CHAPTER 7
FOREIGN TRAVEL

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2.7.1 INTRODUCTION

When a claimant leaves the country, it raises a series of legal issues including availability, compliance with certification and registration requirements, compliance with reporting requirements and willful misrepresentation. The typical fact pattern arises when the claimant travels to a foreign country, other than Canada, for a vacation or to visit family and attempts to certify for benefits using the internet. The Department's certification system recognizes the foreign IP address and imposes a block, preventing the claimant from successfully certifying for benefits and putting a hold on the account until the claimant returns. The claimant may then attempt to certify by some other means, either by asking someone in the United States to certify on his or her behalf or by using some device or software to technologically circumvent the block, such as a Magic Jack device or a virtual private network (VPN). The claimant may also certify that he or she was ready, willing, and able to work during the week he or she was at least partially outside the country.

In the typical case, the Department of Labor issues multiple determinations which are made part of a combined hearing. The first case generally consists of the issue of availability and an associated willful misrepresentation determination imposing a forfeit penalty because the claimant knew he or she was not ready, willing, or able to work but reported to the contrary. The second case generally contains an initial determination holding the claimant ineligible for benefits because he or she failed to comply with certification requirements when certifying while outside the country, either by allowing another to certify for him or her or by circumventing the system by technological means and an associated willful misrepresentation determination with an 80 day forfeit penalty for flagrant fraud. The third case may contain a determination holding the claimant ineligible for the same period because he or she did not comply with reporting requirements on the grounds that the claimant was not in a jurisdiction that is a signatory to the Interstate Benefits Payment Plan (IBPP). If the claimant makes multiple attempts to certify while outside the country, the Department may issue an additional determination holding the claimant ineligible for the subsequent statutory weeks on the grounds that he or she failed to comply with registration requirements for the same reasons.

2.7.2 AVAILABILITY

ELIGIBILITY

The Unemployment Insurance Law provides that "a claimant must be ready, willing and able to work in the claimant's usual employment or in any other for which the claimant is reasonably fitted

by training and experience."[1] To be available for work, a claimant must be prepared to accept employment immediately.[2]

When a claimant leaves the country, he or she is usually held to be unavailable for the length of the trip out of the country. Ultimately, whether a claimant is available on a foreign trip is academic for purposes of eligibility because if the claimant is outside the United States, a U.S. territory or Canada, he or she is also ineligible for the same period because of an inability to report, as will be discussed below.

Whether the claimant is considered available for work during this period depends on the reason for the trip and the claimant's ability to work in the location where he or she travels. In deciding the case, the Judge must take evidence on the claimant's usual labor market, the reasons for traveling, and where the claimant is authorized to work.[3] A claimant who travels for vacation or other personal reasons is not available for work.[4] Incidental work search while on a personal foreign trip does not make one available for work.[5] Generally, when the claimant is looking for work located in the United States while abroad, he or she is considered not available, even if the purpose of the trip could be considered work-related.[6] This is due to the time it would take for the claimant to return to the usual labor market to accept work or attend an interview.[7] In the context

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[1] Labor Law § 591(2).

[2] Appeal Board No. 585041 (holding claimant to be unavailable where it would have taken him 24 hours to return to New York).

[3] Although some prior Board decisions contain language stating a claimant is unavailable "as a matter of law" when in a country that is not a signatory to the Interstate Benefits Payment Plan, that analysis should be avoided. Reference to the Interstate Benefits Payment Plan should be made when addressing the claimant's failure to report, not the claimant's availability (see Section 2.7.3, Failure to Report, below).

[4] Appeal Board No. 587054 (claimant held not available for work while vacationing in Italy); Appeal Board No. 586950 (holding that the claimant was not available for work while on vacation in St. Lucia); Appeal Board No. 582188 (holding the claimant was not available for work while vacationing in Mexico without searching for work); Appeal Board No. 585067 ("[A]s the primary focus of the claimant's travel was vacation, the claimant was not ready, willing, and able to work during this period"); Appeal Board No. 552275 (claimant found not available for work while in Turkey visiting an ill relative despite his contention that he was looking for work there since the primary purpose of the trip was to visit the relative); Appeal Board No. 561517 (claimant held not available for work while in United Kingdom attending his son's wedding since primary purpose of trip was personal, he would have had to fly home prior to starting work and was therefore not immediately available).

[5] Appeal Board No. 552275 (claimant found not available for work while in Turkey visiting an ill relative despite his contention that he was looking for work there since the primary purpose of the trip was to visit the relative).

[6] Appeal Board No. 576993 (Board held claimant not available when she traveled to London to attend an international securities symposium for the purpose of networking with potential employers since she could not physically be present for an interview or contract negotiations for a job in New York).

[7] Appeal Board Nos. 585041, 561517.

of domestic travel; however, the Board has held that a claimant may be available for work where there is a mixed business/personal purpose of the trip.[8]

If the purpose of the trip is to search for work, a claimant may be considered available so long as he or she is authorized to work in the country and is actually looking for work located there.[9]

WILFUL MISREPRESENTATION

When a claimant is found unavailable, the issue of whether the certification that he or she was ready, willing, and able to work will be considered a willful misrepresentation depends on whether the evidence establishes the claimant reasonably believed he or she was available. Where a claimant is on vacation,[10] is traveling for personal matters,[11] or is out of the country to care for a relative,[12] the Board has found that a claimant should know he or she is not ready, willing, and able to work. No further advice would need to be given to a claimant under those circumstances

[8] Appeal Board No. 590147 While the case does not involve foreign travel, the principles may apply to some foreign travel cases. The claimant did some freelance work for a company based in California, though the work was performed remotely in New York. After filing for benefits, the claimant traveled to California for personal reasons. While in California, she performed work on a freelance assignment, as well as another assignment she was given as a test for purposes of obtaining other work. The claimant reported that she was working when certifying for benefits while in California. The Board went on to hold that the claimant was available for work based on her work search activities and actual work while in California, writing, "the most compelling argument in favor of the claimant's availability while in California, and therefore her eligibility for benefits during her sojourn to that state, is the fact that the claimant actually *did* work in her occupation while she was in California…"

[9] Appeal Board No. 588921 (Board held the claimant, a Ugandan native who traveled to Uganda for the primary purpose of seeking a paid fellowship, was available for work except during the dates she was in transit since she was authorized to work in Uganda and was actively applying for other employment while there) . ; but see, Appeal Board No. 576697 (claimant not available while in India as he was not authorized to work there); Appeal Board No. 570211 (holding claimant not available where he not a citizen of the Asian countries he visited, was not legally permitted to work in those countries without a work visa and, if hired, the employer would have to sponsor him for a work visa before he could begin working for them).

[10] Appeal Board No. 585067 (claimant should have known he was not ready, willing and able to work while on vacation in Europe).

[11] Appeal Board No. 584710 (finding that the claimant, on a personal trip to India, made a willful misrepresentation: "we have consistently held that a claimant who is out of the country on personal matters must be aware that she is not available for work, and that no specialized knowledge is needed in order to certify accurately in this circumstance"); Appeal Board No. 555795 ("The Board has consistently held that a claimant who is out of the country attending to personal matters must be aware that he is not available for work.") (citing Appeal Board Nos. 552275 and 482073); Appeal Board No. 584710 ("we have consistently held that a claimant who is out of the country on personal matters must be aware that she is not available for work, and that no specialized knowledge is needed in order to certify accurately in this circumstance") (citing Appeal Board Nos. 582226, 581334, 555795, 552275 and 482073).

[12] Appeal Board No. 570888 (finding that the claimant was aware that she was not available where she traveled to the Dominican Republic to care for her mother).

prior to finding the certification that he or she was ready, willing, and able to work is a willful misrepresentation.

Where the trip has a mixed purpose or the claimant contends that he or she made concerted work search efforts while out of the country, it is necessary to determine if the claimant was informed of eligibility requirements. If a claimant attempts to certify while outside of the country, the claimant sees a screen entitled "Unauthorized Access," which states "You are attempting to claim Unemployment Insurance from outside the United States, a U.S. Territory or Canada. You may not claim benefits until you return to the United States, a U.S. Territory or Canada.'"[13] This would place the claimant on notice that there may be a problem with his or her eligibility while outside of the country.

The Claimant Handbook also puts the claimant on notice that he or she will be considered not ready willing or able for work while out of the country. It advises that to be available one must be prepared to take a job immediately.[14] It further advises a claimant that he or she cannot claim and receive benefits while traveling for vacation or personal reasons and **must** contact the Department of Labor prior to traveling, even if traveling to look for work or a job interview. It further states that a claimant's certification from out of the country will be blocked and the benefits will be withheld[15] and specifically advises:

> Do not attempt to certify for benefits while you are outside of the United States, Canada, Puerto Rico or the Virgin Islands for any reason. Your certification will be blocked and your benefits will be held. Certifying that you are ready, willing, and able to work while you are out of the country or giving your username, password, social security number, and/or PIN number to someone else to certify on your behalf may lead to severe penalties. These penalties can include overpayment, loss of benefits, monetary penalties, criminal prosecution and prison.[16]

This warning has been in the Claimant Handbook since October 2016. Prior versions of the handbook were not as clear. For cases addressing claimants who filed unemployment insurance claims prior to October 2016, the specific language in the version of the Claimant Handbook the

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[13] *See* Chapter 2.7.4, Compliance with Certification and Registration Requirements, below.

[14] Unemployment Insurance: A Claimant Handbook (October 2017), at 2.

[15] Unemployment Insurance: A Claimant Handbook (October 2017), at. VI, XI, XII, and 16.

[16] A Claimant Handbook (October 2017), p. 16.

claimant received must be evaluated to determine whether it would put the claimant on notice that certifications of being ready, willing, and able to work would be false.[17]

Even where a claimant contends he or she did not read the Claimant Handbook, the claimant is responsible for its contents and a willful misrepresentation may be found.[18] If a claimant alleges he or she did not receive the handbook and did not know a Claimant Handbook was available online, testimony from the Department of Labor may be sufficient to establish that the claimant had constructive knowledge that the Claimant Handbook was available online.[19]

Where there is no evidence that a claimant was advised of the eligibility requirements, the work search done on the trip and the claimant's employment history should be taken into consideration when determining whether there was a willful misrepresentation. Where a claimant has a history of working electronically from anywhere in the world and using technology to actively look for work, including emailing prospective employers and participating in phone interviews, a claimant's certification that he was ready, willing, and able to work may not be a willful misrepresentation,[20] especially where it could be determined to be a mistake of law regarding eligibility.[21]

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[17] Appeal Board No. 578069 ("The [2009] claimant Handbook did not include information which would have alerted the claimant that being outside of the United States, in and of itself, could render him unavailable for unemployment insurance benefits."); Appeal Board No. 577668 ("the [handbook in effect in May 2013] does not adequately explain that a claimant could forfeit future benefits by certifying to availability for work while overseas seeking employment. As the claimant had obtained a visa for business purposes, met with companies in an attempt to secure employment, and went so far as to notify the Department of Labor upon his return, his certification to his availability cannot be said to have constituted a wilful misrepresentation").

[18] *Matter of Roberts,* 49 A.D.3d 1129 (3d Dep't 2008) ("neither the claimant's failure to adequately read the handbook nor the purportedly unintentional nature of his misrepresentation is a valid defense") (citations omitted); Appeal Board No. 575540 ("We have also consistently held that a claimant who, having read or at least being on notice of the handbook, then certifies to be having been ready, willing, and able to work at a time when the claimant was out of the country has made a willful misrepresentation").

[19] Appeal Board No. 575540 ("Although the claimant contended that he never saw the handbook or even noticed the link, the witness for the Department of Labor credibly testified that all claimants who file online see the confirmation page and we will follow the presumption that the agency properly followed its procedures").

[20] Although these cases rely on prior handbooks that did not put a claimant on proper notice, the analysis could be used in situations where there is no evidence that the claimant was aware of the more current handbook. *See* Appeal Board No. 578785A (Board found claimant did not make willful misrepresentation regarding availability where claimant traveled to Ireland for personal reasons, had previously worked in the software field in a job that could be and had been done from anywhere in the world, and while on the trip he emailed 17 prospective employers and participated in two phone interviews and could begin work immediately online); Appeal Board No. 576993 (finding no willful misrepresentation where claimant believed she was available because she could trade securities using her iPhone); *but see* Appeal Board No. 577365 (claimant who worked in marketing field in set labor market made willful misrepresentation when he certified that he was ready, willing, and able to work while on a personal trip to Germany, Africa and the Middle East).

[21] Appeal Board No. 578785 (citing *Matter of Valvo*, 57 N.Y.2d 116, 127-28 (1982)).

The Board has held that when a claimant makes multiple certifications that he or she is available while on the same trip out of the country, it is a single offense for purposes of determining the forfeit penalty.[22] The Department's guidelines provide that the penalty for a single offense without an overpayment is four effective days.[23] When there is an overpayment, the forfeit penalty is the greater of eight effective days or the number of effective days the claimant was overpaid.[24] For example, if the claimant was overpaid half of his or her benefit rate, the penalty would be eight effective days; if he or she was overpaid three weeks of benefits, the penalty would be twelve effective days.

2.7.3 FAILURE TO REPORT

The Unemployment Insurance Law requires that for a claimant to be entitled to receive benefits, the claimant must be properly registered within such time and in such manner as the Commissioner has prescribed.[25] The Commissioner's regulations state that a claimant may not receive credit for any period of unemployment from the day on which a failure to report occurs until the claimant next reports.[26] The Board has routinely held that a claimant is ineligible for benefits as a matter of law when the claimant is in a jurisdiction that is not a signatory to the Interstate Benefit Payment Plan (hereinafter "IBPP") on the basis that the claimant could not comply with reporting requirements.[27]

The IBPP is an agreement among the 50 states, Puerto Rico, the U.S. Virgin Islands and Canada.[28] The IBPP itself does not address whether a claimant is eligible while in a jurisdiction that is not a signatory.[29] The Board, however, has long held that a claimant is unable to comply with reporting requirements while outside the United States.[30] Whether a jurisdiction is a signatory

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[22] Appeal Board No. 555795

[23] Special Bulletin A-710-21, at 5.

[24] *Id.*

[25] Labor Law §§ 590 (1) and 596.

[26] 12 NYCRR 473.3 (d).

[27] Appeal Board No. 587055 (citing Appeal Board Nos. 585066, 575501, 575200, and 372361).

[28] The IBPP can be accessed at https://workforcesecurity.doleta.gov/unemploy/pdf/istate_agree_bene_payment.pdf

[29] *Id.*

[30] Appeal Board No. 573558 ("[t]he Board has long held that: It is well established that a claimant who is outside of a jurisdiction which is part of the Interstate Benefits Payment Plan ("the Plan") is… [not] able to comply with reporting requirements") (internal quotations omitted) (citing Appeal Board Nos. 561517, 557498, 557285, 514717, 482073, and 372361).

to the IBPP is a matter of law, rather than fact, and a Judge can decide the issue without testimony from the Department on whether a particular foreign nation is a signatory. The Board has also held that there is no requirement that a claimant be on notice of the requirement to be present in a signatory jurisdiction to be eligible for benefits.[31]

2.7.4 COMPLIANCE WITH CERTIFICATION AND REGISTRATION REQUIREMENTS

ELIGIBILITY

The Commissioner of Labor's regulations provide that a claimant who fails to certify for a benefit period within the seven-day period for such certification shall not be eligible for that benefit period and claimant shall not be eligible for future benefit periods until the claimant files a subsequent claim.[32] A subsequent failure to certify as required is a failure to comply with registration requirements.[33]

To prevent a certification from overseas, the Department of Labor system imposes a block on the claimant's claim when it registers a certification attempt from a foreign IP address.[34] The system then displays a message titled "Unauthorized Access," which states "You are attempting to claim Unemployment Insurance from outside the United States, a U.S. Territory or Canada. You may not claim benefits until you return to the United States, a U.S. Territory or Canada." When a claimant deliberately circumvents this block, either by giving someone in the United States log-in credentials so that person can certify for the claimant[35] or by using a technological device to circumvent the block and make a certification appear as though it was coming from within the United States,[36] the claimant has failed to comply with certification (or registration)

[31] Appeal Board No. 586951 ("It is not dispositive that the claimant did not receive the Claimant Information Handbook, as the claimant cannot receive benefits while in a country not a signatory to the Plan, as a matter of law").

[32] 12 NYCRR 473.2 (c)

[33] Appeal Board No. 579855 (holding that the claimant failed to register as required during his subsequent certifications while in the United Kingdom).

[34] Appeal Board No. 577362 ("If the Department of Labor's system recognizes a foreign internet protocol (IP) address during an internet certification, it puts a block on the claim, preventing the certification from being completed").

[35] Appeal Board No. 590237 (involving the claimant giving her ID and password to someone in the United States "for the purpose of circumventing a foreign IP block and certifying for benefits on her behalf while she was in Great Britain").

[36] Appeal Board No. 575674 (involving a claimant using a Magic Jack device to certify for benefits).

requirements.[37] The period of ineligibility is the statutory week for which the claimant failed to certify as required.[38]

Generally, the evidence must establish that the claimant knew it was improper to certify from outside of the country, use technology to circumvent the Department of Labor's system,[39] or to have someone else certify on his or her behalf. [40] This can be established where the claimant testifies he or she saw the block message when attempting to certify or where the claimant can be imputed with knowledge of the Claimant Handbook. Where the evidence does not establish that the claimant saw the Unauthorized Access message or did not see it until after her certification went through, the Board has declined to find that the claimant failed to comply with certification or registration requirements.[41] A claimant's lack of memory or vague testimony on whether he or she saw the Unauthorized Access message, does not preclude a finding of a failure to comply with certification or registration requirements where the Commissioner of Labor presents evidence of how the system works.[42] The Board has also held that a claimant has failed to certify as required even if he or she did not see the Unauthorized Access message where the claimant is on notice from the Claimant Handbook,[43] which advises that one cannot certify while outside the United States or Canada.[44]

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[37] Although prior Board cases have held that a claimant has failed to comply with certification or registration requirements as a matter of law solely because the claimant attempted to certify from a country that is not a signatory to the Interstate Benefits Payment Plan, this analysis should not be followed.

[38] Appeal Board No. 574443.

[39] *Matter of Corso*, 144 A.D.3d 1367 (3d Dep't 2016); Appeal Board No. 575212.

[40] Appeal Board No. 587056.

[41] Appeal Board No. 580385 (claimant was found to have complied with registration requirements where the claimant credibly testified she did not see the block screen, did not have anyone else certify on her behalf and the Department's documents lacked time zones to reflect when transactions occurred); Appeal Board No. 588636 (crediting the claimant that the operation "timed out" and that she did not actually see the Unauthorized Access message); Appeal Board No. 587215 (crediting the claimant's testimony that a page never loaded, noting that he testified he received similar problems while trying to access his online bank account).

[42] Appeal Board No. 588777 (crediting the Commissioner of Labor's evidence the Unauthorized Access message would have been displayed over the claimant's "vague assertion that the message contained some type of reference to an IP address"); Appeal Board No. 577024 (In finding the claimant saw the block screen, the Board stated "[t]here is a presumption of regularity accorded to the procedures of a governmental agency") (citing 558385, 548318 and 542438A).

[43] Appeal Board No. 589733 (crediting the claimant's testimony that she was unable to load anything when she attempted to access the website and so did not see the Unauthorized Access message but holding that she did not certify as required based on the contents of the Claimant Handbook). It should be noted that the basis of the Board's decision was that she was certifying from South Africa, rather than that she circumvented the block.

[44]. Unemployment Insurance: A Claimant Handbook (October 2017), at. VI, XI, XII, and 16.

WILFUL MISREPRESENTATION

Whether the claimant made a willful misrepresentation depends on what information the claimant had at the time of the certification and what the claimant understood about the means used to certify. Beyond determining whether the claimant made a willful misrepresentation, it is also necessary to determine whether the claimant's act constituted flagrant fraud[45] so as to justify the 80 effective day penalty.

The Department of Labor typically imposes an 80 effective day forfeit penalty when claimants certify while outside the country if it is found that the claimant committed flagrant fraud by circumventing the block by technological means[46] or by giving his or her username and password or PIN to an impostor to certify on his or her behalf.[47] This is true even where the claimant denies an intent to commit fraud.[48]

Where the claimant is on notice of the requirement to not give or tell anyone her PIN, the Board routinely upholds the 80-day penalty.[49] This notice can come from the Claimant Handbook[50] or from other information on the Department's website, such as information on the confirmation page[51] or the website used to establish one's password.[52] However, where the evidence fails to establish that the claimant knew or should have known providing login credentials to another individual to certify on his or her behalf was improper, there may be no willful misrepresentation.[53]

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[45] *See Standards for the Imposition of Wilful Misrepresentation Penalties,* Special Bulletin A-710-21 (1982), at 2-3, 7 (providing for an 80 effective day penalty in cases of "flagrant fraud" or for "aggravating" circumstances such as recidivism).

[46] Appeal Board Nos. 574627 (claimant, who certified twice while in Guyana, was aware using a Magic Jack would give his certifications a U.S. IP address), Appeal Board No. 585068 (claimant's attempt to certify from Europe for a second time was a circumvention of the system warranting 80-day flagrant fraud penalty).

[47] Appeal Board No. 590237 (involving a claimant who provided her login credentials to a third party to certify on her behalf); Appeal Board No. 590237, Appeal Board No. 587056.

[48] Appeal Board No. 587056.

[49] Appeal Board No. 590237 (sustaining the forfeit penalty where the claimant received the Claimant Handbook and so was on notice of the requirement that she not divulge her NY.GOV ID and password); *Matter of Inatomi*, 116 A.D.3d 1332 (3d Dep't 2014) (reaching the same conclusion).

[50] *Id.*; *see also* Unemployment Insurance: A Claimant Handbook (March 2016), at XI, 15.

[51] Appeal Board No. 572124 (noting that the confirmation page states, "NEVER tell anyone your PIN. Claiming unemployment insurance fraudulently (or allowing someone else access to your claim using your PIN) is a serious offense and can lead to severe penalties, including criminal prosecution and imprisonment").

[52] Appeal Board No. 582187 (relying on information in the Claimant Handbook, as well online messages during the application process regarding creating a NY.GOV ID and password).

[53] Appeal Board No. 581876 (finding the claimant did not make a willful misrepresentation by having her mother certify for her where she did not receive the Claimant Handbook and she was not "exposed to the confirmation page at the

Additionally, in cases where a claimant asserts that he or she did not tell anyone the username and password but saved them on a computer and someone certified on his or her behalf, a finding of willful misrepresentation will depend upon whether the claimant authorized someone to make the certification.[54]

In cases involving circumventing the system through technological means, if the evidence establishes the claimant saw the Unauthorized Access message when certifying from a foreign IP address, [55] or received the Claimant Handbook,[56] and then proceeded to use some other means (such as a Magic Jack or VPN) to certify, it constitutes a willful misrepresentation. However, the Board has reduced a flagrant fraud penalty of 80 days to 4 days where it is a one-time occurrence, the claimant voluntarily discloses the fraudulent certification to the Department and received no benefit from that certification.[57] The Board has also declined to impose the 80 day flagrant fraud penalty where the claimant does not see the Unauthorized Access message, where a claimant logged in remotely to a computer in the U.S., or where a claimant made repeated attempts to contact the Department of Labor prior to traveling, even if the claimant was on notice of the Claimant Handbook.[58]

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time she filed her claim"); Appeal Board No. 586952 (no willful misrepresentation where the claimant did not receive the handbook, did not provide login credentials to his wife and did not see internet certification pages).

[54] *See, e.g., Matter of Hart*, 125 A.D.3d 1021 (3d Dep't 2015) (in a case not involving foreign travel, the court held that the claimant did not make a willful misrepresentation since it requires a knowing, intentional or deliberate act and since the claimant did not authorize anyone to certify for him, he did not knowingly, intentionally or deliberately make a false statement). It is of note, however, that in a case involving foreign travel it would be more difficult to establish a lack of knowledge or direction where the Department of Labor's documents establish a blocked certification from a foreign country followed by a certification from the United States.

[55] Appeal Board No. 585068, *affirmed by Matter of Corso*, 144 A.D.3d 1367 (3d Dep't 2016); *but see* Appeal Board No. 588636 (finding no willful misrepresentation after accepting the claimants' testimony they did not see the unauthorized access message).

[56] Appeal Board No. 576975 (finding a willful misrepresentation where claimant did not fully understand the Unauthorized Access message because it was automatically translated into Greek and the claimant's certified using his cell phone since claimant handbook put him on notice he could not certify from foreign country); Appeal Board No. 574627.

[57] Appeal Board No. 574627 (claimant used a Magic Jack device and admitted he did so to disguise his IP address, Board found willful misrepresentation since handbook put claimant on notice that he could not certify from foreign country but decreased the penalty from 80 to 4 effective days since the claimant contacted the Department of Labor to self-report and because it was a one-time occurrence); Appeal Board No. 587246 (citing Department of Labor Special Bulletin A-701-21, distinguishing between single offence and separate offenses and provides for a reduction of a forfeit penalty where a claimant "voluntarily, on his own initiative, without having been challenged, discloses the truth and at such time, returns the benefit check or repays the benefits received").

[58] Appeal Board No. 587215 (declining to impose 80-day penalty where claimant remotely logged in to his computer in New York); Appeal Board No. 589733 (finding no willful misrepresentation where the claimant did not see the Unauthorized Access message from the foreign certification attempt and then used her cellular phone to certify for benefits); Appeal Board No. 577362 (claimant made numerous attempts to contact Department prior to leaving,

The Board has also found a willful misrepresentation but declined to impose a flagrant fraud penalty where the claimant certified for benefits after being presented with a certification statement in the Review of Responses section of the online certification process as the language contained in the Review of Responses would not put the claimant on notice that his or her certifications would result in a forfeit of benefits for 20 weeks and the claimant contacted the Department of Labor shortly after returning to the United States.[59]

In the context of circumventing the system by technological means the Board has reduced the forfeit penalty to four effective days where the offending certification was for a week in which the claimant was at least partially eligible for benefits.[60] Such a reduction would apply where the claimant left the United States on Friday, Saturday or Sunday, and then attempted to certify for benefits for that week, was blocked, and then used some device to circumvent the block.[61] A reduction is not warranted, however, where the claimant certifies again while outside the country for the entire week.[62]

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contacted another state's unemployment insurance division and was told to continue certifying while abroad and believed her problem with certifying was a technical one).

[59] Appeal Board No. 589315.

[60] Appeal Board No 584330 (relying on Appeal Board No. 581403A).

[61] *Id.;* Appeal Board No. 581403A (granting a Commissioner of Labor's withdrawal of its appeal to "allow the Commissioner to modify the initial determination" to reduce the forfeit penalty "based on recent modifications to the Commissioner's policy regarding claimants who attempt to claim benefits while outside the United States and mitigating factors, including that the certification at issue was for a week during which the claimant was essentially eligible for benefits, as she departed the United States on a Saturday"); Appeal Board No. 585066 (makes clear that earlier cases are limited to circumstances present in Appeal Board No. 581403A and 584330 and are not to be followed to the extent that they reduce the penalty without explanation of the mitigating factors).

[62] Appeal Board No. 585066.