training and experience, the length of the individual's unemployment, the distance of the available work from the individual's residence, and the individual's prospects for obtaining local work.

## **D. Discharge**

1. No individual may serve a waiting period or be paid benefits for the duration of the individual's unemployment IF the Director finds that the individual has been discharged for just cause in connection with work. {R.C. 4141.29(D)(2)(a)}
2. Generally
  - a. In order to find that an employee was discharged for just cause in connection with work, there must have been some fault on the part of the employee. *Tzangas, Plakas & Mannos v. Admr., Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 1995-Ohio-206, 653 N.E.2d 1207.
  - b. "Just cause" means conduct which a person of ordinary intelligence would consider to be a justifiable reason for the discharge of an employee; there must be some fault on the part of the employee, although the conduct need not reach the level of misconduct.

*Angelkovski v. Buckeye Potato Chips Co.*, 11 Ohio App.3d 159, 463 N.E.2d 1280 (10th Dist.1983).

- c. The critical issue is not whether the employee has violated a company rule. Rather, just cause for discharge exists when an employee's actions demonstrate an unreasonable disregard for an employer's best interests. *Janovsky v. Ohio Bur. of Emp. Servs.*, 108 Ohio App.3d 690, 671 N.E.2d 611 (2d Dist.1996); *Kiikka v. Admr., Ohio Bur. of Emp. Servs.*, 21 Ohio App.3d 168, 486 N.E.2d 1233 (8th Dist.1985).
- d. In reaching a decision concerning "just cause," the Director is not bound by the terms of a claimant's collective bargaining agreement or employment contract. What is required is a narrow inquiry into employee fault, rather than a decision on whether a contract has been breached. *Wilson v. Matlack, Inc.*, 141 Ohio App.3d 95, 750 N.E.2d 170 (4th Dist.2000).
- e. The Commission not only has the jurisdiction to consider whether a person has been fired for violation of an illegal policy, but, in fact, has the obligation to consider that issue in determining whether a person has been discharged for just cause in connection with work. *Snelling v. Bd. of Rev., Ohio Bur. of Emp. Servs.*, 64 Ohio App.3d 261, 580 N.E.2d 1177 (10th Dist.1991) (holding that when the State Employment Relations Board had determined that the employer had unilaterally imposed a new policy, an employee who was discharged for violating the policy was discharged without just cause in connection with work).
- f. Post-discharge evidence. In determining whether there is just cause for discharge, the Commission will examine only those facts which existed at the time of discharge, because those are the only facts which the employer was able to consider when the decision to discharge was made. For example, if an employee is discharged while under indictment, the facts known to the employer at the time of discharge may be considered, but the Commission will not consider any subsequent conviction. *Bethesda Hosp. v. Fowler*, 5th Dist. Muskingum No. CA 77-25, 1978 Ohio App. LEXIS 8732 (Feb. 22, 1978).

### 3. Progressive discipline

- a. Generally, when the employer has an established, progressive discipline policy, the employer must follow that policy for an employee's discharge to be found to have been for just cause in connection with work. *Eagle-Pitcher Industries, Inc. v. Ohio Bur. of Emp. Servs.*, 65 Ohio App.3d 548, 584 N.E.2d 1245 (3d Dist.1989). Another court explained the rationale: "Progressive disciplinary systems create expectations on which employees rely. Fairness requires an employee not be subject to more severe discipline than that provided for by company policy." See *Peterson v. Dir., Ohio Dept. of Job & Family Servs.*, 4th Dist. Ross No. 03CA2738, 2004-Ohio-2030, citing *Mullen v. O.B.E.S.*, 8th Dist. Cuyahoga No. 49891, 1986 Ohio App. LEXIS 5278 (Jan. 16, 1986).

- b. However, if an employee's misconduct is unusually serious, an employer may have just cause to discharge the employee even if discharge is not provided for in the employer's progressive discipline policy. *Sambunjak v. Bd. of Rev.*, 14 Ohio App.3d 432, 471 N.E.2d 835 (8th Dist.1984) (holding that an employee was discharged for just cause in connection with work when the employee, and a co-worker, took two days off work to go deer hunting after being given only one day of vacation. Although the employer's progressive discipline policy provided for only a one-week suspension, the court held that the situation was unusually serious because of the two employees acting in concert).

#### 4. Attendance

- a. Absenteeism caused by *bona fide* illness, reported to an employer, is NOT just cause for discharge. *Schultz v. Herman's Furniture, Inc.*, 52 Ohio App.2d 161, 368 N.E.2d 1269 (6th Dist.1976).
  - 1) The trend is toward employers establishing "no-fault" attendance policies, which make no distinction between excused and unexcused absences. The case law is in conflict as to whether the claimant has the burden of proving that the absences were caused by illness under a no-fault policy.
    - a) The court held that the burden was on the employee to prove that her absences were due to a *bona fide* illness under a no-fault policy. *Durgan v. Ohio Bur. of Emp. Servs.*, 110 Ohio App.3d 545, 674 N.E.2d 1208 (9th Dist.1996).
    - b) If the employer does not challenge the legitimacy of an employee's illness, the employee is not required to provide medical evidence about the illness. *Niskala v. Dir., Ohio Dept. of Job & Family Servs.*, 9th Dist. Medina No. 10CA0086-M, 2011-Ohio-5705.
  - 2) Absence due to illness can be combined with absences for other reasons to support a discharge for just cause in connection with work. For example, a court held that where only nineteen of twenty-seven attendance points were due to illness, the employee was discharged for just cause in connection with work. *Mohawk Tools v. Admr.*, 6th Dist. Williams No. WMS-85-15, 1986 Ohio App. LEXIS 5978 (Mar. 14, 1986).
- b. The courts generally require that an employer must notify its employees about its attendance policy, that there is a rational basis for the attendance policy, that it is understandable, and that it is fairly applied to all employees. *Kolimackouski v. Admr., Ohio Bur. of Emp. Servs.*, 10th Dist. Franklin No. 89AP-1010, 1989 Ohio App. LEXIS 4596 (Dec. 12, 1989); *Shaffer v. Am. Sickle Cell Anemia Assn.*, 8th Dist. Cuyahoga No. 50127, 1986 Ohio App. LEXIS 7116 (June 12, 1986).

- 1) A policy which penalizes an employee for an excused absence has been found to be unfair. *See, e.g., Sugar Creek Packing Co. v. Tudor*, Montgomery C.P. No. 85-3731 (Aug. 27, 1986), unreported.
  - 2) The employee's last attendance point was assessed when the employee called off only twenty minutes before work instead of giving the required one-hour notice. The court held that the employer's application of its attendance policy was hyper-technical, devoid of compassion, and unreasonable, and held that the employee was discharged without just cause in connection with work. *Lloyd v. Martin Brower Co.*, Cuyahoga C.P. No. 159847 (Apr. 28, 1994), unreported.
  - 3) The claimant's wife called his foreman to report his absence because he was broken down on the road and unable to call. The court held that claimant provided sufficient notice of his absence because his wife had called his foreman in the past without reprimand. *Isaac v. O.B.E.S.*, 8th Dist. Cuyahoga No. 48850, 1985 Ohio App. LEXIS 7431 (Mar. 21, 1985).
- c. Medical Leaves of Absence
- 1) An employee who fails to return to work at the end of a medical leave can be discharged for just cause in connection with work. *Adams v. Ohio Dept. of Job & Family Servs.*, 2018-Ohio-2045, 113 N.E.3d 1087 (2d Dist.); *Pulay v. Case Western Reserve University*, Cuyahoga App. No. 48300 (Dec. 6, 1984), unreported.
  - 2) An employee can be required to submit medical documentation demonstrating a need to begin or continue a medical leave of absence. An employee who falsifies or refuses to provide such documentation can be discharged for just cause in connection with work. *Adkins v. Admr.*, 11th Dist. Lake No. 93-L-125, 1994 Ohio App. LEXIS 4123 (Sep. 16, 1994); *Rummell v. Admr.*, Cuyahoga C.P. No. 62999 (Oct. 1, 1984), unreported.
  - 3) An employee who fails to provide medical certification to her employer can be discharged without just cause in connection with work when other factors, such as failure of the physician to provide the certification, mitigate the fault attributable to the employee. *Lifeline of Ohio Organ Procurement, Inc. v. Dir., Ohio Dept. of Job & Family Servs.*, C.P. No. 11CVF-2438, 2011 Ohio Misc. LEXIS 2721 (July 7, 2011).
  - 4) If an employee uses reasonable means to notify his employer of a medical excuse for his absence, he cannot be deemed to be at fault solely because the reasonable means failed, in fact, to accomplish the notification to the employer. *Gem City Eng. Co. v. Admr., Ohio Bur. of Emp. Servs.*, 2d Dist. Montgomery No. 11412, 1989 Ohio App. LEXIS 2314 (June 7, 1989).
5. Unsuitability. In *Tzangas, Plakas & Mannos v. Admr., Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 1995-Ohio-206, 653 N.E.2d 1207, the Ohio Supreme Court held that

unsuitability for a position constitutes sufficient fault to support a discharge for just cause in connection with work IF:

- a. the employee does not perform the required work;
  - b. the employer made known its expectations of the employee at the time of hiring;
  - c. the expectations were reasonable; AND
  - d. the requirements of the job did not change since the date of the original hiring for that particular position.
  - e. The Commission applies *Tzangas* analysis to cases involving salespersons discharged for failing to meet sales goals. *In re Adams*, Unemp. Comp. Rev. Comm. No. B00-00962 (2000); *see also Gallant v. Cooley Custom Cabinetry, Inc.*, C.P. No. 10CVF-03-4249, 2010 Ohio Misc. LEXIS 18860 (June 28, 2010), the claimant never made any sales (custom cabinetry) for the employer. The Hearing Officer will decide whether the employer's sales quota was reasonable.
6. Insubordination. An employee can be discharged for just cause in connection with work for willfully refusing to carry out the lawful instructions of a supervisor.
- a. The specific instructions given to an employee can supersede an employer's general disciplinary policy, providing just cause for discharge if the employee fails to carry out the specific instructions. *Rose v. Hercules Tire & Rubber Co.*, 3d Dist. Hancock No. 5-87-9, 1990 Ohio App. LEXIS 345 (Feb. 1, 1990).
  - b. An employee at Ford Motor Company was repeatedly warned that company policy required that "foreign" cars must be parked in a specified area of the parking lot. The court held that there was a valid basis for the policy, which was negotiated through claimant's union, and that claimant's discharge for repeated and flagrant violations of this parking rule was a discharge for just cause in connection with work. *Fields v. Bd. of Rev.*, 3d Dist. Allen No. 1-86-37, 1987 Ohio App. LEXIS 8536 (Aug. 20, 1987).
7. Profanity. The mere fact that an employee uses profanity does NOT support a discharge for just cause in connection with work. *Lombardo v. Admr., Ohio Bur. of Emp. Servs.*, 119 Ohio App.3d 217, 695 N.E.2d 11 (6th Dist.1997). The courts generally consider four factors when determining whether the employee's use of profanity supports a discharge for just cause in connection with work:
- a. the severity of the profanity used;
  - b. the provocation for the profanity;
  - c. whether the profanity was isolated or part of a pattern; AND
  - d. whether other employees or customers were present.
  - e. Applying *Lombardo*, one court held that there was no just cause for discharge when an employee responded profanely to an employer's use of profanity. *Barnes v. Dir., Ohio Dept. of Jobs & Family Servs.*, 11th Dist. Geauga No. 2002-G-2426, 2003-Ohio-1883.

8. Discharge during a Notice of Resignation Period

- a. If the employee is discharged during a notice of resignation period, and the employer does NOT pay normal wages to the employee for the balance of that period, then the question will be whether there was just cause in connection with work to support the discharge. *Bank One Cleveland, N.A. v. Mason*, 64 Ohio App.3d 723, 582 N.E.2d 1085 (8th Dist.1990).
  - 1) In order to constitute a justifiable reason for discharge, the employer's reason for discharge would need to be closely tailored to a legitimate interest of the employer and must be reasonably communicated to the employee prior to the submission of a letter of resignation. The court held that the employer's internal policy of immediately terminating employees in sensitive positions had not been communicated to its employees, and therefore did not constitute just cause for claimant's discharge. *Id.* at 725.
- b. If the employer DOES pay normal wages to the employee for the balance of the employee's notice period, then the question will be whether there was just cause for the employee's decision to quit employment. *In re Hale*, Unemp. Comp. Rev. Comm. No. R89-09811 (1989).

9. Alcohol

- a. Although alcoholism is considered to be an involuntary condition, the adverse effects that alcohol has on an employee's job performance can permit an employer to discharge an employee for just cause when the employee fails to take reasonable steps to prevent the disability from affecting the employee's job performance. *Harris v. Admr., Ohio Bur. of Emp. Servs.*, 51 Ohio St.3d 37, 553 N.E.2d 1350 (1990).
- b. If an employer prohibits employees from possessing alcohol at work, a court has held that an employee can be discharged for just cause in connection with work for having an open wine bottle in her car in the employer's parking lot. *Janovsky v. Ohio Bur. of Emp. Servs.*, 108 Ohio App.3d 690, 671 N.E.2d 611 (2d Dist.1996).
- c. If an employer prohibits employees from being "under the influence of alcohol" at work, the question is not whether the employee's blood alcohol level would prevent the employee from legally operating a motor vehicle under Ohio law, but rather whether the employee has shown other signs of impairment. *State v. Deskin*, 7th Dist. Mahoning No. 99 C.A. 177, 2000-Ohio-2578.
- d. If an employee agrees, as a condition of a Last Chance Agreement that "any further alcohol-related misconduct or performance problems, or alcohol use as herein described" is prohibited, the employee can be discharged for just cause in connection with work for an off-duty DUI arrest. *Birdsong v. Dept. of the Navy*, Fed.Cir. 98-3186, 1998 U.S. App. LEXIS 18742 (Aug. 12, 1998).

## 10. Illegal Drugs

- a. Drug-Free Workplace Policy
  - 1) The Review Commission has held that an employer's interests in maintaining a safe working environment and a drug-free workplace can support a random drug testing policy. *In re Sandlin*, Unemp. Comp. Rev. Comm. No. B93-02109.
  - 2) Provided that such a drug-free workplace policy is in writing, and that advance notice is given to the employee, an employee who fails a random drug test can be discharged for just cause in connection with work, even if there is no evidence that the employee's work performance was impaired. *In re Sandlin, supra*.
- b. Absent such a drug-free workplace policy, it must be established that there is a connection between the employee's drug use and employment.
  - 1) For example, a commercial truck driver who tests positive for marijuana can be discharged for just cause in connection with work because the US Department of Transportation forbids such individuals from operating a commercial vehicle. *Shields v. Anderson Concrete Corp.*, 10th Dist. Franklin No. 93AP-364, 1993 Ohio App. LEXIS 3229 (June 22, 1993).
  - 2) When a public utility prohibits its employees from off-duty drug possession, an employee who violates this rule can be discharged for just cause in connection with work because of the employer's duty to the public. *S. Cent. Bell Tel. Co. v. Sumrall*, 414 So.2d 876 (La.App.1982).
  - 3) An employee who was convicted of drug trafficking, and charged with conveying drugs in prison, was discharged for just cause in connection with work where there was adverse publicity to the employer and where the employer had a written policy which warned that employees would be discharged for off-duty drug trafficking. *Gen. Elec. Co. v. Grayson*, Hamilton C.P. No. A84-02021 (Sept. 29, 1986), unreported.
- c. The Review Commission has held that hair testing is reliable for determining if an employee is using illegal drugs. *In re Otto*, Unemp. Comp. Rev. Comm. No. B95-02542 (1995).
- d. “[W]here the existence of just cause depends upon a positive drug test for marijuana, the facts governing the reliability of the test are peculiarly within the knowledge of the employer, and the discharged employee presents some evidence to impeach the reliability of the test -- in this case, his testimony that he had never used marijuana -- the employer has a burden of coming forward with some evidence to show that the test administered is reliable.” Once claimant testified that he had not used marijuana while employed, the reliability of the test could no longer simply be assumed, but had to be supported by some prima facie evidence, at least, of the test's reliability. After this evidence of the test's reliability is presented, the burden of persuasion on this issue would be upon the claimant, to prove to the satisfaction of the fact-finder that the test

was unreliable. *Silkert v. Ohio Dept. of Job & Family Servs.*, 184 Ohio App.3d 78, 2009-Ohio-4399, 919 N.E.2d 783 (2d Dist.).

#### 11. Legal Substances

- a. An employee who repeatedly tested positive for nicotine was discharged for just cause in connection with work where the employer had a strict anti-tobacco/nicotine policy. Pursuant to the policy, which was phased in over a period of several years, “all associates must maintain a smoke free, tobacco free and nicotine free status at all times. Smoking or otherwise using tobacco or nicotine products (in any form or manner) at any time by associates is prohibited. This prohibition includes both on premises (including parking lots) and off premises, both during work hours and non-work hours.” The policy’s stated goal was to provide “a safe and healthy workplace” that “promote[s] the health and well-being of its associates.” The court acknowledged that while the policy is arguably intrusive to the extent it purports to control its employees’ conduct outside of the work environment, the employer is a privately owned company which is free to enact lawful policies. *Reidell v. Reynolds & Reynolds Co.*, 2d Dist. Montgomery No. 26392, 2015-Ohio-1048.

#### 12. Fighting

- a. An employee who is the aggressor in a fight at work can be discharged for just cause in connection with work. *Seitz v. Admr.*, 8th Dist. Cuyahoga No. 48567, 1985 Ohio App. LEXIS 6352 (Apr. 11, 1985).
  - 1) An employer must fairly and evenly punish employees for fighting.
  - 2) If the employer has a policy to discharge any employee because of fighting, regardless of who was the aggressor, both employees in a fight can be discharged for just cause in connection with work. *Schaef v. Cleveland Elec. Illum. Co.*, 8th Dist. Cuyahoga No. 39966, 1980 Ohio App. LEXIS 13728 (Jan. 17, 1980).
- b. An employee who fights solely in self-defense cannot be discharged for just cause in connection with work. *Conwell v. Admr.*, Cuyahoga App. No. 47914 (Oct. 4, 1984), unreported.
  - 1) If an employee is provoked into a fight through mere words, no matter how vile or abusive, the employee cannot claim self-defense. *Seitz, supra*, at 6.
  - 2) If an employee is assaulted, reports the assault to the employer and returns to work, and then later engages the assailant in a fight, the employee can be discharged for just cause in connection at work. *Ishteivi v. Mather Co.*, Lucas C.P. No. 79-2492 (June 16, 1980), unreported.

#### 13. Licensing and Insurability

- a. Generally. Where an employee is required to be licensed, or insurable under the employer's insurance carrier, as a condition of continued employment, and the

employee loses the required license or becomes uninsurable, the employee can be discharged for just cause in connection with work. *Mayes v. Bd. of Rev.*, 32 Ohio App.3d 68, 513 N.E.2d 818 (10th Dist.1986) (school bus driver discharged for just cause in connection with work for becoming uninsurable due to an off-duty DUI, because it was in violation of the employer's best interests); *Samson v. Bd. of Rev.*, Pike App. No. 95 CA554 (May 16, 1996), unreported (employee discharged for just cause in connection with work for losing security clearance); *Williams v. Sec. Armored Car Servs., Inc.*, Scioto C.P. No. CIV 84-65 (June 14, 1984), unreported (employee discharged for just cause in connection with work for failing to obtain operator's certification within two years as required); *Schroeder v. City of Fairborn*, Montgomery C.P. No 94-133 (June 9, 1994), unreported (employee discharged for just cause in connection with work for failing to obtain chauffeur's license as required); *In re Noonan*, Unemp. Comp. Rev. Comm. No. B94-02018 (1994) (employee discharged for just cause in connection with work for failing to obtain stock broker's license within one year as required).

- 1) When employment is expressly conditioned upon obtaining or maintaining a license or certification and an employee agrees to the condition and is afforded a reasonable opportunity to obtain or maintain the license or certification, an employee's failure to comply with that condition is just cause for termination. The claimant's promotion to residential services program manager was conditioned on the requirement that she obtain certification as a licensed independent social worker ("LISW") within 15 months. It had not been established that this requirement was an unreasonable expectation or that the time within which she was required to obtain the license was unreasonable. *Williams v. Ohio Dept. of Job & Family Servs.*, 129 Ohio St.3d 332, 2011-Ohio-2897, 951 N.E.2d 1031.
- b. Criminal Records Check of Direct Care Providers
- 1) Any applicant who is under final consideration for employment in a position that involves providing direct care is required to undergo a criminal records check. The Bureau of Criminal Identification and Investigation shall conduct a criminal records check of each applicant.
    - a) An applicant includes a person in a full-time, part-time, or temporary position, but DOES NOT include a person who provides direct care as a volunteer without receiving or expecting to receive remuneration. {R.C. 3712.09 (A) (1) and 3721.121 (A) (2)}
    - b) For employment with a home health agency or if the person is referred to a home health agency by an employment service for such a position, see R.C. 3701.881 (E) (1).
    - c) For employment with a hospice care program or pediatric respite care program, see R.C. 3712.09 (B) (1).

- d) For employment with a home or adult day-care program, see R.C. 3721.121 (B) (1).
    - i. Ohio Adm.Code 3701-13-01 specifically addresses employment involving direct care to an older adult (age sixty or older). Under this Chapter, a direct care provider includes:
      - (1) An adult day-care program operated by and on the same site as a nursing home, residential care facility, home for the aging, or the Ohio veteran's home;
      - (2) A county home or district home;
      - (3) A hospice care program;
      - (4) A hospital unit certified as a nursing facility or skilled nursing facility;
      - (5) A nursing home, residential care facility, or home for the aging;
      - (6) An entity that provides services through the PASSPORT program for services to older adults.
    - ii. Ohio Adm.Code 3701-13-05 specifically enumerates the disqualifying offenses.
- 2) The agency shall not employ an applicant or continue to employ an employee in a position if the person has been convicted of or pleaded guilty to any of the offenses listed or referenced. See R.C. 3712.09 (C) (1) (a) for employment with a hospice care program or pediatric respite care program. See R.C. 3721.121 (C) (1) (a) and Ohio Adm.Code 3701-61-07 for employment with a home or adult day-care program. See R.C. 3701.881 (A) (6) for employment with a home health agency or if the person is referred to a home health agency by an employment service.
- a) Generally speaking, the prohibited offenses include homicides, assaults, patient abuse and neglect, kidnapping, abduction, extortion, coercion, sexually oriented offenses, robbery, burglary, various types of theft and financial crime, domestic violence, weapons charges, and drug charges.
  - b) The agency may employ conditionally an applicant for whom a criminal records check request is required prior to obtaining the results provided that the agency shall request a criminal records check no later than five business days after the individual begins conditional employment. {R.C. 3712.09 (C) (2) (a), 3721.121 (C) (2) (a), and 3701.881 (G) (1) (a); Ohio Adm.Code 3701-13-04 (A)(2)}
  - i. The agency shall terminate the individual's employment if the results of the criminal records check are not obtained within 30 days (60 days under R.C. 3701.881 (G) (3)) after the date the request is made. Regardless of when the results are obtained, the agency shall terminate the individual's employment if the results indicate that the individual

- has been convicted of or pleaded guilty to any of the listed offenses. {R.C. 3712.09 (C) (2) (b), 3721.121 (C) (2) (b) and 3701.881 (G) (3)}
- ii. Termination of employment shall be considered just cause for discharge under R.C. 4141.29 (D) (2) if the individual makes any attempt to deceive the program about the individual's criminal record. {R.C. 3712.09 (C) (2) (b), 3721.121 (C) (2) (b) and 3701.881 (G) (3); Ohio Adm.Code 3701-13-04 (E)}
  - c) Under certain circumstances, the agency is not required to request a criminal records check of the applicant or employee. {See R.C. 3712.09(I), 3721.121 (I) and 3701.881 (E) (1); Ohio Adm.Code 3701-13-02 (C) and 3701-13-03 (H)}
  - d) EXCEPTION: The agency may employ a person who has been convicted of or pleaded guilty to a prohibited offense but meets personal character standards. {R.C. 3712.09 (F), 3721.121 (F) and 3701.881 (J)(2)(d) mention personal character standards as set forth by the director of health. Ohio Adm.Code 3701-13-06 sets forth the standards involving direct care to an older adult.}
- c. Exceptions to licensing and insurability policy.
- 1) UCFE (Unemployment Compensation for Federal Employees). The Review Commission has held that an individual who loses his civilian military employment because the employee loses active military status through no fault of the employee is discharged without just cause in connection with work. *In re Kiggins*, Unemp. Comp. Rev. Comm. No. B01-00551 (2001).
  - 2) An employee's driving license was suspended after the employee's brother had received a citation while using the employee's name without the employee's knowledge or consent. The court held that, although the employer could not allow the employee to continue driving, there was not just cause for discharge because the employee had not committed any misconduct. *Morris v. Ohio Bur. of Emp. Servs.*, 90 Ohio App.3d 295, 629 N.E.2d 35 (10th Dist.1993).
  - 3) A twenty-year ambulance driver was required by a new law to be certified as an emergency medical technician. The court held that the employee, who could not pass the certification examination in part because of a reading disability, was discharged without just cause in connection with work. *Friedman v. Physicians & Surgeons Ambulance Serv.*, 9th Dist. Summit No. 10287, 1982 Ohio App. LEXIS 12291 (Jan. 6, 1982). "Incapability due to a learning disability is not the culpability necessary to constitute just cause for the denial of benefits." *Id.* at 7.
14. Off-duty Misconduct. Misconduct in connection with work is NOT restricted to conduct occurring during formal work hours, but there must be a sufficient connection between the off-duty misconduct and the employment.

- a. Office parties and gatherings
  - 1) An employee was discharged for just cause in connection with work when, at an office party, the employee used rude and profane language towards other employees and their spouses, attempted to start fights, and “spilled” beer on other employees that he did not like. *Sheeran v. State*, 10th Dist. Franklin No. 84AP-324, 1984 Ohio App. LEXIS 10609 (Aug. 9, 1984).
  - 2) An employee was discharged for just cause in connection with work for misappropriating funds entrusted to the employee as treasurer of an employee bowling league, which had an adverse effect on the work atmosphere. *Haynesworth v. Bd. OF Rev.*, 8th Dist. Cuyahoga No. 52519, 1987 Ohio App. LEXIS 5603 (Jan. 22, 1987).
- b. Remaining at work while off-duty. An employee was discharged for just cause in connection with work for arguing with a co-worker at work while off-duty. *Grandowicz v. Ohio Bur. of Emp. Servs.*, Lucas C.P. No. 78-1699 (Mar. 26, 1979), unreported.
- c. Off-duty harassment of employees. An employee was discharged for just cause in connection with work for being convicted of telephone harassment of the employer's general manager. *Watling v. The Kroger Co.*, 10th Dist. Franklin No. 94APE05-718, 1994 Ohio App. LEXIS 4642 (Oct. 13, 1994).
- d. Public employees
  - 1) Police officers. As police officers are sworn to uphold the law, any violation of the law, even if committed while off-duty, is connected to the officer's employment. “Police officers are held to a higher standard of conduct than the general public. Law enforcement officials carry upon their shoulders the cloak of authority of the state. For them to command the respect of the public, it is necessary then for these officers even when off duty to comport themselves in a manner that brings credit, not disrespect, upon their department.” *Jones v. Franklin Cty.*, 52 Ohio St.3d 40, 555 N.E.2d 940 (1990). *See also Yant v. Bd. of Rev.*, 5th Dist. Richland No. C/A 1939, 1981 Ohio App. LEXIS 12351 (Jan. 28, 1981) (a police aide was discharged for just cause in connection with work for being convicted of off-duty gross sexual imposition with a minor).
  - 2) A postal worker was discharged for just cause in connection with work for being convicted of off-duty felony drug trafficking. *Hartley v. Ohio State Bd. of Rev.*, 10th Dist. No. 83AP-1176, 1984 Ohio App. LEXIS 10161 (June 26, 1984).
  - 3) A city employee was discharged after being arrested for an off-duty bar fight, and then kicking out a police car window. While there was a large amount of publicity surrounding these events, the court held that there was not just cause for discharge because the employee's conduct had not impacted the other employees' morale, the city's reputation, or the other employees' ability to perform their jobs.

*City of Galion v. Admr.*, Crawford C.P. No. 93-CV-014 (Aug. 4, 1993), unreported.

- e. Private bank tellers. A bank teller was discharged for just cause in connection with work for being late on loan payments, overdrawn on a credit card, and for bouncing checks. *Nungesten v. Admr.*, Williams C.P. No. 24529 (Aug. 7, 1984), unreported.
  - f. Social media. The claimant's posting of two statements on social media were done on her own time and on her own web page. The postings were not originally authored by the claimant, and had been posted repeatedly by others. "[T]he two statements contained no specific and/or directed no comments to her employer or fellow employees." The court held that this "would not lead an ordinarily intelligent person to believe that they would be terminated from their job and lose unemployment benefits." *Ohio Edn. Assn. v. Dir., Ohio Dept. of Job & Family Servs.*, Franklin C.P. No. 14CVF-06-6718 (Oct. 15, 2014), unreported.
15. Competition with Employer. An employee who engages in competition with the employer and includes solicitations from his personal company inside the employer's mailing to members can be discharged for just cause in connection with work. *Mossa v. Ohio Credit Union League*, 10th Dist. Franklin No. 86AP-1141, 1987 Ohio App. LEXIS 7460 (June 9, 1987).
16. Polygraphs. A police officer may be discharged for just cause under R.C. 4141.29(D)(2)(a) when the officer refuses a supervisor's order to take a polygraph test, so long as the officer has been informed:
- a. the subject of the intended inquiry, which is specifically and narrowly related to the performance of the officer's official duties;
  - b. the officer's answers cannot be used against the officer in any subsequent criminal prosecution; and
  - c. the penalty for refusal is discharge.
  - d. Furthermore, the order for the officer to take a polygraph test must be reasonable and lawful. *Warrensville Hts. v. Jennings*, 58 Ohio St.3d 206, 569 N.E.2d 489 (1991).
17. Civil Service examination. If an employee is discharged because another individual passes a civil service examination for the employee's position:
- a. The discharge is without just cause in connection with work if the employee simply failed the examination.
  - b. The discharge is with just cause in connection with work if the employee failed to take the examination, and lacked justification for failing to take the test.

## E. Correctional Institution

1. No individual may serve a waiting period or be paid benefits for the duration of the individual's unemployment IF the Director finds that the individual became unemployed because of commitment to any correctional institution. {R.C. 4141.29(D)(2)(d)}
2. An employee can be discharged for just cause in connection with work for scheming to prevent the employer from learning that the employee was incarcerated. *Lindsay v. Admr.*, Summit App. No. 16542 (June 22, 1994), unreported.

## F. Dishonesty

1. No individual may serve a waiting period or be paid benefits for the duration of the individual's unemployment IF the Director finds that the individual became unemployed because of dishonesty in connection with the individual's most recent or any base period work. {R.C. 4141.29(D)(2)(e)}
  - a. Dishonesty is defined as "the commission of substantive theft, fraud, or deceitful acts." {R.C. 4141.29(D)(2)(e)}
    - 1) *See e.g., Rhode v. Mkt. Ready Real Estate*, 10th Dist. Franklin No. 12AP-160, 2012-Ohio-5475. The court held that "[A]n individual who, without authorization, forges company checks made payable to himself commits acts constituting dishonesty as defined in R.C. 4141.29(D)(2)(e)."
  - b. The Review Commission has defined "substantive theft" to be theft of any item, or a series of items, with a total value of \$50.00 or more.
2. If the Director finds that the individual became unemployed because of dishonesty, the qualifying weeks and remuneration earned in such work shall be excluded from the individual's base period, and shall NOT be used to determine the individual's total benefits payable, the individual's weekly benefit amount, or employer charges. {R.C. 4141.29(D)(2)(e)}
  - a. An individual's application for determination of benefit rights will be disallowed IF, after excluding the qualifying weeks and remuneration earned from the employer with whom dishonesty was the reason for separation, an individual does not meet the requirements for a valid application.
  - b. Penalties for dishonesty may also be imposed upon an individual who is given a disciplinary layoff for misconduct in connection with work. *In re Bricker*, Unemp. Comp. Rev. Comm. No. B90-01882 (1990).

## G. Disciplinary Layoff

1. No individual may serve a waiting period or be paid benefits for any week IF the Director finds that the individual has been given a disciplinary layoff for misconduct in connection with work. {R.C. 4141.29(D)(1)(b)}
2. Reinstatement. If an employer reinstates an individual who had been discharged at the time of filing the claim for benefits, the Review Commission will consider the time off to be a disciplinary layoff and will determine whether the layoff was for misconduct in connection with work.
3. Generally, a disciplinary layoff of indefinite duration (or over 60 days), and under no definite terms or conditions, will be considered to be a discharge. *In re Hendershot*, Unemp. Comp. Rev. Comm. No. B90-01019 (1990).

## **IX. Offers of Work and Referrals to Work**

### **A. Generally**

1. No individual may serve a waiting period or be paid benefits for the duration of the individual's unemployment IF the Director finds that the individual has refused without good cause to accept an offer of suitable work OR has refused or failed to investigate a referral to suitable work when directed to do so by a local employment office of this state or another state. {R.C. 4141.29(D)(2)(b)}
  - a. This disqualification will not be imposed if:
    - 1) The work is offered by the individual's employer and the individual is not required to accept the offer pursuant to the terms of the labor-management contract or agreement. {R.C. 4141.29(D)(2)(b)(i)}
    - 2) The individual is attending a training course under Ohio Revised Code Section 4141.29(A)(4). {R.C. 4141.29(D)(2)(b)(ii)}
2. The court held that R.C. 4141.29(D)(2)(b) “requires two separate determinations to be made in order to deny the claim. \* \* \* Although, the inquiries are obviously interrelated, separate tests have been developed for each inquiry.” *Pratt v. Kirby Co.*, 19 Ohio App.3d 188, 482 N.E.2d 1318 (8th Dist.1984).
  - a. First, that the claimant has refused suitable work; AND
  - b. Second, that the refusal was without good cause.
3. The individual must have actually received the offer or referral before the disqualification can be imposed. *Rabal v. Bd. of Rev.*, Richland C.P. No. 77-559-L (Mar. 6, 1978), unreported.
4. It is the policy of the Review Commission and ODJFS that when an individual refuses an offer of suitable work without good cause, but the offer of work was for one week or less, the individual will only be held to have been able to obtain suitable work during the week claimed under R.C. 4141.29(A)(5).

### **B. Suitable Work – factors to consider**

1. No individual otherwise qualified to receive benefits shall lose the right to benefits by reason of a refusal to accept new work IF:
  - a. As a condition of being so employed the individual would be required to join a company union, or to resign from or refrain from joining any bona fide labor organization, or would be denied the right to retain membership in and observe the lawful rules of any such organization. {R.C. 4141.29(E)(1)}

- 1) The court held that the statute's "certain named requisites which if the employer imposes upon the applicant for employment as a condition or requisite of being employed, a refusal by the applicant of such employment will not bar him from unemployment benefits." *Chambers v. Owens-Ames-Kimball Co.*, 146 Ohio St. 559, 67 N.E.2d 439 (1946).
  - b. The position offered is vacant due directly to a strike, lockout, or other labor dispute. {R.C. 4141.29(E)(2)}
  - c. The work is at an unreasonable distance from the individual's residence, having regard to the character of the work the individual has been accustomed to do, and travel to the place of work involves expenses substantially greater than that required for the individual's former work, unless the expense is provided for. {R.C. 4141.29(E)(3)}
    - 1) The court held that, if the (four) claimants who worked for a commercial masonry and construction company that performs work at various job sites within a 150-mile radius of where the company is based, an offer of work within that same radius will be suitable with respect to the distance of travel required. The decision also held that the claimants had previously worked for less wages than the employer had offered them for working at the job site in question. *Hill v. Admr., Ohio Bur. of Emp. Servs.*, 4th Dist. Adams No. 98 CA 662, 1999 Ohio App. LEXIS 223 (Jan. 25, 1999).
  - d. The remuneration, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality. {R.C. 4141.29(E)(4)}
    - 1) Although the statute does not expressly allow consideration of a reduction in income, a review of the case law demonstrates that there is ample authority for permitting the consideration of the claimant's reduction in pay. *Feldman v. Loeb*, 37 Ohio App.3d 188, 525 N.E.2d 496 (8th Dist.1987) (The claimant was faced not only with a material reduction in pay, but with an inability to determine the extent of that reduction. Court held that a claimant should not be required to accept proffered new employment immediately, at a substantially lower rate of pay).
2. In determining whether any work is suitable, consideration shall also be given to the following: {R.C. 4141.29(F)}
  - a. Degree of risk to the individual's health, safety, or morals. The fact that an individual may not have complained about alleged unsafe working conditions in the past does NOT prevent that individual from asserting that the offered work was not suitable because it posed an unreasonable safety risk. *Clay v. Admr.*, Montgomery App. No. 14084 (Feb. 23, 1994), unreported.
  - b. Individual's physical fitness for the work. An individual who refuses offered work for valid medical reasons need not notify the employer of any medical problem or ask if

other work is available. *Hubbard v. Wilson Sporting Goods Co.*, Lawrence App. No. 1720 (Dec. 30, 1983), unreported.

- c. Individual's prior training and experience. Suitable work is not limited to the work which the individual customarily performs, but includes the work that the individual could learn to perform given the individual's skills, training, and experience. *Austin v. Admr.*, Huron C.P. No. 50369 (Apr. 4, 1988), unreported.
- d. Length of the individual's unemployment.
- e. Distance of the available work from the individual's residence.
- f. Individual's prospects for obtaining local work.

### C. Good Cause

1. The test for "just cause" under R.C. 4141.29(D)(2)(a) is set forth in *Peyton v. Sun T.V. & Appliances*, 44 Ohio App.2d 10, 335 N.E.2d 751 (10th Dist.1975):
  - a. "There is, of course, not a slide-rule definition of just cause. Essentially, each case must be considered upon its own particular merits."
  - b. "Traditionally, just cause, in the statutory sense, is that which, to an ordinary intelligent person, is a justifiable reason for doing or not doing a particular act."
  - c. Although the Commission has treated the terms "just cause" and "good cause" synonymously, this court did not address "just cause" in the context of refusing an offer of suitable work under R.C. 4141.29(D)(2)(b).
2. On appeal, the court determined that the suspension of benefits and the subsequent trial's court's affirmance of that decision were not unreasonable, unlawful, or against the manifest weight of the evidence. Benefits were suspended because claimant refused, without good cause, an offer of suitable work. The claimant refused an offer of employment because she felt it was unsuitable because of her medical problems, although the offered employment was within her medical limitations. The court did not uphold claimant's argument that, "If an individual refuses an offer of work from a former employer, it is a refusal without good cause if the work is still suitable in light of his or her later work experience, unless claimant previously quit such employment with just cause, or was discharged without just cause." The claimant was the store manager and had been discharged without just cause. *Skidmore v. Lorain Goodwill Industry Admr.*, 9th Dist. Lorain C.A. No. 4094, 1987 Ohio App. LEXIS 5961 (Feb. 25, 1987).
3. An Assistant Elementary School Principal's contract was not renewed because of the closing of three schools. The court held that claimant refused suitable work without good cause when he refused a contract to teach an eighth-grade science class. The claimant would have accepted the teaching position if the salary had been the same as his previous administrative position. The court held that "the reduction in pay was substantial, but this

fact was not determinative in deciding whether the work was suitable, and the evidence otherwise shows that the claimant was qualified to teach elementary school and that the salary offered to him was comparable or higher than the usual salaries for similar positions in the locality. Furthermore, the evidence fails to disclose that the claimant had any objection to the conditions of employment other than the salary.” *Goings v. State Unempl. Comp. Bd. Rev.*, 2d Dist. Greene No. 84-CA-63, 1984 Ohio App. LEXIS 11716 (Nov. 5, 1984).

4. An individual may not refuse a suitable offer of work for good cause only because that offer was made by a current employer planning on eliminating the individual’s current position. *Washington Cty. Engineer v. Admr.*, 4th Dist. Washington No. 95CA34, 1996 Ohio App. LEXIS 4310 (Sep. 25, 1996).

## **X. Overpayment and Fraudulent Misrepresentation**

### **A. Overpayment Where There is No Fraudulent Misrepresentation**

1. If the Director finds that an applicant for benefits has been credited with a waiting period or paid benefits to which the applicant was not entitled, for reasons OTHER than fraudulent misrepresentation, the Director shall cancel such waiting period and require that such benefits be repaid to the Agency, or be withheld from any benefits to which such applicant is or may become entitled before any additional benefits are paid. {R.C. 4141.35(B)(1)(a)}
  - a. However, the Director shall NOT cancel such waiting period and require that such benefits be repaid or withheld IF the overpayment is the result of the Director's correcting a prior decision due to a typographical or clerical error in the Director's prior decision, OR an error in an employer's report, under R.C. 4141.28(G).
  - b. Further, the Director shall cancel such waiting period and require that such benefits be repaid or withheld ONLY within six months after the determination under which the claimant was credited with that waiting period or paid benefits becomes final, OR within three years after the end of the benefit year in which such benefits were claimed, whichever is LATER.
    - 1) This limitation does NOT apply to cases involving the retroactive payment of remuneration covering periods for which benefits were previously paid to the claimant. {R.C. 4141.35(B)(1)(b)}
    - 2) However, in such cases, the director's order requiring repayment shall NOT be issued UNLESS the Director is notified of the retroactive payment within six months from the date the retroactive payment was made to the claimant. {R.C. 4141.35(B)(1)(b)}
2. Collection of Overpayment. The director may recover overpayment amounts from unemployment benefits otherwise payable to an individual under R.C. Chapter 4141. Any overpayments made to the individual that have not previously been recovered under an unemployment benefit program may be recovered pursuant to the Social Security Act and Federal Unemployment Tax Act. {R.C. 4141.35(B)(2)}
3. If the amount of the repayment is not recovered within three years from the date the Director's order requiring repayment became final, the Director shall initiate no further action to collect such benefits AND the amount of any benefits not recovered at that time shall be canceled as uncollectible. {R.C. 4141.35(B)(3)}
  - a. Overpayments not paid in full within forty-five days of a decision becoming final may be referred to Ohio's Attorney General for further collection efforts.

- b. Any outstanding balances not repaid or recovered through collection efforts will be recovered by the withholding of any future benefits to which claimant is or may become entitled.
- 4. An individual's right to appeal under this division shall be limited to the state's authority to recover overpayment of benefits. {R.C. 4141.35(C)}

## **B. Fraudulent Misrepresentation**

- 1. If the Director finds that any fraudulent misrepresentation has been made by an individual with the object of obtaining benefits to which the individual was not entitled, the Director:
  - a. Shall, within four years after the end of the benefit year in which the fraudulent misrepresentation was made, cancel the individual's entire weekly claim for benefits that was fraudulently claimed, OR the individual's entire benefit rights if the misrepresentation was in connection with the individual's application for determination of benefit rights. {R.C. 4141.35(A)(1)}
  - b. Shall order that, for each application and weekly claim canceled, the individual shall be ineligible for two otherwise valid weekly claims that are claimed within the six years following the discovery of the misrepresentation. {R.C. 4141.35(A)(2)}
  - c. Shall order that the total amount of such benefits be repaid to the director, or be withheld from future benefits accruing and otherwise payable, before the individual may become eligible for further benefits. {R.C. 4141.35(A)(3)}
    - 1) If such benefits are not repaid within thirty days after the director's order becomes final, interest on the outstanding balance will accrue at an annual rate of fourteen percent, compounded monthly. When all overpaid benefits are repaid according to an approved repayment plan, the Director may cancel interest accrued during the period of the repayment plan. {R.C. 4141.35(A)(3)}
    - 2) If the amount of the repayment is not recovered within six years from the date the Director's order requiring repayment became final, the Director shall initiate no further action to collect such benefits AND the amount of any benefits not recovered at that time shall be canceled as uncollectible. {R.C. 4141.35(A)(3)}
  - d. Shall by order assess a mandatory penalty on such a person in an amount equal to 25 percent of the total amount of benefits rejected or canceled. {R.C. 4141.35(A)(4)}
  - e. May take action to collect benefits fraudulently obtained under the unemployment compensation law of any other state or the United States or Canada. {R.C. 4141.35(A)(5)}
  - f. May take action to collect benefits that have been fraudulently obtained from the director, interests, and court costs, through attachment and garnishment proceedings. {R.C. 4141.35(A)(6)}
  - g. Overpayments not paid in full within 45 days of a decision becoming final may be referred to Ohio's Attorney General for further collection efforts.

- h. Any outstanding balances not repaid or recovered through collection efforts will be recovered by the withholding of any future benefits to which claimant is or may become entitled.
  - 1) Effective Sept. 5, 2005, R.C. 4141.29(D)(2) no longer provides for a suspension of benefits for fraudulent misrepresentation.
  
- 2. The essential elements of fraud are set forth in *Friedland v. Lipman*, 68 Ohio App.2d 255, 429 N.E.2d 456 (8th Dist.1980). This standard was specifically applied to an unemployment case in *Diliberto v. Admr., O.B.E.S.*, 8th Dist. Cuyahoga No. 57181, 1989 Ohio App. LEXIS 2859 (July 20, 1989).
  - a. A representation, or where there is a duty to disclose, concealment of fact;
  - b. Which is material to the transaction at hand;
  - c. Made falsely with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred;
  - d. With intent of misleading another into relying upon it;
  - e. Justifiable reliance upon the representation or concealment; AND
  - f. A resultant injury proximately caused by the reliance.
    - 1) The court held that claimant's average weekly profit from a karate studio that he owned and operated exceeded the 20 percent exemption and therefore claimant was not entitled to receive the full weekly benefit amount. The resultant injury is that the bureau paid benefits it may not have otherwise have been required to pay resulting in a monetary loss to the Bureau. *Nichols v. Admr., Ohio Bur. of Emp. Servs.*, 7th Dist. Jefferson No. 87-J-21, 1989 Ohio App. LEXIS 914 (Mar. 14, 1989).
  
- 3. Basically, all of the essential elements of fraud must be shown in order to justify fraudulent misrepresentation.
  - a. The court erred in finding fraudulent misrepresentation solely on the basis of an allegedly incorrect answer on a claim form, where there was no other evidence of fraudulent intent. *Id.* at 9.
  - b. The court held, "The record does not disclose credible, probative evidence of a knowing intention on the part of appellant to deceive the Bureau. The evidence established, at best, appellant's lack of awareness of the perimeters of the unemployment compensation laws. Therefore, the finding by the Board of Review of fraudulent misrepresentation was unreasonable and against the weight of the evidence." *Nutting v. Ford Motor Co.*, 8th Dist. Cuyahoga No. 38979, 1979 Ohio App. LEXIS 10549 (June 7, 1979).
  
- 4. The intent to commit fraud may be inferred from intrinsic or extrinsic evidence, as well as from the surrounding circumstances. "The general rule that fraud is not presumed, but must

be proved by the party who alleges it, does not mean that it cannot be otherwise proved than by direct and positive evidence. As the general American authorities indicate, fraud in a transaction may be proved by inferences which may reasonably be drawn from intrinsic evidence respecting the transaction itself, such as inadequacy of consideration, or extrinsic circumstances surrounding the transaction. Fraud may be, and often is, proved by or inferred from circumstances, and the circumstances proved may in some cases raise a presumption of its existence." *Nichols, supra*, at 7-8.

- a. An individual will be held to intend the ordinary and probable consequences of the individual's acts. *Kurtz v. Giles*, Montgomery C.P. No. 77-1187 (Feb. 2, 1979), unreported. In *Nichols*, the court also cited this point, "Thus, as Ohio cases hold, there is a presumption that every reasonable person anticipates and intends the ordinary and probable consequences of known cases and conditions. And this applies in cases of fraud." 51 Ohio Jurisprudence 3d 103, Fraud & Deceit, Section 240." *Nichols, supra*, at 8.
  - b. An individual's mere denial of fraudulent intent is not conclusive if the circumstances of the case show otherwise. *Kurtz, supra*.
  - c. However, an individual's simple negligence in failing to exercise due care in ascertaining the truth of the representation at issue does not support an inference that the individual knew that the representation was false at the time it was made. *Crupa v. Bd. of Rev.*, Cuyahoga C.P. No. 102588 (July 25, 1986), unreported.
  - d. Further, an individual's reliance upon a state employee's mistaken advice about the law does not support an inference that the individual knew that the representation was false at the time it was made. *Carroll v. Giles*, 5th Dist. Richland No. CA-1743, 1978 Ohio App. LEXIS 8873 (Dec. 1, 1978). The court held "Estoppel does not apply to an agency of the state." *Id.* at 6. *See also England v. Bd. of Rev.*, Franklin C.P. No. 77CV-10-4196 (Mar. 14, 1978), unreported.
5. Fraudulent misrepresentation cases generally involve one of the following questions every claimant is required to answer on each weekly claim certification form:
- a. Whether the claimant was "able, available and seeking work as instructed." *See, e.g., Johnson v. Admr.*, Cuyahoga App. No. 73591 (May 14, 1998), unreported, (the court held that a claimant made fraudulent misrepresentation that he was able to work as a truck driver when medical documentation showed that he was totally disabled from working as a truck driver).
  - b. "During the week claimed, did you refuse any offers of work?" *See, e.g., Townsend v. Bd. of Rev.*, 10th Dist. Franklin No. 88AP-912, 1989 Ohio App. LEXIS 1173 (Mar. 30, 1989) (the court held that claimant made fraudulent misrepresentation that she did not refuse work when she had failed to report to work after agreeing to an assignment with a temporary help agency. The suitability of the refused work, or the reason for the

refusal, are not relevant to this inquiry, as “[t]he only issue was whether appellant knowingly made a fraudulent misrepresentation as to her refusal”). *Id.* at 8.

- c. "Did you work, or were you self-employed, during the week claimed?" *See, e.g., Admr. Ohio Bur. of Emp. Servs. v. Veres*, 7th Dist. Mahoning 84 C.A. 180, 1986 Ohio App. LEXIS 5982 (Mar. 18, 1986) (the court held that claimant made fraudulent misrepresentation that he was not self-employed when he was working up to 64 hours per week at a tavern he owned); *see also May v. Bd. of Rev.*, 9th Dist. Summit C.A. No. 9406, 1980 Ohio App. LEXIS 14138 (Jan. 9, 1980) (the court held that claimant made fraudulent misrepresentation when he failed to report his self-employment on claim form even though he was working up to 40 hours per week. Claimant argued that he was unemployed because the expenses exceeded his income from the business. The court rejected the argument finding that “if a claimant either performs services or receives remuneration, he is not unemployed”). *Id.* at 5.