

**Mending the
Unemployment Compensation
Safety Net for
Contingent Workers**

(October 1997)

National Employment Law Project

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Introduction

The Social Security Act of 1935 created an unemployment compensation system designed to suit the needs of the full-time, full-year, predominately male workforce that dominated the labor market at that time.¹ Today, however, the labor force has seen a tremendous increase in the number of nonstandard jobs, often referred to as “contingent” work -- the label applied to workers whose positions are not full-time and “permanent” (such as independent contractors, part-time, temporary, and seasonal workers), and whose jobs are often low-paying and offer few, if any, benefits.² These workers now account for nearly 30 percent of the workforce.³ Not only have the jobs changed, but the composition of the workforce has changed as well. For example, a recent study documents that the contingent workforce is now disproportionately made up of women and people of color.⁴

In order to recover unemployment benefits, there are at least two levels of the screening process that are a special problem for contingent workers. First, for an unemployed individual to qualify for benefits, she must avoid disqualification based on a “voluntary quit”⁵ or “misconduct”⁶ determination. Generally, if it is determined that the spell of

¹ See generally, Deborah Maranville, *Feminist Theory and Legal Practice: A Case Study of Unemployment Compensation Benefits and the Male Norm*, 43 HASTINGS L. J. 1081 (April 1992); Nancy E. Down, *Work and Family: Restructuring the Workplace*, 32 ARIZONA L. REV. 431, 439 (1990); *Hearing Before the House Subcommittee on Human Resources, Committee on Ways and Means*, 102d Cong., 1st Sess. 73-79 (Feb. 20, 1991) (testimony of Diana Pearce, Wider Opportunities for Women); Commission on the Future of Worker Management Relations, *Report and Recommendations* (Dec. 1994) at 35.

² U.S. Department of Labor, Bureau of Labor Statistics, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS REPORT 900 (August 1995) [hereinafter CONTINGENT AND ALTERNATIVE EMPLOYMENT]; United States General Accounting Office, WORKERS AT RISK: INCREASED NUMBERS IN CONTINGENT EMPLOYMENT LACK INSURANCE, OTHER BENEFITS (1991) [hereinafter WORKERS AT RISK].

³ Economic Policy Institute, NONSTANDARD WORK, SUBSTANDARD JOBS (1997) (“The majority of nonstandard workers -- 58.2 percent -- are the lowest quality work arrangements, jobs with substantial pay penalties and few benefits relative to full-time standard workers.”).

⁴ CONTINGENT AND ALTERNATIVE EMPLOYMENT at 1.

⁵ Unemployment compensation laws in most all states disqualify individuals who “voluntarily” leave their jobs without good cause. 76 AM. JUR. 2D, Unemployment Compensation ' 104. Approximately two-thirds of the states require good cause to be “connected to the work” or attributable to the employer, meaning that compelling individual circumstances will usually not be considered. U.S. Department of Labor, Employment and Training Administration, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 4-33 (August 1994); See also, Rick McHugh and Ingrid Kock, *Unemployment Insurance: Responding to the Expanding Role of Women in the Work Force*, CLEARINGHOUSE REVIEW 1422, 1426 (April 1994).

⁶ A benefit denial based on a finding of misconduct generally concludes that the claimant has committed an act

unemployment is the result of an individual's voluntary decision, non-work-related circumstances, and/or behavior labeled as contrary to her employer's interests, benefits will be denied. She must also meet "continuing eligibility" requirements; that is, she must be able, available and willing to work, while receiving benefits and must not refuse an offer of suitable work.⁷

Although every individual applying for unemployment benefits has to satisfy these requirements, the inherent nature of contingent work and the circumstances leading an individual to become a participant of the contingent workforce leave many of these workers outside the unemployment system. For example, a single parent struggling to hold down a part-time job while managing her household may have to give up her job when her employer imposes a shift change that makes it impossible to find a child care provider. This newly unemployed individual will often be denied benefits for having voluntarily quit her job. In fact, most contingent workers find collecting unemployment benefits difficult or impossible because of inflexible state eligibility standards that have not changed to keep pace with the changing job market and workforce. The result is a disproportionately low benefit reciprocity rate for these workers.⁸

As a result of the changing labor market, and increased attention now given the issue of the effectiveness of the unemployment compensation system, more states have taken steps to specifically address the issue. For example, both Maine and New Hampshire passed laws this year requiring state commissions to study reform of the unemployment compensation in relationship to the growth in contingent and low-wage employment.⁹

that is contrary to the employer's interest. *See generally*, 76 AM. JUR. 2D, Unemployment Compensation ' 77.

⁷ *See generally*, 76 AM. JUR 2D, Unemployment Compensation ' 116 for a general explanation of continuing eligibility requirements.

⁸ Young-Hee Yoon, Roberta Spalter-Roth, and Marc Baldwin, UNEMPLOYMENT INSURANCE: BARRIERS TO ACCESS FOR WOMEN AND PART-TIME WORKERS, Research Report No. 95-06 (National Commission for Employment Policy, July 1995) [hereinafter BARRIERS TO ACCESS].

⁹ The New Hampshire law (H.B. 429, 1997 Sess.) state, in part : "There is a need for unemployment compensation to respond to the changed needs prompted by the changing economy. Workers often must attempt to balance work and family responsibilities. These workers sometimes must restrict the time of day they are available for work or their number of hours of work per day or week due to care-giving responsibilities. The unemployment compensation system has failed to examine the implications of the increased role of women in the economy. Therefore, the general court finds it necessary to study the issue of unemployment compensation as it relates to the contingent workforce and low-wage workers."

What follows is an analysis of the barriers to unemployment benefits faced by part-time, temporary, and other contingent workers, including leased employees and independent contractors. Issues unique to each category of contingent worker are identified, explained, and analyzed. When relevant, the analysis includes: 1) a survey of the statutory law surrounding the resolution of each issue; 2) an overview of successful case law theories; and 3) model state legislation. The report is thus intended to support efforts on the part of advocates and state policy makers to expand access to unemployment compensation consistent with the fundamental changes in the labor market. It is part of a larger project of the National Employment Law Project to support reform of the unemployment compensation system in selected states to benefit women and low-wage workers.¹⁰

¹⁰ See also National Employment Law Project, *WOMEN, LOW-WAGE WORKERS AND THE UNEMPLOYMENT COMPENSATION SYSTEM: STATE LEGISLATIVE MODELS FOR CHANGE* (October 1997, Revised Edition).

I. Part-time Workers and the Unemployment Compensation System

The number of individuals employed in part-time jobs has increased steadily since the early 1980s.¹¹ Some workers prefer part-time work to full-time work because it affords flexibility in work schedules, thus allowing an individual to balance work with other responsibilities. Many others, however, are involuntary part-time workers; those who want full-time jobs but work part-time because it is the only work available.¹² As the number of part-time workers increases, so does the share of unemployed part-time workers. Due to restrictive interpretations of state law, these individuals find it increasingly difficult to qualify for benefits in a system that generally fails both the voluntary and involuntary part-time worker.¹³

A. Multiple Employment Scenarios: Who's the Employer?

In general, the unemployment system is structured to benefit the claimant who has lost her full-time job involuntarily and who then remains totally unemployed until she finds another full-time job. Claimants whose work histories differ from this paradigm often have trouble collecting the benefits to which they are entitled. Here we deal with those situations, increasingly common in the workplace, where a claimant whose work history involves a combination of part-time and full-time work¹⁴ is denied benefits under the “voluntary quit” provisions of the law.¹⁵ This situation may arise with a worker who

¹¹ WORKERS AT RISK at 3.

¹² WORKER AT RISK at 4. *See also*, CONTINGENT AND ALTERNATIVE EMPLOYMENT at 2 (finding that approximately two-thirds of contingent workers included in the survey, made up of a disproportionately large share of part-time workers, preferred to have permanent rather than contingent jobs). U.S. Department of Labor, FACT FINDING REPORT, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS (May 1994) at 21 (hereinafter, DUNLOP REPORT)(documenting that in 1992, out of a total 20.6 million part-time workers, 6.5 million workers were categorized as involuntary part-time workers).

¹³ BARRIERS TO ACCESS at 40 (finding that unemployed workers who previously worked full-time are almost four times more likely to receive unemployment benefits as are unemployed part-time employees).

¹⁴ The number of multiple job holders increased from 4 million to 7.2 million between 1976 and 1989. U.S. Bureau of Labor Statistics, NEWS, U.S. Department of Labor, 91-547 (October 30, 1991); Statistical Abstract of the United States, Table No. 640 (1993).

¹⁵ Our analysis is limited to the relationship between voluntary quits and multiple employment. Misconduct disqualifications, however, do arise in the multiple employment context. *See, Glende v. Comm'r of Economic Security*, 345 N.W.2d 285 (Minn. App. 1984)(claimant who held part-time and full-time jobs concurrently was

moonlights or works both part-time and full-time jobs, either concurrently or consecutively. When she loses her full-time job against her will, she may quit her part-time job for economic considerations or to dedicate more time to a full-time job search. This raises the issue of whether such workers should be denied benefits for having voluntarily quit their employment.

The issue here is not so much the reason for leaving the job, but rather which job is looked to for the purposes of the voluntary separation determination. Should it be the job most recently held? The job that can be identified as the claimant's "primary" employment? Either job? Both? This section will consider four fact patterns that give rise to multiple employment issues that appear regularly in a part-time worker's job history and often complicate unemployment benefit determinations.

1. Moonlighting Fact Patterns

a. Subsequent Involuntary Separation

The first situation, which is quite common, involves a worker who is concurrently employed at full-time and part-time jobs; she resigns from the part-time job and is later laid off from the full-time job. For example, an individual working full-time finds it necessary to take on a part-time job to supplement her income. After juggling two jobs, she realizes that such a schedule is impractical and quits the part-time job. Much to her surprise, soon after relinquishing the part-time job, she is laid-off, through no fault of her own, by her full-time employer.

This worker's qualification for unemployment compensation is determined by the job that makes her "unemployed." Her loss of part-time job makes her ineligible because she quit voluntarily; she would qualify if the full-time job determines her eligibility because she lost the job through no fault of her own. The question has been resolved in several different ways, both by statutes and case law.

eligible for benefits after she lost her part-time job due to disqualifying misconduct and then lost her full-time or principal job under nondisqualifying circumstances).

At least eight states have statutes or regulations providing that an individual caught in this situation is eligible for benefits.¹⁶ A Maryland law provides a model of how a state can accommodate such claimants.¹⁷ Under this provision, a claimant's disqualifying voluntary quit from a part-time job will be excused as follows: "A claimant who is otherwise eligible for benefits from the loss of full-time employment may not be disqualified from the benefits attributable to the full-time employment because the claimant voluntarily quit part-time employment, if the claimant quit the part-time employment before the loss of the full-time employment."¹⁸ This is the preferred policy because it ensures that an individual who is fired from her full-time job through no fault of her own will not be penalized for having previously quit her part-time job.

Provisions in New Hampshire and Minnesota provide other examples of favorable legislation addressing this issue.¹⁹ New Hampshire has an administrative rule that characterizes the issue in terms of "incidental employment".²⁰ The rule states that an individual will not be disqualified for leaving incidental employment, in the case of a part-time job, provided she had no knowledge or belief that a layoff from the full-time job was likely.²¹ Finally, in Minnesota, a claimant who leaves part-time work while

¹⁶ Conn. Gen. Stat. Ann. ' 31-236(b)(1); Minn. Stat. ' 268.09(1)(c)(7) and (9); Ohio Rev. Code Ann. ' 4141-29(2)(a)(2)(ii); Iowa Rule ' 4.27(96); N.H.Code Admin. R. Dept. of Employment 503.02; La. Stat. ' 1601(1)(a)(ii)(c); Ind. Code ' 22-4-15-1(c)(1); Md. Code Ann. ' 8-1001(a)(2)(effective October 1, 1995). A Louisiana provision excuses a voluntary separation from part-time or interim employment if the separation was necessary to protect a full-time position. La. Rev. Stat. ' 1601(1)(c). The recently amended Indiana law provides that an individual will not be denied benefits if she voluntarily quits one job to accept another job and then shortly thereafter loses the second job provided she remains in employment with the second employer with a reasonable expectation of continued employment." Ind. Code ' 22-4-15-1(c)(1)(amended, P.L. 166-1996, ' 3, in response to *Winder v. Review Board*, 528 N.E.2d 854 (Ind.App. 1988) which held that the original version of Ind. Code ' 22-4-15-1(c)(1), which required individuals to work at the new job for at least 10 weeks, violated the Equal Protection Clause.)

¹⁷ Md. Code Ann. ' 8-1001(a)(2)(effective October 1, 1995).

¹⁸ *Id.*

¹⁹ N.H. Code Admin. R. Dept. of Employ. 503.02; Minn. Stat. ' 268.09(1)(c)(7) and (9).

²⁰ N.H. Code Admin. R. Dept. of Employment 503.02.

²¹ *Id.*

continuing full-time work will not be disqualified if she attempted to return to the part-time job after being separated from the full-time job.²²

In many other states, resolution of this issue is dictated by voluntary quit laws that only apply to the “most recent work” held by the claimant.²³ This definition of most recent work directs the state to look only to the circumstances surrounding the separation from the job held most recently in point of time. Thus, in the moonlighting situation described above, the nondisqualifying involuntary separation from full-time work controls, not the preceding voluntary quit from part-time employment.

If, however, the last job was lost due to disqualifying circumstances and the prior job was lost through no fault of the claimant’s, she could be denied benefits under the “most recent work” theory. Advocates should examine the facts leading to a particular worker’s spell of unemployment to determine if it is in her best interest to advocate that the disqualification determination be governed by the separation from her most recent work.

In addition, not every state that defines the phrase “most recent work” limits its interpretation to the job held most recently. In Ohio, for example, the statute refers to “most recent work” as the claimant’s most recent separation and to the extent necessary, prior separations from work.²⁴ This indicates that the application of the “most recent

²² Minn. Stat. " 268.09(1)(c)(7) and (9).

²³ Six states look to the “most recent work”: Ala. Code ' 25-4-78; Cal. Unempl. Ins. Code " 1256 & 12563; D.C. Code Ann. ' 46-111; Ga. Code Ann. 34-8-194(1); S.C. Code Ann. ' 41-35-120; Tenn. Code Ann. 50-7-303. *See also*, Alas. Stat. 23.20.379 (Alast suitable work”); Ark. Stat. Ann. ' 11-10-513 (Alast employment”); N.M. Stat. Ann. ' 51-1-7A and N.Y. Labor Laws 593 (Alast employer”); N.J. Stat. ' 43:21-5(a) (Amost recent base year employer” is defined as the “employer with whom the individual most recently, in point of time, performed services in employment in the base year.”); N.H. ' 282-A:12 (Amost recent employer” means the last employer with whom an individual’s work record exceeded four consecutive weeks of employment); N.D. Cent. Code 52-0-02 (Amost recent employment”); S.D. Codified Laws Ann. 61-6-13 (Amost recent employer”); Tex. Labor Code Ann. ' 207.045(a) (Alast work”); 21 Vt. Stat. Ann. 1344(2) (Alast employing unit”); V.I. Code Ann. tit--, ' 304(b)(2) (Amost recent suitable work”); Va. Code 60.2-618 (Alast employing unit for whom the individual worked days or from any subsequent employing unit”);

²⁴ *Ohio Stat. ' 4141.28 (D)(1)*. In *Frato v. Board of Review*, 8 Unempl. Ins. Rpt. (CCH) & 10,005 (Ohio App. 1991), a claimant who left her part-time job under disqualifying conditions, was found eligible for benefits after subsequently losing her full-time job because, according to the court, her most recent job met the statutory eligibility requirements. If the separation from “the most recent job meets the requirements, the investigation ends [and it is] not necessary to examine the circumstances surrounding” an earlier separation. *Id.* While this claimant was found eligible for benefits under the Ohio statute, the court’s decision indicates that a claimant’s history of job separations may still be a factor in determining eligibility.

work” theory does not guarantee that inquiry will not be made into the claimant’s history of job separations.

In jurisdictions that fail to address this issue directly with a statute or regulation, and do not incorporate the definition of most recent work into its voluntary quit statute, at least two different theories -- the “independent claim” theory and the “employment status” theory -- have been successfully argued.

Under the “independent claim” theory, a disqualifying termination from one job does not automatically disqualify the employee from benefits. According to this theory, each separation must be considered separately and, thus, benefit eligibility determined according to the facts relating to each job separation. In contrast, the “employment status” theory is based on the concept that events surrounding a separation from employment which does not leave a claimant unemployed should not be considered when making an eligibility determination. Thus, because the individual is still employed at her full-time job at the time of the disqualifying voluntary quit from her part-time job, the circumstances surrounding the first separation are ignored.

In *Berzac v. Marsden Building Maintenance Company*,²⁵ a case involving two claimants, the court applied the independent claim theory, looking to each of the multiple employers and adjusting benefits accordingly. In *Berzac*, one claimant left his part-time job, shortly before losing his full-time job, because health problems made holding two jobs impossible. The other claimant worked full-time as a school-bus driver but, because this job left her with free time around the noon hour, she also took on a part-time job. She left this job after only one week, however, when she found that it conflicted with her full-time work schedule. Ten days later she was laid off from her full-time job, leaving her unemployed.

When these claimants applied for benefits, their claims were denied based on a finding that they voluntarily quit their part time jobs. The Supreme Court of Minnesota reversed,

²⁵ *Berzac v. Marsden Building Maintenance Company*, 311 N.W.2d 873 (Minn. 1981) The *Berzac* holding appears to apply only to the multiple employment situation when, after voluntarily quitting one job, the claimant later finds herself totally unemployed when the job with the remaining employer is involuntarily terminated. In *Sticka*, discussed *infra* at page 36, the holding was expressly extended to apply to concurrent multiple employment situations when the claimant voluntarily quits a part-time job after involuntarily losing a full-time position.

holding that claims involving multiple employment situations should be decided as they relate to each of the multiple employers.²⁶ The practical application of this holding is that a claimant who voluntarily leaves a part-time job and is later laid-off from a full-time job may be entitled to receive benefits as to one employer (in this case, the full-time employer), but not as to the other employer. As a result, however, wages earned at the disqualifying job, which could effect the monetary eligibility determination and the level of benefits received, are not counted.

The Missouri Supreme Court adopted the employment status theory in *Brown v. Labor & Ind. Relations Commission*,²⁷ reasoning that only a separation from employment that leaves a worker totally unemployed should be considered when making a voluntary quit determination. Applying this theory to the first moonlighting fact pattern, the reason surrounding a claimant's separation from the earlier part-time job becomes "irrelevant" if she is still employed in the full-time job after the separation. The court reasoned that because "[a] worker in regular full employment . . . is neither partially or totally unemployed" after leaving concurrent part-time work and before losing her full-time job, the preceding voluntary termination cannot disqualify her.²⁸ Similarly, a New Jersey court has asserted that the threshold requirement is that an individual be "unemployed," and unless that requirement is satisfied, there is no need to consider the conditions for voluntarily leaving a part-time job held concurrently with a full-time job.²⁹

b. Subsequent Voluntary Separation

The next moonlighting fact pattern involves a claimant who works a full-time job and a part-time job concurrently, involuntarily loses her full-time job and then voluntarily quits her part-time job. For example, an industrious worker takes on both full-time and part-time work in an attempt to increase her income. After an involuntary lay-off by her full-time employer, she quits her part-time job because it is no longer economically feasible to

²⁶ See also, *Gilbert v. Hanlon*, 335 N.W.2d 548 (Neb. 1983).

²⁷ *Brown v. Labor & Ind. Relations Commission*, 577 S.W.2d 90 (Mo. 1978). See also, *McCarthy v. Iowa Empl. Sec. Comm'n.*, 76 N.W.2d 201 (Iowa 1956).

²⁸ *McCarthy v. Iowa Empl. Sec. Comm'n.*, 76 N.W.2d 201 (Iowa 1956).

²⁹ *Merkel and Board. of Review v. HIP of New Jersey*, 573 A.2d 517, 519 (N.J. Super. Ct. App. Div. 1990).

maintain that job. She may relinquish the part-time position because transportation or child care costs exceed her earnings.

The outcome of this case depends on whether the claimant's subsequent voluntary quit from part-time employment taints the preceding involuntary separation. The question has been resolved in several different ways, both by statutes and case law.

Wisconsin recently resolved this issue favorably for part-time workers by creating a statutory exception to its voluntary quit disqualification.³⁰ Under this provision, which serves as a model for other states, the voluntary quit disqualification will not apply to a claimant who quits her part-time job after involuntarily losing her full-time job if the loss of the full-time job makes it “economically unfeasible for the employee to continue the part-time work.”³¹

However, not all states that have addressed this situation have done so in this worker-friendly manner. For example, a recent legislative amendment to Florida's voluntary quit law defines the term “work” to include “any work, whether full-time, part-time, or temporary.”³² In this situation, contrary to the prior scenario, qualification based on the second job, the most recent employment, would prevent the worker from receiving benefits.

³⁰ Wis. Stat. 108.04(7)(k)(1988)(disqualification does not apply to an employee who terminates part-time work of not more than thirty hours per week if otherwise eligible to receive benefits because of the loss of the employee's full-time employment and the loss of the full-time employment makes it economically unfeasible for the employee to continue part-time work).

³¹ *Id.* At least four other states have passed laws to address this issue, but all of these provisions have their limitations because they place other conditions on coverage, such as requiring that work at the secondary employment continue for a certain time period. N.H. Admin. R. Dept. of Employ. 503.02(b)(1) and (2)(a) & (b); Conn. Stat. ' 13(b)(2); Fla. Stat. ' 443.101(1)(a)(1994); Minn. Stat. ' 268.09(1)(c)(9). In New Hampshire, for example, a voluntary separation from “incidental employment” will be excused if the claimant worked for at least four consecutive weeks in the part-time job following the end of the full-time job. Connecticut law provides that a claimant who suffers a separation from part-time employment following a nondisqualifying separation from full-time employment may qualify for partial unemployment benefits based on the full-time work. Conn. Stat. ' 13(b)(2).

³² Fla. Stat. ' 443.101(1)(a) (Supp. 1994). This provision has been interpreted to result in a total denial of benefits to workers caught in the second moonlighting fact pattern. In *Alderman v. Unemployment Appeals Commission, et al.*, 664 So.2d 1160 (Fla. App. 1995), however, the claimant argued that the state erred in denying her benefits under the new law when she quit her part-time job after being laid off from her full-time job. The appellate court agreed with the claimant's interpretation of the statute, that her benefits may be reduced but not forfeited altogether.

In the jurisdictions that have not addressed this issue by statute or regulation, several different theories have been successfully argued on behalf of workers who feel compelled to quit part-time jobs after being laid-off from full-time jobs. “Benefit reduction,” “suitable work,”³³ and public policy theories, as well as the “employment status” theory³⁴ and a variation of the “most recent work” theory,³⁵ described earlier, have been adopted by some courts.

The “benefit reduction” theory rests on the premise that quitting a part-time job after being laid off from a full-time job should not result in a total denial of benefits. Instead, the claimant should only suffer a reduction in benefits equal to the amount she earned at the part-time job.³⁶ Applying the “suitable work” rationale to the second moonlighting fact pattern allows a claimant to qualify for benefits if the part-time job she quits was not suitable for her given her prior work experience.

A review of the case law addressing this moonlighting scenario reveals that the “employment status” theory, which ignores events surrounding a job separation that does not render a worker unemployed, was again successfully argued in *Sticka v. Holiday Village South*.³⁷ The claimant in *Sticka* was employed full-time as a structural engineer for an architectural firm. When her hours were involuntarily reduced she took on two

³³ The refusal of suitable work concept, an element of continuing benefit eligibility, is based on the premise that, to remain eligible for benefits, a claimant must not refuse an offer of suitable work, as defined by the state. 76 AM. Jur. 2d, Unemployment Compensation ' 120 Generally, a claimant will not be disqualified if she refuses an offer of work that is considered unsuitable pursuant to the state’s definition of the term and in relation to her past work experience. This theory has been borrowed from the continuing eligibility forum and applied voluntary quit determinations.

³⁴ *Supra* p. 7.

³⁵ *Supra* p. 6.

³⁶ This reasoning corresponds to the partial benefit scheme in place in each state. 1C Unempl. Ins. Rpt. (CCH) & 1920. A partial benefit scheme allows a claimant who is underemployed to collect a limited amount of benefits while continuing to work. A claimant who earns more than a statutorily specified minimum, commonly known as the disregard, while receiving benefits will have her weekly benefit check decreased according to the amount of earnings exceeding the disregard. If a claimant stops earning wages in excess of the disregard, under nondisqualifying conditions, her benefit amount will usually be returned to the initial level. Some courts have decided, however, that a benefit-receiving claimant who voluntarily quits part-time work after losing a full-time job is disqualified "to the extent that his benefits were decreased by virtue of his part-time earnings." In other words, when a claimant voluntarily quits a job in which she earned enough to cause a reduction in her benefits, the benefit amount will not be returned to its original level.

³⁷ *Sticka v. Holiday Village South*, 348 N.W.2d 761 (Minn. 1984).

part-time jobs to supplement her income. Shortly thereafter, she was terminated from her engineering job. She applied for and began receiving partial unemployment benefits; benefits based on earnings from her previous full-time job reduced by a fraction of wages currently being earned at her part-time jobs. When she later quit her part-time jobs so she could expand her work search to other parts of the country, her benefits were terminated based on a finding that she had voluntarily quit those jobs.

Relying on the *Berzac*³⁸ decision, the Supreme Court of Minnesota reversed. Although the court acknowledged that the factual scenario presented in *Sticka* was the converse of that in *Berzac*,³⁹ the court nevertheless held that events arising after a claimant becomes unemployed and has qualified for benefits are “irrelevant.” The court reasoned that a claimant’s benefits cannot be terminated based on an act occurring after her separation from employment upon which benefit eligibility is based because the claimant is already unemployed by virtue of having lost her full-time job.⁴⁰ A more reasonable approach, according to the court, is that once a claimant satisfies the statutory definition of unemployed, the “cessation of part-time work for any reason” should not disqualify her “from any and all benefits.”⁴¹

In *Tomlin v. Unemployment Insurance Appeals Board*,⁴² a California court also focused on the claimant’s employment status. The claimant, Tomlin, worked full-time for Lockheed, and part-time for J.C. Penney. Due to company cutbacks, she was laid off from her job at Lockheed and was found eligible for partial benefits. She continued to work at J.C. Penney for several weeks after her discharge from Lockheed but eventually quit. Her benefits were subsequently terminated based on her decision to quit her job at J.C. Penney.

³⁸ *Supra* n. 24.

³⁹ In *Berzac*, the claimants held part-time and full-time jobs concurrently. After quitting their part-time jobs, they were laid off from their full-time jobs. *Berzac*, 311 N.W.2d 873 (Minn. 1981).

⁴⁰ *Sticka v. Holiday Village South*, 348 N.W.2d at 762. See also, *Rodgers v. Department of Employment Security*, 542 N.E.2d 168, 172 (Ill. App. 1989) (holding that a voluntary quit from a part-time job does not preclude a claimant from receiving benefits based upon a prior involuntary separation from full-time employment); *Butler v. Board of Review*, 484 N.E.2d 318 (Ill. App. 1985) (same).

⁴¹ *Id.* at 763.

⁴² *Tomlin v. Unemployment Insurance Appeals Board*, 147 Cal. Rptr. 403 (Cal. App. 2d 1978).

The California Court of Appeals reversed, reasoning that once a claimant is unemployed and qualifies for benefits based upon the loss of a full-time job, the fact that she maintains a part-time job does not change her status as unemployed. Thus, once it is determined that a claimant is unemployed, subsequent job separations have no bearing on that status and cannot be used as grounds to terminate benefits.

Significantly, the *Tomlin* court looked to the interpretation of the phrase “most recent work” and concluded that the phrase “should not be construed to mean merely the last employment of any kind prior to filing for benefits but must refer to significant or regular employment.”⁴³ This interpretation favors the worker since, if read literally as point in time, the most recent work theory would act to disqualify a claimant under this fact pattern. The only effect a subsequent termination of part-time employment should have on benefit eligibility, according to the *Tomlin* court, is a benefit reduction, or a reduction of the weekly benefit amount by an amount equal to wages received in excess of the statutory disregard.

Florida case law presents a recent example of the “benefit reduction” theory, eluded to in *Tomlin*, being applied to this moonlighting fact pattern. In *Wright v. Florida Unemployment Appeals Commission*,⁴⁴ the court held that a claimant who leaves her part-time job after being laid off from her full-time job is still eligible for benefits but her benefits should be decreased by the amount of the income from her part-time

⁴³ *Tomlin v. Unemployment Insurance Appeals Board*, 147 Cal. Rptr. at 408.

⁴⁴ *Wright v. Florida Unemployment Appeals Commission*, 512 So.2d 333 (Fla. App. 1987)

employment.⁴⁵ The Florida courts revisited this issue in *Alderman v. Unemployment Appeals Commission et al.*,⁴⁶ and again ruled that a benefit reduction was appropriate.

In *Appeal of Borichevsky*,⁴⁷ the Supreme Court of New Hampshire applied the “suitable work” theory to this moonlighting fact pattern. Like the other claimants described in this section, the worker in this case held two jobs simultaneously. He was employed full-time as a draftsman and part-time as a cook at Pizza Hut. He was laid off from his full-time job and began collecting unemployment benefits. Shortly thereafter, he quit his part-time job because he could not support himself on that income. The Supreme Court of New Hampshire held that the claimant was still eligible for benefits on the ground that his work at his part-time job was not suitable. The court reasoned that where it appears that a part-time job would not be suitable employment and could be refused without jeopardizing eligibility for benefits, it makes even less sense that quitting the same part-time job should result in a termination of benefits.⁴⁸

The New Mexico Supreme Court, in *Lopez v. Employment Security Division*,⁴⁹ adopted a public policy theory to address this moonlighting scenario. Again, the claimant in this case was concurrently employed at full-time and part-time jobs. After being laid off from

⁴⁵ Beginning with *Neese v. Sizzler Family Steak House*, 404 So.2d 371 (Fla. App. 1981), *rev. den'd*, 412 So.2d 471 (Fla. 1982), Florida courts have consistently found in favor of claimants who have voluntarily left part-time employment after having lost a full-time job. The *Neese* court specifically *rejected* the principle that whenever a claimant has two or more jobs and leaves any one of these jobs without good cause, the employee is denied all benefits. The *Wright* decision signified the beginning of a shift in policy, but the First, Second and Third District Courts of Appeals in Florida have each held that the *Neese* and *Wright* decisions should also be applied to situations where a claimant voluntarily quits subsequently held part-time employment. *Coelho v. Balasky, et al.*, 631 So.2d 335 (Fla. App. 1994); *Barry v. Faulk Investments, Inc.*, 621 So.2d 713 (Fla. App. 1993); *Stewart v. Family Dollar Tree and Florida UAC*, 635 So.2d 73 (Fla. App. 1994); *Elmore V. Hammond*, 642 So.2d 128 (Fla. App. 1994); *Tierney v. Florida UAC and Bern's Steakhouse*, 640 So.2d 154 (Fla. 2nd DCA 1994). These courts have uniformly refused to distinguish the *Neese* and *Wright* cases on the ground that the part-time employment was not held concurrently with the prior full-time employment, finding that such a distinction lacked merit.

⁴⁶ *Alderman v. Unemployment Appeals Commission et al.*, 664 So.2d 1160 (Fla. App. 1995).

⁴⁷ *Appeal of Borichevsky*, 494 A.2d 772 (NH 1985). The New Hampshire statute provides that a claimant will not be disqualified if she leaves work which would not have been deemed suitable work under the statute and terminates such employment within four consecutive weeks of employment, with or without good cause. N.H. Stat. ' 282-A:32I(a)(1).

⁴⁸ *Sticka v. Holiday Village South*, 348 N.W.2d at 763 n.1.

⁴⁹ *Lopez v. Employment Security Division*, 802 P.2d 9 (N.M. 1990). Also central to the courts decision was the definition of employment which, according to this court, only means employment during which base-period wages are earned.

her full-time job she quit her part-time job so she could concentrate on a search for full-time employment. The supreme court analyzed the situation in light of the legislative intent behind the state's unemployment laws. Specifically, the court focused on the policy that the statute was intended to lighten the burden of unemployment for a worker and her family and therefore should be construed liberally in favor of the claimant."⁵⁰ The Massachusetts Supreme Judicial Court also relied on public policy reasoning when it held, in *Emerson v. Director*,⁵¹ in favor of a claimant in a factually similar case. The Massachusetts court stressed that to deny a worker benefits under such a scenario would mean that an "unemployed worker would be disinclined to take part-time work and would prefer to remain idle and receive full benefits."⁵² To hold otherwise, the court stated, would have the effect of "reward[ing] the idle and punish[ing] the ambitious."⁵³

c. Quitting Interim Part-time Work

The third moonlighting fact pattern arises when a claimant becomes totally unemployed, starts collecting benefits, and then takes on a part-time job. Shortly thereafter, she voluntarily quits the part-time job. For example, after being unemployed and collecting benefits for several weeks, a claimant accepts a part-time job in an attempt to delay the exhaustion of benefits. She then quits the part-time job when she realizes that her time is better spent focusing on a search for full-time work. This situation is different from the two prior scenarios because at no time does the claimant hold both full-time and part-time jobs at the same time. The claimant takes on part-time work after becoming totally unemployed and qualifying for benefits. The resolution of this situation is based on whether accepting and then later quitting part-time work can be used as grounds for terminating a benefit award based on unrelated employment. Again, outcomes may be dictated by either statutes or case law.

⁵⁰ *Id.* See also 76 AM. JUR. 2D ' 14, p. 760.

⁵¹ *Emerson v. Director*, 471 N.E. 2d 97, 99 (Mass. Sup. Jud. Ct. 1984)

⁵² *Id.* at 99.

⁵³ *Id.* at 99.

Minnesota law provides that a voluntary quit from a part-time job accepted while a claimant is collecting benefits will not result in a termination of those benefits.⁵⁴ This provision, which serves as a model for other states, is preferred because it allows a claimant to accept an interim part-time job to supplement her benefits without risking benefit termination if the job does not work out.

Case law interpreting the “employment status,”⁵⁵ “suitable work,”⁵⁶ “primary employment”⁵⁷ and “benefit reduction”⁵⁸ theories, all described earlier, have been applied to this fact pattern.⁵⁹ In fact, the leading case addressing this moonlighting fact pattern, *Goodman v. Board of Review*,⁶⁰ incorporates three of these theories.

The claimant in *Goodman* lost her full-time job as a shirt-presser when, because of a plumbing problem at her home one day, she failed to report to work. She qualified for benefits based on the separation from her full-time job. Shortly after she started receiving benefits, she accepted a part-time telemarketing job. She quit this job when it began to conflict with her search for full-time work. When notified that she voluntarily quit the part-time job, the state terminated her benefits and ordered her to repay the full amount of benefits received.

The claimant appealed the determination, arguing that New Jersey’s voluntary quit law was meant to apply only where a claimant has voluntarily quit primary employment, not

⁵⁴ Minn. Stat. ' 268.09(1)(c)(9)

⁵⁵ *Supra* p. 7.

⁵⁶ *Supra* p. 11.

⁵⁷ *Supra* p. 10.

⁵⁸ *Supra* p. 10.

⁵⁹ In addition, a “purging” theory has been used to resolve this issue. For example, in *Honeywell, Inc. v. Hoyhtya*, 400 N.W.2d 818 (Minn. App. 1987), a full-time worker requested and received a reduction in hours to part-time shortly before she was laid off. The state contended that the claimant was not entitled to any benefits because her request for a reduction in hours constituted a disqualifying voluntary quit from her full-time position. The court, however, treated the claimant's tenure as a full-time employee as a separate job from her tenure as a part-time employee, and ruled that though she was disqualified for having voluntarily quit her full-time employment (by requesting a reduction in hours), her ensuing part-time employment had purged the prior disqualification and she was eligible for benefits.

⁶⁰ *Goodman v. Board of Review*, 586 A.2d 313 (N.J.App. 1991).

an interim part-time job. Relying on the fact that New Jersey's law does not define the term "work" in terms of its voluntary quit statute,⁶¹ the state argued that the "provision is unqualified and is meant to discourage workers from quitting full-time or part-time jobs under all circumstances."⁶²

The intermediate appellate court agreed with the claimant and reversed the termination of benefits and order of repayment, basing their decision on the employment status theory. According to the court, the remedial purposes of the program "are really frustrated when benefits are denied to a claimant who quits a part-time job which had not previously affected the claimant's statutorily-defined status of unemployed."⁶³ The court reasoned that once a claimant becomes unemployed, "acquiring a part-time job . . . does not destroy her status automatically as unemployed and does not defeat her eligibility for benefits."⁶⁴ The *Goodman* decision is also significant because it endorses the theory that a claimant has good cause to quit interim part-time work if the work is not "suitable" for the claimant.⁶⁵

In *Holman v. Olsten Corporation*,⁶⁶ the suitable work theory was successfully argued on behalf of a claimant caught in this moonlighting fact pattern. The claimant in *Holman*, who held a master's degree in public health, was forced to resign from her full-time position due to a serious illness. Because of an exception in the Minnesota voluntary quit statute, the claimant qualified for and started collecting benefits.⁶⁷ Four months later, she accepted a part-time position that paid wages considerably lower than her previous job.

⁶¹ The New Jersey statute does define the term "most recent base year employer" as "that employer with whom the individual most recently, in point of time, performed services in employment in the base year." N.J. Stat. Ann. ' 43-21-19(x). This phrase "most recent base year employer", however, is not referenced in the State's voluntary quit provision.

⁶² *Id.* at 315.

⁶³ *Goodman* at 316.

⁶⁴ *Id.* at 316.

⁶⁵ *Goodman, supra* n. 58. *See supra* n. 49 for discussion of the suitable work theory.

⁶⁶ *Holman v. Olsten Corporation*, 389 N.W.2d 236 (Minn. App. 1986)

⁶⁷ The Minnesota voluntary quit statute provides that a separation from employment due to a serious illness does not disqualify an individual for unemployment benefits. Minn Stat. ' 268.09(1)(2)(b) (1984).

She quit that job after her second night of work, complaining of low wages. As a result, the state terminated her benefits.

The Minnesota Court of Appeals disagreed with the state's action and reinstated the claimant's benefits. The court reasoned that the "demonstrated diligence and willingness of individuals to find some additional means of support, even if it is not suitable employment for them" should not result in total ineligibility for benefits.⁶⁸ Like the *Goodman* court, the *Holman* court noted that the claimant's interim position did not change her original status as unemployed. The *Holman* court, however, did agree that the "fault in loss of a part-time job taken after becoming unemployed may justify a reduction in benefits."⁶⁹

An Arkansas court also extended the benefit reduction theory to the third moonlighting fact pattern in *Stiles v. Coit*.⁷⁰ Here, the claimant held the same full-time job for 10 years before being laid-off. She qualified for benefits and shortly thereafter accepted a part-time job. Approximately four months later, she quit the part-time job to relocate with her husband. After the relocation, she filed a claim for benefits. The claim was denied based on a finding that quitting her interim part-time job to relocate with her family amounted to a disqualifying voluntary quit. The Arkansas Supreme Court reversed, holding that the claimant is entitled to benefits based on her full-time job "subject only to a reduction in benefits to the extent that her part-time wages compel that result."⁷¹

d. Quitting to Take a Better Job

The final fact pattern in this section does not involve concurrent employment. It involves a situation in which a worker leaves a part-time job, or some other type of contingent employment, to accept a better job but soon loses the new job through no fault of her own. For example, after bouncing between an assortment of part-time jobs offering low-wages, no benefits and no job security, a worker finally secures a permanent full-time

⁶⁸ *Holman v. Olsten Corp.*, 389 N.W.2d at 241.

⁶⁹ *Id.*

⁷⁰ *Stiles v. Coit*, 686 S.W.2d 405 (Ark. 1985).

⁷¹ *Stiles v. Coit*, 686 S.W.2d at 407.

position that offers benefits and pays a living wage. In anticipation of starting this new job, she quits her part-time job. She is then laid-off from her new job before it starts or shortly thereafter.

At issue here is whether a worker in this situation is eligible for benefits after voluntarily quitting part-time employment, even though she lost her most recent employment -- the full-time job -- involuntarily. This question is often answered “no” because of state laws that define the term “employment” narrowly. Employment that lasts for a short period of time or yields little income is technically not considered to be “employment” under state law.⁷² Therefore, the state looks to the voluntary quit from the part-time job when arriving at an eligibility determination. The end result is that if the claimant’s tenure at the new job is too brief, or if she earns too little before losing the job, her attempt to improve her employment situation can leave her both unemployed and ineligible for benefits. Several states have passed laws that address this fact pattern. For example, some laws provide that leaving one job to accept a better job will not result in a disqualification regardless of the length of time the new position is held or the amount of wages earned.⁷³ Texas law, which serves as a model for other states, expressly provides that “an individual who is partially unemployed and who resigns that employment to accept other employment that the individual reasonably believes will increase the individual’s weekly wage is not disqualified.”⁷⁴ This law is preferred because it allows a worker to make a move towards improving her work situation with less risk. A contingent worker in Texas, for example, may be more likely to quit her dead-end job to

⁷² Some states only recognize a claimant’s “most recent work” if she has “performed thirty (30) work days of employment.” D.C. Stat. & 4126(z); other states define “most recent work” to include only work that results in “paid wages equal to or exceeding ten times his weekly benefit amount or if the wages paid are less than ten times his weekly benefit amount, it shall be considered as the most recent work when a preponderance of evidence establishes that the intent of the hiring agreement was to provide for regular permanent employment.” Tenn. Stat. Sec. 50-7-303(b)(1)(C).

⁷³ Advisory Council on Unemployment Compensation, *UNEMPLOYMENT INSURANCE IN THE U.S.: BENEFITS, FINANCING, COVERAGE* (February 1995) [hereinafter, 1995 ACUC REPORT]. These states include: New Hampshire, Alabama, Connecticut, Florida, Illinois, Indiana, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, North Dakota, Ohio, Oregon, South Dakota, Texas, Washington, West Virginia, and Wisconsin. “The type of job varies by state but might include leaving in good faith to accept full-time work with another employer or accepting another job while on layoff.” *Id.*

⁷⁴ Texas Unempl. Comp. Act ' 5(a).

accept a better job, knowing that if the new job falls through and she cannot return to her former job, she will still be eligible for benefits.⁷⁵

Other states that have laws addressing this issue require that claimants work at the new job for a specified length of time or earn a certain amount of wages before that job counts as “employment,” allowing a claimant to avoid disqualification based on the preceding voluntary quit.⁷⁶ In Iowa, for example, a claimant will not be disqualified if she leaves a job in good faith for the sole purpose of accepting other employment, provided she remains at the new job for at least six weeks.⁷⁷

If the state where you practice does not address this fact pattern in its voluntary quit law, an alternative argument is that the claimant had “good cause,” as defined by state law, to leave her former job. For example, if your client quit her part-time job because of bad working conditions and/or low wages, that constitutes good cause to leave the job behind and accept a better job. The effectiveness of this argument depends on how the term “good cause” is defined by state law.⁷⁸ Some states allow a worker to quit for “good cause,”⁷⁹ while other states have more restrictive laws which only allow a worker to quit

⁷⁵ Michigan law, which provides an exception for claimants who leave one job to accept permanent full-time work with another employer, and performs services for that employer, is another favorable example. Mich C.L. ' 421.29(5). This exception has its limitations. It appears that the claimant must have left one job to accept full-time work, not just a better employment situation and must complete some actual work in the new position. See, *White v. MESC*, 6 Unempl. Ins. Rpt. (CCH) & 10,079 (Mich. Cir. Ct. 1993)(claimant must leave employment with the intention of accepting full-time work with an identified employer and later perform services for the same); *Paddy McGee's v. De LaTorre and MESC*, 6 Unempl. Ins. Rptr. (CCH) & 9897.07 (Mich. Cir. Ct. 1985)(holding that leaving one job for a job with a scheduled work week of 352 hours and that lasted only one week satisfies '421.29(5)).

⁷⁶ Ind. Code 22-4-15-1(c); Iowa Code ' 96.5(1)(a); Ohio Stat. ' 4141.291. See also, *Lafferty v. Review Board*, 600 N.E.2d 1378 (Ind. App. 1992) (claimant disqualified for leaving full-time job to accept another permanent full-time job which offered reasonable expectation of betterment of wages or working conditions because new job did not last for ten weeks as required by statute).

⁷⁷ Iowa Code ' 96.5(1)(a). There are similar provisions in Ohio and Washington. The provision in effect in Ohio states that a claimant who voluntarily quits her work to accept another job must keep the new job for three weeks and “earn wages equal to one and one-half times his average weekly wage or one hundred eighty dollars, whichever is less.” Ohio Stat. ' 4141.291. Similarly, in Washington, a claimant can only avoid disqualification under these circumstances if she has left work to accept a “bona fide offer of bona fide work” or, in other words, work that results in wages equal to five times her weekly benefit amount. Wash. Rev. Code ' 50.20.050(1) & (2)(a).

⁷⁸ 76 AM. JUR 2D ' 151, p. 918. See also, *Harding v. Industrial Commission*, 515 P.2d 95 (Colo. 1973), *Horvath v. Rev. Board of Indiana Employment Security Division*, 503 N.E.2d 441 (Ind. App. 1987).

⁷⁹ Sixteen states do not require good cause to be connected with work. These states include: Alaska, California, Colorado, Hawaii, Nebraska, Nevada, New York, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South

her job for “good cause attributable to the employer” or “good cause connected with work.”⁸⁰

If the law requires that good cause be work-related, this theory may be less successful. In spite of the employer’s role in establishing working conditions that often lead workers to quit a job, many administrative agencies and courts ultimately conclude that personal reasons motivate a worker to leave one job for a better job. Where good cause need not be work-related, however, economic factors including wages and job security may rise to the level of good cause justifying a voluntary quit.

In many states, however, the outcome of this issue is still dictated by case law interpreting two familiar theories -- most recent work and good cause⁸¹; and one new theory -- the “voluntary prong” theory. The voluntary prong theory requires an examination of the reasons motivating the quit to determine whether the quit was, in fact, voluntary,⁸² and considers that a claimant has not become voluntarily unemployed if the terms and conditions of the job she left were so intolerable that she had no other reasonable alternative but to accept the better job.⁸³

Carolina, Utah, Virgin Islands, and Virginia.

⁸⁰ Twenty states require that good cause be connected with work and fail to recognize any exceptions for personal reasons. These states include: District of Columbia, Georgia, Idaho, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Mexico, New Jersey, Oklahoma, Vermont, and West Virginia. The remaining states require good cause be connected with work but also include specific statutory exceptions that recognize personal reasons. These states include: Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Indiana, Iowa, Kansas, Maine, Maryland, Montana, North Carolina, North Dakota, South Dakota, Tennessee, Texas, Washington, Wisconsin, and Wyoming.

⁸¹ The good cause theory just discussed has been adopted by courts to resolve this issue. Again, the outcome depends on how the term good cause is defined. For example, Indiana’s “connected with work” provision is stated in *Gray v. Dobbs House, Inc.*, 357 N.E.2d 900, 904 (Ind. 1988), to require the worker to show that quitting was related to the employment and objective in character, and that the reasons for quitting were such as would impel a reasonably prudent person to quit under the same or similar circumstances. Leaving one job for a better one could meet this standard, depending on the facts. In *Arrendale v. Review Board*, 445 N.E.2d 128 (Ind.App. 1983), the court ruled that a reasonably prudent employee would quit a temporary part-time job to maintain full-time employment. See also, *Consiglio v. Administrator*, 81 A.2d 351 (Conn. 1951).

⁸² This standard is best described in terms of whether the claimant exercised her own free will or choice when separating from the job. 76 AM. JUR. 2D ' 104, p. 873.

⁸³ “A reasonably prudent person who was supporting children and paying rent would be forced to terminate a position which offered only 14 hours of work per week.” *Robinson v. Review Board*, 516 N.E.2d 1079 (Ind.App. 1987).

In *Habel v. Department of Employment & Training*,⁸⁴ the Vermont Supreme Court adopted the most recent work reasoning in the context of leaving work for a better job. The claimant in *Habel* quit his job at a car dealership to accept a better paying job with a competitor.⁸⁵ The claimant was fired from his new job approximately two weeks later because he “failed to meet the job standards,” a circumstance unlikely to disqualify him for benefits. The claimant’s initial application for benefits was denied based on a finding that he voluntarily quit his previous job. Although the circumstances surrounding the separation from the second job were not disqualifying, the state found that the benefit determination must be based on the separation from the first job because the period of employment with his subsequent employer was too brief to count as “employment” under Vermont law.

The Vermont Supreme Court reversed, holding that the term “employment” should be interpreted to mean last in time for purposes of a voluntary quit determination.⁸⁶ Applying this reasoning to the facts, only the circumstances surrounding the separation from the last job in point of time are relevant.⁸⁷

Several years later, the Vermont Supreme Court reaffirmed the *Habel* holding when it defined the term “employment” in *Howard v. DET*.⁸⁸ On the morning she expected to start her new job, the claimant in this case was told that she had been laid-off. The state determined that she was ineligible for benefits because, in anticipation of her new job, she quit her previous job and had not worked any hours or received any remuneration at her new job.

⁸⁴ *Habel v. Dep’t of Empl. & Training*, 507 A.2d 973 (Vt. 1986).

⁸⁵ While both of these jobs appear to have been full-time, his situation was nonetheless similar to many of those who leave part-time jobs and take full-time jobs, in that he left his job to take a more lucrative position.

⁸⁶ *Habel*, 507 A.2d 973.

⁸⁷ While it is extremely helpful to advocate for a “*Habel*-like” interpretation of the “most recent work” phrase for this particular fact pattern, it is important to remember that this interpretation is not appropriate in all multiple employment situations. For example, under the second moonlighting fact pattern (which involves a subsequent separation from part-time employment), arguing that the most recent work should be limited to the job most recently held in point of time is detrimental to the claimant trying to qualify for benefits. Under that scenario, the argument to be made is that most recent work should be limited to “significant or regular” employment, a position that works against a claimant who leaves one job for a better position.

⁸⁸ *Howard v. DET*, 572 A.2d 931 (Vt. 1990).

The state’s decision relied on a case in which the phrase “employment,” as used in another sections of the state’s unemployment law, had been defined to exclude employment in which the worker earned less than a minimum amount of income.⁸⁹ The state reasoned that because the claimant in this case failed to earn the minimum, she was ineligible for benefits. The supreme court rejected the state’s determination, holding that “[t]here is no policy or reason to construe ‘employment’ narrowly to require that some compensation be paid or owed.”⁹⁰

An alternative argument is to attack the “voluntary” prong of the state’s voluntary quit law. While this argument, which relies on a broad interpretation of the term voluntary, is still relatively novel in the context of unemployment law, it has been argued successfully in several cases.⁹¹

In a case decided by the Michigan Supreme Court, *Clarke v. North Detroit General Hospital*,⁹² the term “voluntary” was defined to exclude nurses who lost their jobs for failing licensing examinations. The court relied on the reasoning of an earlier Michigan decision, *Lyons v. Employment Security Commission*, which held “that the word ‘voluntary’ as used in [Michigan law] must connote a decision based upon a choice between alternatives which ordinary men would find reasonable - not mere acquiescence

⁸⁹ *Littlefield v. Dept. of Employ. & Training*, 487 A.2d 507, 513 (1984) (holding that when making a determination in terms of what employer is assessed with the experience rating, an employing unit cannot become the last employing unit until the employee has earned enough wages (\$695) to make the employer responsible for benefits).

⁹⁰ *Id.*

⁹¹ *Clarke v. North Detroit General Hospital*, 470 N.W.2d 393 (Mich. 1991); *Lyons v. Employment Sec. Comm’n*, 108 N.W.2d 849 (Mich. 1961); *Laya v. Cobar Constr. Co.*, 300 N.W.2d 439 (Mich. App. 1980). See *Manias v. Director, Div. Of Employment Sec.*, 445 N.E.2d 1068 (Mass. 1983) (claimant who left work due to a reduction in hours and a conflict with child care demands had urgent and compelling reasons to do so, rendering her resignation involuntary); *Zukoski v. Director, Division of Employment Sec.*, 459 N.E.2d 467 (Mass. 1984) (same); *Gulf County School Board v. Washington*, 567 So.2d 420 (Fla. 1990) (teacher discharged for failing certification exam required to continue teaching did not leave work voluntarily). See also, *Fink v. Department of Health & Rehabilitative Services*, 649 So.2d 240 (Fla. Dist. Ct. App. June 16, 1994) (This voluntary prong argument has been unsuccessfully applied to a recent appeal of a Florida decision denying benefits to a claimant who was the victim of domestic violence).

⁹² *Clarke v. North Detroit General Hospital*, 470 N.W.2d 393 (Mich. 1991).

to a result imposed by physical and economic facts utterly beyond the individual's control.”⁹³

In another Michigan decision, *Laya v. Cebal Construction Co.*,⁹⁴ the appellate court adopted the standard of voluntariness articulated in *Lyons*. *Laya* involved a claimant who resigned rather than work 272 miles from his home. The court recognized that the claimant chose to leave his job to return to his family but still held as a matter of law that the claimant did not leave his job voluntarily. The court reasoned that the claimant “was not faced with a choice between alternatives that ordinary persons would consider reasonable. Such a choice is the same as no choice at all.”⁹⁵ Although these cases are quite different from the moonlighting scenarios, the same question of voluntariness is implicated. The economic and other individual circumstances motivating a claimant's decision to leave a job to try to secure a better one should be argued.

Finally, arguing that the claimant had good cause to leave the part-time or other contingent work to accept a better job may be effective. This is especially true when the new job is significantly better than the old one and when the old job offered clearly inadequate compensation or poor working conditions. Again, this argument will be more successful in states where non-work-connected factors are considered when defining what constitutes good cause.

In states requiring that good cause be work-related, it should be argued that factors forcing a worker to leave one job for a better job are within the employer's control and therefore are work-related.⁹⁶ Courts have found that workers who leave their jobs because of a unilateral change in hours or a reduction in pay have done so with good cause attributable to the employer. In *Newland v. Job Service North Dakota*,⁹⁷ the North Dakota Supreme Court found that a unilateral change in hours of work which created a

⁹³ *Lyons v. Employment Sec. Comm'n*, 108 N.W.2d 849, 857 (Mich. 1961).

⁹⁴ *Laya v. Cebal Construction Co.*, 300 N.W.2d 439 (Mich. App. 1980).

⁹⁵ *Id.*

⁹⁶ 76 AM. JUR 2d ' 105, p. 874 (supporting the argument that certain “substantial unilateral changes in employment” conditions can justify a finding of good cause related to work).

⁹⁷ *Newland v. Job Serv. N.D.*, 460 N.E.2d 118 (N.D. 1990). See also, *Palmieri v. Commonwealth Comp. Board of Review*, 544 A.2d 557 (Pa. Cmwth. Ct. 1988), *Covington v. Board of Review*, 737 P.2d 207 (Utah 1987).

conflict with care giving responsibilities provided good cause attributable to the employer and justified a voluntary quit. The claimant in this case customarily worked the day shift.

When the employer informed her that her schedule was being changed to an irregular night shift with uncertain starting and ending times, she left her job because she could not secure child care during the hours of her new shift. The supreme court reasoned that “a substantial shift in working hours, even if the overall number of hours was not changed, could constitute good cause attributable to her employer for leaving work.”⁹⁸

B. Can I Limit My Job Search to Part-time Work?

All state laws require that a claimant be continuously “able and available” for work to receive benefits.⁹⁹ Either by statute, regulation or case law, most states interpret the available for work requirement as meaning full-time work on all shifts, regardless of the past work history of the claimant.¹⁰⁰ This requirement creates another obstacle to eligibility for claimants who find that due to individual circumstances, they are only able to work part-time. For example, care-giving responsibilities may allow a single parent to work only a part-time schedule so that she can be at home when her children return from school.

This raises the issue of whether an individual can limit her job search, or her availability for work, to part-time jobs and still be eligible for benefits. The question has been resolved in several different ways, both under statutes and case law.¹⁰¹ We begin with an analysis of the best statutory and regulatory approaches to this problem, then proceed to explain successful case law theories.

⁹⁸ *Newland*, 460 N.E.2d at 123-24. See MCHUGH AND KOCK *infra* n. 11.

⁹⁹ See generally, 76 AM. JUR. 2D, Unemployment Compensation ' 116 for a general discussion of continuing eligibility requirements.

¹⁰⁰ After examining this issue with respect to part-time workers, the Advisory Council on Unemployment Compensation (ACUC) recommended that state work search rules requiring that all claimants seek full-time work, rather than permitting part-time work where necessary, should be eliminated. 1995 ACUC REPORT at 18.

¹⁰¹ See generally, 76 AM. JUR. 2D, Unemployment Compensation ' 117 (stressing that “a person who seeks only part-time employment is not thereby rendered unavailable for work as a matter of law.”) See also, *Industrial Commission v. Redmond*, 514 P.2d 623 (Colo. 1973); *Harper v. Unemployment Ins. Appeal Board*, 293 A.2d 813 (Del. Super. 1972); *Rosenbaum v. Johnson*, 377 N.E.2d 258 (Ill. 1978); *Scardina v. Commonwealth*, 537 A.2d 388 (Comwth. Ct. 1988).

If a claimant limits her work search to only part-time jobs, she will be found ineligible for benefits in 24 states due to restrictive interpretation of state law.¹⁰² In fact, only 10 states expressly allow claimants to seek only part-time jobs while remaining eligible for benefits. Even in these states, a claimant must satisfy other criteria such as having a part-time work history and establishing that part-time jobs exist in the area where they live.¹⁰³

The model approach to this issue, as codified by regulation in California, provides that a claimant who limits her work search to part-time jobs is considered to be available for work provided she proves that there is “good cause” and available part-time jobs.¹⁰⁴ Significantly, the California statute is silent on the part-time availability issue, which

¹⁰² NELP’s research reveals that 24 states require availability for full-time employment. To arrive at this figure, we have included all those states that by statute, regulation, administrative case law or judicial case law render a claimant ineligible if her work search is limited to part-time work. Seven states have statutes explicitly defining “able and available” as meaning full-time work. Ga. Empl. Sec. law ' 34-8-195 (1992) and 34-8-24 (1994); Ind. Empl. & Training Act ' 22-4-14-3(a)(3) (1987); Me. Rev. Stat. ' 1192(3); Mich. Empl. Sec. Act ' 421.28(1)(a) (1994); N.H. Rev. Stat. ' 282-A:31.I(d)(1994); N. M. Unempl. Comp. L. ' 51-1-5.A(3)(1993); and Okla. Stat. ' 2-203 (1993). Pennsylvania and Vermont, two states with law requiring availability for full-time work, are excluded from this list of seven states, because case law holds that part-time availability restrictions do not render a claimant unavailable. Nine states have rules or regulations requiring a search for full-time employment. Ala. Dept. Of Ind. Rel R. 480-4-3-.15(1982); Conn. Unempl. Comp. Regs. ' 31-235-6(a)(1986); Idaho Empl. Sec. L. R. 09.30.468 &09.30.062; Iowa Empl. Sec. Comm’n R. 4.22(1)(b); Minn. R. 3305.0501(1988); Neb. DOL Regs. Ch. 4, ' .004; Or. Admin. R. 3-036(3)(a); Utah Admin. R. 562-4c-3(1); 3(1)(a); 3(3)(a)(1993); and Wis. Admin. Code ' 128.01(2)(a)(1984). The remaining eight states have administrative case law or judicial case law requiring availability for full-time work. *DOL v. Boucher*, 581 P.2d 660 (Alaska 1978); Arizona App. Trib. Dec. 8860 (10/25/60); *Duvall v. Dir.*, 1D Unempl. Ins. Rptr. (CCH) &9343 (Ark. App. 1981); *Robinson v. ESB*, 97 A.2d 300 (1953); Miss. Bd. Of Rev. No. 8-BR-40 (5/21/40); S.D. App. Ref. No. 5587 (7/10/64), *aff’d* by Comm. No. 5587 (7/27/64); *TEC v. Hays*, 360 S.W.2d 525 (1962); *UCC v. Tomko, et al.*, 65 S.E.2d 524 (1951). See also, 1995 ACUC REPORT at 103-104 (comparing results of NELP research with information provided by the U.S. Department of Labor and results of a survey conducted by the Interstate Conference of Employment Security Agencies).

¹⁰³ Colorado, Massachusetts, and New Jersey require that the claimant have a history of part-time work in order to satisfy the availability provision. See, 7 Colo. Code Regs. " 2.2.2 & 2.2.3 (1980), see also, *Bartholomay v. Ind. Comm.*, 642 P.2d 50 (Colo. App. 1982); Mass. DET LOB 477 (3/7/94); N.J. Rev. Stat. ' 43:221-20.1(1952). Montana and Washington (the Washington statute requires a claimant to accept any suitable work offered) allow a claimant to limit her availability to less than a full week of work. See, Mont. Admin. R. 24.11.452(2)(1990); Wash R. Code ' 50.20.010(3)(1981). California, Delaware, District of Columbia, Illinois, and Ohio do not limit coverage to workers with a history of part-time work. See infra n. 96, see also, Del. Code Ann., tit. 19, ' 3314(3)(1994); D.C. Unempl. Comp. Act ' 46-110(3) & (4)(A)(1994); Ill. Unempl. Ins. Act ' 500(C)(1990); Ohio Rev. Code ' 4141.29(A)(4)(a)(1994).

¹⁰⁴ Cal. Code Regs. tit. 22 ' 1253 (c)-1(b) (1988). The availability of part-time jobs is often referred to as “labor market demand” or “substantial field of employment”. “Substantial field of employment” is defined by rule as requiring the “presence of potential job openings with more than a minimal number of employers who would use the services offered by the claimant” and the “type of services performed by the claimant are generally performed in the area in which he or she offers them.” Cal. Code Regs. tit. 22, ' 1253(c)-1(c)(3) (1988).

makes the implementation of this approach viable in many states,¹⁰⁵ and it does not require the claimant to have a history of part-time work, which makes it the preferred approach. If a claimant has always worked at full-time jobs but for some reason can later only accept part-time work, she can limit her work-search to part-time jobs and still be considered available for work. Other states, including Massachusetts,¹⁰⁶ New Jersey,¹⁰⁷ Colorado¹⁰⁸ and Illinois,¹⁰⁹ address this issue directly by statute and/or regulation, thus

¹⁰⁵ In fact, approaching the issue through administrative means may be easier than the legislative alternative. In California, once a claimant establishes that she has good cause for restricting her availability, the burden is on the state to establish that no substantial field of employment remains open to the claimant. Cal. Code Reg. tit. 22, ' 1253(c)-1(d) (1988). To illustrate this rule, a bookkeeper who, upon her physician's advice, restricted her work to five hours per day was not disqualified for benefits because her restriction was imposed for a "compelling reason" and working less than eight hours per day was not uncommon in her occupation. App. Bd. Precedent Ben. Dec. No. P-B-172 (Jan. 6, 1976), 2 Unempl. Ins. Rptr. (CCH) & 8421. Similarly, a part-time secretary who refused work which conflicted with her schedule as a full-time law student was found to be eligible for benefits. *Glick v. Unempl. Ins. App. Bd.*, 591 P.2d 24 (Cal. 1979). The California Supreme Court held that limiting one's availability in order to attend school constituted "good cause." *Id.* at 29. The *Glick* court also found that despite the fact that the claimant had previously worked during daytime and weekday hours, the claimant remained available to a "substantial field" of employers since placing such an emphasis on her previous occupation would "tie" the claimant to her prior administrative occupation. *Id.* at 31.

¹⁰⁶ Mass. Gen. L., Ch 151A, ' 24(b)(1993); Mass. DET LOB 477 (3/7/94). As the result of a recent change in the interpretation of Massachusetts law, which is silent on whether availability must be for full-time work, by the state's Department of Employment and Training, claimants who limit their availability to part-time work are now required to prove that they have a history of part-time work to be considered able and available for work when availability is restricted to part-time employment. *Id.* Under the new interpretation, a claimant must have a history of part-time work based on good cause, plus good cause to continue part-time work, and be available for part-time work to the same extent as most recent work. *Id.* Prior to the implementation of this policy, claimants in Massachusetts, like those in California, were found to have satisfied availability requirements provided the claimant had good cause for limiting her availability and the limitation did not remove her from the labor market. *See Conlon v. Director of Div. of Emp. Sec.*, 413 N.E.2d 717 (1980) (holding that claimant met the availability requirements notwithstanding her unwillingness to work all shifts other than the day shift because of personal domestic responsibilities).

¹⁰⁷ The New Jersey statute finds a claimant eligible provided: 1) a substantial portion of her base period earnings are derived from part-time work; 2) there is good cause for limiting the work search to part-time work; and 3) there is a sufficient amount of suitable work in the claimant's locality to justify such limitation. In addition, the statute provides that the claimant still must be available for enough hours so that she will earn remuneration equivalent to her weekly benefit amount. N.J. Rev. Stat. ' 43:221-20.1 (1952). *See also Edmundson v. DES*, 176 A.2d 520 (N.J. Super. Ct. App. Div. 1961)(claimant limiting availability to part-time work eligible after satisfying R.S. 43:21-20.1); *Levine v. Universal Furniture & Bd. of Rev.*, 7 Unempl. Ins. Rptr. & 1960.70(N.J. Super. Ct. 1977)(eligible if base earnings are equivalent to full-time worker's).

¹⁰⁸ In Colorado, in addition to a requirement that 60 percent of wage credits be earned from part-time employment, any unemployed part-time worker shall be deemed available for work if she is available for and actively seeking her customary part-time work or other part-time work for which she is qualified, and if such part-time work exists in her locality. 7 Colo. Code Regs. " 2.2.2 & 2.2.3 (1980). The regulation, however, has been interpreted to render an individual "unavailable" when restricting availability to part-time employment on advice from her physician. *Medina v. Ind. Comm.*, 554 P.2d 1360 (Colo. Ct. App. 1976) (claimant ineligible after restricting hours to part-time upon physicians advice); *but see, Bartholomay v. Ind. Comm.*, 642 P.2d 50 (Colo. Ct. App. 1982) (finding claimant who restricted availability to part-time work eligible under 7 Colo. Code Regs. " 2.2.2 & 2.2.3 (1980)).

offering other examples of how state programs can accommodate claimants who must restrict the hours they are available for work. These provisions, however, require that claimants have a history of part-time work. They offer no relief to individuals who are forced from their full-time jobs because of individual circumstances, for example, and for the same reasons must limit their work search to part-time jobs.

Effective case law theories in this scenario include: the good cause theory, the “labor market attachment” theory, public policy reasoning, and a theory focusing on the definition of employment.

The “labor market attachment” theory is based on the premise that a claimant should not be considered unavailable for work if there are part-time jobs available during those hours she is available to work. Unfortunately, the claimant’s part-time work history is also often considered under this analysis and the other case law theories. Even if a claimant can prove that part-time jobs exist in her community, a court may find her ineligible if she has not worked part-time jobs in the past.

The public policy reasoning centers on the notion that unemployment laws should be liberally construed in favor of claimants in an attempt to lessen the burden of unemployment.¹¹⁰ Given this underlying principle, courts in jurisdictions where the law is silent on this issue have refused to read into the law a requirement that claimants be available for full-time work. Claimants who can establish that good cause exists to limit their availability to part-time work are generally found eligible for benefits in these jurisdictions. Finally, another argument can be based on the definition of the term employment. Most states do not define employment to mean exclusively full-time employment, and therefore part-time employment should be considered satisfactory.

¹⁰⁹ ILL. UNEMP. INS. ACT ' 500(c). In Illinois, the law requires only that a claimant be “able to work and available for work,” but an administrative rule provides that a claimant will be found available for work if he can prove, by a preponderance of evidence, that: (a) he restricts his availability to part-time work due to (1) circumstances which are beyond his own control; or (2) the kind of work suitable to his skill, training or experience is available only on a part-time basis, and he is not reasonably qualified for available full-time work; and, (b) he is seeking work in an area where a labor market for the part-time work applicable to him and suitable to his skill, training or experience normally exists; and, c) he has a reasonable possibility of securing that part-time work suitable to his skill, training or experience. RULES OF UNEMPL. INS. ACT ' 2865.125 (1990). Significantly, this regulation has been interpreted to disqualify one who restricts her availability to part-time work based on a “personal preference.” *See, Rosenbaum v. Dir.*, 377 N.E.2d 258 (Ill. 1978).

¹¹⁰ *See* 76 AM. JUR. 2D ' 14, p. 760.

Ironically, in Pennsylvania and Vermont, where the law disqualifies a claimant who refuses to accept an offer of a suitable full-time job in order to pursue part-time employment,¹¹¹ there is a well developed line of cases supporting the proposition that a claimant should not be disqualified because of limiting her availability to part-time work. These decisions rely primarily on the labor market attachment theory.

The Commonwealth Court of Pennsylvania, in *Hospital Services Assoc. of Northeastern Pennsylvania*,¹¹² ruled that a claimant who limits her availability to part-time night work due to child care responsibilities should not be disqualified for benefits. According to the court, “it is well settled that a claimant may limit his availability and still remain eligible for benefits, provided that his limitation does not effectively remove him from the labor market.”¹¹³

The Vermont Supreme Court, in *Stryker v. DES*,¹¹⁴ also held that a claimant is available for work provided the restrictions do not substantially remove her from the labor market. In *Stryker*, the claimant, a sixty year old woman whose work history included only part-time employment, was found available for work even though she was willing to accept only part-time employment.¹¹⁵ Relying on the claimant’s history of part-time work and the existence of a substantial market of part-time employment in her geographical area, the Vermont Supreme Court held that “nothing in the unemployment compensation law . . .

¹¹¹ Penn. Stat. § 402(a.1) (1983); Rules of Vt. ESB, R. 13(H).

¹¹² *Hospital Service Assoc. of Northeastern Pennsylvania v. Bd. of Rev.*, 476 A.2d 516 (Pa. Cmwlth. 1984).

¹¹³ *Id.* This labor market analysis was applied again in 1987, when the Commonwealth Court addressed the issue in *Wilder & Miller v. Unemployment. Comp. Bd.*, 525 A.2d 852 (Pa. Cmwlth. 1987). Shortly after inquiring if her full-time hours could be reduced to part-time hours so she could spend more time with her husband, who was retired, the claimant in this case lost her job. She filed for UC benefits while she pursued part-time employment. She was denied benefits at the hearing level, but the Commonwealth Court reversed, holding that the “[c]laimant’s limitation to part-time employment does not per se render her unavailable.” The court reasoned that provided some part-time jobs exist in the claimant’s local labor market, she cannot be considered unavailable for work.

¹¹⁴ *Stryker v. DES*, 11 Unempl. Ins. Rpt. (CCH) & 8200 (Vt. 1976).

¹¹⁵ 11 Unempl. Ins. Rptr. (CCH) & 8200 (Vt. 1976). Just over one year later the court applied the reasoning that unless a claimant’s restrictions on employment “substantially remove herself from the labor market” she should be found eligible for benefits. See *Carson v. DES*, 11 Unempl. Ins. Rptr. (CCH) & 8209 (Vt. 1977) (finding claimant available provided restrictions do not substantially remove her from the labor market); *contra* Ref. Dec., App. No. 3186, (5/26/60) (restricting employability to part-time work rendered claimant unavailable).

. justifies excluding this claimant from benefits as a matter of law, based on her attachment to a part-time labor market.”¹¹⁶

More recently, in *Skudlarek v. Department of Employment & Training*,¹¹⁷ the Vermont Supreme Court reversed a decision denying benefits to a part-time nurse who refused an offer of full-time employment after her employer eliminated all part-time positions. The court noted that “permanent part-time workers have become common in our economy” and that if a part-time employee is attached to a “real and substantial labor market, then that part-time status is protected.”¹¹⁸

At least three jurisdictions, Delaware, the District of Columbia, and Ohio, that have no statutory or regulatory authority on the issue, have used a combination of theories already discussed to arrive at case law holding that a claimant’s limitation to part-time employment does not automatically make her unavailable for work.

The Delaware case, *Harper v. Appeals Board*,¹¹⁹ involved a woman who, because of a medical problem and upon the advice of her physician, worked only two days a week. After working this schedule for 24 years, she lost her job through no fault of her own. She was denied benefits when the referee determined she was “unavailable” because she limited her job search to part-time work.

Influenced by public policy supporting the proposition that the unemployment law should be liberally construed, the court reversed, holding that the claimant should not be denied benefits because the statute only requires an individual to be available for employment, not full-time employment.¹²⁰ The court concluded that if a claimant has good cause for seeking part-time employment and is part of a labor market, she has satisfied the requirement.

¹¹⁶ *Id.*

¹¹⁷ *Skudlarek v. Department of Employment & Training*, 627 A.2d 340 (Vt. 1993).

¹¹⁸ *Id.*

¹¹⁹ *Harper v. App. Board*, 293 A.2d 813 (Del. Super Ct. 1972).

¹²⁰ *Id.*

Applying similar reasoning, the District of Columbia Court of Appeals, in *Hawkins v. District Unemployment Compensation Board*,¹²¹ held that a claimant will not be deemed unavailable if she restricts her job search to part-time employment. The court stated that if “the legislature, in enacting the unemployment compensation law, intended that only those who are ready, willing, and able to accept full-time work be eligible for benefits, it would have so stated.”¹²² The proper question, according to the court, is whether the claimant is genuinely attached to the labor market and whether she is making adequate contacts to obtain work. The court did emphasize, however, that the presumption of availability could be negated if the limitations imposed by the claimant were so extreme “as to rebut the existence of his availability on the labor market.”¹²³

An argument used successfully in Ohio focuses on the definition of “employment.”¹²⁴ Because the law defines employment as “any service performed for wages,” making no distinction between part-time and full-time work, the availability requirements of the law include availability for part-time work provided the claimant has a history of part-time work.¹²⁵

¹²¹ *Hawkins v. District Unemployment Compensation Board*, 3 Unempl. Ins. Rptr. & 8218 (D.C. App. 1978).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Ruggles v. Bd. of Rev.*, 8 Unempl. Ins. Rptr. (CCH) & 1950.91 (Ohio Ct. of Com. Pleas 1978).

¹²⁵ *Id.*

II. The Temporary Help Industry

The following section examines the barriers to the unemployment compensation system faced by temporary workers; a unique class of contingent workers whose numbers, combined with leased workers,¹²⁶ have increased at a rate of 300 percent between 1982 and 1993.¹²⁷ Temporary employment offers sporadic jobs of limited duration in a wide range of occupations. These positions, whether full-time or part-time, are generally characterized by low wages, little job security and no benefits. Temporary workers are often assigned to complete dangerous tasks yet receive little or no training. Given these poor working conditions, it is distressing that the temporary workforce is the fastest growing segment of the contingent workforce.¹²⁸ The employers and temporary agencies claim that workers are anxious to take on temporary positions, focusing on the misconception that workers favor the flexible hours. The reality of the situation is that many of these workers would rather hold permanent jobs.

Hiring temporary workers has become the weapon of choice for employers striving to cut costs in a marketplace increasingly characterized by restructuring strategies aimed at increasing the bottom line at the expense of workers. Hiring temporary workers allows employers to pay lower wages than for those associated with permanent workers in similar occupations,¹²⁹ and to avoid paying employment taxes and providing fringe benefits, such as sick days, health benefits¹³⁰ or vacation time. The alleged cost savings in

¹²⁶ Leased employment arrangements are discussed *infra* at p. 64.

¹²⁷ U.S. Department of Labor, Bureau of Labor Statistics, *Employment and Earnings* (Jan. 1994). Actual gains in employment increased by only 23 percent during that time. *Id.* See *infra* p. 64 for a complete discussion of leased employment arrangements.

¹²⁸ Although the temporary help supply (THS) industry has been in existence since the 1920s, statistics identify a rapid growth trend over the past twenty years. For example, during the course of the 1980s, the THS industry grew by 158 percent, emerging from a “stopgap service into America’s favorite source of substitute and replacement labor at an average daily rate of over 1 million people each day.” The THS industry payroll swelled from \$547 million in 1970 to \$8.5 billion in 1987, and continued significant growth is expected throughout the 1990s. WORKERS AT RISK at 18. See also, Christopher Cook, Temps--The Forgotten Workers, *The Nation* 124 (January 31, 1994).

¹²⁹ U.S. Department of Labor, Bureau of Labor Statistics, EMPLOYMENT & EARNINGS (March 1993) (documenting that, on average, temporary workers earn 20 percent less than their permanent counterparts). See also, WORKERS AT RISK at 5.

¹³⁰ Less than 25 percent of temporary workers employed through temporary agencies are offered health benefits. Virginia L. DuRivage, NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE, Economic Policy Institute (Virginia L. DuRivage ed. 1992) at 95.

employment related taxes is the main reason for the dramatic increase in the use of temporary agencies to meet staffing needs, and is the focal point of marketing strategies developed by the agencies to promote their services.¹³¹ The National Association of Temporary Services (NATS), who represents temporary agencies' interests, aggressively lobbies for the passage of legislation that favors temporary agencies.¹³²

Applicants seeking work arrive at a temporary agency where they are screened, allegedly to identify their job skills and evaluate their work history, in order to match the client-firm's needs with the worker's abilities.¹³³ If the applicant is found to be satisfactory, she is placed into a pool of eligible candidates.¹³⁴ Then, in exchange for a fee paid by the client-firm, the agency is expected to pay the worker's wages and associated payroll taxes, including unemployment taxes. The temporary worker is expected to show up for her assigned job, get her weekly time card filled out and signed by the client-firm, and report back to the temporary agency when the assignment is completed.

What follows is an analysis of the various issues that arise when workers attempt to access the unemployment system after separating from temporary work. Although challenges to these workers' rights to unemployment benefits have been dealt with mostly by case law, we have also included descriptions of state laws which affect the workers' ability to qualify for benefits.

A. Who's the Employer?

¹³¹ See Generally, Edward A. Lenz, *Co-Employment: Employer Liability Issues in Staffing Services Arrangements*, National Association of Temporary Services, Second Edition [hereinafter *Co-Employment*].

¹³² *Id.*

¹³³ Some employers bypass the temporary agency and hire temporary staff directly. In 1992, the U.S. Department of Labor estimated that approximately half of the 2.5 million temporary employees in the U.S. were hired directly by employers. DUNLOP REPORT, *supra* n. 10, at 21.

¹³⁴ Many temporary agencies require applicants to fill out lengthy medical history questionnaires merely to qualify for the "applicant pool"; a practice likely to violate the Americans with Disabilities Act. See *Discriminatory Screening by Temporary Agencies: What Are the Limits?*, NELP UPDATE (National Employment Law Project, New York, NY), Vol. III, Number 3, Winter 1995 at 2.

The question of “Who’s the employer?” in the context of temporary work is important for two reasons. First, the party designated as the employer is the party responsible for paying the temporary worker’s unemployment taxes. Since both the temporary agency and the client firm want to avoid the tax liability, the temporary agency claims that the client firm is the employer, and vice versa. All too often, a worker who applies for benefits after separating from a temporary job will find that the processing of her claim is delayed while the state attempts to resolve this issue. Second, if an employer is not identified, the worker stands to be misclassified as an independent contractor.¹³⁵

Some states have resolved this issue by passing laws that identify temporary agencies as the “employer,” and the party responsible for tax payments. These states have generally adopted one of two different approaches.¹³⁶ Some states simply deem the temporary agency the employer,¹³⁷ which allows temporary agencies to provide the client-firm with a workforce that is virtually guaranteed not to result in unemployment tax liability.¹³⁸ This is the preferred model because it avoids an evidentiary battle to establish coverage. Other state laws dictate that employer status can be established only if the agency performs a specific set of functions.¹³⁹

¹³⁵ See *infra* p. 57 for a more complete discussion of independent contractor misclassification.

¹³⁶ Other approaches adopted in a few states include: establishing that temporary agencies are co-employers with client firms, Mo. Rev. Stat. ' 288.032; Neb. Rev. Stat. ' 48-648; and establishing joint liability between agency and client-firm if the agency is not certified with the state, R.I. Gen. Laws ' 44-30-71.

¹³⁷ Okla. Stat. ' 2-404A(C)(1995) (stating that “[f]or the purposes of the Employment Security Law of 1980, the temporary help firm is deemed the employer of the temporary employee”); Ariz. Stat. ' 23-614; Calif. Stat. ' 606.5; Utah Stat. ' 35-4-22.1; Tex. Lab. Code Ann. ' 5221a-10; Neb. Stat. & 4012.

¹³⁸ In fact, NATS expressed significant concern over a Washington state decision holding that the staffing agency was a “payroll agent.” Although, *Rho Company v. Department of Revenue*, 782 P.2d 986 (Wash. 1989), was not a unemployment compensation case, the decision, according to NATS, could result in findings of liability for tax purposes on agencies’ clients alone. In its report, NATS provides a list of actions a staffing or temporary help agency must take to maintain “at least co-employer status.” *Id.*

¹³⁹ Cal. Unemp. Ins. Code ' 606.5(a); Ariz. Rev. Stat. Ann. ' 23-614.E & F; Utah Code Ann. ' 35-4-202.4(a) & (b). For example, California law defines the temporary agency as the employer provided it performs all of the following functions: 1) negotiates with clients regarding time, place, type of work and working conditions; 2) determines assignments and reassignments of workers; 3) retains the authority to assign or reassign workers to other clients when a worker is determined unacceptable; 4) assigns or reassigns the workers to perform services for a clients; 5) sets the rate of pay; 6) pays the worker from its own account; and 7) retains the right to hire and fire workers. Cal. Unemp. Ins. Code ' 606.5(a) (1986).

At first glance, legislation that identifies the agency as the employer and/or the party liable for tax contributions appears to create some sense of order surrounding the issue of employer tax liability, thus simplifying one barrier to eligibility. Once the client-firm is free from tax liability, however, many temporary agencies contest workers' unemployment claims on the grounds that the workers are not "employees" of the agency but independent contractors.¹⁴⁰ In states that have not resolved this issue in their laws, case decisions relying on "independent contractor" analysis and "agency" theories have been used to determine who's the employer.

The independent contractor analysis relies on factual findings regarding the temporary agency, the client-firm and the worker to determine who meets the statutory definition of "employer" and "employee" for taxation purposes.¹⁴¹ The agency theory rests on the principle that the client-firm's ability to exercise control over the workers is derived from its relationship with the temporary agency, and, therefore, the temporary worker is an employee of the agency. The very nature of temporary work, shifting workers from one assignment to the next, sometimes by different agencies, feeds the controversy of who is liable for tax purposes.¹⁴²

In *R.A.F.S. v. Department of Labor and Employment Security*,¹⁴³ a Florida court applied the independent contractor analysis and concluded that the workers were employees of the temporary agency for purposes of unemployment tax liability. In this case, the temporary agency furnished equipment, supplies and workers to a nuclear power plant. The

¹⁴⁰ This scenario also comes into play in states that have not legislatively defined the agency as the employer.

¹⁴¹ Most state unemployment laws do not provide definitions of "employee" or "independent contractor." Instead, the determination of whether an independent contractor versus an employee/employer relationship exists is generally made by the application of one of two different tests: the Common Law Test or the ABC Test. See *infra* p. 58 for a more complete discussion of employee classification.

¹⁴² *Breaux and Digle, Inc. v. United States*, 900 F.2d 49 (5th Cir. 1990) (holding that crab meat packers were not independent contractors); *California Employment Comm'n v. L.A. Downtown Shopping News Corp.*, 150 P.2d 186 (Cal. 1944) (holding that newspaper carriers were newspaper employees); *Tripp & Assoc. v. Industrial Claim Appeals Office of Colorado*, 739 P.2d 245 (Co. App. 1987); *Allison, Inc. v. Board of Review of Industrial Comm'n, Dept. of Empl. Sec.*, 749 P.2d 1280 (Utah Ct. App. 1988) (holding that truck drivers who transported hay in company's trucks were employees), *cert. denied*, 765 P.2d 1278 (Utah 1988); but see, *J.R. Simplot Co. v. State of Idaho, Dept. of Employment*, 718 P.2d 1200 (Idaho 1986) (holding that potato loaders were not employees because the company had no control over the details of the loading operation).

¹⁴³ *R.A.F.S. v. Department of Labor and Employment Security*, 466 So. 2d 373 (Fla. Dist. Ct. App. 1985). The Florida law does not designate the agency as the employer for purposes of unemployment tax liability.

temporary agency's argument that the workers were independent contractors was rejected after the court's examination of the facts showed: the agency, not the power company or the workers themselves, controlled the workers' hours of employment; the workers were not engaged in a "distinct occupation, separate and apart" from the agency's business; and the technicians placed by the agency were totally supervised.¹⁴⁴ Significantly, despite the existence of a written agreement signed by the workers indicating the creation of an independent contractual relationship, the court held that "it is not the parties intent but the dealings between the parties that determine an employer/employee relationship."¹⁴⁵

The New Hampshire Supreme Court rejected a similar claim made by a temporary agency in *In re Work-a-Day of Nashua*.¹⁴⁶ In *Nashua*, the temporary agency placed unskilled temporary workers in "day labor" positions. The temporary agency selected the workers, provided them with transportation to job sites, and paid them at the end of each day, as is common in most day labor arrangements. The temporary agency, however, had not been making tax contributions for the workers.

The court rejected the agency's argument that the workers were independent contractors because they performed unskilled labor, a "trade independent from the agency's essentially clerical enterprise" and that the "workers employment would survive any termination of the relationship."¹⁴⁷ The court reasoned that the relationship between the tasks performed by the workers placed by Nashua and Nashua's own employees is irrelevant. In addition, Nashua failed to prove that "its workers were prepared to do similar work for other employers" if their relationship with Nashua was terminated.¹⁴⁸

In *In re Gentile Nursing Services*,¹⁴⁹ a New York court held that licensed nurses placed by a temporary agency are not independent contractors even though the nurses provided their

¹⁴⁴ *Id.* at 374.

¹⁴⁵ *Id.* at 375.

¹⁴⁶ *In re Work-a-Day of Nashua*, 564 A.2d 445 (N.H. 1989). New Hampshire law does not dictate that the temporary agency is the employer of the temporary employee.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *In re Gentile Nursing Services, P.C.*, 65 N.Y.S. 2d 622 (N.Y. 1985).

own liability insurance, transportation, equipment and supplies, and worked under the direction and control of the patient or the patient's physician.¹⁵⁰ The court reinstated an earlier decision concluding that the temporary agency is the employer based on a record showing facts of an employer-employee relationship including sufficient supervision and control.¹⁵¹ In reaching its determination the court noted several key actions taken by the agency, including: establishing the nurses' hourly wage and paying them based on weekly statements submitted to the company; prohibiting the clients from paying the nurses directly; and contractually forbidding the nurses "from working independently for its clients for 90 days following the termination of the nurses affiliation."¹⁵²

The agency theory has been adopted by at least one court to arrive at the conclusion that the temporary agency is the employer of the workers it placed in temporary jobs. In *Kilgore Group, Inc. v. ESC*,¹⁵³ the South Carolina Supreme Court reasoned that although the client-firm controlled the day-to-day activities of workers it could not be considered the employer because it had no contract with the workers.¹⁵⁴ The client-firm's ability to control the workers was derived exclusively from the contract between the temporary agency and the client-firm, and the contract between the agency and the workers. The temporary agency then delegated its authority to control the workers to the client-firm. This agency theory, however, has been rejected by other courts on the grounds that an agency relationship cannot be found where there is no indication that the client-firm has consented to act on behalf of the agency and be subject to its control.¹⁵⁵

¹⁵⁰ *In re Gentile Nursing Services, P.C.*, 65 N.Y.S. 2d 622 (N.Y. 1985). See also, *In re Kokoni*, 540 N.Y.S.2d 546 (N.Y. App. Div. 1989); *In re Whyte*, 517 N.Y.S.2d 111 (N.Y. App. Div. 1987); New York law does not identify who is liable for unemployment tax payments in temporary employment situations.

¹⁵¹ *In re Gentile Nursing Services, P.C.*, 65 N.Y.S.2d 622 (N.Y. 1985).

¹⁵² *Id.*

¹⁵³ *Kilgore Group, Inc. v. ESC*, 437 S.E.2d 48 (S.C. 1993)

¹⁵⁴ *Kilgore Group, Inc. v. ESC*, 437 S.E.2d 48 (S.C. 1993). Accord, *Tripp & Assoc. v. Industrial Claims Appeals Office*, 739 P. 2d 245 (Colo. Ct. App. 1987); *Matter of Holbrook Speech Services, Inc.*, 498 N.Y.S.2d 185 (1986). In South Carolina the common law rules are used to determine employer-employee status.

¹⁵⁵ *Work-a-Day of Fitchburg, Inc. v. Comm'r. of the DET*, 591 N.E.2d 182 (Mass. 1992) (rejecting the agency theory because no indication that client firm consented to act on behalf of the agency). In *Work-a-Day of Fitchburg*, the court reasoned that the client-firm is acting for itself and is not subject to the agency's control. The court went on to hold that both the agency and the client-firm exercise some control over the workers and because the workers are not free from control they cannot be considered independent contractors. The case was remanded to determine who is the employer by "determin[ing] which elements of direction and control, those held by" the agency or the client-firm are more important in light of the employment and training law.

B. Disqualification Issues

1. Voluntary Quit

As discussed previously, most state unemployment laws include a “voluntary quit” disqualification provision that effectively denies benefits to a worker who voluntarily quits her job without “good cause.”¹⁵⁶ A temporary worker may find herself locked into a series of temporary jobs, fearing that if she quits the job to focus her efforts on securing permanent work she will be denied benefits for having voluntarily quit the temporary job.¹⁵⁷ This issue is of special importance to temporary workers for several reasons.¹⁵⁸

Upon separation from employment after the completion of a temporary assignment, claimants will be found eligible for benefits in only five states and ineligible for benefits in 20 states based on a voluntary quit analysis.¹⁵⁹ Again, resolution of this issue often depends on whether state law requires good cause to be work-connected. The voluntary quit scenario raises three disqualification issues unique to temporary workers. An analysis of each of these issues, including advocacy tips, follows.

a. Separation from Job with Predetermined Expiration Date

The first scenario involves a worker who accepts a temporary job with a predetermined expiration date. For example, reasoning that temporary work is better than being unemployed, an individual accepts a position that she knows will last only six months. At the end of the six month job she again finds herself unemployed and files a claim for benefits. She is then denied benefits based on a finding that she voluntarily quit her job.

¹⁵⁶ *Supra* p. 20.

¹⁵⁷ *See, Winterle v. Commonwealth of Pennsylvania, UC Bd. of Review*, 442 A.2d 1211, 1212 (Comwth. Ct. 1982) (holding that refusing a new temporary assignment to look for permanent employment disqualified claimant from receiving benefits).

¹⁵⁸ It is important to note that suitability of employment issues usually arise in these types of cases. Although most courts try to avoid “mixing” the two issues, others refer to suitability as a factor to be weighed in determining whether the employee has a duty to report to request new assignments, a duty to accept new assignments, or has good cause to separate from temporary employment.

¹⁵⁹ 1995 ACUC REPORT at 114. In 28 states, eligibility “often varies.” *Id.*

At issue in this case is whether by accepting a job with a predetermined expiration date a worker has voluntarily agreed to be unemployed at the end of the term. The question has been answered in several different ways, dictated either by statutes or case law.¹⁶⁰

At least two states, Minnesota and Delaware, have laws that, in effect, provide that a worker will not be disqualified under the state's voluntary quit law if she becomes unemployed solely as the result of completing a period of employment lasting for a fixed duration.¹⁶¹ These laws represent the model approach. Absent such an exception, upon the expiration of a job with a fixed term, temporary workers are often denied benefits based on voluntary quit grounds.¹⁶² Finding themselves unemployed and ineligible for benefits, these workers often have no alternative but to return to the temporary agency.

Courts which hold that completing a job with a predetermined expiration date does not constitute a voluntary quit apply the "voluntary prong" analysis.¹⁶³ Focusing on the involuntary nature of the separation, the court reasons that a worker who accepts the temporary job with a predetermined expiration date does not leave that job voluntarily at the end of the agreed upon term, because she had no other option.¹⁶⁴ Where there is an

¹⁶⁰ See generally, *Unemployment Compensation: Termination of Employment, Known to Be For a Specific, Limited Duration, Upon Expiration of Period, As Voluntary*. 30 A.L.R.4th 1201 (1984).

¹⁶¹ Minn. Stat. ' 268.09, subd. 1(a) (1980); 68 Del. Laws ch. 421 (1992)(stating that "[a]n individual who becomes unemployed solely as the result of completing a period of employment that was seasonal, durational, temporary or casual duration will not be considered as a matter of law to have left such work voluntarily without good cause attributable to such work solely on the basis of the duration of the employment."); See also, *Kahn v. CDI Temporary Services, Inc.*, No. 91A-12-9, 1994 WL 150868 (Del. Super. Ct. Mar. 21, 1994).

¹⁶² An administrative rule in Georgia has a harsh impact on temporary workers who find themselves unemployed at the end of a job with a predetermined expiration date. The rule states that the "fact that the temporary assignment ends does not necessarily mean the individual is out of work due to lack of work." GA. COMP. R. & REGS. R. 300-2-4.07(1). As a practical matter, this means that even though the temporary assignment has ended and the agency does not offer another assignment, the individual may not be considered unemployed and therefore is unable to qualify for benefits.

¹⁶³ *Supra* p. 22. In addition to considering the involuntary nature of the separation, the courts have also considered the remedial nature of the law and emphasized that it is "entitled to a liberal construction and interpretation." *Adams AIA Architect v. DES*, 430 A.2d at 446, 447 (Vt. 1981).

¹⁶⁴ See *Lincoln v. DET and Shelburne Veterinary Hospital*, 592 A.2d 885 (Vt. 1991); *Adams AIA Architect v. DES*, 430 A.2d 446 (Vt. 1981). See also *Kentucky Unemp. Ins. Comm'n v. American Nat'l Bank and Trust*, 367 S.W.2d 260, 262 (Ky. Ct. App.1963) (holding that "the voluntary acceptance of such work does not constitute a voluntary leaving at the end of the agreed time); *Losordo v. Department of Economic Security*, 449 A.2d 941 (Vt. 1982); *Intermountain Jewish News*, 524 A.2d 132, 133 (Colo. Ct. App. 1977) (fact that advertising salesman for publication agreed that his employment would end after publication of specific issue is not a basis for denying benefits under voluntary leaving provision); *State Dept. of Industrial Relations v. Montgomery Baptist Hospital*,

agreement for temporary employment, and no evidence suggesting it was the employee who asked for the limited term, it is presumed that the employer dictated the terms of the agreement.¹⁶⁵ The claimant became unemployed because of a lack of work, not because she voluntarily left her position.¹⁶⁶

In *Lincoln v. DET and Shelburne Veterinary Hospital*,¹⁶⁷ the Vermont Supreme Court went to great lengths to communicate that if the temporary nature of the job is created at the request of the employee, a disqualification may apply. The court, however, clearly delineated that the disqualification analysis must be a “practical one” looking beyond the inferences about voluntariness that arise from the “mere presence of an employment agreement.”¹⁶⁸

Similarly, in *Cervantes v. Administrator of Unemployment Compensation*,¹⁶⁹ the Connecticut Supreme Court emphasized that the voluntariness of each case must be examined before determining eligibility. The *Cervantes* court rejected the employer’s argument that the claimant “voluntarily contracted to be unemployed” upon expiration of the seven month employment contract.¹⁷⁰ The court held that when an employee has no

Inc., 359 So. 2d 410 (Ala.Civ.App. 1978); *In re Interrogatories by the Industrial Comm’n*, 496 P.2d 1064 (Colo.App. 1972) (cook for school who understood that employment would terminate at end of school term could not be denied benefits based on employer’s argument that she agreed to waiver); *Kentucky Unemp. Ins. v. American National Bank*, 367 S.W.2d 260 (Ky. Ct. App. 1963); *Walker v. Pogreba*, 316 N.W.2d 315, 317 (Neb. 1982) (employee who signed temporary employment agreement did not leave voluntarily at end of temporary employment where employer did not ask employee to stay on); *See also Commissioner of Minn. DES v. City of Duluth*, 297 N.W.2d 239 (Minn. 1980) (holding that the doctrine of “constructive voluntary quit” was no longer viable in light of legislative developments).

¹⁶⁵ Several courts have held that a disqualification is likely to result where the temporary employee is offered a chance to continue work but declines. *See, Calkins v. Board of Review*, 489 N.E.2d 920 (Ill. Ct. App. 1986); *Walker Manufacturing Company v. Pogreba*, 316 N.W.2d 315 (Neb. 1982).

¹⁶⁶ *Adams AIA Architecture v. DES*, 430 A.2d at 447. Interestingly, the court stated that to disqualify a claimant under these circumstances “would exclude from benefits almost all seasonal workers.” *Id.* (citing *In re Interrogatories*, 496 P.2d 1064,1066 (Colo. App. 1972)).

¹⁶⁷ *Lincoln v. DET and Shelburne Veterinary Hospital*, 592 A.2d 885, 888 (Vt. 1991).

¹⁶⁸ *Id.* at 888.

¹⁶⁹ *Cervantes v. Adminr.*, 411 A.2d 921, 923 (Conn. 1979).

¹⁷⁰ *Id.*

choice as to the terms of the contract, including the termination date, she will not suffer a voluntary quit disqualification.¹⁷¹

More recently, a Kansas court held that when a claimant voluntarily accepts a limited-term position but has “no power to extend the period of employment” there is not a voluntary quit at the end of the term because the worker has no realistic choice in determining the duration of employment.¹⁷² Not all courts, however, have accepted this theory based on the involuntary nature of the separation.¹⁷³

b. Failing to Report After Completing an Assignment

The next voluntary quit scenario with elements unique to temporary workers involves a worker who is denied benefits for failing to report to the temporary agency after completing an assignment. For example, after completing a series of dead-end temporary jobs, a worker is anxious to break the cycle and secure permanent employment. In order to do this, she needs time off to find a new job and income support to carry her over until she gets back to work. However, if she reports to the agency upon completion of what she would like to be her last assignment, the agency will find her another assignment.¹⁷⁴ Refusing the assignment will most likely result in a benefit disqualification. Accepting the assignment leaves her with no time to look for permanent work. Regardless of the reason behind the decision, though, failing to report to the agency after completing an assignment may be interpreted as a disqualifying voluntary quit.

¹⁷¹ *Cervantes v. Adminr.*, 411 A.2d 921 (Conn. 1979).

¹⁷² *City of Lakin v. Kansas Empl. Sec. Board*, 865 P.2d 223 (Kan. App. 1993).

¹⁷³ *Calkins v. Bd. of Rev.*, 489 N.E.2d 920 (Ill. Ct. App. 1986); *Wilmington Country Club v. Unemp. Ins. App. Bd.*, 301 A.2d 289 (Del. 1973) (holding that the nature of a bartending job was such that acceptance amounted to voluntary termination at the expiration of employment). This holding was limited by the Delaware Supreme Court in *Grier v. Unemp. Ins. App. Bd.*, 306 A.2d 22 (Del. 1973), holding that duration is only one criterion in considering the totality of the circumstances of the employment.

¹⁷⁴ The agency will arrange some sort of work so the individual cannot claim that she is unemployed, thus avoiding a claim for benefits. The “experience rating” system which determines the unemployment tax rate for the leasing or temporary help company, contains a built-in incentive for agencies to prevent workers from qualifying for unemployment benefits. To keep its experience rating in check, a temporary agency can offer a one-day assignment to an individual worker when the worker is about to qualify for unemployment benefits. Francoise J. Carre, “*Temporary Employment in the Eighties*,” in *NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE*, Economic Policy Institute (Virginia L. DuRivage ed. 1992) at 78.

Through the enactment of restrictive state laws, several states have effectively excluded from the unemployment system temporary workers who fail to report for additional work after completing an assignment.¹⁷⁵ Rather than exhibit a model of how to accommodate the worker who is anxious to leave behind a series of dead-end temporary jobs and is in need of income support during the transition to permanent employment, these laws favor the temporary agencies.¹⁷⁶ Advocates should become familiar with these laws and oppose any legislative attempts to introduce similar provisions.¹⁷⁷ These laws generally require the worker, upon completion of the assignment, to notify the agency that she is available for work and the failure to do so results in a voluntary quit disqualification. In Georgia, for example, a temporary worker is presumed to have left employment voluntarily without good cause if the employee does not contact the agency for reassignment.¹⁷⁸

¹⁷⁵ Fla. Stat. ch. 93-153 ' 1.443.101(2)(b) (1993); Neb. Rev. Stat. ' 48-628(a)(1); Okla. Stat. ' 2-404A(2)(B); Tex. Rev. Civ. Stat. Ann. art. 5521b-3(a); Del. Code Ann. ' 3327(2); Mich. Comp. Laws ' 421.29(1); Ga. Code Ann. 34-8-195(5)(c); Colo. Rev. stat. ' 8-73-105.3(2) & (3).

¹⁷⁶ The only reasonable feature of these provisions is that the burden to report to the agency upon completion of the assignment is only effective if the agency has notified the worker of her obligation to do so. For example, the Nebraska statute requires the agency to advise “the temporary employee of his or her obligation to contact the temporary help firm upon completion of assignments” and advise the temporary employee that he or she may be denied benefits for failing to do so. Neb. Rev. Stat. sec. 48-628. Most temporary agencies print the reporting requirement on the time slip provided to the temporary worker.

¹⁷⁷ In response to intensive lobbying by the temporary help service industry, the New Jersey Department of Labor recently proposed new rules regarding eligibility of temporary employees for unemployment compensation benefits. Among other things, the proposed rule required temporary employees to report to the agency upon completion of each assignment as a condition of eligibility for benefits. During the comment period, the DOL received extensive feedback from advocates on both sides of the issue and, as a result, the originally proposed rule was withdrawn and replaced with a revised version. In its current format, the rule provides guidelines for determining benefit eligibility for claimants employed by a temporary agency where there is a written agreement between the agency and the claimant and where no written agreement exists. Specifically, the rule is intended to clarify the circumstances under which a claim will be reviewed as a voluntary leaving issue, a suitable work issue, and an available for work issue.

¹⁷⁸ Ga. Code Ann. sec. 34-8-195 (c). The Georgia law imposes the most extreme restrictions on the rights of temporary workers to unemployment benefits. The Georgia legislature recently passed a statute that provides for the ineligibility of an individual who “refuses an intermittent or temporary assignment without good cause when the assignment is comparable to previous work” performed by the employee. Ga. Code Ann. ' 34-8-195(c). In addition to this provision, the legislature also adopted a regulation that benefits temporary agencies particularly, providing that “an individual who makes himself/herself available for only part-time or full-time work in the temporary help industry in which reasonable gaps in employment are expected will not necessarily be deemed unemployed.” Ga. Comp. R. & Regs. r.300-2-4-.07. Similarly, Texas law dictates that a temporary employee has left work voluntarily without good cause if she fails to contact the agency for reassignment. Tex. Rev. Civ. Stat. Ann. art 5512b-3(a); *Beaumont v. Texas Employment Comm'n.*, 753 S.W.2d 770 (Tex. 1988) (disqualifying claimants who applied for unemployment benefits before notifying agency that assignment had ended).

The objective behind these statutes is quite clear. It ensures that the agency knows when the temporary worker is unemployed so a referral to another assignment can be made. The temporary agency can avoid a benefit claim if it can continually offer assignments because, technically, the worker is not unemployed.¹⁷⁹ This creates a win-win situation for the agency. If the employee accepts the assignment, she is no longer unemployed and therefore ineligible for benefits. If the employee refuses the assignment, the agency will argue that benefits should be denied because the individual voluntarily terminated the relationship.

In states that have not enacted similar laws, advocates have argued that traditional contract principles control these situations.¹⁸⁰ The premise of this argument is that once the temporary worker has completed her assignment, she is no longer an employee of the temporary agency. “The worker is under no contractual obligation to accept additional assignments but is merely registered for work with the agency. Similarly, the agency is under no obligation to offer additional assignments to the worker.”¹⁸¹ As a result, the worker’s failure to report back to the agency after completing an assignment is permissible and should not result in a voluntary quit separation. This strategy has experienced mixed results.

In *Manpower, Inc. of Wichita v. Sutton*,¹⁸² the Kansas Court of Appeals held that failing to report to a temporary agency after completing an assignment constituted a voluntary quit. The claimant in *Manpower* secured several different temporary jobs through a temporary agency. Thereafter, he did not report to the agency for reassignment. Having subsequently worked for other employers, the claimant filed for benefits. The issue

¹⁷⁹ See Francoise J. Carre, *Temporary Employment in the Eighties*, in NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKERS 78 (Virginia L. DuRivage ed., 1992).

¹⁸⁰ Deborah Maranville, *Changing Economy, Changing Lives, Unemployment Insurance and the Contingent Workforce*, 4 B. U. Pub. Int. L. J. 291, 310 (1995) [hereinafter, *Changing Economy, Changing Lives*]. It is important to note that this contract theory is only relevant when a temporary job is secured through the use of an agency. If the temporary employment is arranged through a direct hire, the appropriate argument is that the claimant was laid off, due to lack of work, at the end of the term and did not voluntarily quit. This difference is key because when there is a direct hire situation the employer is less likely to claim that there was additional work available.

¹⁸¹ *Id.*

¹⁸² *Manpower, Inc. of Wichita v. Sutton*, 724 P.2d 690, 695 (Kan. Ct. App. 1986).

addressed by the court was whether completion of each assignment leaves the claimant unemployed due to lack of work and no longer an employee of the temporary agency.¹⁸³

The temporary agency argued that the claimant left work voluntarily without good cause when he failed to report for additional assignments. Although Manpower did not guarantee its employees 40 hours of work per week, and, in fact, assignments could have been sporadic, the court found that “completion of one working assignment did not amount to termination of the claimant’s employment. Failure to report for a work assignment, when such assignments were available amounted to leaving work voluntarily without good cause.”¹⁸⁴

This absolute view has not been adopted in all states. In fact, the Minnesota Supreme Court in *Smith v. Employer’s Overload Co.*¹⁸⁵ held that requiring individuals “to continue to appear for job offers at the risk of disqualification . . . penalizes the industrious worker.” In *Smith*, one of the claimants sought employment with a day-labor agency after losing his permanent, full-time job. To earn gas money to continue his search for work, he accepted four different one day jobs, requiring unskilled manual labor. The agency paid him his wages at the end of each day. When Smith chose to apply for benefits rather than continue to accept temporary jobs, he was denied benefits on the ground that he had voluntarily quit his employment with the temporary agency.

Relying on principles of contract law, the Minnesota Supreme Court reversed the denial of benefits. The court reasoned that because a contract of employment is governed by the same rules applicable to other types of contracts, the intention of the parties must be considered when determining whether a continuing employment relationship exists. After examining the characteristics of the employment relationship, including the fact that the agency seeks workers on a daily basis and that jobs are assigned on a first-come, first-

¹⁸³ The dispute over the disqualification issue in *Manpower* was relevant only as to which employer’s account would be charged with the claim. Nevertheless, the same contract principles were used.

¹⁸⁴ *Id.*

¹⁸⁵ *Smith v. Employer’s Overload Co.*, 314 N.W.2d 220 (Minn. 1981). *See also, Prentice v. Albert & Bassett*, 623 N.E.2d 744 (Ohio 1993) (applying contract principles, the court found claimant remained eligible after leaving temporary job that lasted one week). This is not a viable argument in some states because statutes preempt the argument. In Colorado, for example, policy dealing with the employees of temporary agencies states that “completion of an assignment for a third-party...does not, in itself, terminate the employment agreement between the [agency] and the employee.” Colo. Rev. Stat. ‘ 8-73-105.5 (1993).

served basis, the court concluded the scenario did not manifest an ongoing employment relationship from which the claimant voluntarily quit.

Significantly, the court looked to the legislative history of the Minnesota voluntary quit law which explicitly excludes from the definition of voluntary quit a separation from employment by reason of its temporary nature.¹⁸⁶ Given the “express recognition of the public policy against penalizing one who accepts temporary employment, to disqualify a person for working at a temporary job is inherently contrary to the policies of the statute.”¹⁸⁷ Finally, the court noted the unfairness of a rule that would bind a worker to unsuitable work after acceptance even though he could not have been required to accept it initially.¹⁸⁸

c. “Good Cause” to Separate From Temporary Employment

The final disqualification scenario involves the question of when does a worker have good cause to quit a temporary job. For example, a worker quits a temporary job in the middle of an assignment because of hazardous working conditions. Or, a temporary worker quits at the end of an assignment because she is dissatisfied with her wages. Under this scenario, employers claim that, provided there are other assignments available, the worker has chosen voluntarily to terminate the relationship by failing to accept additional assignments without having good cause to do so.

The resolution of this issue depends on what factors are considered in the good cause analysis, a standard that varies from state to state. One overriding consistency, however,

¹⁸⁶ The Minnesota legislature amended the voluntary separation provision of its unemployment compensation statute in 1980, providing that “for the purpose of [the] clause, a separation from employment by reason of its temporary nature or for inability to meet performance standards necessary for continuation of employment shall not be deemed voluntary.” *Smith v. Employer’s Overload*, 314 N.W.2d at 222 (quoting Minn. Stat. ’268.09, subd. 1(1) (1980)). The success of this argument need not hinge on the existence of established public policy regarding the need to encourage the unemployed to accept temporary employment. The existence of a statutory provision that expressly states that completion of a temporary assignment does not in itself terminate the employment agreement between the agency and the worker will be much more difficult to overcome. Colo. Rev. Stat. sec. 8-73-105.5(2) (1994).

¹⁸⁷ *Id.* at 223.

¹⁸⁸ *Id.* at 222. It is important to note that in this case the court limited its holding to those situations where the job held by the employee was clearly unsuitable. This approach raises questions as to suitability of the employment in voluntary quit cases.

is that “state laws have become more restrictive in their definition of good cause for voluntary leaving, focusing more exclusively on reasons attributable to employment and considering reasons related to the worker’s personal circumstances less frequently.”¹⁸⁹ Again, this issue has been resolved in several different ways, both by statute and case law.

A few states have laws providing that a worker has good cause to quit a temporary job if the work is unsuitable or represents a “substantial departure”¹⁹⁰ from the claimant’s customary work experience and the claimant voluntarily quits the job within a fixed period of time.¹⁹¹ Wisconsin law, which represents the model approach, states that a claimant will not be disqualified for voluntarily quitting temporary work if the work is unsuitable and she quits within 10 weeks of accepting the job.¹⁹² This is the preferred approach because it allows a worker to take on an interim temporary job, perhaps in a new occupation that may lead to reemployment, on a trial basis. Then, if things do not work out, she can quit the job without jeopardizing her benefit eligibility. In other states, resolution of this issue depends on whether state law requires that good cause be work-related.¹⁹³

Case decisions rely on the good cause theory, obtaining mixed results for claimants trying to qualify for benefits under factually similar scenarios. Again, if a court interprets the term good cause to include individual circumstances, a claimant can more easily satisfy the standard and qualify for benefits. When good cause must be work-related, however, benefits will often be denied. Alternatively, the “trial period” philosophy of the Wisconsin statute has been adopted by one court.

¹⁸⁹ 1995 ACUC REPORT at 110.

¹⁹⁰ Minn. Stat. sec. 268.09(1)(c)(10).

¹⁹¹ Minn. Stat. sec. 268.09(1)(c)(10) (no voluntary quit disqualification if work is not suitable, separation occurs within 30 days of commencement and it is due to reasons which would have caused the work to be unsuitable); N.D. Cent. Code sec. 52-06-02(1)(b) (no disqualification for leaving temporary work if unsuitable and quit within 10 weeks); and Wis. Stat. sec. 108.04(7)(e) (no disqualification for leaving temporary work if unsuitable and quit within 10 weeks).

¹⁹² Wis. Stat. sec. 108.04(7)(e).

¹⁹³ *Supra* p. 20.

In Delaware, where the voluntary quit statute requires good cause to be work-related, a claimant was denied benefits after severing a relationship with a temporary agency due to low wages and because the agency failed to find suitable assignments.¹⁹⁴ In denying benefits, the court held that once a claimant had registered with an employment agency “they became her employer and she had the burden of showing good cause for terminating the relationship.”¹⁹⁵ The court found the claimant’s reasons to be personal in nature and therefore not “such as would justify one in voluntarily leaving the ranks of the employed and joining the ranks of the unemployed.”¹⁹⁶

The court stated that good cause cannot be found where the employee simply feels it is financially advantageous to terminate her employment. There must be a substantial reduction in wages and hours or a substantial deviation in the working conditions from the original agreement. Furthermore, if dissatisfied with terms and conditions of employment, the court clearly stated that the worker is obligated to put the employer on notice regarding dissatisfaction with assignments so steps can be taken to correct the situation.¹⁹⁷ The court refused to address the claimant’s assertion that the work was unsuitable, reasoning that the question of suitability only arises in the context of an employment offer.¹⁹⁸

More recently, however, a Wisconsin court applied the good cause analysis in this context and found a claimant eligible for benefits. The claimant in *Cornwell Personnel*

¹⁹⁴ *Smith v. The Placers, Inc.*, C.A. No. 90A-12-001, 1993 Del. Super. LEXIS 483. See also, *Winterle v. Comwth. of Pa., Bd. of Rev.*, 442 A.2d 1211 (Pa. Comwth. Ct. 1982) (holding that one whose job is terminated, but whose employer offers him continuing work which he refuses, is a voluntary quit).

¹⁹⁵ *Smith v. The Placers, Inc.*, C.A. No. 90A-12-001, 1993 Del. Super. LEXIS 483.

¹⁹⁶ *Id.*

¹⁹⁷ A more reasonable approach was taken by the Minnesota Supreme Court when, in *McDonnell v. Anytime Temporaries*, 349 N.W.2d 339 (Minn. 1984), it required a claimant only to complete a temporary assignment rather than to continue accepting new assignments. The claimant in *McDonnell* accepted a two-week temporary job but quit after one day and without completing the assignment, because she wanted a permanent job, circumstances likely to be considered personal in nature. The court held that the claimant must complete the assignment but need not continue to accept temporary jobs that did not meet her work objectives.

¹⁹⁸ See also, *Department of Labor v. Unemp. Comp. Rev. Bd.*, 535 A.2d 716 (Pa. Cmwlth. Ct. 1988) (holding that the initial acceptance of a job offer creates a presumption of suitability and the claimant must show deception as to the conditions of employment or a substantial unilateral change in order to recover benefits); *McDonnell v. Anytime Temporaries*, 349 N.W.2d 339 (Minn. App. 1984) (holding that suitability of the employment is not an exception to the “voluntary quit” disqualification).

Associates, Ltd. v. Labor and Industry Review Commission,¹⁹⁹ secured a job through a temporary agency. He started out earning \$4.25 per hour but his salary had increased to \$5.75 per hour by the time he was laid off approximately 18 months later. When the claimant called the temporary agency for work, he was offered a choice of three assignments. He refused all three because the salary was \$4.00 per hour. Shortly thereafter, he applied for and began receiving unemployment benefits. The temporary agency challenged the determination on the grounds that the claimant had quit his job without good cause attributable to the employing unit.

In this case of first impression, the Wisconsin Court of Appeals rejected the agency's argument, holding that "a significant reduction of wages to a level substantially below prevailing wage rates, particularly in light of the relatively low wage level that [the claimant] initially received," amounted to work-related good cause justifying the separation from work.²⁰⁰ In analyzing the Wisconsin good cause standard, the court stressed that the circumstances "must involve some fault on the employer's part 'and must be real and substantial'."²⁰¹ Because the three assignments offered resulted in a 15 to 20 percent wage reduction from his last assignment and all paid wages "substantially lower than prevailing wage rates for similar work in the employee's labor market," the claimant satisfied the good cause standard and remained eligible for benefits.²⁰²

The trial period theory was adopted by the Vermont Supreme Court in *Wallace v. Department of Employment Security*.²⁰³ The court held that the claimant may voluntarily leave unsuitable employment without forfeiting unemployment benefits if the claimant leaves the job within a "reasonable amount of time." Even though the Vermont statute is silent regarding this issue, the court noted that an individual undertaking unsuitable

¹⁹⁹ *Cornwell Personnel Associates, Ltd. v. Labor and Industry Review Commission*, 499 N.W.2d 705 (Wisc. App. 1993).

²⁰⁰ *Cornwell Personnel Associates, Ltd.*, 499 N.W.2d at 709.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Wallace v. Dept. of Employment Security*, 365 A.2d 517 (Vt. 1979).

employment “is entitled to a trial period” during which a voluntary quit disqualification will not arise.²⁰⁴

2. Refusing Temporary Work: When is Temporary Work “Unsuitable?”

All individuals collecting unemployment benefits must satisfy state continuing eligibility requirements.²⁰⁵ In fact, benefits may be terminated if these requirements are not satisfied. One such requirement is that a claimant must accept an offer of suitable work made while she is unemployed.²⁰⁶ Depending on state law, turning down a job will result in benefits being terminated unless the claimant can prove that she had “good cause” to refuse the job offer.²⁰⁷ This raises two closely related issues.

First, under what circumstances is temporary work considered to be suitable work. For example, an individual who has been unemployed for a period of time finds that temporary work is the only work available.²⁰⁸ The question here is whether an individual must accept an offer of temporary work in order to remain eligible for benefits, or

²⁰⁴ *Id.* at 515.

²⁰⁵ Another continuing eligibility issue involves the claimant’s availability for work while collecting benefits. *Supra* p. 24 for a general discussion of continuing eligibility. The “availability for work” issue also appears in the temporary work scenario, but with less frequency. For example, in South Dakota, there is an administrative rule governing “availability” determinations that deems a claimant who has an established relationship with a temp agency unavailable if without good cause, she fails to accept job referrals with that employer. S.D. Rule 47:06:04:21.02. Good cause includes compelling personal circumstances which prevent acceptance of the work. *Id.* See, *Rehart v. Dept. of Empl.*, 568 P.2d 522, 523 (Idaho 1977) (holding that a claimant who limits her availability to only temporary work pending an anticipated return to former seasonal work is eligible for benefits); *Luciano v. Commonwealth*, 503 A.2d 92, 93 (Pa. Commwth. Ct. 1986) (limiting availability to temporary work for a set amount of time because of plan to return to school does not disqualify).

²⁰⁶ 1995 ACUC REPORT at 113 (documenting that suitability is defined in terms of health, morality, safety, and labor standards, travel distance to work, relationship of job to previous work experience, and length of unemployment). See also, 76 AM. JUR. 2D, Unemployment Compensation ' 122.

²⁰⁷ The majority of states disqualify a claimant who refuses an offer of work without good cause. The definition of good cause varies from state to state. Depending on state law, good cause to refuse an offer of suitable employment may include a job offer that is not in the claimant’s previous occupation; a job paying significantly less than the prior job; a job that is inappropriate due to physical or mental conditions; or an offer of temporary work if the claimant has no prior history of such work. 1995 ACUC REPORT at 116.

²⁰⁸ A recent survey concluded that a claimant with no prior history of temporary employment who refuses an offer of temporary work will be eligible for benefits in 28 states and will be denied benefits in one state. Eligibility varies in 20 states. 1995 ACUC REPORT at 117 (Table B-7).

whether she can hold out for a permanent job.²⁰⁹ Second, when does an individual have good cause to refuse an offer of temporary work. For example, an individual involved in an ongoing relationship with a temporary agency may suddenly refuse additional assignments claiming that the work is not suitable.²¹⁰ This raises the question of whether, once temporary assignments have been accepted, an individual can ever establish good cause to refuse additional temporary assignments.

Treatment of these issues varies from state to state. Some states resolve the issues by applying relevant laws. Georgia law has established the most onerous requirements regarding an individual's option to refuse additional temporary assignments. The law provides that an individual will not be eligible for benefits in any week when she refuses a temporary assignment if the job offered is similar to previous assignments.²¹¹ Once she refuses the assignment, the claimant is technically deemed "employed" under the language of the law, and thus ineligible for benefits. This effectively confines a worker to temporary jobs, in some cases completely disregarding her prior experience and training.

Fortunately, very few states have addressed this issue in a manner similar to Georgia. Instead, the resolution of this issue is generally dictated by a state's refusal of suitable work law. These laws are applied on a case-by-case basis to determine first, whether the temporary work offered is suitable; and second, whether a claimant has good cause to refuse the offer of temporary work.²¹²

²⁰⁹ Although some temporary work is full-time work, the "able and available" provisions would also affect individuals who want to limit their search to temporary employment because, arguably, they are not attached to the labor force. The concerns regarding disqualification of individuals seeking part-time work only, as discussed earlier, are also applicable to those who want to work temporary assignments. The majority of the cases on issues regarding contingent workers and the "able and available" provision in state unemployment compensation statutes involve workers who limit their search to part-time employment.

²¹⁰ A recently completed survey concluded that a claimant with a recent prior work history including temporary work who refuses an offer of temporary work will be eligible for benefits in only 8 states and ineligible for benefits in 22 states. Eligibility varies in 19 states. 1995 ACUC REPORT at 117 (Table B-7).

²¹¹ Ga. Stat. sec 34-8-195(c); Ga. R. 300-2-4-.07(2). This legislative policy applies to those working through agencies as well as those working for traditional employers (direct hires) and effectively bind workers to temporary jobs.

²¹² What constitutes "good cause" in the context of a refusal of suitable work statute does not necessarily constitute "good cause" in the voluntary quit context. For example, in a state with a voluntary quit provision expressly limiting good cause to reasons attributable to the employer, a court may or may not extend the work-connected requirement to the refusal of suitable work requirement that is silent on the issue. See *Nurmi v. Vermont Empl. Sec. Bd.*, 197 A.2d 483 (Vt. 1964), *overruled by Shufelt v. DET*, 531 A.2d 894 (Vt. 1987) (extending the "attributable to the employer" requirement in the Vermont statute to encompass the "refusing suitable work"

In the absence of a specific disqualification provision, as in the majority of states, suitable work is in part defined by minimum federal requirements.²¹³ The federal requirements indicate that if the temporary assignment offers “wages or other conditions of employment [that] are substantially less favorable than those prevailing for similar work in the locality, or are such as tend to depress wages or working conditions,” it is unsuitable.²¹⁴ Other factors weighed in the determination of suitability include the degree of risk to one’s health, safety and morality, prior training, experience and earnings,²¹⁵ the length of unemployment,²¹⁶ prospects of securing local work in one’s customary occupation and the distance of the available work from one’s residence.²¹⁷

section). See also Elizabeth F. Thompson, Note, *Unemployment Compensation: Women and Children -- The Denials*, 46 U. MIAMI L. REV. 751, 770 (1992).

²¹³ Federal Unemployment Tax Act 26 U.S.C. sec. 3304(a)(5). Under the federal standards, no refusal to accept employment is deemed without good cause or results in a benefit denial if: 1) acceptance of the job requires membership in a company union or would interfere with membership in any labor organization; 2) there is an industrial controversy in the establishment in which the employment is offered; and 3) the wages or other conditions of employment are substantially less favorable than those prevailing for similar work in the locality, or are such as tend to depress wages or working conditions.

²¹⁴ *Id.*

²¹⁵ Regarding prior earnings, some states include a provision that renders a job unsuitable if the wages are not at least 80 percent of the claimant’s “past adversely affected employment.” See Annotation, *Unemployment Compensation: Eligibility as Affected by Claimant’s Refusal to Accept Employment at Compensation Less Than That of Previous Job*, 94 A.L.R. 3d (1979). In *Simpson v. Adia Temporary Services*, C.N. 14-91-58, 1992 Ohio App. LEXIS 3329, the court of appeals held that a claimant who had accepted temporary assignments from an agency in the past was not disqualified when she refused a new assignment that paid less than 80 percent of the wages at her previous full-time permanent position. See also *Cornwall Personnel Ass’n. v. LIRC*, 499 N.W.2d 705 (Wis. Ct. App. 1993) (finding good cause to refuse because wage was substantially lower than prevailing wage for similar work and more than two-thirds lower than previous job). Similarly, the Arkansas court of appeals has held that in cases where the claimant is laid-off from a permanent part-time position, he is not disqualified for refusing to accept a full-time position “if the wages are substantially less than the prior earnings of the claimant in his primary occupation from which he has become unemployed.” *Price v. Everret*, 616 S.W.2d 766, 768 (Ark. App. 1981). In this case, taking the full-time permanent position would have resulted in a 50 percent wage reduction. The court noted, however, that as the period of unemployment lengthens, a claimant may have to reduce salary expectations. *Id.*

²¹⁶ In some states, the definition of “suitable work” changes as the duration of unemployment increases. For example, claimants in 11 states are required to accept lower paying jobs as the duration of unemployment increases. Florida, Idaho, Louisiana, Utah, Wyoming, Georgia, Iowa, Maine, Mississippi, Montana, and North Dakota. 1995 ACUC REPORT at 122, n. 13.

²¹⁷ At least three states consider travel distance to work in their suitability analysis: Delaware, New York, and Ohio.

If the work is considered suitable, the next question is whether the claimant had good cause to refuse the offer of suitable work. Good cause, in the context of refusing work, is a variable standard, often defined as “whether a reasonable person desirous of employment would have refused the offered work” and generally not including “personal reasons unrelated to the employment.”²¹⁸ Whether a claimant has good cause to refuse an offer of temporary work generally depends on whether she has a prior history of such work. If a claimant with no prior history of temporary work refuses an offer of such work, she will be eligible for benefits in approximately 28 states.²¹⁹ If, on the other hand, she has a recent history of such work, she will be eligible for benefits in only 8 states.²²⁰

In other states, the outcome of a “refusal of work” determination is based on case law.²²¹ Case law analysis involves a comparison of the offered job with the claimant’s background, including prior work experience and wages, to determine whether it is suitable. “Public policy” and “trial period” theories have been used to address this issue.

Court decisions regarding the refusal of offers for temporary work generally hold that a claimant does not have good cause to refuse work simply because it is temporary.²²² For

²¹⁸ 76 AM. JUR. 2D ' 120, p. 888.

²¹⁹ 1995 ACUC REPORT at 117.

²²⁰ *Id.*

²²¹ When an individual refuses an additional temporary assignment, eligibility is properly analyzed under refusal of suitable work theory, not voluntary quit analysis. The Vermont Supreme Court rejected an employer’s attempts to “bootstrap” a refusal to return to employment to “constitute a sort of retroactive voluntary leaving.” *Losordo v. Department of Employment Security*, 449 A.2d 941, 942 (Vt. 1982). When an individual becomes unemployed upon the expiration of a fixed period of employment, it is due to a lack of work not personal choice. In *Losordo*, the claimant had worked for the United States Postal Service in temporary assignments. After completing two of these 90-day appointments, he refused a third because he could not afford the cost of commuting to work. The Department of Employment Security had denied him benefits on voluntary quit grounds. Noting that the temporary assignment had ended, the court reversed, holding that the claimant’s decision against returning had no relevance “to the reason in fact for the end of employment; the attempt to tie the two together was error.” *Id.*

²²² *Vejdani v. Western Temp. Svcs.*, 486 N.W.2d 461 (Minn. App. 1992) (refusal of temporary reemployment offering substantially the same wages and conditions of employment disqualifies); *Wacaster v. Daniels*, 603 S.W.2d 907 (Ark. App. 1980) (claimant laid off from full-time job denied benefits after refusing an offer of temporary reemployment earning comparable salary, working similar hours, and performing similar tasks, all for the same employer, because job was suitable and temporary nature does not create good cause to refuse offer); *In re Wachtel*, N.Y. Unemp. Ins. Rptr. (CCH) & 11,420 (N.Y. 1990) (refusing offer of temporary work because waiting to hear from firms that might offer permanent employment is not good cause); see *Willrich v. Top Temporary*, 379 N.W.2d 731 (Minn. App. 1986); *Schneider v. OBES, Ohio Unemp. Ins. Rpt.* (CCH) & 9850 (Ohio Ct. Comm. Pleas 1989); *Norland v. IDJS and First Interstate Bank*, Iowa Unemp. Ins. Rptr. (CCH) & 8682 (Iowa 1987) (holding that “her desire and her good faith efforts to obtain permanent work does not amount to” good cause and the work cannot be

example, in *Wacaster v. Daniels*,²²³ an Arkansas court denied a claimant benefits after determining that her main reason for refusing the offered position was that the job was temporary. The claimant in *Wacaster*, who was laid-off from her full-time job, was offered reemployment doing the same work at a comparable salary for similar hours, but the position was temporary. The court reasoned that an unemployed individual is obligated to accept suitable work, regardless of whether the work is temporary or permanent, and that suitable work is not limited to work that is equivalent in every aspect to the prior work. If the position was offered at substantially lower wages, then the court may have found that the job was not suitable.²²⁴

Courts have held that the claimant's job history and training, as well as the length of claimant's unemployment, are important factors in determining suitability of employment. In *Kuether v. Personnel Pool of Minnesota*,²²⁵ after applying the elements of the state's suitable work law, the court concluded that the claimant's rejection of the agency's offer of temporary work was not disqualifying because the work offered was unsuitable. The court noted that despite the claimant's ongoing relationship with the temporary agency, the claimant had recently been a "full-time, permanent employee and was unaccustomed to general labor" and thus to deny benefits "would, in effect, penalize him for accepting temporary work while seeking full-time, permanent employment."²²⁶ Case law establishing the right to refuse permanent work that does not utilize previous training, experience and skill should be used to support this argument.²²⁷

considered unsuitable because it is for the same employer at the same wage and involves similar duties).

²²³ *Wacaster v. Daniels*, 603 S.W.2d 907 (Ark. App. 1980).

²²⁴ *Johnson v. Admin., Div. of Employment Security*, 166 So.2d 366 (La. App. 1964) (holding that a claimant generally may refuse a job paying substantially less than prior employment without losing benefit eligibility). A substantial decrease in wages may also amount to good cause for leaving employment. See, *Kyle v. Beco Corp.*, 707 P.2d 378 (Idaho 1985); *Bunny's Waffle Shop, Inc. v. Calif. Employment Comm.*, 151 P.2d 224 (Cal. 1944); *Tombigbee Lightweight Aggregate Corp. v. Roberts*, 351 So.2d 1388 (Ala. Civ. App. 1977).

²²⁵ *Kuether v. Personnel Pool of Minnesota*, 394 N.W.2d 259 (Minn.App. 1986). See also, *Unemployment Compensation Board of Review v. Franklin & Lindsey, Inc.*, 438 A.2d 590 (Pa. 1981) (holding that a claimant's refusal of an offer of secretarial work made by former employer, when her previous 18 months of work for the employer consisted of drafting and surveying, was not disqualifying).

²²⁶ *Keuther*, 394 N.W.2d at 261.

²²⁷ *Keystone Steel & Wire v. Illinois Department of Labor*, 346 N.E.2d 399 (Ill. App. 1976); *In re Claim of Jaslow*, 473 N.Y.S.2d 273 (N.Y.App. Div. 1984); *In re Troutman*, 141 S.E.2d 613 (N.C. 1965); *In re Potvin*, 313 A.2d 25 (Vt. 1973); *In re Platt*, 292 A.2d 822 (Vt. 1972).

In *Henry v. Dolphin Temporary Help Services*,²²⁸ the Minnesota Supreme Court refused to deny benefits to a claimant who, after accepting one temporary job in order to make contacts that would lead her to full-time work, refused additional temporary assignments. The claimant had a work history consisting of 16 years of full-time permanent employment as a computer specialist. After considering the claimant's prior training, short length of unemployment, and that her prospects of securing suitable work had not diminished, the court concluded that the work offered was "unsuitable" and "wholly inconsistent with her previous long-term employment history."²²⁹

Relying on public policy reasoning that the unemployed should be encouraged to accept interim work, a New Jersey court, in *Wojcik v. Board of Review*,²³⁰ refused to suspend a claimant's benefits when, after accepting five weeks of temporary assignments requiring manual labor, the claimant refused additional assignments. A contrary result would inhibit persons who are temporarily unemployed from taking work which is not commensurate with their former employment, but is nevertheless gainful activity which serves the general public interest.²³¹

In *Valenty v. Medical Concepts Development, Inc.*, the Minnesota Supreme Court held that a worker will not be disqualified after accepting an unsuitable job if she accepts the job and then leaves the job within a "reasonable" time.²³² The court, however, did not establish specific guidelines as to what would constitute a reasonable time. In this case the claimant, an unemployed dental assistant, left a "light manufacturing" temporary job

²²⁸ *Henry v. Dolphin Temporary Help Services*, 386 N.W.2d 277 (Minn. App. 1986).

²²⁹ *Id.* at 281. In addition, the court found that there was no "ongoing employment relationship" between the claimant and the temporary agency, and thus the agency was not a base period employer, thus barring a claim that she had refused work from a previous employer. Minn. Stat. sec. 268.09, subd. 2 (1984) disqualifies an individual who fails to accept an offer of re-employment from a base period employer without good cause. In this case the court held that although this part of the statute was not applicable, the claimant must be disqualified if he "refuses to accept suitable work when offered him." *Henry v. Dolphin Temporary Help Services*, 386 N.W.2d at 280.

²³⁰ *Wojcik v. Bd. of Rev.*, 277 A.2d 529 (N.J. 1971).

²³¹ *Id.* at 531. See also, *Wallace v. DES*, 365 A.2d 517, 519 (Vt. 1976); *Herman v. Florida Dep't of Commerce*, 323 So.2d 608, 609 (Fla. Dist. Ct. App. 1975); *Crocker v. Ill. Department of Labor*, 459 N.E.2d 332 (Ill. App. 1984).

²³² *Valenty v. Medical Concepts Development, Inc.*, 503 N.W.2d 131 (Minn. 1993) (unpublished opinion), *aff'g* 491 N.W.2d 679 (Minn. App. 1992).

after 5 hours because it hurt her back, the work was completely different from any work she had performed in the past and the pay was far less than her previous permanent job. The court also noted that it was sound policy to extend a “trial period” to those workers attempting unsuitable jobs. In making this determination the court stated that “a person receiving unemployment compensation benefits should not be penalized for taking an unsuitable job for a short time. A contrary holding would discourage those persons receiving benefits from attempting any job that was not technically ‘suitable’.”²³³

²³³ *Id.* at 134.

III. Other Categories of Contingent Work

As more employers attempt to avoid the responsibilities and costs associated with being employers, the number of contingent work arrangements in today's workplace continues to rise. Increasingly common are multiple party work relationships which often entail a "Who's on first?" routine when it comes to identifying the employer and sorting out the workers' rights. The following discussion identifies three additional contingent work relationships -- independent contractors, leased workers, and seasonal workers -- which, like part-time and temporary workers, suffer unique barriers to accessing the unemployment system.

A. Independent Contractors

Currently, there is no uniform standard to determine whether a worker is an independent contractor or an employee. As a result, whether a worker is employed as a manual laborer or as a highly skilled professional, she runs the risk of being misclassified as an independent contractor. For example, home health aides employed by home health care agencies and assigned to complete nearly identical tasks may be classified as employees in one state and as independent contractors in another state.²³⁴

For purposes of the unemployment system, the classification issue has implications for both the employer and the worker. The issue is critical to workers because it is a precursor to benefit eligibility. Workers who are classified as independent contractors are considered self-employed and, as a result, are routinely denied unemployment benefits.²³⁵

To add insult to injury, independent contractors are responsible for paying their own taxes,²³⁶ are generally paid less than "co-workers" who perform the same jobs, and do not receive health care or other employee benefits; an arrangement that results in considerable savings to the employer.

²³⁴ *Global Home Care, Inc. v. DLES*, 521 So.2d 220 (Fla. App. 1988)(classifying home health care aides as independent contractors after applying the common law classification test), *contra In re Central Employment Agency*, 396 N.Y.S.2d 707 (1977)(holding, under the common law classification test, that home health aides are employees of the agency).

²³⁵ 1995 ACUC REPORT at 169. *See generally*, 76 AM. JUR. 2D, Unemployment Compensation ' 72.

²³⁶ I.R.C. " 1401-1403. This includes income taxes and self-employment taxes.

For employers, the classification issue is important because it determines so many labor costs such as payroll taxes, which includes unemployment taxes. Whenever possible, employers label their workers as independent contractors, attempting to disavow the employer-employee relationship and its related responsibilities.²³⁷ In fact, after weighing the resulting cost savings from classifying workers as independent contractors against penalties imposed for misclassifying, many employers intentionally misclassify their workers and cash in on the savings.²³⁸

In the context of unemployment benefit eligibility, the issue of misclassification generally arises after a worker has lost her job and applies for unemployment benefits. As the claim is processed, the state realizes that the employer has not paid the corresponding unemployment taxes for the recently unemployed worker. The employer defends its position by claiming that the worker was not an employee, but an independent contractor.²³⁹ In response, the worker argues that her employer has misrepresented her employment status by classifying her as an independent contractor.

The question here is whether, given the work relationship, an employer-employee relationship necessary to invoke coverage exists, or whether the arrangement falls outside those parameters thus justifying classification as an independent contractor. This problem has been addressed in different ways, both under state law and case decisions. As explained below, state laws generally take the form of the “Common Law Test” or the

²³⁷ *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) (a prior panel decision, 97 F.3d 1187, 1189, acknowledged that “[l]arge corporations have increasingly adopted the practice of hiring . . . independent contractors as a means of avoiding payment of employee benefits, and thereby increasing their profits”).

²³⁸ IRS data from 1984 indicates that one out of seven employers misclassified workers as independent contractors resulting in the misclassification of more than 3 million workers. Internal Revenue Service Compliance Measurement Group, Research Division, EMPLOYER SURVEY: REPORT ON FINDINGS, STRATEGIC INITIATIVE ON WITHHOLDING NONCOMPLIANCE. Washington, D.C.: U.S. Department of Treasury (1989). A more recent estimate indicates that from 1984 to 1994, the number of misclassified workers increased by 23 percent (from 3.3 million to 4.1 million workers); this estimate, which excludes workers in agricultural and mining sectors, predicts that as many as 5 million workers will be misclassified by the year 2005. Coopers and Lybrand, *Projection of the Loss in Federal Tax Revenues Due to Misclassification of Workers*, Washington, D.C. (1994). See also, 1995 ACUC Report at 171.

²³⁹ Employers will often point to a signed agreement stating that the employee has agreed to work as an independent contractor as proof that an employer-employee relationship does not exist. However, case law holds that an agreement between the employer and the worker that declares the worker’s status is not dispositive. See generally, 76 AM. JUR. 2D ‘34, p. 783. See also, *Weitzel Redi-Mix, Inc. v. Industrial Comm. of State*, 728 P.2d 364 (1986), *Insul-Lite Window & Door Mfg., Inc. v. Industrial Comm.*, 723 P.2d 151 (1986).

“ABC Test,” which most courts use to arrive at classification determinations. At least one state, however, has recognized the “Economic Realities Test” as a viable option.

The implementation of the Common Law Test in approximately 13 states is likely attributable to existing federal policy.²⁴⁰ For federal tax purposes,²⁴¹ the Internal Revenue Code defines the term employee as “an individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.”²⁴² Under this test, a worker is considered an employee if the consumer of the worker’s services “has the right to direct and control the manner and details of the worker’s performance.”²⁴³ A twenty-factor test, developed by the Internal Revenue Service, provides the criteria used to determine the issue of “control,” the main factor that will dictate whether a worker is properly classified as an independent contractor.²⁴⁴ The burden of establishing a worker’s status as an independent contractor rests on the alleged employer.²⁴⁵

²⁴⁰ These states include: Ala. Code " 25-4-7 & 25-4-10(a)(1)(b); Ariz. Rev. Stat. Ann. ' 23-613.01(A)(1); Cal. Unemp. Ins. Code ' 621(b) & Cal. Code Regs. ' 4304-1; D.C. Unemp. Comp. Act ' 46-101(2)(A)(I)(II); Fla. Unemp. Comp. Act ' 443.036(19)(A)(1)(b); Iowa Emp. Sec. Law ' 96.19(18)(a)(2) & Iowa Admin. Code R. 3.19(1-7); Ken. Stat. Ann. ' 44-703(I)(1)(B) & (D); Minn. Stat. ' 268.04(12)(1)(d) & Minn. R. 3315.0501(2), (4) & 3315.0555; Miss. Emp. Sec. Law ' 71-5-11(I)(14) & Miss. Reg. TR-12; Mo. Rev. Stat. ' 288.034(5) & Mo. Code Regs. ' 10-4.150; N.C. Gen. Stat. ' 96-a(6)(a); N.D. Cent. Code ' 52-01-01(17)(e) & N.D. Admin. Code ' 27-02-14-01(f)(a) & (b)(1-20), S.C. Code ' 41-27-230(1)(b); and N.Y. Lab. " 511 & 512.

²⁴¹ This includes the Federal Insurance Contributions Act (FICA), 26 U.S.C. " 3101 *et seq.*, and the Federal Unemployment Tax Act (FUTA), 26 U.S.C. " 3301 *et seq.*

²⁴² 26 U.S.C. " 3121.

²⁴³ 1995 ACUC REPORT at 170.

²⁴⁴ The 20 IRS common law factors include: 1) Is the worker required to comply with instructions?; 2) Does the employer train the worker?; 3) Are the worker’s services integrated into the business?; 4) Must the worker render the services personally?; 5) Who hires, supervises and pays the worker’s assistants?; 6) Is there a continuing relationship between the worker and the employer?; 7) Who sets the hours of work?; 8) Is full time work required?; 9) Must the worker perform work on the employer’s premises?; 10) Who sets the order or sequence of work to be performed?; 11) Are written or oral reports required?; 12) Is payment by the hour, week, month or job?; 13) Who pays business and/or travel expenses?; 14) Who furnishes tools and materials?; 15) Has the worker made a significant investment in the facilities, etc.?; 16) Who realizes the profit or loss?; 17) Does the worker work for more than one company?; 18) Does the worker make his or her services available to the general public?; 19) Does the employer retain the right to discharge the worker?; 20) Does the worker have the right to quit even if the job is not finished? REVENUE RULING 87-41; Susan L. Coskey, *Vizcaino v. Microsoft Corporation; A Labor and Employment Lawyer’s Perspective*, 47 LAB. L. J. 91, 94 (1996).

²⁴⁵ 76 Am. Jur. 2d ' 33, p. 780.

The majority of states, however, have adopted a three-part or “ABC Test.”²⁴⁶ Under the “ABC Test,” the model state law approach to addressing this issue, a worker is considered an employee unless the employer proves: A) that the worker is free from control and direction over the performance of her work; B) that the work is performed either outside the usual course of the business for which it is performed or is performed outside of all places of business of the enterprise for which it is performed; and C) that the worker is customarily engaged in an independent trade, occupation, profession or business.²⁴⁷ The employer must satisfy all three prongs of the test in order to establish that a worker has been properly classified as an independent contractor.²⁴⁸

Under part “A” of the test, the employer must show that she neither had nor reserved the right to control the performance of the work completed.²⁴⁹ In essence, this part of the test

²⁴⁶ The 24 states which have adopted the “ABC test” include: Alaska Stat. sec. 23.20.525(a)(10)(A-C)(1980); Conn. Gen. Stat. sec. 31-222(a)(1)(B); Del. Code Ann., tit. 19, sec. 3302(9)(K)(1983); Ga. Emp. Sec. Law sec. 34-8-35(f)(1991); Haw. Rev. Stat. sec. 383-6(1-3); Ill. Unemp. Ins. Act sec. 212 (A-C)(1990); Ind. Emp. and Training Act sec. 22-8-1(a)(1971); La. Rev. Stat. sec. 1472(12)(E)(I-III)(1994); Me. Rev. Stat. sec. 1043(11)(E)(1992); Md. Code Ann. sec. 8-205 & Md. Regs. Code tit. 24, sec. 18(A), 18(B)(2-3)(1991); Mass. Gen. L., ch. sec. 2(a-c)(1990); Neb. Rev. Stat. sec. 48-604(5)(1994); Nev. Rev. Stat. sec. 612.085 (1993); N.H. Rev. Stat. sec. 282-A-9(III)(a-c); N.J. Rev. Stat. sec. 43:21-19(I)(6)(A-C)(1991); N.M. Unemp. Comp. Law sec. 51-1-42(F)(5)(a-c)(1994); Ohio Rev. Code sec. 4141.01(B)(1)(b)(1989) & Ohio Admin. Code sec. 4141-3-05(A)(1991); Okla. Stat. sec. 1-210(14)(a-c) & Okla. Empl. Sec. Comm. R. 240:10-1-2(A)(1993); P.R. Emp. Sec. Act sec. 702(k)(5)(1988); R.I. Gen. Laws sec. 28-42-7; Tenn. Code Ann. sec. 50-7-207(e)(1)(1993); 21 Vt. Stat. Ann. sec. 1301(6)(B)(I-iii) (1991); V.I. Unemp. Ins. Act sec. 302(k)(5)(A-C)(1981); and W.Va. Unemp. Comp. Law sec. 21A-1-3(7)(a-c)(1994). The remaining states use some combination of the three factors considered under the ABC test. These states include: Colo. Empl. Sec. Act sec. 80-70-115(1)(b) & (c); Idaho Empl. Sec. Law sec. 72-1316(d); Mont. Unemp. Comp. Ins. Law, sec. 39-51-201(14) & Mont. Admin. R. 24.11.821 & 24.11.825; Or. Rev. Stat. sec. 657.040(1)(a-c) & Or. Admin. R. 31-180; Penn. Stat. sec. 4(1)(2)(B); S.D. Code sec. 61-1-10(1)(2); Utah Code Ann. sec. 35-4-204(3)(a) & (b); Wis. Stat. sec. 108.02(12); and Wyo. Stat. sec. 27-3-104(b). Others rely on a variation unique to their own state. These states include: Kan. Stat. Ann. sec. 44-703(I)(1)(D); Texas has adopted only the “A” prong of the ABC test, Tex. Unemp. Comp. Act sec. 19(g)(1); Virginia excludes from the definition of employment any individual that satisfies the “A” and either the “B” or “C” prongs of the ABC test, Va. Code sec. 60.2-212(C)(1-2); Washington does employ the complete ABC test, but also provides an alternative statutory test which requires the satisfaction of six factors, some of which are derived from the ABC test, in order to negate the existence of an employer-employee relationship, Wash. Rev. Code sec. 50.04.140.

²⁴⁷ E.g., Alaska Stat. sec. 23.20.525(a)(10)(A-C); *Tachick Freight Lines, Inc. v. ESD*, 773 P.2d 451 (Alaska 1989) (requiring that all three prongs of the ABC test be satisfied in determining “independent contractor” status).

²⁴⁸ 76 AM. JUR. ' 49, p. 808. See also, *Tachick Freight Lines*, 773 P.2d 451 (Alaska 1989); *Latimer v. Admr.*, 579 A.2d 497 (Conn. 1990); *Silva v. Dir.*, 499 NE.2d 1205 (Mass. 1986).

²⁴⁹ *Carpet Remnant Warehouse, Inc. v. DOL*, 7 Unemp. Ins. Rptr. (CCH) & 8605 (N.J. 1991) (applying the ABC Test; discussing factors indicative of control, including “whether the worker is required to work any set hours or jobs, whether the enterprise has the right to control the details and means by which the services are performed, and whether the services must be rendered personally”).

is a codified version of the Common Law Test, as courts often consider such factors as the right to discharge, who furnished tools or equipment and the method of payment.²⁵⁰ The ambiguous language of the “B” prong has consistently presented problems for the courts as reflected in inconsistent determinations regarding whether part “B” has been satisfied.²⁵¹ Part “C” of the test requires an employer to prove that the worker is not dependent on the employer. In other words, the employer must prove that the worker has a business or occupation “that will clearly continue despite termination of the challenged relationship.”²⁵² At least one court has held that the employer must show that workers have a proprietary interest in the occupation to satisfy the “C” prong of the ABC test.²⁵³

The ABC Test is considered to be a welcomed departure from the Common Law Test because it “permit[s] a finding of an employer-employee relationship where the facts would not justify such a finding at common law.”²⁵⁴ Not only do the three factors combine to create a broader definition of the term employee, but generally the test is strictly construed against the employer.²⁵⁵ In addition, it clearly sets out that the employer has the burden of proving all three factors. If the employer fails to prove one of the three elements then the worker is to be considered an employee.²⁵⁶

Inconsistent case decisions interpreting these statutory tests, however, indicate that neither is a fool-proof method.²⁵⁷ Courts adopting a narrow interpretation of either test

²⁵⁰ *The Beare Co. v. DES*, 10 Unemp. Ins. Rptr. (CCH) & 8375 (Tenn. 1991) (explaining that first the common law rules must be satisfied and then the “ABC” test is applied); *Latimer v. Admr.*, 579 A.2d 497 (Conn. 1990) (individual held to be an employee where the employer retained the right to discharge the workers, paid the workers at an hourly rate and required them to report their activities).

²⁵¹ See Comment, *Interpretation of Employment Relationship Under Unemployment Compensation Statutes*, 36 Ill. Rev. 873, 877 (1942) (The phrase, ‘the usual course of business,’ contained in (b) is confusingly vague”).

²⁵² *Carpent Remnant Warehouse, Inc. v. DOL*, 7 Unempl. Ins. Rpt. (CCH) & 8605 (N.J. 1991)

²⁵³ *Nyer v. UIC*, 5 Unemp. Ins. Rptr. (CCH) & 1332.75 (Me. Sup. Jud. Ct. 1992).

²⁵⁴ 76 AM. JUR. 2d '49, p. 808, notes 61 & 62. *Trauma Nurses, Inc. v. Board of Review, N.J. Dept. of Labor*, 576 A.2d 285 (N.J. Super. Ct. App. Div. 1990), *McKinley v. R.L. Payne & Son Lumber Co.*, 143 S.W.2d 38 (Ark. 1940), *Beal v. Industrial Comm.*, 535 S.W.2d 450 (Mo. Ct. App. 1975).

²⁵⁵ *Yurs v. Director of Labor, Department of Labor, etc.*, 235 N.E.2d 871 (Ill. App. 1968).

²⁵⁶ 76 AM. JUR. 2D '49, p. 808.

²⁵⁷ The question of whether telephone solicitors were employees or independent contractors was addressed by court in two states that apply the Common Law Test. Each state arrived at a different outcome. See, *Smoky*

often restrict the number of individuals classified as employees, leading to increased numbers of legitimate employees being misclassified as independent contractors and ultimately being denied benefits. The inconsistencies created by the various statutory guidelines used at the state and federal level have not gone unnoticed. In fact, the Advisory Council on Unemployment Compensation recently stressed that “clear definitions that delineate the conditions under which an individual would legitimately be qualified as an independent contractor” would eliminate much of the ambiguity leading to misclassification.²⁵⁸

Until laws are changed, however, advocates may be wise to argue that the Economic Reality Test should be used to resolve the classification issue.²⁵⁹ While it has not been codified in the unemployment laws of any state, the Michigan courts have applied this test in the context of unemployment compensation.²⁶⁰ Under this test, which is designed to broaden the scope of the term employee, the determining factor is dependency; whether the individual performing the services is economically dependent upon the person for whom the services are performed.²⁶¹

Mountain Secrets, Inc. v. South Carolina Employment Security Commission, 439 S.E.2d 288 (S.C. App. 1993) (concluding that telephone solicitors were employees after evidence showed that employer provided office space and telephones), *contra Delco Industries, Inc. v. DLES*, 519 So.2d 1109 (Fla. App. 1987) (holding that telephone solicitors are not employees although the firm provided a place to work and monitored calls).

²⁵⁸ 1995 ACUC REPORT at 13.

²⁵⁹ The “economic reality” test was developed by the federal courts to determine the employer-employee status under the Fair Labor Standards Act. *See, Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729-730 (1947); *Castillo v. Givens*, 704 F.2d 181 (5th Cir.), *cert. den’d*, 464 U.S. 850 (1983).

²⁶⁰ Michigan’s unemployment law does not include the ABC Test or the Common Law Test. Instead, it provides that services performed by an individual for remuneration are employment unless the “individual is under the employer’s control or direction as to the performance of the services both under contract for hire and in fact.” M.C.L. ’ 421.42; M.S.A. ’ 17-545. Although this statute seems to emphasize an employer’s right to control, the Michigan courts have held that in order to determine whether or not an individual is covered by the Act, courts must apply the “economic realities” test. *Capital Carpet Cleaning and Dye Company, Inc. v. Employment Security Commission*, 372 N.W.2d 332 (Mich. App. 1985).

²⁶¹ Marc Linder, *What is an Employee? Why It Does, But Should Not Matter*, 7 LAW AND INEQ. J. 155, 174 (1989)(documenting the history of the economic reality test and explaining that “in its modern version - dating back to the 1940s - the economic reality of dependence test subsumes the control test, which is a sub-set of the economic reality test.”). Courts have considered a number of factors to determine the “economic dependence” of the worker, including the liability incurred by the employer if the relationship is terminated, the permanency of the relationship, opportunity for profit or risk of loss, the investment in equipment and/or tools, the degree of control, the worker’s skills and whether the individual holds himself out to the public as an independent contractor. *See, McKissic v. Bodine*, 201 N.W.2d 333 (Mich. App. 1972).

In *Capital Carpet Cleaning and Dye Company, Inc. v. Employment Security Commission*,²⁶² the Michigan Court of Appeals held that the use of the common law control test had been abrogated in interpreting social legislation, including employment security legislation such as unemployment compensation, and that the “test is now based on economic reality.”²⁶³ According to the court, the relevant factors to be considered under the economic reality test include: “1) control of the worker’s duties; 2) payment of wages; 3) the right to hire and fire and the right to discipline, and 4) the performance of the duties as an integral part of the employer’s business towards the accomplishment of a common goal.”²⁶⁴

Applying these criteria to the claimants in *Capital Carpet Cleaning*, the court found that even though the business owner did “not exercise direct hour-to-hour control,”²⁶⁵ he did control “the overall direction of the carpet cleaners’ employment situation,”²⁶⁶ and therefore the carpet cleaners are employees of the business. The court was influenced by the fact that all income was turned over to the owner who then paid the carpet cleaners by check. Another persuasive element was that the work done by the carpet cleaners was so integral to the owner’s business that neither could exist without the other. The court also noted that the carpet cleaners rented their equipment from the business owner, the cost of supplies were deducted from their paychecks, and that none of the carpet cleaners maintained separate business offices.

B. Leased Workers

²⁶² *Capital Carpet Cleaning and Dye Company, Inc. v. Employment Security Commission*, 372 N.W.2d 332 (Mich. App. 1985). See also, *Goodchild v. Erickson*, 134 N.W.2d 191 (Mich. 1965) (declaring, in the context of a workers’ compensation case, that the control test had been abandoned as the exclusive criterion used to determine the existence of an employee-employer relationship); *McKissic v. Bodine*, 201 N.W.2d 333 (Mich. App. 1972)(holding that the test to determine employment status for the purposes of the worker’s compensation law is the “economic reality” test).

²⁶³ *Id.*, citing *Industro-Motive Corp. v. Wilke*, 150 N.W.2d 544 (Mich. App. 1967).

²⁶⁴ *Capital Carpet Cleaning and Dye Company, Inc.*, 372 N.W.2d at 334.

²⁶⁵ *Id.* at 333.

²⁶⁶ *Id.* at 334.

Another contingent work arrangement is created when an employer contracts with an employee leasing firm to meet its staffing needs. This scenario operates under the same rationale as the temporary industry: it is less expensive for employers to “out-source” administrative functions to a firm that specializes in manipulating the system to cut costs.²⁶⁷ In fact, one of the main reasons for the dramatic increase in the use of employee leasing firms is the alleged cost savings to employers regarding payroll taxes, including unemployment taxes, and other employee benefits.

Employee leasing arrangements involve an employer placing all or most of its existing work force onto the payroll of the leasing firm. For example, an employer contracts with a leasing firm, anticipating that the firm will provide staff for its entire operation. The employer, who is now the client-firm, then terminates all or some of its workforce. The recently terminated workers are then hired by the leasing firm and leased back to the client-firm, their original employer. The “leased employees” perform the same or similar tasks. The assignments are generally long-term, pay higher wages than other types of contingent work and offer benefits.

In return for paying a service fee, usually based on a percent of the client-firm’s payroll, the employee leasing firm takes over the work force of the client-firm but does not provide the workplace, does not supervise workers, and does not have the authority to discharge workers. The leasing company, however, is expected to pay the employee’s wages, payroll taxes, including unemployment taxes, and benefits.

Like the temporary industry described in Part II of this article, the employee leasing industry is experiencing sustained growth.²⁶⁸ Indeed, reports document that the number of employee leasing firms has increased from 98 firms in 1984 to more than 2,100 firms in 1994.²⁶⁹ Many state and federal unemployment insurance officials find this growth pattern alarming. Their primary concern is that the leasing firms will attempt to manipulate the experience rating system and/or attempt to avoid tax liability, which will

²⁶⁷ T. Joe Willey, *The Business of Employee Leasing* 7 (2d ed. 1993). The unemployment system provides an excellent example of how employee leasing firms manipulate the system. The firms effectively lower tax rates by pooling a mixture of high and low experience rated companies. The long-term result may be that state trust funds will be under funded. *See also*, 1995 ACUC REPORT at 174.

²⁶⁸ 1995 ACUC REPORT at 174-75.

²⁶⁹ *Id.*

ultimately have a negative impact on state's ability to fund its unemployment system.²⁷⁰ In addition, concern has been expressed over the definition of the employer-employee relationship which, for the leased worker -- like all other contingent workers -- can have repercussions in the context of unemployment benefit eligibility and beyond.

The relationship among the three parties is complex and the question of "Who's the employer?" is not easy to answer. The employee leasing firm sometimes assumes the responsibility for paying unemployment taxes. It is not unusual, however, for both the leasing firm and the client-firm to refuse the role of employer, which results in the leased workers being misclassified as independent contractors and, in turn, results in the leased workers being denied unemployment benefits.

Many states have taken a proactive approach to this issue by passing laws that attempt to define the role of the leasing firm in the context of the unemployment system. States addressing the who's the employer issue have generally adopted one of three different methods to determine who is the employer and thus the party liable for unemployment insurance tax contributions. At least 26 states have laws that identify the leasing firm as the employer; nine states identify the client-firm as the employer.²⁷¹ Several states apply a seven-point test to determine employer status, either requiring that all seven or some combination of the factors be satisfied.²⁷² Another option is to resolve the issue by looking to the party who maintains "direction and control" of the workers.²⁷³

²⁷⁰ KRA Corporation, EMPLOYEE LEASING STUDY INTERIM REPORT, RESULTS OF THE SURVEY OF STATE UNEMPLOYMENT INSURANCE TAX ADMINISTRATORS, submitted to the U.S. Department of Labor, Unemployment Insurance Service (June 19, 1995), 1-1 & 2-1 (*hereinafter*, KRA LEASING STUDY).

²⁷¹ KRA LEASING STUDY at 3-1. These provisions because they may be located in unemployment provisions, general business regulations, tax regulations, or workers compensation provisions.

²⁷² *Id.* The leasing firm is required to meet the following seven criteria in order to obtain employer status: 1) negotiates with clients or customers for such matter as time, place, type of work, etc.; 2) determines assignments or reassignments of workers, even though workers retain the right to refuse specific assignments; 3) retains the authority to assign or reassign a worker to other clients or customers when a worker is determined unacceptable by a specific client or customer; 4) assigns or reassigns the worker to perform services for a client or customer; 5) sets the rate of pay for the worker, whether or not through negotiation; 6) pays the worker from its own account or accounts; and 7) retains the right to hire and terminate workers. *See* ARIZ. REV. STAT. ' 23-614(a)-(g), CAL. UNEMPL. INS. CODE ' 606.5(b) & (c)

²⁷³ *Id.*

Alternatively, resolution of this issue may depend on whether state law directly addresses the question of tax liability. Some states designate that the leasing firm is liable for tax contributions.²⁷⁴ Others hold the client-firm liable for taxes only if the leasing firm does not pay. Another alternative is to hold the client-firm and the leasing firm jointly and severally liable.²⁷⁵

²⁷⁴ *Id.* at 3-2.

²⁷⁵ *Id.*