CHAPTER 15
SELF-EMPLOYMENT ASSISTANCE PROGRAM

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2.15.1 INTRODUCTION

Labor Law § 591-A provides for the Department of Labor to operate a Self-Employment Assistance Program (SEAP) as authorized by the Internal Revenue Code.[1] The purpose of the program is to provide assistance to qualified individuals to start their own businesses. Such individuals receive an allowance in lieu of regular unemployment insurance benefits but in the same amount and under the same conditions that they would receive regular unemployment insurance benefits.[2] Claimants participating in the program are not subject to the requirements

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[1] 26 U.S.C. § 3306: (t) **Self-employment assistance program.** For the purposes of this chapter, the term "self-employment assistance program" means a program under which—

(1) individuals who meet the requirements described in paragraph (3) are eligible to receive an allowance in lieu of regular unemployment compensation under the State law for the purpose of assisting such individuals in establishing a business and becoming self-employed;

(2) the allowance payable to individuals pursuant to paragraph (1) is payable in the same amount, at the same interval, on the same terms, and subject to the same conditions, as regular unemployment compensation under the State law, except that—

(A) State requirements relating to availability for work, active search for work, and refusal to accept work are not applicable to such individuals;

(B) State requirements relating to disqualifying income are not applicable to income earned from self-employment by such individuals; and

(C) such individuals are considered to be unemployed for the purposes of Federal and State laws applicable to unemployment compensation, as long as such individuals meet the requirements applicable under this subsection;

(3) individuals may receive the allowance described in paragraph (1) if such individuals—

(A) are eligible to receive regular unemployment compensation under the State law, or would be eligible to receive such compensation except for the requirements described in subparagraph (A) or (B) of paragraph (2);

(B) are identified pursuant to a State worker profiling system as individuals likely to exhaust regular unemployment compensation; and

(C) are participating in self-employment assistance activities which—

(i) include entrepreneurial training, business counseling, and technical assistance; and

(ii) are approved by the State agency; and

(D) are actively engaged on a full-time basis in activities (which may include training) relating to the establishment of a business and becoming self-employed;

(4) the aggregate number of individuals receiving the allowance under the program does not at any time exceed 5 percent of the number of individuals receiving regular unemployment compensation under the State law at such time;

(5) the program does not result in any cost to the Unemployment Trust Fund (established by §904(a) of the Social Security Act) in excess of the cost that would be incurred by such State and charged to such Fund if the State had not participated in such program; and

(6) the program meets such other requirements as the Secretary of Labor determines to be appropriate.

[2] Labor Law § 591-a (2) (a) – (b) (but see exceptions, below)

relating to lack of total unemployment, availability for employment, and refusal of offers of employment.[3] In addition, such claimants are not subject to the provision in Labor Law § 523 that a claimant will not accrue effective days in a week in which remuneration exceeds the maximum benefit rate.[4]

2.15.2 STATUTORY REQUIREMENTS

To qualify for participation in SEAP, an individual must be eligible to receive unemployment insurance benefits, including benefits payable to federal civilian employees and ex-service members, and have been identified by a worker profiling system as an individual likely to exhaust regular unemployment benefits.[5] Claimants may only be approved once for participation in SEAP.[6]

A claimant's self-employment assistance activities must be approved by the Department of Labor and by the Department of Economic Development. These activities may include entrepreneurial training, business counseling and technical assistance offered by entrepreneurship assistance centers established pursuant to New York Economic Development Law § 211, State University of New York small business centers, community-based organizations, local development corporations, and boards of cooperative educational services (BOCES).[7] An individual accepted into SEAP is expected to be actively involved on a full-time basis in activities, including training, which relate to establishing a business and becoming self-employed.[8]

The number of individuals participating in SEAP may not at any time exceed five percent of the number of individuals receiving regular unemployment insurance at the same time.[9]

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[3] Labor Law § 591-a (2) (b) (i); *see also Matter of Wilson*, 308 A.D.2d 667 (3d Dep't 2003) (the employer's objection that the claimant refused an offer of employment without good cause was overruled, in part, because the claimant had been accepted into SEAP a few days prior to the offer being made).

[4] Labor Law § 591-a (2) (b) (ii)

[5] Labor Law § 591-a (2) (c) (i) – (ii); *see also* Labor Law § 591 (4)

[6] Labor Law § 591-a (2) (c) (v); *see also* Appeal Board No. 528096 (claimant approved for participation in SEAP but withdrew from the program after six months. Seven years later, claimant again applied to SEAP but was denied because of her prior participation in the program despite her contention that she had never been notified of her prior acceptance since the evidence established she had received SEAP benefits and was held to have participated in the program).

[7] Labor Law § 591-a (2) (c) (iii)

[8] Labor Law § 591-a (2) (c) (iv)

[9] Labor Law § 591-a (2) (d)

An applicant for participation in SEAP must provide the Department of Labor with the following: a description of the proposed self-employment; a description of the applicant's knowledge of or experience in self-employment or knowledge of or experience with the product to be offered; and the names and addresses of all employers during the two years prior to making the application, including the nature of the businesses and the nature of the claimant's job duties at those businesses.[10]

The statute also provides that preference is to be given to claimants whose proposed business is unlikely to compete with any of the claimants' respective base period employers.[11]

2.15.3 NEW YORK CRITERIA FOR ACCEPTANCE INTO SEAP

To apply for participation in SEAP, New York requires that claimants be: at least 18 years of age; eligible to receive at least 13 or more additional weeks of unemployment insurance benefits; the recipient of an invitation letter from the New York State Department of Labor or categorized as a dislocated worker (determined via a profile score); and new to the SEAP program (that is, not approved for SEAP in the past).

For a proposed business to be approved, there are five basic criteria to be met. The individual must be: locating the proposed business in New York State;[12] willing to work full-time to launch the business; planning to be an active owner of the business and not a silent partner in a business partnership; a first-time business owner and operator of the proposed type of business (that is, the individual cannot have previously owned or operated a business of similar nature);[13] and

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[10] Labor Law § 591-a (3)

[11] Labor Law § 591-a (4); and see Appeal Board No. 565104 *aff'g* A.L.J. Case No. 112-00763 (Claimant's application for SEAP was denied because he was proposing a business that would likely compete directly with his base period employer).

[12] The claimant does not have to be a resident of New York, but must be eligible to receive unemployment insurance in New York and the proposed business must have its principal location in New York, https://www.labor.ny.gov/seap/frequently-asked-questions.shtm (last accessed May 29, 2019). *See* Appeal Board No. 524298 (in this NTU case, the Board did not credit the claimant's contention that his business was started as part of participation in SEAP, as the claimant obtained a certificate from the State of New Jersey reflecting the formation of the business as a limited liability company and a New Jersey employer identification number).

[13] *See* Appeal Board No. 572281 *aff'g* A.L.J. Case No. 113-01750 (claimant was denied participation in SEAP as evidence established she opened a sauna business in mid-October 2012 and applied for SEAP in late October 2012; claimant was also found to be not totally unemployed for the time period she was receiving benefits and starting her business); Appeal Board No. 566156 *aff'g* A.L.J. Case No. 012-10920 (claimant, employed by a family-owned metal fabrication company whose products included custom-made bronze and stainless steel grilles, sought participation in SEAP for a business to manufacture custom perforated sheet metal and linear bar grilles. Claimant was properly

prepared with a clear business idea.[14] A claimant who already has a business cannot participate in SEAP because only claimants who are eligible to receive unemployment insurance can be accepted into the program.[15] Claimants cannot change their business idea after acceptance into SEAP, as it would change the terms of the approval.[16]

Practice Tip:

In cases where the issue is whether the claimant owned the business prior to applying for SEAP, the record should be developed on whether the claimant already owned an established business or had engaged in any start-up activities performed prior to applying for SEAP. Such activities may include:

- Applying for a business identification number
- Forming a corporation or obtaining a certificate of doing business
- Creating a website or other social media sites, or obtaining a business email address
- Filing quarterly sales tax reports
- Taking deductions for business-related expenses on tax returns or reporting profits or losses on tax returns
- Making investments of time, money, or resources in starting a business and, if so, the nature and extent of such investment.
- Attending sales events, industry conventions, etc.
- Printing business cards or other business forms or documents.

PROFILING SCORE

Claimants must have been identified by the Department of Labor as an individual likely to exhaust their benefits prior to finding new employment and have written acceptance into the SEAP program from the Department prior to starting or operating their business while collecting

denied participation in SEAP as his aim was to continue his current business through SEAP, rather than start a new business).

[14] https://labor.ny.gov/seap/ (last accessed May 28, 2019)

[15] https://www.labor.ny.gov/seap/frequently-asked-questions.shtm (last accessed May 29, 2019); *see, e.g.*, Appeal Board No. 452496 (claimant, a NYS employee, also had a business as an appraiser and property tax consultant, rendering him not totally unemployed and, consequently, ineligible to receive UI; as he was ineligible, his application for participation in SEAP was properly denied).

[16] https://www.labor.ny.gov/seap/frequently-asked-questions.shtm (last accessed May 29, 2019)

benefits.[17] Such identification is accomplished, pursuant to Federal law, by a profiling system.[18] Claimants who are on recall or who use a union hiring hall are excluded from the profiling process.[19] Claimants are assigned a profile score ranging from zero to 100. Currently, a claimant with a score of 50 or higher[20] is considered to be likely to exhaust UI benefits and, consequently, a potential candidate for acceptance into the SEAP program.[21]

In New York, the profile score is based on four claimant characteristics: (1) the number of years the claimant was on the job with the last employer; (2) the county where the claimant lives; (3) the number of effective days claimed on any prior claim filed within three years of the current claim; and (4) the industry in which the claimant recently received the most earnings.[22] The industry in which the claimant received the most earnings is identified by its three-digit code in the North American Industrial Classification System (NAICS).[23] It is the industry, not the claimant's specific job within the industry, that is a factor in the profile score.[24] A NAICS code is

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[17] *Unemployment Insurance: A Claimant Handbook*, June 2018, https://labor.ny.gov/formsdocs/ui/TC318.3e.pdf (last accessed May 29, 2019)

[18] 42 U.S.C. § 503: **(j) Worker profiling** (1) The State agency charged with the administration of the State law shall establish and utilize a system of profiling all new claimants for regular compensation that—

> **(A)** identifies which claimants will be likely to exhaust regular compensation and will need job search assistance services to make a successful transition to new employment;
>
> **(B)** refers claimants identified pursuant to subparagraph (A) to reemployment services, such as job search assistance services, available under any State or Federal law;
>
> **(C)** collects follow-up information relating to the services received by such claimants and the employment outcomes for such claimants subsequent to receiving such services and utilizes such information in making identifications pursuant to subparagraph (A); and
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> **(D)** meets such other requirements as the Secretary of Labor determines are appropriate.

[19] https://www.doleta.gov/programs/wprs.cfm (last accessed May 30, 2019)

[20] Effective December 21, 2009, the Department of Labor lowered the profile score from 70 to 50.

[21] https://www.labor.ny.gov/seap/frequently-asked-questions.shtm (last accessed May 29, 2019).

[22] Prior to October 21. 2007, the profiling model was based on characteristic data related to industry, occupation, job tenure, mass layoff and education. To more accurately predict the claimant's likelihood of exhausting his or her unemployment benefits, the Department of Labor implemented the current system which uses administrative characteristic information about the claimant and eliminated claimant identified information such as occupation and education.

[23] The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. NAICS was developed under the auspices of the Office of Management and Budget (OMB), and adopted in 1997 (https://www.census.gov/eos/www/naics/ (last accessed May 29, 2019)).

[24] *See* Appeal Board No. 562253 *aff'g* A.L.J. Case No. 111-09733 (the NAICS code for nursing and health care facilities was properly assigned to claimant's last employer, a nursing and health care facility); Appeal Board No. 508741 (NAICS code for educational professionals, including teachers, was properly assigned to claimant who worked as a school district guidance counselor)); Appeal Board No. 464448 (attorney who worked for the NYS

assigned to an employer when it registers with DOL. The code is updated as necessary based on employer responses to DOL surveys.[25]

The methodology used by DOL to identify individuals who may qualify for acceptance into SEAP has been held to be a "statistically reliable basis for projecting the relative likelihood that an applicant will exhaust his benefit entitlement."[26] Absent any challenge to the accuracy of the criteria used in calculating the score,[27] a presumption of regularity is accorded to the accuracy of the criteria applied to a particular claimant, including accurate input of data and proper functioning of the computer.[28]

Department of Environmental Conservation was properly classified as working in a professional occupation; the Board rejected his argument the claimant's argument that he should have been narrowly classified as an environmental attorney).

[25] Appeal Board No. 549093 (Surveys are sent out every three to four years).

[26] Appeal Board No. 466267 (claimant assigned a score which fell below the minimum; the Board rejected the claimant's contentions that additional factors should have been taken into consideration in profiling him).

[27] Appeal Board No. 458468 (claimant's profile score was derived from personal information provided by the claimant and his last employer; the claimant did not contend that the data was inaccurate or incorrect); Appeal Board No. 472498 (employer's objection to claimant's acceptance into SEAP was overruled; employer had not contended that the profiling criteria was inputted inaccurately or that the computer malfunctioned); Appeal Board No. 521430 (profiling score based on information that claimant provided to DOL; no evidence that profiling criteria were entered inaccurately or that computer malfunctioned).

[28] Appeal Board No. 456580; see also Appeal Board No. 542438-A