

A Guide To

*Unemployment Insurance
Appeals Hearings*



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INTRODUCTION

*U*nemployment Insurance hearings are conducted by the State Office of Administrative Hearings and Rules (SOAHR). The purpose of this booklet is to help you understand what happens at an unemployment insurance hearing, so you can make your best case to the Administrative Law Judge (ALJ). We hope that after you have read this booklet, you will understand whom and what to take to the hearing, what you must prove, and how to do so.

The information in this booklet is not legally binding; it is provided for informational purposes only.

Free Representation

*I*ndependent **Advocates** are available to assist you in presenting your case before the Administrative Law Judges. **THERE IS NO COST TO YOU FOR THE SERVICES OF AN ADVOCATE.**

One group of Advocates is available only to assist unemployed workers; the other group is available only to assist employers. The employer advocates will assist in both matters related to unemployment benefits and unemployment taxes.

You can choose your own **Advocate** from among those available in your area. They have all passed a comprehensive examination regarding their knowledge of the unemployment insurance law and procedures.

The Advocacy Program is operated by the Unemployment Insurance Agency (UIA). For more details about the Advocacy Program, call the UIA at 1-800-638-3994 and choose menu item #2. If you wish to have an Advocate represent you, call as soon as you have filed your appeal from the UIA's Redetermination to the State Office Of Administrative Hearings and Rules (SOAHR).

Basic Terms Used At A Hearing

We'll begin by explaining some of the terms used most often in a hearing.

An ALJ is an attorney who works for the SOAHR, hearing and deciding cases involving unemployment compensation. The ALJ's job is to hold a hearing to consider the evidence – oral and in writing – presented by all parties at the hearing. After this hearing, the ALJ issues a written decision making findings of fact and conclusions of law. The ALJ may also question the witness(es). The ALJ then decides how the law must be applied to those facts.

Parties are the people whose rights might be affected by the outcome of an unemployment compensation case. There may be three parties at a hearing: the unemployed worker (the individual seeking the unemployment benefits), the employer (the business that is, or may be, charged for the payment of benefits, or whose tax rate or liability for taxes is in question), and the Unemployment Insurance Agency (UIA).

If a case gets to the ALJ, it usually means that there is a disagreement about the previous UIA decision (redetermination). An employer may feel that the unemployment benefits should not be paid, or that the employer should not have to pay unemployment taxes, or that his/her tax rate is wrong. An unemployed worker may feel that the UIA should not have denied his or her claim for benefits. The UIA may be at the hearing to support its previous rulings.

Evidence can be anything used by a party to convince the ALJ about the facts of the case.

The most common type of evidence is called **testimony**, which means statements made, under oath or affirmation, at the hearing, by a party or one of the party's witnesses, who has first-hand knowledge of the events.

Evidence can also be in written form, but there must be someone present at the hearing who can testify (give testimony) from their own knowledge about any documents. In reaching a decision later, the ALJ must decide how much importance to give to each statement or document admitted as evidence.

Witnesses are people who are brought or subpoenaed (ordered to appear) to the hearing by either party to give testimony about facts they personally know about. The ALJ may limit the number of witnesses testifying about the same facts.

These are the terms we'll need to get started. Throughout the rest of this booklet, we'll be explaining some additional terms, as they come up.

Why Is It Important To Attend The Hearing?

*T*here are several reasons why it is important for you to attend the hearing:

1. If you are the party who appealed the case and you do not appear at the hearing, the ALJ may dismiss the case (that is, cancel the appeal) for lack of prosecution (that is, failure to appear to carry forward the appeal). This means the UIA redetermination is affirmed.
2. If you are the party required to “make the case,” and you are not present at the hearing, then no one will be present at the hearing to “make the case.” You will probably lose.
3. The ALJ attaches importance only to sworn testimony, and to documents supported by sworn testimony. For that reason, even though the UIA may have agreed with your point-of view in the past, the ALJ must take a fresh look at the evidence, and cannot give much weight to the documents found in the file unless someone is at the hearing to testify about them.
4. The hearing is generally your last chance in the appeal process to present the facts of your case. Even though there are further steps available in the appeal process after the hearing, with rare exceptions the only evidence that will be taken into consideration during the rest of the appeal process is the evidence presented at the hearing.

Appeals to the Board of Review and the courts usually involve only arguments about the law, not about the evidence. For that reason, the administrative hearing is critical in the appeal process.

What Happens First?

*T*he Agency first issues a decision called a Determination, which tells whether unemployment benefits will be paid, how much will be paid per week, and how many weeks will be paid. If either party disagrees with the Determination, they can protest, indicating their reasons for disagreeing. The Agency will review the case and issue a redetermination. The Redetermination may affirm the Determination, or it may modify or reverse the Determination.

One of the parties (unemployed worker or employer) may disagree with the Redetermination. That party sends or delivers to the Agency a written appeal, asking for a hearing before an ALJ of the State Office of Administrative Hearing and Rules.

If the appeal is received on time, it is scheduled for a hearing. If the appeal is received late, the ALJ must dismiss the appeal. However, if a party withdraws the late appeal before the hearing, and the appealing party requests the UIA reconsider its last decision, then the Agency will determine whether the reason for the lateness of the appeal amounts to “good cause.” If good cause is found the lateness of the protest or appeal will be excused. If the appealing party appeals an adverse UIA decision, the ALJ will issue an order either finding or not finding good cause, and will make a decision about the issue of the case.

After the appeal is filed, all parties will receive a Notice of Hearing, telling them where and when the hearing will take place. The hearing is held either at a regional hearing location or by telephone.

The State Office of Administrative Hearings and Rules mails the Notice of Hearing at least 10 days before the scheduled hearing date (or 20 days in advance for a fraud case.) The back of the Notice

of Hearing contains some very important information you need to review about the hearing. **Be sure to read it carefully before the date of the hearing!**

Preparation Before The Hearing

You are entitled to have an attorney, or an Advocate from the UIA's Advocacy Program, or other representation with you at the hearing, although representation is not required. If either party does not have an attorney, Advocate or representative at the hearing, the ALJ will ask questions. Each party should also be prepared to ask questions of all witnesses. If you or your attorney, Advocate, or representative, or a witness are unable to attend the hearing, you may write to the ALJ or call the ALJ's office and request an adjournment (postponement) of the hearing, giving the reasons for the request.

The ALJ will only grant adjournments for exceptionally good reasons. Generally, having another appointment which could be rescheduled is not a sufficient reason for an adjournment. In an emergency, call the ALJ's office before the hearing and explain the situation. Sometimes, if not all necessary witnesses are available, the hearing is held with the available witnesses, and the hearing is concluded on another day.

Even if you choose to represent yourself, you need to decide whether to have witnesses at the hearing. You should ask your witnesses to

participate in the hearing well in advance of the hearing and tell them the date and time of the hearing.

Advise your witnesses to tell the truth about what happened, but do not tell them what to say or how to say it.

If a witness might not appear voluntarily, you may obtain a **subpoena** to require that person to appear. The subpoena may be obtained from the UIA or the ALJ's office. The party should give the witness the subpoena in a reasonable time before the scheduled hearing. The UIA will not deliver subpoenas for the party. After the hearing, a person who appears at a hearing under subpoena can receive a small fee for his or her time, as well as mileage. This fee will be paid and mailed by the UIA.

If the case involves a quit or a firing, the parties should bring as witnesses those persons who have personal knowledge of the details of the quit or firing, such as a supervisor or co-worker.

Since you will have an opportunity at the hearing to ask questions of the other party and their witnesses, you should consider asking the ALJ's office, in advance of the hearing, if you can look at the case file. From the file, you can see what statements the other party made to the UIA. Often, those are the same statements they will make at the hearing. Knowing what statements the other party will likely make may help you in deciding who your witnesses should be, and what questions you should ask the other party.

Before the hearing, it is a good idea to write down questions you wish to ask the other party, as well as important points you wish to make on your own behalf. Take your notes to the hearing; they will

give you added confidence and allow the hearing to proceed more smoothly. However, because your notes can only be used to refresh your memory, your testimony cannot consist of reading your notes aloud.

Before the hearing, decide what documents (attendance records, employer policy statements, doctors' statements, check stubs) you will need to make your case. Also, be sure to take the witnesses who can testify as to their own knowledge of the documents. Doctors' statements and government records (such as safety inspection reports) may generally be admitted without the presence of a witness.

If you are hearing-impaired or have difficulty speaking or understanding English, you may request that a qualified interpreter attend the hearing to translate for you. If you need an interpreter, you should notify the ALJ's office as early as possible. If you take your own interpreter, the ALJ may postpone the hearing until the ALJ's office can schedule an independent interpreter.

Who And What Should Be Taken To The Hearing?

Naturally, the unemployed worker and employer should attend the hearing. Unemployed workers should attend because their right to benefits is in question. Employers should attend because the ALJ's decision may affect their liability or cause their accounts to be charged for benefits paid. (Sometimes, a representative of the UIA also attends the hearing.) The ALJ may also permit observers at the hearing.

In deciding whom, if anyone, you should present as a witness, it is important to keep in mind that the hearing operates within the general requirements of the rules of evidence much like a court. The ALJ will not accept most **hearsay** testimony, that is, testimony not within the witness's own first-hand knowledge. For example, the ALJ cannot permit a party or witness to answer a question by saying "I don't know what happened, but from what Joe tells me...." If "Joe" knows what happened, then "Joe" should have appeared at the hearing. Nobody else can testify as to what "Joe" would have said had he been at the hearing. If, for example, a worker's attendance is at issue, the person with the most personal knowledge should appear as a witness to describe the worker's attendance and any warnings given by the employer to the worker.

In addition to presenting witnesses with personal knowledge of the facts, parties may wish to introduce documents to support the testimony of the witnesses. Documents include such things as attendance records, written warnings, dates of verbal warnings, layoff notices, and letters or other correspondence that bear on the case. The employer's keeper of business records should be present at the hearing to testify about them, and to testify that they are the actual records.

Another reason it is important to present witnesses, in addition to documents, is that only a person who is present at the hearing (in person or by phone) can be cross-examined by the other party. A notarized statement generally cannot, therefore, be used at the hearing in place of a witness.

What Happens At The Hearing?

When parties scheduled for an in-person hearing arrive at a regional location of the State Office of Administrative Hearings and Rules, they should first notify the information clerk of their arrival and/or sign the sign-in sheet.

The parties (and their attorneys, representatives, Advocates, witnesses, and any others) are then directed to a waiting area. It is a good idea to arrive at the hearing location 10 or 15 minutes early.

The ALJ calls the case and decides who can enter the hearing room. The ALJ sits at a desk, or sometimes behind a judge's bench, and the parties and their witnesses and representatives usually sit at a table in front of the ALJ's desk. The ALJ will direct the parties and witnesses where to sit.

The ALJ begins by introducing him- or herself by name, making sure he or she has the names of all the parties, witnesses, representatives, Advocates and attorneys.

Hearings are tape recorded. If an appeal is later taken, the tape recording is typed up as a transcript. It is the transcript that is reviewed at higher levels of appeal. It is important for everyone to speak loudly and slowly, and not rustle papers or interrupt others, so that a clear recording can be made. The transcript and the documents which are accepted as exhibits become the "record" of the hearing that is reviewed at higher levels of appeal.

The ALJ asks the parties and witnesses to raise their right hands, and then administers an oath or affirmation to each of the parties and witnesses, asking them to swear or affirm that they will tell the truth, the whole truth, and nothing but the truth.

The ALJ then identifies each of the participants in the hearing for the record, and summarizes the issue being appealed and the UIA's Redetermination.

Often, the ALJ requests that the witnesses be **sequestered**, that is, asked to sit outside the hearing room while the other witnesses are testifying, so that the witnesses are not influenced by each other's testimony. An ALJ may also determine that the testimony of the witnesses is "cumulative," that is, that they will all be testifying to the same set of facts. In that case, the ALJ may accept the testimony of only one of the witnesses, and not permit the party's other witnesses to testify.

The ALJ usually asks the party with the burden of proof to present his or her case first. There is a more complete discussion of who has the burden of proof, and what that means, on page 17 of this booklet.

If the party with the burden of proof has a representative, Advocate, or attorney, that person usually asks the party and the witnesses questions. This process is called **direct examination**. If the party with the burden of proof does not have a representative, Advocate, or attorney, the ALJ may ask the questions. Even if the party has a representative, Advocate, or attorney, the ALJ may ask additional questions to clarify testimony. The ALJ will also give the party with the burden of proof an opportunity to present his or her case in narrative fashion.

After the party with the burden of proof presents testimony, the other party has the opportunity to ask questions of each witness. This is called **cross-examination**. If the party has a representative, Advocate, or attorney, that person conducts the cross-examination; if the party does not have a representative, Advocate, or attorney, the ALJ conducts the cross-examination, or may ask the party to do so. Next, the other party presents direct testimony, and that party's witnesses may be cross-examined.

Sometimes during a hearing, an issue comes up that was not originally part of the case, and was not indicated on the Notice of Hearing. In that situation, the ALJ permits an adjournment to allow the parties to prepare for that issue. If they feel prepared to give evidence on the new issue, the parties can agree to give up their right to an adjournment, and continue with the hearing.

The ALJ is responsible for getting all of the information needed to fully understand the facts of the case. An important function of the ALJ is **fact-finding**. In some cases, this may mean that the ALJ takes over the function of direct- or cross-examination, and that the ALJ will exclude the testimony of some witnesses.

The ALJ is also responsible for ensuring that the rules of evidence are generally followed throughout the hearing. For that reason, the ALJ may rule that certain testimony is hearsay or is not relevant to the case and cannot be allowed, or that certain documents cannot be accepted, or that the testimony of certain witnesses will not be permitted.

The ALJ is responsible for directing the progress of the hearing. When the ALJ attempts to closely control the hearing, he or she is not being rude. Rather, the ALJ is ensuring that the hearing is not prolonged by testimony unrelated to the issues.

At the conclusion of the hearing, the ALJ may give the parties an opportunity to make closing statements, summarizing their positions on the issues in the case if the ALJ believes such statements will assist him or her in deciding the facts of the case.

The procedures followed at in-person hearings are also followed for hearings held by telephone, as much as possible.

What Happens After The Hearing?

After the hearing, the ALJ reviews the testimony of the parties, some of which may conflict as to the facts. The ALJ may also take into account the demeanor of the parties and their witnesses, that is, the manner in which they presented testimony and answered questions and the consistency of a witness's testimony. This may help the ALJ determine the credibility (believability) of the parties and witnesses.

Based on these factors, the ALJ makes "findings of fact," that are included in the ALJ's written decision. In addition, the ALJ decides how the unemployment compensation law applies to the facts of the case, and makes conclusions of law. The most important factor the ALJ uses in making his or her decision is this: **HAS THE PARTY WITH THE BURDEN OF PROOF SUCCESSFULLY MET THAT BURDEN?** (See page 17 of this booklet for information about Burden of Proof.)

The ALJ will usually issue a decision within 60 days of the date of the hearing. Any losing party may appeal the decision to the Michigan Employment Security Board of Review. The last page of the decision includes information about how to appeal. It is also possible to request a rehearing before the ALJ, but this will be granted only at the discretion of the ALJ, based upon the reason stated in the request for rehearing.

The ALJ cannot talk about the case with a party, before or after the hearing, because this would be unfair to the absent party. Thus, the ALJ cannot take a party's telephone call. The ALJ's office personnel can answer questions about the scheduling of the case or issuance of the decision.

Burden Of Proof:

The Key To Making Your Best Case

*I*n every hearing, the ALJ's attention is focused on one primary issue: Has the party with the burden of proof carried that burden by substantial evidence, with first-hand testimony, and other admissible evidence?

Misconduct Cases

In a misconduct case, the burden is always on the employer to prove:

- (1) That the unemployed worker engaged in misconduct, and
- (2) That the misconduct occurred in connection with the work.

In unemployment compensation cases, the Michigan Supreme Court has defined “misconduct” as a willful or wanton disregard of the employer’s interest, or negligence of such seriousness as to imply disregard of the employer’s interest.

However, the mere inability to do the job, or a good faith error in judgment, is not considered misconduct. In some cases, the employer may have a perfectly good and valid reason to discharge an employee, but that reason still might not amount to misconduct for purposes of the unemployment compensation law.

The exact wording of the Michigan Supreme Court definition of misconduct is found on page 23 of this booklet.

The employer may need to show, through testimony and, if possible, documents, that (1) the employer had a policy on the particular conduct involved; (2) the employer applied the policy equally to all employees; and (3) the employer had not previously condoned the actions that resulted in the discharge. In some cases, it is useful for the employer to show that the unemployed worker had received warnings about infractions, but that the unemployed worker continued in the misconduct after the warnings.

However, where the employee’s misconduct is a serious offense, the employer need not warn the employee prior to discharge.

Voluntary Leaving Cases

In a voluntary leaving case, the burden is on the unemployed worker to prove:

- (1) That the leaving was **voluntary but with good cause attributable to the employer**, or
- (2) That the leaving was **involuntary** (for example, due to personal health reasons).

To show that a leaving was with good cause attributable to the employer, the unemployed worker must prove that some condition existed that would have made continued employment unacceptable to a reasonable person. This condition must have been brought to the employer's attention and the employer failed to correct it.

Unsafe working conditions, failure to pay wages when due, or failure to provide promised benefits or promotions (things over which the employer has control but fails to correct) are examples of situations that could amount to good cause attributable to the employer for the worker to voluntarily leave a job.

To prove that a leaving was involuntary, the unemployed worker may, for example, prove that a health reason, verified by a doctor, prevented the worker from continuing to do the job, that the worker informed the employer of this fact and tried to find another job with the same employer, but that the employer was unable or unwilling to do so. (However, a person who is unable to do any work he or she has done in the past, or work he or she was trained to do, is no longer part of the labor force, and would not be eligible for unemployment benefits until again able to work.)

Refusal Of Suitable Work Cases

In a refusal of suitable work case, the burden of proof is on the **employer** to show:

- (1) That **the employer made an offer of work** to the unemployed worker;
- (2) That the work offered was **suitable**;
- (3) That the offer was **for a job that really existed**;
- (4) That the offer was **specific**; and
- (5) That the unemployed worker **refused the offer**.

Elements of suitability of a job include wages, distance from the worker's residence, length of unemployment, and risk to the unemployed worker's health, safety, or morals.

The burden then shifts to the unemployed worker to show that he or she had **good cause** to refuse the offered suitable work.

Eligibility For Benefits

In an eligibility case, the burden of proof is always on the **unemployed worker** to prove that he or she filed a claim and, for every week he or she is claiming benefits, he or she was:

- (1) Able to work;
- (2) Available for full-time, suitable work;
- (3) Actively seeking work, unless this requirement has been excused; and
- (4) Reporting for benefits as directed by the UIA, or had good cause for not reporting or filing as directed.

It is a good idea for the unemployed worker to keep notes about where he/she looked for work each week, and to take these notes to the hearing.

Liability/Tax Issues

An employer's liability/tax issues may include, but are not limited to, the following:

- The employer believes that he/she should not have been determined liable to pay unemployment taxes
- The employer believes that he/she should not have been determined a successor of another employer's business
- The employer disagrees with the tax rate.

If appealing these issues, the employer must bring supporting documents to the hearing, as well as appropriate witnesses.

Some Final Words

*T*he best advice for parties appearing before an ALJ is to be prepared for the hearing:

1. Know what the issue (question) before the ALJ is. It is indicated in the Notice of Hearing. Also, read the important information on the back of the Notice of Hearing.
2. Know who has the burden of proof.
3. Know what has to be proved in order to carry that burden of proof.
4. Review the file in advance, so that you can plan the major points you wish to make, and can plan the questions you wish to ask the other party.
5. Take to the hearing the necessary papers and witnesses. Make sure that the witnesses are persons who can offer testimony as to their own knowledge.
6. Arrive at the hearing on time.

If the decision of the ALJ is not in your favor, you may either request a rehearing before the ALJ (for example, if you have additional facts that were not available to you at the time of the original hearing), or you may appeal the ALJ’s decision to the **Michigan Employment Security Board of Review**, which is a separate agency from the UIA and from the State Office of Administrative Hearings and Rules. The 30-day time limits for filing either a request for rehearing before the ALJ, or an appeal to the Board of Review, will be on the last page of the ALJ’s decision.

You must file within the time limits given. If your request for a rehearing is late but within one year of the ALJ’s decision, your request will be considered to be a request for a **reopening** of the case before the ALJ, who will then have to decide whether you have “good cause” for requesting a reopening.

When it receives an appeal, the Board of Review reviews the transcript of the ALJ hearing, which is the written form of the tape recording made at the hearing. The Board of Review will then decide whether the ALJ properly weighed the facts presented at the hearing and properly applied the law to the facts. Occasionally, if requested by the parties, the Board of Review will allow parties to appear in person before the Board to present oral arguments.

We believe that if you follow the suggestions made in this booklet, you will be able to make your best case. We hope that by reading this booklet, you will know how to prepare for the hearing and what to expect, and will feel more at ease when attending the hearing.

In addition, the State Office of Administrative Hearings and Rules welcomes your comments about your hearing and about this booklet (what should be added, what needs clarification, etc.). Please direct your comments, in writing, to the Director, State Office of Administrative Hearings and Rules, 611 W. Ottawa, 2nd Floor, Lansing, Michigan 48933.

The following is the definition of misconduct adopted by the Michigan Supreme Court in the case of *Carter v Employment Security Commission*, 364 Mich 538, 541 (1961):

“[Misconduct in an unemployment compensation case is] ... conduct evincing such wilful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed ‘misconduct’ within the meaning of the [unemployment compensation] statute.”

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