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Temp Work and Unemployment Insurance—Helping Employees at Temporary Staffing and Employee Leasing Agencies:

When may an employee be denied unemployment benefits between jobs?

What is a temp agency? Temp agencies, sometimes called “employee leasing” or “temporary staffing” agencies, act as labor intermediaries, hiring employees who are then sent out to work for another firm, the “third party employer.”¹ A third party employer may send job applicants to a temporary agency, which acts as the employee’s “employer,” paying wages and taxes while the employee actually works for the third party, often on that company’s property. Or workers searching without success for full-time permanent work may approach a temporary agency for a job to tide them over until a permanent job comes along

The number of temporary employees working in the US tripled between 1990 and 1999

Nearly three and a half million Americans work for temporary agencies, which act as contractors assigning them to individual jobs. The number of temporary employees employed in the United States tripled from 1990 to 1999. The temporary staffing industry is a \$72 billion industry in the United States.

Why do temporary agencies care if their employees receive unemployment benefits? In most cases, state unemployment insurance (“UI”) laws treat the temp agency as the “employer” of the employee for purposes of paying UI taxes, workers’ compensation premiums, and other payroll taxes. Like all private employers, temp agencies have their UI tax rate set according to whether or not their employees file valid UI claims and receive UI benefits. This is called “experience rating” and is similar to what happens to your auto insurance premiums if you get a ticket or have an accident. Unlike other employers, temp agencies sell their services to third party employers by offering savings on the third party employer’s payroll costs. To offer these savings, temp agencies must keep their UI experience rated taxes low. This gives them a particular incentive to keep employees off UI benefits between temporary job assignments.

Temp agencies have an incentive to keep their workers off UI benefits between jobs.

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What are the basic requirements for receiving UI benefits, and how do they affect temp employees? The basic requirements to receive unemployment benefits in all states include:

1. The employee must establish “monetary eligibility,” by working and earning a certain amount of wages or by working a certain number of hours;
2. The employee must be involuntarily unemployed – this means that a employee cannot have quit work, unless for some important (and in most states, work-connected, reason);
3. The employee must be “able and available” for work, and “actively seeking” work; and
4. The employee must not refuse offers of “suitable work” without “good cause.”

What kinds of problems do temporary employees have when they apply for unemployment benefits between jobs? In general, each of the typical rules about UI eligibility can affect a temporary employee’s claim for UI benefits. For example, the employee might not have worked enough time or earned enough money to qualify.² The temp agency may claim that an employee has “voluntarily quit” a job, or is not “able and available” to work because s/he has not called the agency for more referrals. The agency may claim that the employee has refused an offer of “suitable work,” because s/he wants to concentrate on search for full-time, permanent work and refuses new offers of more short-term jobs or jobs at lower wages than the norm in the industry.

Temporary work, “voluntary quits,” and requirement to contact the temp agency between jobs: Some states have enacted legislation which says that temporary employees have voluntarily quit their jobs unless the employee contacts the temp agency prior to applying for unemployment insurance benefits. Seventeen states, including Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Iowa, Kansas, Michigan, Minnesota, Nebraska, New Mexico, North Dakota, Oklahoma, Rhode Island, Texas, have this provision. Six additional states have passed a modified version of the ASA bill. In 2001, only one state (Minnesota) enacted the ASA law, and legislation was introduced in two states (Michigan and Rhode Island) to repeal the ASA law. This year, Ohio enacted a law related to temp workers that is not as restrictive as the ASA legislation.

In these states, and others where courts or agencies may adopt this approach, temp employees who cannot prove that they have called the temp agency for referrals between jobs, and before filing a UI claim, are disqualified, at least until they have begun work again and been laid off again.

Advocates should oppose the inclusion of such provisions in their state laws, because they single out temp employees who have fulfilled their current temp assignments, and shift the burden of providing a new assignment to the employees. In practice, many employees who are actively seeking work are unfairly disqualified under this provision simply for lack of proof.

What if there is no formal requirement to contact the temp agency between jobs? If no state law or policy requires the employee to contact the temp agency between jobs, states should pay UI benefits to workers whether or not they have called the temp agency. Voluntary quit rules apply only when an employee leaves “work.” If there is no current job, the employee has not left “work.” Moreover,

in some states, the temp agency is no longer the “employer” when an employee is between jobs. Finally, the end of a temporary assignment, where the duration of work is controlled by the third-party employer, is not properly treated as a “leaving” by the temporary employee.

If state law does not require a temp worker to contact the agency between jobs, workers should not be denied UI for failure to do so.

2. Temporary work, “able and available,” and requirement to contact the temp agency between jobs:

Temporary agencies also argue that an employee under contract to them is not “able and available” for work if s/he

has not contacted the temporary agency between jobs. This argument should also fail as long as the employee is engaging in an independent job search.

The only federal requirement for “able and available” is that a employee be registered for jobs that are listed through states’ unemployment agencies, and that s/he be able to certify on weekly claim forms that s/he is able to work and available for work. Some states have additional requirements such as a minimum number of employer contacts per week, or that employees keep a “job search” log. Unless it is a formal requirement of state UI law that temp workers conduct job searches through the temp agencies, these workers should not be denied UI benefits solely on the basis of failure to contact the temp agency. Additionally, advocates should resist inclusion of such a discriminatory provision in their state UI law.

3. Temporary work and new offers of temp jobs: What about refusals of jobs offered by the temp agency?

Federal law says that states may not deny unemployment benefits to eligible employees for refusing to accept “new work,” if the “wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality.”

The Department of Labor (DOL) has noted that employers use temporary agency employees to avoid costs like higher wages, training and benefits, and that by doing this the firms depress the factors considered “prevailing conditions of work.” DOL has published a series of Program Letters to guide the states on the “prevailing conditions” question. They are available on-line at: <http://wdr.doleta.gov/directives> (see UIPL No. 41-98, change 1, published in July 2000, and UIPL No. 41-98, published August 1998).¹ These program letters are important tools for UI advocates.

Temp agencies often argue that employees are ineligible for unemployment because they have not accepted other similar jobs from the agency, no matter what the wages, fringe benefits, or temporary nature of the job. The program letters offer guidance in determining three issues: 1) what is “new work?” 2) what is “similar work”; and 3) what are conditions that are “substantially less favorable to the individual?”

A. What is an offer of “new work?” New work covers new assignments when the job contains different duties from those the employee agreed to in his or her contract. It also covers different terms or conditions of employment from those in the existing contract.

If a new job offer consists of different duties than a prior job, it is new work. For example, if a person previously worked as a secretary, and is offered a job as an accounting clerk, this is “new work,” even if the same employer is involved. If the transfer or the new job is at \$8 per hour, and the prior job was at \$10 per hour, it is new work. On the other hand, if the new job is at the same rate of pay and the same working conditions and the same duties as the old job, but for a new supervisor, it will likely not be considered “new work.”

B. What is “similar work in the locality?” An employee cannot be disqualified for failure to accept new work if the conditions offered are “substantially less favorable than those prevailing for similar work in the locality.” Should states compare temp work with temp work, or should they compare the underlying occupation with terms and conditions of work in the underlying occupation? Some states have denied unemployment benefits to temp employees who refuse other temp work, saying that the lack of benefits, lower wages and temporary nature of the work are those “prevailing for similar work,” i.e., temp work, in the area. This test would disqualify any employee for refusing temp work in any industry, as long as s/he has already worked in temp work in that industry. This test is wrong:

¹ For a detailed review of DOL’s guidance on “suitable work,” see its 1947 Program Letter, UIPL 130, at <http://www.workforcesecurity.doleta.gov/external/lpext.dll?f=templates&fn=main-j.htm&2.0>

The test for “similar work” means similar underlying work. For example, for a secretary who has worked as a temp, the state should look at the conditions of work for all secretaries in the area, not only for temp secretaries in the area.

DOL says in its program letters that the “occupation is the proper starting point for determining what is and is not similar work.”

C. How should states examine prevailing conditions with respect to temporary work; What are conditions of work that are “substantially less favorable to the individual?” Once the state has considered that an offer is of “new work,” and established the comparison with jobs with similar duties, it must establish whether the offer of new work comes with wages and working conditions that are less favorable to the individual than those prevailing in the underlying occupation.

The Department of Labor Program Letter makes it clear that states should attempt to obtain labor market information about work in a given locality in order to make this comparison. It suggests that unions, Job Service records and Bureau of Labor Statistics data should be consulted, if available.

In addition, the state’s decision must be made based on the whole job package, including wages, the fact that the job is temporary, whether the employee is being asked to break a strike, hours of work, etc.

1) What about fringe benefits? With respect to fringe benefits, the Department of Labor makes clear that fringe benefits are conditions of work, but advises the states to examine fringe benefits ONLY if the employee raises the issue. Employees should be advised to raise the issue, since in nearly every case, the fringe benefits at the temp job will be lower than those prevailing in the occupation.

2) What about the fact that the job is temporary? With respect to the temporary nature of the job, if the norm for work in a particular occupation is temp work, then temp work is the prevailing condition of work, and the job offer will probably not be considered inadequate solely on that basis.

If the temp agency can show that it can offer permanent work; i.e., that the employee will be employed at the end of each assignment, the job offer will probably not be considered inadequate even though it is for temporary work.

3) What about shift changes? The Department of Labor program letter says that this is one of the factors to be considered in its determination of “prevailing conditions.” If it is the practice in the industry is to work three shifts, an employee could be denied unemployment benefits for failure to accept work on any shift. If however, the prevailing practice is to work two shifts, a employee would not be denied for failure to accept work on the third, or night, shift.

4) What about voluntary temporary work? The federal law says that the prevailing conditions test examines whether the working conditions are less favorable “to the individual.” According to the DOL Program Letter, if a employee has chosen temp work, the fact that the work is temporary may not be considered important.

Who can we call for help? The National Employment Law Project provides advice and support for policy makers and advocates relating to unemployment compensation, including part-time employees. Contact Maurice Emsellem at (510) 663-5700 or e-mail at emsellem@nelp.org, Rick McHugh at (734) 426-6773 or e-mail at rmchugh@nelp.org, or Becki Smith at (360) 534-9160, e-mail rsmith@nelp.org.

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¹ For more information on who is an “employer,” including theories about when the temp agency and the third party employer may both be “employers,” see NELP’s “Employment Relationships Checklist,” <http://www.nelp.org/pub8.pdf>.

² In all states, a person must have earned a particular amount of money or worked a particular length of time to qualify for benefits, though the amounts vary. For unemployment insurance, all work performed during an employee’s “base year,” usually the first four of the last five calendar quarters, is counted. The work done on a particular temp assignment is added to all other work performed during the base year.

ⁱ For a detailed review of DOL’s guidance on “suitable work,” see its 1947 Program Letter, UIPL 130, at <http://www.workforcesecurity.doleta.gov/external/lpext.dll?f=templates&fn=main-j.htm&2.0>