CHAPTER 4
TOTAL UNEMPLOYMENT

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2.4.1 INTRODUCTION

A claimant will be ineligible to receive benefits if not totally unemployed.[1] What constitutes lack of total employment for this purpose includes any employment, even employment which is not covered by the Unemployment Insurance Law.[2] In other words, more than the traditional view of employment as an individual who works for and is paid by an employer. A claimant may lack total unemployment if she is a corporate officer or otherwise owns a business, either as a sole proprietor or in a partnership. Part-time public officials may also be considered not totally unemployed, either continuously or on days when public duties are being performed. Claimants who receive back pay, vacation pay, holiday pay, or dismissal pay are also considered to be not totally unemployed.

In determining whether a claimant is or is not totally unemployed, one or more of the following factors will need to be considered:

- Whether a claimant, while claiming benefits, has performed services for which he receives remuneration.
- Whether a claimant, while claiming benefits, has performed services for which she receives no remuneration.
- Whether a claimant, while claiming benefits, receives remuneration without having to perform services.
- Whether a claimant, while claiming benefits, is starting up or continuing the activities of a self-employment enterprise or of a corporation in which she is a principal or has suspended the activities of a self-employment enterprise or of a corporation.
- Whether a claimant, while claiming benefits, is continually involved in a self-employment enterprise or as an officer of a corporation in which he is a principal or is involved only during certain periods.

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[1] Labor Law § 591 (1): Unemployment. Benefits, except as provided in section five hundred ninety-one-a of this title, shall be paid only to a claimant who is totally unemployed and who is unable to engage in his usual employment or in any other for which he is reasonably fitted by training and experience. A claimant who is receiving benefits under this article shall not be denied such benefits pursuant to this subdivision or to subdivision two of this section because of such claimant's service on a grand or petit jury of any state or of the United States. (Labor Law § 591-a concerns the Self-Employment Assistance Program, discussed below.)

[2] *See* Labor Law § 522; *see also*, *Matter of Gruber*, 89 NY2d 225 (1996), where the Court wrote that “any employment, even in an industry that is not covered by the Law, excludes the condition of total unemployment” (fn. 2).

2.4.2 CORPORATE OFFICERS AND SELF-EMPLOYMENT

Generally, a claimant who is a principal or officer in a business for which services are performed on a regular and continuing basis is not totally unemployed.[3] Even where the services are performed on a sporadic basis, a partner, principal or officer may be considered not totally unemployed, regardless of whether remuneration is earned as a result of those services[4] or whether the company is profitable, so long as the claimant stands to gain financially from the business's continued operation.[5]

An officer or principal of a business is also generally considered to be not totally unemployed even during slack periods, or in the case of a seasonal business, during the off-season.[6] Activities such as soliciting future sales, attending seminars, and maintaining or repairing equipment in anticipation of the business being reopened for the next season render the claimant not totally unemployed.[7]

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[3] Appeal Board No. 530838 (the claimant and another sold bath and beauty products at parties held in customers' homes, usually once a month)

[4] *Matter of Bernstein*, 67 A.D.3d 1287 (3d Dep't 2009) ("A claimant who is a principal in an ongoing corporation will not be considered totally unemployed if he or she stands to benefit financially from its continued operation, no matter how minimal the activities performed on its behalf").

[5] Appeal Board No. 540124 ("an officer and a shareholder of an ongoing corporation is not totally unemployed under the law, regardless of whether or not he performs services and whether or not the business makes a profit, because he stands to gain financially from its continued operation"); *Matter of Carasso*, 23 A.D.2d 935 (3d Dep't 1965); *Matter of Boscarino*, 117 A.D.3d 1145 (3d Dep't 2014) (claimant found not totally unemployed where, in furtherance of her business, performed such activities as leasing and renovating a commercial space, obtained a NY tax identification number, and obtained merchandise to sell is not totally unemployed, notwithstanding that the business was not yet profitable)

[6] *Matter of DeVivo*, 51 A.D.2d 619 (3d Dep't 1976) (claimant, the vice president of a family home construction business, was considered not totally unemployed despite being laid off from the company during the slow season because he stood to gain financially from the business).

[7] *Matter of Pasinski*, 141 A.D.3d 989 (3d Dep't 2016) (claimant was considered not totally unemployed during the off-season where he was the owner of a charter fishing business and during the off season maintained the business website, communicated with prospective customers, paid various business-related expenses, advertised, and preparing the boat for operation for the next season); Appeal Board No. 552107 (claimant found not totally unemployed where he was a corporate officer, along with his father, and a 40% shareholder of a general contracting business; his off-season activities included soliciting future jobs and providing estimates); *but see* Appeal Board No. 581318 (claimant found to have total unemployment where she had a construction business but performed no services in the construction field for almost one year prior to filing her claim for benefits, had no expectation of performing any future construction work and was not soliciting business).

However, a claimant who performs services solely to maintain and preserve, or to limit liability on, real property purchased or otherwise obtained to use as a residence is totally unemployed, even if the property might generate rental income at some time in the future.[8] Additionally, an occupation pursued as a hobby, rather than a business, does not cause the claimant to be ineligible.[9] A claimant who engages in time-consuming and continuous activities on behalf of a business which generates income is distinguishable from someone who engages in a hobby.[10]

DETERMINING PRINCIPAL STATUS

To determine whether an individual is a principal in an ongoing business, the analysis focuses on the claimant's authority to perform certain activities on behalf of the company and whether the claimant can manipulate the company's fiscal affairs. For example, a claimant who works for a family business is not a true principal of the business solely by reason of his family relationship, when he or she is not an officer or shareholder, has no authority to sign checks, and there is no evidence that he was other than a regular employee.[11] On the other hand, a claimant whose

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[8] Appeal Board No. 527987 (the claimant, his wife, and another couple purchased lakefront property to use as a vacation home, but gave some consideration to the idea of renting the property when neither couple was in residence); Appeal Board No. 539250 (the claimant's grandmother transferred a five-unit residential building to the claimant and three other family members; the claimant and family members reside in two of the units, another two units are rented out, and the fifth is vacant pending future rehabilitation; a corporation was created to manage the building and limit the family members' liability; in finding that the claimant was not employed by virtue of the corporation, the Board noted that its purpose was solely to manage living space and the claimant's activities in paying taxes, insurance, etc., were incidental to that purpose); *but see* Appeal Board No. 543476 (a claimant engaged in regular activity on behalf of a rental property from which she stands to gain financially is lacking in total unemployment) (citing Appeal Board No. 521519).

[9] Appeal Board No. 545033 (claimant was found to be engaging in a hobby and eligible for benefits where he was an excavator by trade and rebuilt custom cars as a hobby, driving the car as his personal vehicle until he tired of it and sold it in order to buy another car to rebuild as the claimant did not and had no to plans to receive income from rebuilding cars, had no bank account, tax identification number, or d/b/a, and did not advertise or have customers).

[10] Appeal Board No. 564415 (claimant found to be engaging in a business and not pursuing a hobby where she bred, cared for, showed, and sold dachshunds, advertised the dogs for sale and received income from the sale of the dogs); Appeal Board No. 552896 (found to be engaging in a business and not a hobby where claimant obtained a d/b/a, set up a business bank account, wrote off a portion of his rent as a business expense, and produced a weekly television program).

[11] Appeal Board No. 539564 (claimant was found not totally unemployed as he was not a principal in his family's company but only worked as an hourly laborer); Appeal Board No. 544212 (claimant was not a true principal in his wife's business where he could hire and fire employees, but had no check writing authority, received a W-2, worked for other employers during the period at issue and was paid an hourly rate; although the claimant had some expertise in the business, his wife also had experience in the same field); Appeal Board No. 559007 (claimant, a former Olympic gymnast, who gave her daughter $12,000 to start her own gymnastics center, helped direct people who delivered equipment to the building, posed for pictures, and guaranteed the daughter's lease on the property was not considered de facto principal in the business as she was not an officer of the business, was not a signatory on the checking account, and only provided minimal services for the business prior to it's opening); Appeal Board No. 538528 (evidence failed

name is listed on a d/b/a or other state forms and on the business banking account who performs substantial and regular activities on behalf of the business may be deemed a true principal of the business.[12]

In some cases, a claimant's spouse may have been made owner and sole officer in a corporation in order to take advantage of state or Federal regulations requiring that a certain percentage of government contracts be awarded to minority-owned business, but the claimant is the one with the experience in the field, and is the one who performs most of the duties. It may be appropriate to find that the claimant was the *de facto* principal and is not totally unemployed. However, there must be a record establishing that the claimant was, in fact, involved in the business.[13]

ACTIVITIES RENDERING AN OFFICER OR PRINCIPAL NOT TOTALLY UNEMPLOYED

A nominal corporate officer, who owns no stock, is totally unemployed during periods that he or she is not actually performing any services (these situations usually arise in the context of a family-owned business).[14] A claimant who has an ownership interest in a business, but performs no services for the business and is not active in the business may be totally unemployed.[15]

Additionally, solely taking a tax advantage based on the existence of a business, without more, is

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to establish that claimant was a de facto principal in his wife's business where he was not an officer or a signatory on the corporate checking account and did not engage in any start-up activities on behalf of the business).

[12] Appeal Board No. 565208 (the claimant was a true principal in his wife's halal meat and grocery store); Appeal Board No. 544757 (the claimant was a true principal, with his wife, in a cabin rental business); and Appeal Board No. 523357 (claimant, a concrete finisher, handled the daily operations of a concrete finishing company which had been opened in the names of his wife and daughter, in order to quality for minority status).

[13] *Matter of Domes*, 254 A.D.2d 602 (3d Dep't 1998) (finding claimant eligible on the grounds that the claimant's wife also had experience in the field and there was no evidence, only speculation, that the claimant performed services on behalf of the business); *Matter of Lewis,* 290 A.D.2d 782 (3d Dep't 2002) (finding claimant was not a de facto principal in wife's business and was entitled to benefits where certificate of doing business was solely in the name of claimant's wife, she was the only one authorized to sign business checks, she took care of the bookkeeping and banking and answered the telephone, and in the absence of evidence that claimant performed any services for the business during the periods for which he received unemployment benefits).

[14] Appeal Board No. 477058-A (claimant, a manual laborer for a family-owned corporation paid on an hourly basis, was eligible for benefits despite being named vice-president of the company where evidence established that he was named officer solely so he could act as a secondary guarantor on a line of credit the corporation took out to cover a cash flow shortage and had no authority to sign checks or make decisions on the corporation's behalf. Board noted he did not stand to gain any financial benefit from the corporation (other than his hourly wage) and had no power over corporate decisions).

[15] Appeal Board 367708 (The claimant lent money to his brother for the purchase of a tavern and was made an owner to protect his investment, but performed no services.

insufficient to support a finding that a claimant is not totally unemployed.[16]

Whether the claimant should be considered not totally unemployed based on ownership or officer status in a business will depend on the nature of any activities performed by the claimant and whether those activities are more than *de minimus* in nature.[17]

DAY TO DAY DETERMINATIONS VS. CONTINUING TIME PERIOD DETERMINATIONS

Initial determinations may be issued finding the officer or principal of a business not totally unemployed on a continuing basis or only on specified days. Where the initial determination finds the claimant not totally unemployed on a continuing basis, the evidence may show that the claimant should be held ineligible only intermittently.[18]

The mere continued existence of the corporate entity, with its attendant tax advantage, is insufficient to render the claimant not totally unemployed on a continuous basis.[19] A claimant who

[16] Appeal Board No. 572367 (claimant found to have total unemployment despite forming a limited liability company and purchasing liability insurance where she never commenced operation of the business), Appeal Board No. 544180 (claimant's tax benefit from ownership interest in a company without evidence that she provided services was insufficient to establish that the claimant was employed), Appeal Board No. 541752 (a tax advantage, without more, is not sufficient to support a finding that a claimant was employed), Appeal Board No. 472439-A (claimant was found eligible for benefits where both claimant and her mother's names were on the business property but claimant was only a 10% owner for tax purposes)

[17] Appeal Board No. 487728 (claimant who was a chemist by trade and who was the named vice president and secretary in her husband's music business, was found to have total unemployment where the services she performed on behalf of husband's corporation were de minimus and consisted of paying the business telephone bill once a month and picking up business mail for a period of a few months at a time when her husband was ill); Appeal Board No. 523845 (claimant, a mutual funds analysis, was found to have total unemployment where he was made an officer of his wife's corporation, formed to provide temporary employment to nurses; the claimant was listed on the checking account but he never wrote a check nor performed any services on behalf of the business); Appeal Board No. 483338 (claimant, an account manager, was an officer and shareholder in her husband's automotive engine repair business; she was authorized to sign checks but had signed any in the three years prior to the filing of her claim; the only service she ever performed was to help her husband update the corporate books in preparation for her UI hearing)

[18] Appeal Board No. 547064 (claimant, a corporate attorney, found not totally unemployed only on specific days where she started a corporation to design, market and sell comfortable shirts for full-figured women; she performed services on 16 discrete days, identified through the claimant's records); Appeal Board No. 555220 (claimant found not totally unemployed only on days he performed services for side business selling used cars where he performed services on a sporadic basis, on five to six days each month); Appeal Board No. 561070 (the claimant, a drummer in an indie pop rock band, was found not totally unemployed only on days when he rehearsed or performed)

[19] Appeal Board No. 572836 (citing Appeal Board No. 556179A).

does not devote a substantial amount of time or render substantial services may properly be held not totally unemployed only on those days when services are actually performed.[20]

For example, a claimant who operates a part-time business concurrently while employed with an employer and who continues to operate the business on a part-time basis after being separated from regular employment may be found to be totally unemployed on days he or she does not perform services.[21] A claimant who provides sporadic services solely on a freelance basis and reports as days worked those days on which he or she performs the services may be totally unemployed on other days, even if certain *de minimus* activities are performed.[22]

STARTING UP AND CLOSING DOWN A BUSINESS

A claimant who is starting a business or who is in the process of winding down a business may be not totally unemployed, depending on the nature and extent of the activities performed.

With respect to start-up activities, it must be determined whether the claimant was merely contemplating a business or was actively taking steps to start the business.[23] These activities may include renting or buying a site for the business; setting up a bank account; filing a d/b/a or certificate of incorporation; buying supplies; setting up a website or taking steps to advertise a new business; or making substantial investments into the business.[24] The fact that a claimant

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[20] Appeal Board No. 549769 (claimant found not totally unemployed only on specific days where he started an internet travel service for which he performed services on only ten days over a period of several months).

[21] Appeal Board No. 591265 (claimant, a sales and marketing director for an oil and propane company, also had a business providing DJ services at weddings and other events found not totally unemployed only on only certain days; the Board noted that the claimant had no employees, worked on a seasonal basis only, and generally had only one event per week. Ancillary services such as paying bills and answering e-mails were too insubstantial to render the claimant not totally unemployed on a continuing basis); *but see Matter of Box*, 168 A.D.2d 729 (3d Dep't 1990) (evidence supported a finding that claimant was not totally unemployed for the entire time period despite claimant's assertion that he was seeking other employment while operating his business).

[22] *Matter of Alm*, 302 A.D.2d 777 (3d Dep't 2003) (claimant, a freelance massage therapist, found to be not totally unemployed on days she performed massage therapy services and when she wrote checks to pay for workshops and books related to massage therapy but found to lack employed on days where the only activity she engaged in was depositing checks into her bank account from clients).

[23] *Matter of Standig*, 3 A.D.3d 828 (3d Dep't 2004) (claimant found not totally unemployed where his activities in making presentations in order to seek funding and otherwise contacting prospective vendors for an online information brokerage system had "surpassed those inherent to merely exploring the feasibility of establishing a business").

[24] Appeal Board No. 543169 (claimant found not totally unemployed where he filed a d/b/a for a business to develop a biodiesel fuel, created a website, met with potential investors, looked for a business site, met with banks, attended seminars, and purchased equipment) *but see* Appeal Board No. 544567 (claimant was determined to be totally unemployed where he intended to start a boat detailing business, advertised in a Pennysaver, purchased cleaning supplies, and placed a binder on an insurance policy, but never paid for the policy, had no office or checking account, never had any customers and business was never operational).

does not receive a salary is not controlling, if the claimant is performing services.[25] The claimant's initial activities may be exploratory in nature, only, but subsequently develop into concrete steps to open a business.[26] Thus, the dates of any such milestones may be critical. A claimant whose business never went into operation is totally unemployed when all start-up activities occurred prior to the filing of the claim.[27]

In circumstances where a claimant alleges the business is no longer in operation, the focus of the analysis is on what activities, if any, the claimant engaged in on behalf of the business for the time period in question. When a business is no longer viable, engaging in sporadic activities such as paying bills,[28] or cancelling insurance or speaking to creditors,[29] does not render a claimant not totally unemployed. Additionally, consulting with professionals in hastening the winding down process does not mandate a finding of ineligibility.[30] Further, the failure to complete formal paperwork dissolving the business does not render a claimant not totally unemployed.[31]

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[25] *Matter of Restivo*, 24 A.D.3d 1007 (3d Dep't 2005) (claimant found not totally unemployed where he formed an investigation business, paid business expenses, solicited clients, purchased supplies, established a business bank account, and performed investigative services despite fact that the business was not initially profitable).

[26] Appeal Board No. 579122 (claimant and three others formed a corporation in October 2010, intending to open a diner, but took no steps other than looking for a site, later decided to open a franchise restaurant instead, signed a franchise agreement in August 2011 and each partner contributed their share of the $25,000.00 franchise fee. A lease was signed in November 2011 and the restaurant opened in April 2012. The claimant was found to be totally unemployed prior to August 2011, as his activities prior to that time were exploratory in nature only. He was deemed not totally unemployed upon the signing of the franchise agreement).

[27] Appeal Board No. 524015 (claimant found to lack total unemployment where he intended to open a grocery, to be operated by his wife; he renovated a space and purchased supplies but was unable to obtain a loan to cover the costs of opening a store and the store never opened).

[28] Appeal Board No. 543367 (citing Appeal Board Nos. 544057, 534263, 497990, and 424288); *Matter of Salomone,* 34 A.D.3d 1037 (3d Dep't 2006); Appeal Board No. 563704 (claimant found totally unemployed where her business was defunct and the only activities she engaged in were handling of accounts receivables, the payments of outstanding debt, and responding to occasional inquiries to say that the business was no longer operational).

[29] Appeal Board No. 541903 (claimant was not totally unemployed during winding down period of business despite activities of writing checks to pay past bills, depositing funds that were due to the company, cancelling the insurance, and speaking to creditors as these activities were not substantial in nature in furtherance of an ongoing business).

[30] Appeal Board No. 543367 (citing Appeal Board Nos. 525368 and 497990).

[31] *Matter of Haseltine,* 30 A.D.3d 938 (3d Dep't 2006) (claimant was totally unemployed where she ceased operating a construction business, cancelled liability and Workers' Compensation Insurance, closed the business checking account, and stopped soliciting new business; the fact that she did not cancel the certificate of doing business was insufficient, on its own, to find her not totally unemployed); Appeal Board No. 552216 (claimant was totally unemployed where business physically closed and partner was paying debts and selling assets; claimant's writing of a few checks to pay business debts was *de minimus*).

Practice Tip:

In developing the record on whether a claimant is not totally unemployed (regardless of whether the claimant's business was incorporated, a partnership, an LLC, etc.) the following areas must be explored:

- What specific activities, if any, is the claimant performing on behalf of the business?
- Is the claimant actively seeking customers or clients?
- Is there a separate business premises?
- If not, where is business transacted? If at home, does the claimant take an income tax deduction?
- Does the business own any equipment, including such office equipment as computers, printers, fax machines, etc.?
- Does the business own any other supplies?
- Is there a business checking account?
- How often does the claimant write checks and for what purpose?

  There may be a difference between a claimant who writes a quarterly check to the IRS, without performing any other services, and a claimant who is writing checks to obtain supplies.

- Does the claimant have business stationery or business cards?
- If so, does the claimant hand out business cards – how often and under what circumstances?
- Is there a business telephone?
- Is the claimant advertising and if so, where and how often? Newspapers (including "Pennysavers")? Internet? Yellow pages?
- Is there a website? If so, what is the content? Are fees paid to maintain it? Are there ads on the website that generate income to the claimant?
- Are there any other employees and if so, how many?
- Is the claimant taking business deductions and if so, for what and in what amounts?
- Tax returns, bank records, and other documentation will also help establish the extent of a claimant's activities on behalf of a business.

In developing the record, make sure to identify the time periods involved, particularly where the business existed prior to the filing of the claim. The fact that a claimant may have obtained business equipment at some earlier date does not automatically mean that the claimant is still actively operating a business, even if the equipment is still in the claimant's possession.

2.4.3 INTERNET BUSINESSES

The existence of a website may affect a claimant's eligibility for benefits in one of two ways: (1) the claimant has a business which involves physical contact between the claimant and the business customers (for example, a store, a restaurant, a physical therapy business) and also

has a website associated with the business; or (2) the claimant's business exists solely on the Internet (for example, a web-based retail store). In either case, the existence of a website will bear on the analysis of whether a claimant is or is not totally unemployed. Keep in mind that a website is only one part of the analysis; the record must still be developed on any and all activities that the claimant may have performed on behalf of a business.

Practice Tip:

In determining the significance of a website in the decision of whether a claimant is or is not self-employed, evidence is needed on the following points:

- What is the content of the website?
- What is the purpose of the website?
- Can the website be used to purchase goods or obtain the claimant's services?
- Are there ads on the website and, if so, can income be generated from those ads?
- Does the claimant continue to pay a fee to keep the website active?
- If there is no other activity on behalf of the business other than the active website, why is the website still active?

If the hearing file includes screen shots or other documentation of the actual website, those pages may be considered.

A claimant's act in creating a website for a new business, particularly when taken in conjunction with other activities, such as opening a bank account, ordering business cards, and so on, may be evidence that the claimant is not totally unemployed and, consequently, ineligible to receive benefits, even if the business is not yet lucrative.[32] These activities show that a claimant has gone beyond mere contemplation of a business and has taken active steps to start one.[33]

A claimant may have had a business prior to filing a claim for benefits (frequently as a sideline to regular employment) and then contend that he or she is not employed because the business is no longer functioning. In such cases, claimants must be questioned about any activities performed on behalf of the business, including activities related to the business's website.

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[32] *Matter of Romero* (232 A.D.3d 1147 (3d Dep't 2014) (claimant found not totally unemployed where he formed a corporation for the purpose of importing and selling clothes manufactured overseas, creating a logo, developed a business website, distributed business cards, attended trade shows, and had apparel samples made); *Matter of Gazzara* (60 A.D.3d 1226 (3d Dep't 2009) (court found claimant not totally unemployed based on activities determined to be "in furtherance of her business and in anticipation of obtaining a financial benefit" where she purchased a host website and domain name, designed the website, printed business cards, and solicited business); *Matter of Nigro,* 47 A.D.3d 1040 (3d Dep't 2008) (claimant not totally unemployed where he established a business website, set up business telephone lines and a business checking account, and obtained a federal identification number).

[33] *See* Starting Up and Closing Down a Business, above.

The fact that a website is still in existence does not, in and of itself, establish that the business is in operation. Rather, it is the nature and extent of the services performed in connection with the website that is material.

For example, in Appeal Board No. 581119, the claimant, prior to filing her claim and while still employed full-time, had become certified in childbirth and breastfeeding education. She created a website which presented educational information for expectant mothers, and subsequently linked the website to Facebook and Twitter accounts. However, there were no services or products sold on the website nor were any clients or revenue generated from the website or related social media. After filing her claim, the only activity the claimant performed was to spend anywhere from ten minutes to one hour, once a week, to improve the website. The Department of Labor had held the claimant to be ineligible on a continuing basis; the Appeal Board modified the determination to hold the claimant ineligible on only one day a week (representing the one day a week she worked on the website).[34] Similarly, in Appeal Board No. 564645, the claimant's limited activities on behalf of a business, established prior to his claim for benefits were limited to only an hour or so each week, during which he would check e-mails and update the business's Twitter and Facebook pages. In affirming the hearing decision that held the claimant ineligible only on days when services were actually performed, the Board noted that the existence of a website through which sales might be made was not sufficient to establish the kind of concerted and continued activity which would support a conclusion that the claimant was ineligible on a continuing basis.

The fact that a claimant may pay a fee to maintain an existing website does not, without more, render the claimant not totally unemployed.[35] However, the existence of a website to advertise services or sell a product may contribute to a holding that a claimant is not totally unemployed if the claimant engages in other activities suggesting the furtherance of a business.[36] Even where

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[34] The Appeal Board distinguished this case from Appeal Board No. 541230, which involved a claimant who operated a bed and breakfast, which was advertised on the establishment's website. The Board noted that the claimant was simply experiencing a lull in his business, which was continuing and which could revive at any time guests arrived.

[35] Appeal Board No. 572593 (claimant found eligible for benefits where he hoped to start a fishing charter business, set up a website, but had no business bank account, was not actively seeking customers, and had neither incorporated nor filed a certificate of doing business); Appeal Board No. 541578 (claimant found eligible for benefits where evidence established his existing business was inactive despite his payment of a fee to maintain a website, where he did not advertise, had no other expenses related to the business and there were no business premises); ***but see,*** Appeal Board No. 588968 (claimant found not totally unemployed where she sold jewelry and other accessories online; maintained an inventory worth approximately $5,000.00, and regularly posted pictures and messages to the website and to her Instagram and Facebook accounts).

[36] *Matter of Meade*, 12 A.D.3d 769 (3d Dep't 2004) (claimant found not totally unemployed where she had incorporated a business prior to being laid off, maintained a business checking account, website, post office box, inventory to well and periodically checked the website for e-mail); Appeal Board No. 544718 (claimant who maintained a website to advertise his services as a photographer and to sell his photographs was found to be not totally unemployed, given that he also continued to advertise at festivals, in magazines aimed at brides, and on the Internet; maintained a business checking account and business credit card; and continued seeking new customers); Appeal Board No. 566339

a claimant maintains an active website for the sale of products and actively checks the website, while performing no other activities on behalf of a business, it may be concluded that the claimant was totally unemployed for the time period the website is active.[37]

Where a claimant engages in numerous business-related activities, the existence of a website will be another factor in determining whether the claimant is or is not totally unemployed. A claimant who maintained a website to advertise his services as a photographer and to sell his photographs was found to be not totally unemployed, given that he also continued to advertise at festivals, in magazines aimed at brides and on the Internet; maintained a business checking account and business credit card; and continued seeking new customers.[38]

In certain limited cases, a claimant's website may be viewed as, essentially, an online résumé, rather than a business. The website, in such cases, may contain little more than a list of services the claimant can provide, a list of previous clients, and contact information.[39]

(claimant, an accountant, was found not totally unemployed where he set up a website for his business, which originally was to prepare tax returns but was later expanded to include a variety of financial services, and for which the claimant paid a fee to Google so that his website would come up as an ad when someone did a related Google search).

[37] Appeal Board No. 543727 (claimant, an actress who had created a corporation to trademark her fictional, comedic persona and set up a website to sell intimate apparel associated with her character which was operational for one month and which she checked on a daily basis while it was operational, was only found not totally unemployed for the one-month period when the website was operational).

[38] Appeal Board No. 544718; Appeal Board No. 566339 (claimant, an accountant, was found not totally unemployed where he set up a website for his business, which originally was to prepare tax returns but was later expanded to include a variety of financial services, and for which the claimant paid a fee to Google so that his website would come up as an ad when someone did a related Google search).

[39] Appeal Board No. 551960 (the claimant set up a business and website to enhance his opportunities to obtain work and website was nothing more than a listing of claimant's available services with contact information similar to a resume), and Appeal Board No. 556179A (the claimant, an actress and teacher with a law degree who prepared tax returns for clients; was found to have total unemployment where website only listed the services she could provide and was not used to obtain clients).

Practice Tip:

In developing the record, the following points should be developed:

• How often did the claimant visit the website?

• What was the purpose of the website visits?

• Did the claimant only enter updates or was the claimant also checking for orders (where goods or services could be ordered on the website)?

• Was any income being generated from the website, either through the goods or services offered by the claimant, or by ads placed on the website which generated money paid to the claimant whenever a visitor to the site clicked on an ad?

2.4.4 VOLUNTEER WORK

For purposes of determining whether a claimant is totally unemployed, it is not controlling whether a claimant is in fact compensated, monetarily or otherwise, for the services he or she performs; rather, whether a claimant is performing volunteer services that would render the claimant ineligible turns on "the activity's future financial payoff, regardless of the present financial circumstances."[40]

A claimant who performs volunteer work is considered totally unemployed when there is no expectation that the claimant's activities will lead to remuneration.[41] A claimant may volunteer services for a non-profit corporation or other entity; in either case, there must be no compensation

[40] Appeal Board No. 564415 (rejecting a claimant's contention that she was totally unemployed because her activities in connection with a kennel that she owned had social value and the business was losing money); Appeal Board No. 559992 (architect who worked with the expectation of acquiring hours of experience to satisfy professional requirements for his license lacked total unemployment, even though his expectation turned out to be erroneous and he received no credits toward his license for his unpaid work, because his motivation in rendering the services was to work toward his license so that he could obtain work as an architect).

[41] Appeal Board No. 579763 (claimant, an attorney with a defunct law practice, was found totally unemployed despite providing occasional pro bono legal services to two churches); *Matter of Connerton*, 132 A.D.3d 1210 (3d Dep't 2015) (claimant found to have total unemployment where she provided child care for a former co-worker's daughter at the same time as caring for her own child and was neither paid nor had any expectation of being paid).

received nor any expectation of future compensation.[42] It is not dispositive if the claimant is later hired by the entity for which volunteer services were performed.[43]

Factors that determine whether services are performed without expectation of remuneration include whether compensation was ever given or reasonably anticipated in the future, notwithstanding that there may be potential for it, and whether the claimant had other employment during that time period.[44] For example, in *Matter of Solomon,* 256 A.D.2d 774 (3d Dept 1998), the claimant, a founding member of a nonprofit corporation, was found to be not totally unemployed while performing unpaid services for the corporation, such as planning events, attending conferences and publishing a newsletter since the evidence established she performed paid services before and after this period, and there was a reasonable anticipation that her efforts would result in compensation in the future.

Likewise, in *Matter of Falus,* 276 A.D.2d 1009 (3d Dep't 2000), the claimant lacked total unemployment where he made uncompensated efforts to start a nonprofit organization devoted to promoting health and disease prevention in communities, because the activities and goals he undertook were similar to previous paid employment. The evidence supported the conclusion that he would receive future compensation, despite not receiving any for the period in question.[45] Similarly, in *Matter of Remchuk,* 283 A.D.2d 701 (3d Dep't 2001), the Court found the claimant lacked total unemployment where he was a mechanic by trade and spent several hours a day in his brother's automotive repair business performing a variety of chores, with the expectation that he would eventually become a partner in the business.

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[42] Appeal Board No. 509759 (claimant found to be totally unemployed where he formed a corporation to raise funds to build a cathedral in Haiti).

[43] Appeal Board No. 577489 (claimant worked as an unpaid clerk for a hospital while seeking employment; he was later hired by the hospital).

[44] *Matter of Masferer*, 197 A.D.2d 763 (3d Dep't 1993) (claimant was founder and president of a nonprofit organization who worked 20-30 hours a week at the organization's retail outlet while also working full-time as a vocational instructor at a correctional facility, but never received any compensation from his work for the nonprofit organization nor expected to receive any. Court directed the Appeal Board to consider whether voluntary service rendered to a charitable organization without pay and without reasonable anticipation of future compensation or benefit constituted employment for purposes of the Unemployment Insurance Law. Upon reconsideration (Appeal Board No. 437490C), the Appeal Board held: "employment means an exchange of services rendered for some form of compensation," and found that this claimant was totally unemployed, notwithstanding that he could potentially influence the Board to pay him for his services).

[45] *Matter of Rodriguez*, 282 A.D.2d 855 (2d Dep't 2001) (affirming Appeal Board No. 486869, finding claimant lacked total unemployment where he co-founded a nonprofit corporation operating an art museum and filed for benefits after laying himself off due to financial difficulties but continued to perform services for the museum, noting that he was in control of the compensation he received and fully anticipated returning to the payroll when the financial situation warranted, such that his interests were financial and not limited to "emotional ties").

Practice Tip:

In developing the record in a case involving lack of total unemployment where a claimant indicates he or she was a volunteer, ascertain the following:

- For whom is the claimant providing the services?
- If a company, was this is a nonprofit organization? If so, what is its purpose?
- How did the claimant get involved with the individual(s) or the organization?
- What services does the claimant provide and how often does the claimant provide them?
- Was the claimant paid or given any non-monetary compensation for the services?
- If so, was this for reimbursement of expenses or could it be considered remuneration?
- Did the claimant previously perform paid work for the same organization? Does he or she anticipate doing paid work for this organization in the future?
- What is the claimant's paid employment history? Is it similar to the services that she or she is providing?
- What is the claimant's motivation in performing the services?
- Is the claimant actively looking for other work? Is he or she using the organization's equipment to do so?

2.4.5 PUBLIC OFFICIALS

A paid public official may be found to be not totally unemployed, either continuously or on specific days, if he or she retains his or her position as a public official after filing a claim upon separation from other employment. Whether the ineligibility is continuous or on a day to day basis will depend on whether the claimant must be available to perform the duties of the office at any given time or whether the claimant's duties may be performed on discrete days.

Where an elected official receives an annual salary for his or her work, performs a variety of duties in that capacity, and is subject to inquiries by constituents, he or she lacks total unemployment on a continuing basis.[46] However, where a public official is able to limit his or her duties to specific

[46] *Matter of Geracitano*, 277 A.D.2d 558, 559 (3d Dep't 2000) ("a councilperson [is] not totally unemployed where the proof showed that he received an annual salary for his work as a councilperson, performed a variety of duties in that capacity and was subject to inquiries by his constituents"); *Matter of Silverstein*, 236 A.D.2d 757 (3d Dep't 1997) (claimant found not totally unemployed on a continuous basis despite his contention that he performed all of his duties as a council member on the four days a month the council met); *Matter of Belle*, 225 A.D.2d 826 (3d Dep't 1996) (claimant found not totally unemployed on a continuous basis where he received an annual salary, performed a variety of duties and was subject to inquiries from his constituents); Appeal Board No. 564710 (claimant, a paid elected village trustee, was found not totally unemployed on a continuous basis where evidence established he was required to be available throughout the week to respond to calls from village residents, in addition to his other duties as trustee);Appeal Board No. 566636 (claimant, a part time village mayor who performed duties every day of the week, was not totally unemployed on a continuous basis).

discrete days during the week and is not subject to inquiries from the public, he or she may properly be found not totally unemployed only on days during which services are performed.[47]

2.4.6 WORKING WHILE COLLECTING

A claimant who performs services for an employer, which brings in or which may bring in income, is considered to be employed and consequently is ineligible to receive benefits. A claimant lacks total unemployment if he or she performs services of even an hour or less on any given day,[48]even if the claimant will not be paid for the services until a later date[49] and even under circumstances where the claimant performs activities but is working on a commission basis only.[50]

A claimant who participates in a paid college work study program is also not totally unemployed.[51] Similarly, a graduate student working as a graduate assistant on a project funded by a state agency is not totally unemployed.[52]

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[47] Appeal Board No. 561452A (claimant, a town tax collector who received annual salary of approximately $7,800.00, was found not totally unemployed only on days he performed services of sending tax bills, receiving and depositing payments and issuing receipts where evidence did not establish he needed to be available to constituents whenever assistance was required); Appeal Board No. 586337 (claimant found not totally unemployed only on days he attended meetings where evidence did not establish he performed services on any other days).

[48] *Matter of Shenman*, 297 A.D.2d 852 (3d Dep't 2002) (claimant was not totally unemployed on any day he performed services despite fact that he worked less than eight hours a day). *Matter of Shuman*, 135 A.D.3d 1284 (2016) (an adjunct professor, working anywhere from 45 minutes to two hours a day, on two to four days a week, is not totally unemployed on each day he worked).

[49] Appeal Board No. 582859 (claimant not totally unemployed on any day she performed services as a special education teacher even though she did not receive her first paycheck until one month after she began working)

[50] Appeal Board No. 523415 (claimant found not totally unemployed where evidence established he continually contacted customers on behalf of a rubber stamp manufacturer, forwarded orders as received, and received commissions on an irregular basis).

[51] *Matter of Yamamura*, 111 A.D.3d 1049 (3d Dep't 2013).

[52] Appeal Board No. 578036

Pursuant to Labor Law § 523,[53] a claimant who works less than four days a week, but earns over the statutory maximum benefit rate is considered not totally unemployed for the entire week on the basis that the claimant is not able to accrue effective days.[54]

Practice Tip

Working while collecting cases arise at a point in time subsequent to the period of employment, often two or three years later. As a result, record development will depend heavily on documentation, including the following:

- Payroll records
- Time records
- Check stubs
- TCC questionnaires filled out by the employer.

Hearings will often be attended only by the claimant and—sometimes—a representative of the Commissioner of Labor. The claimant must be carefully confronted with all documentation entered into evidence. Unless the claimant convincingly challenges the credibility of these documents (where no employer witness is at the hearing to authenticate the documents), the documents may be relied upon to find the claimant not totally unemployed. *See, e.g., Matter of Umpierre*, 60 A.D.3d 1182 (3d Dep't 2009) (court credited the employer's documentary evidence of copies of pay stubs and a Department of Labor audit summary to establish the claimant's employment since claimant could not recall when he worked for the employer).

In most cases, the claimant will admit to having been employed but will dispute that any willful misrepresentation was made when certifying to not having been employed. As noted above, many of these cases arise more than a year after benefits were collected, in which case the record must establish a willful misrepresentation pursuant to Labor Law § 597 (3). The claimant may allege that he or she is the victim of identity theft. If the claimant denies revealing the password or NY.GOV ID used to claim benefits, has never filed a complaint of identity theft, and has no other

[53] Labor Law § 523 provides, in pertinent part: "Effective day" means a full day of total unemployment provided such day falls within a week in which a claimant had four or more days of total unemployment and provided further that only those days of total unemployment in excess of three days within such week are deemed "effective days". No effective day is deemed to occur in a week in which the claimant has days of employment for which he is paid compensation exceeding the highest benefit rate which is applicable to any claimant in such week.

[54] *Matter of Robinson*, 125 A.D.3d 1038 (3d Dep't 2015) (claimant, an LPN, found not totally unemployed for entire weeks despite working between 2-5 days on various weeks since she received a salary in excess of the maximum weekly benefit rate each week); *Matter of Robinson*, 75 A.D.3d 1030 (3d Dep't 2010) (claimant, a university lecturer, was found not totally unemployed for entire week periods where he taught two days a week over the summer session but was paid a flat fee for the entire session on a semimonthly basis resulting in an average weekly wage above the maximum benefit rate).

documentation to support a conclusion that the claimant was such a victim, then the contention may be rejected.[55]

2.4.7 VACATION PAY / HOLIDAY PAY / BACK PAY / DISMISSAL PAY

VACATION AND HOLIDAY PAY

Labor Law § 591 (3) provides that a claimant is not eligible to receive benefits on any day during a paid vacation period or on a paid holiday. The terms "vacation period" and "paid holiday" are defined in the statute:

> (b) The term "vacation period", as used in this subdivision, means the time designated for vacation purposes in accordance with the collective bargaining agreement or the employment contract or by the employer and the claimant, his union, or his representative. If either the collective bargaining agreement or the employment contract is silent as to such time, or if there be no collective bargaining agreement or employment contract, then the time so designated in writing and announced to the employees in advance by the employer is to be considered such vacation period.
>
> (c) A paid vacation period or a paid holiday is a vacation period or a holiday for which a claimant is given a payment or allowance not later than thirty days thereafter, directly by his employer or through a fund, trustee, custodian or like medium provided the amount thereof has been contributed solely by the employer on behalf of the claimant and the amount so contributed by the employer is paid over in full to the claimant without any deductions other than those required by law, even if such payment or allowance be deemed to be remuneration for prior services rendered as an accrued contractual right, and irrespective of whether the employment has or has not been terminated.

[55] *Matter of Monserrate*, 102 AD3d 1046 (3d Dep't 2013) (claimant denied revealing his bank account PIN and the Board found it not credible that an individual would certify on the claimant's account where such an individual had no means of gaining access to the funds); Appeal Board No. 579461 (where certifications were made by telephone and benefits deposited into the claimant's UI bank account, and where the claimant testified that he did not lose his debit card or otherwise reveal its number that no one else had access to his telephone).

The payment of accrued vacation pay does not mean that a paid vacation period exists, if there was no advance written designation of a vacation period. For example, the payment to a claimant of accrued vacation leave at the time of a discharge does not establish a paid vacation period.[56] The payment of accrued vacation pay during an annual plant shutdown does not establish a paid vacation period, if the collective bargaining agreement specifically provides the employer cannot require employees to take their paid vacations during the plant shutdown.[57] Additionally, no vacation period has been found where a collective bargaining agreement or other written agreement does not specifically designate a period of non-working time as a vacation period.[58]. There is also no paid vacation period, as defined by the statute, when a collective bargaining agreement only establishes the number of weeks of vacation per year, but does not designate a specific period when vacation must be taken.[59]

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[56] *Matter of Faccio*, 37 AD2d 633 (3d Dep't 1971), *aff'd* 31 N.Y.2d 702 (1972) (the period following claimant's discharge was not a vacation period "in the true sense of the word, no respite from work with rest and relaxation and an expectation of return at the end of the period" despite him being paid out accrued vacation time where collective bargaining agreement did not provide for a designated vacation period, only that the vacation schedule would be arranged at the employer's convenience and that an employee would be paid any accrued leave at the time of a separation from employment).

[57] *Matter of Granich*, 60 A.D.2d 716 (3d Dep't 1977), aff'd 46 NY2d 871 (1979); Appeal Board No. 519325 (the employer, a country club, issued a memorandum that accrued leave was to be liquidated during the annual shutdown, but the period was not designated as a vacation period).

[58] Appeal Board No. 570156 (no vacation period found where collective bargaining agreement did not specifically designate a vacation period but provided that after 120 days of work aboard a vessel, seamen must be off the ship for a period of 60 days and also provided that seamen accrued 14 days of vacation for every 30 days worked, and claimant, an ordinary seaman and a member of the Seafarers International Union (SIU), applied to the union for vacation pay from a fund administered by the SIU to start at beginning of the off-ship rotation period); Appeal Board No. 452165 and Appeal Board No. 570156. It should be noted that Appeal Board No. 518239, which reached a contrary view, was not specifically overruled by Appeal Board No. 570156, but should not be followed. The decision in Appeal Board No. 526255, also involving a seaman, did not address the wording of the collective bargaining agreement, but instead decided the case on the fact that the claimant in that case never applied for vacation pay during his off-shore rotation period and therefore the provision of Labor Law § 591(3)(c) was not met.

[59] Appeal Board No. 552664 (the claimant was a waiter in the employer's dining facility, which was shut down annually each August; although the employer preferred that employees take their vacation during the shutdown, the shutdown period was not designated in writing in advance as the vacation period, and employees could take their vacations at other times of the year); Appeal Board No. 503019 (the collective bargaining agreement provided only that employees were entitled to two one-week vacations, which were to be taken during the twelve-month period running from May 1, to April 30, each year).

Practice Tip

In order to establish that there is a paid vacation period, the following factors must exist:

- The period was designated in writing in advance, either in a collective bargaining agreement or an employment contract, or in a written announcement by the employer.
- The claimant must receive the vacation pay (or the holiday pay, in the case of a paid holiday) within thirty days of the time designated as the vacation period or the holiday.
- DOCUMENT NEEDED: The collective bargaining agreement, employment contract, or other written document which is contended to be the advance designation of the vacation period.

A claimant who receives holiday pay is ineligible for the day on which the pay is credited. For example, where a claimant is entitled to pay for July 4th, and July 4th falls on a Monday but the holiday pay is credited to the claimant on Sunday July 3rd, the claimant is ineligible to receive benefits for one day in the week ending July 3rd.[60]

Practice Tip:

The more difficult issue in holiday pay cases is often related to the issue of willful misrepresentation with respect to the claimant's certification on the question of holiday pay. If the claimant answered "no," evidence will be needed on the following:

- Was there a union contract providing for holiday pay and, if so, which holidays were paid holidays?
- If there was no union contract, was there an employer policy that provided for paid holidays?
- If there was such a policy, was the claimant aware of the policy?
- Was the claimant's certification made before or after receiving the holiday pay?
- If the certification was prior to the claimant's receipt of the holiday pay, did the claimant know or should he have known that he was to receive holiday pay?

[60] Appeal Board No. 587929 (claimant not eligible for benefits on day he was credited with holiday pay but his certification was not considered willful misrepresentation because he was unaware he would receive holiday pay and certified for the week prior to receiving the holiday pay); Appeal Board No. 583642 (claimant's employer paid all employees $200.00 because the business had been closed for several days due to weather conditions; the employer had never paid holiday pay in the past. While the issue of the holiday pay was time-barred, the overpayment issue was not; the Board concluded that the claimant's certification that he had not received holiday pay was accurate so there was no basis for recoverability).

BACK PAY

A claimant's receipt of a back pay award may result in a determination that the claimant was not totally unemployed.[61] This analysis arose originally in court decisions affirming Appeal Board decisions that back pay awards constitute wages for the purpose of filing a claim for UI benefits.[62] Based on this holding, the Appeal Board later concluded, in a decision affirmed by the Appellate Division, that claimants who had received back pay awards for their period of unemployment had not been totally unemployed and had to repay the UI benefits they had received following their separations from employment.[63]

However, in order for the claimant to be considered not totally unemployed for the entire period he or she was out of work, the back pay award must fully reimburse the claimant for the wages that would have otherwise been received. In the event that a back pay award is less than the full amount of wages that would have otherwise been earned, the claimant may only be held ineligible for the period covered by the back pay award.[64] In order to determine the time period covered by the partial back pay award, the lump sum should be divided by the claimant's average weekly wage.[65]

If the award to the claimant is reduced by the amount of unemployment insurance that the claimant received or other collateral sources (remuneration earned from employment that had been concurrent with the employer from whom the claimant was separated and which had continued[66]), then the award is no longer considered back pay but, rather, damages for wrongful discharge. In such a case, the claimant cannot be considered to be not totally unemployed for unemployment insurance purposes.

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[61] *Matter of Glick,* 77 A.D.3d 1008 (3d Dep't 2010) ("A lump-sum payment of back pay constitutes wages for the purpose of determining benefits and, therefore, the Board's determination that claimant was not totally unemployed and the overpayment was recoverable is supported by substantial evidence").

[62] *Matter of Tonra*, 258 App Div 835 (3d Dep't 1939), *aff'd* 283 NY 676 (1940); *Matter of McCoy*, 262 App Div 790 (3d Dep't 1941) (claimants' respective unions had filed complaints with the National Labor Relations Board alleging the employer had violated provisions of the National Labor Relations Act; in both cases the claimants subsequently were reinstated and received back pay awards from the employers representing the salary they would have received had they not been discharged).

[63] *Matter of Skutnik*, 268 App Div 357 (3d Dep't 1944).

[64] Appeal Board No. 31,113-52 (claimant's earnings would have been $900.00 for the period he was out of work, but the award was only for $100, so he was only "employed" during the period which the $100 would have covered).

[65] Appeal Board No. 278,823; Appeal Board No. 510815 (claimant received a lump sum back pay award of $10,494.11; her average weekly salary was $478.08, so her back pay award covered 21.95 weeks. As a result, she was ineligible for the entire period of her claim, which covered 21.5 weeks).

[66] *Matter of Cohen*, 44 A.D.2d 286 (3d Dep't 1974); Appeal Board No. 513494.

Back pay is considered retroactive payment of remuneration. The Department of Labor must issue an initial determination within six months of the payment of such back pay, absent any willful misrepresentation. [67] However (and assuming that the six-month deadline is met), any overpayment is automatically recoverable; it does not depend on the existence of a factually false statement or willful misrepresentation.[68]

DISMISSAL PAY

Labor Law § 591 (6) provides the following:

> (a) No benefits shall be payable to a claimant for any week during a dismissal period for which a claimant receives dismissal pay, nor shall any day within such week be considered a day of total unemployment under section five hundred twenty-two of this article, if such weekly dismissal pay exceeds the maximum weekly benefit rate.
>
> (b) The term "dismissal pay", as used in this subdivision, means one or more payments made by an employer to an employee due to his or her separation from service of the employer regardless of whether the employer is legally bound by contract, statute or otherwise to make such payments. The term does not include payments for pension, retirement, accrued leave[69], and health insurance or payments for supplemental unemployment benefits.
>
> (c) The term "dismissal period", as used in this subdivision, means the time designated for weeks of dismissal pay attributable to the claimant's weekly earnings in accordance with the collective bargaining agreement, employment contract, employer's dismissal policy, dismissal agreement with the employer or other such agreement. If no such agreement, contract or policy designates a dismissal period, then the dismissal period shall be the time designated in writing in advance by the employer to be considered the dismissal period. If no time period is designated, the dismissal period shall commence on the day after the claimant's last day of employment. If the dismissal payment is in a lump sum amount or for an indefinite period, dismissal payments shall be allocated on a

[67] Labor Law § 597 (3); *Matter of Glick*, 77 A.D.3d 1008 (3d Dep't 2010).

[68] Labor Law § 597 (4).

[69] Note, however, that public service employees who are kept on payroll in order to liquidate accrued leave are considered to be not totally unemployed. *Matter of Berger*, 41 N.Y.2d 1065 (1977).

> weekly basis from the day after the claimant's last day of employment and the claimant shall not be eligible for benefits for any week for which it is determined that the claimant receives dismissal pay. The amount of dismissal pay shall be allocated based on the claimant's actual weekly remuneration paid by the employer during his or her employment or, if such amount cannot be determined, the amount of the claimant's average weekly wage for the highest calendar quarter.
>
> (d) Notwithstanding the foregoing, the provisions of this subdivision shall not apply during any weeks in which the initial payment of dismissal pay is made more than thirty days from the last day of the claimant's employment.

There are several factors that must exist in order for the claimant to be ineligible under this statute:

- The payment must be due to the separation from employment rather than for any other reason.
- The weekly dismissal pay must be <u>greater than</u> the weekly maximum benefit rate.
- The first payment must be made within 30 days of the claimant's last day of employment. If the claimant is receiving periodic payments (rather than a lump sum payment), the statute will apply as long as the first payment was made within the 30-day period. There is no requirement that all payments must be made within 30 days.[70]

The statute lists several types of payment which are not considered dismissal pay. There may be other types of payment which are not considered dismissal pay. For example, a claimant who starts—or indicates an intention to start—a lawsuit against an employer and, as part of a settlement agreement, is paid a sum of money by the employer has probably not received dismissal pay. However, the fact that an employer may require a claimant to sign a release agreement in order to receive severance pay, including language under which the claimant waives any possible claims against the employer, does not prevent a finding that the payment is dismissal pay, particularly if no lawsuit has been commenced or even contemplated.[71]

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[70] Appeal Board No. 590887 (claimant received two severance payments, the first of which occurred within 30 days of her last day of employment; Board noted the definition of dismissal pay only requires the initial payment to be made within 30 days).

[71] Appeal Board No. 580782 (lump sum payment was dismissal pay despite employer requiring claimant to sign a general release agreement where evidence established the payment was made solely as a result of claimant's separation from employment and there was no existing lawsuit or potential lawsuit the claimant was agreeing not to pursue).

There are several ways in which the number of weeks in the dismissal period may be calculated. The document which provided for dismissal pay may specifically provide for a number of weeks of dismissal pay.[72] Per the statute, if there is no writing designating the dismissal period, and the claimant is receiving weekly payments, then the dismissal period starts the day after the claimant's last day of employment. If the claimant receives a lump sum, the weeks are determined by dividing the lump sum by the claimant's actual weekly wage.[73] If the claimant did not have a set weekly wage, the dismissal period is determined by dividing the lump sum by the claimant's average weekly wage during the high calendar quarter.[74]

The claimant's last day of employment is not necessarily the last day on which the claimant actually performed services for the employer. Rather, it is the last day on which an employment relationship existed between the claimant and the employer.[75] The statute requires that the dismissal pay be made within 30 days of the last day of employment. The Appeal Board has

[72] Appeal Board No. 581028 (dismissal period was five weeks in length since separation agreement specifically provided that the claimant would receive five weeks' severance pay).

[73] Appeal Board No. 583022 (claimant earned $2,475.21 per week and received lump sum dismissal pay in the amount of $104,358.69; dividing the lump sum by his actually weekly salary resulted in a dismissal period of 42 weeks).

[74] Appeal Board No. 589460 (Board determined claimant's average weekly wage in the high calendar quarter since claimant's actual weekly wage could not be determined because she was paid on an hourly basis, worked 40 or more hours a week and was paid overtime).

[75] Appeal Board No. 581056 (claimant last performed services on December 27, 2013 but received his regular pay until January 15, 2014; consequently, payment of lump sum dismissal pay on February 7, 2014, was within 30 days of last day of employment); Appeal Board No. 591311 (despite claimant last performing services on April 20, his employment relationship lasted until May 20 because he continued to receive his regular pay during that time period); Appeal Board No. 591517 (claimant's last day of work determined to be May 2 despite last physical day of work being March 2 where she accrued benefits until that time and received payments pursuant to the WARN Act for two months after her last day of work until facility closed).

determined that this means the day on which the employer paid it out, not the date on which the claimant actually received the dismissal pay.[76]

Practice Tip

In a dismissal pay case, evidence may be needed on the following points.

- When was the claimant's last day of employment?
- When did the claimant file a claim for unemployment insurance benefits?
- Did the claimant receive dismissal pay?
- DOCUMENT NEEDED: If there is a policy, collective bargaining agreement, employment contract, or separation or other agreement which sets out the terms of the payment, the document should be entered into evidence. If the parties do not have a copy and are unable to get a copy, detailed questions will have to be asked about the terms and nature of the payment.
- Does the document establish the number of weeks covered by the dismissal pay?
- When was the payment made (not received)?
- Was the payment in a lump sum?
- What was the claimant's actual weekly salary or, if necessary, average weekly wage in the high calendar quarter?
- What is the weekly amount of the dismissal pay?

[76] Appeal Board No. 580782 (The check for dismissal pay released on May 1, 2014; the claimant was not at home when delivery was attempted so she did not receive it until the following day, May 2nd. May 1st was the 30th day; the Appeal Board held that the payment was made within the time provided for in the statute).