2015 Government Practice Seminar

Advice from Administrative Law Judges-
Do's and Don'ts

3:15 p.m. - 4:15 p.m.

Presented by

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Friday, March 27, 2015
ISBA
Government Practice Section
Annual CLE
Friday, March 27, 2015

“Advice From ALJs: Do’s And Don’ts”

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Top Ten Tips From A Central Panel ALJ
Prepared by Emily Gould Chafa, ALJ with the DIA AHD

1. **Read the Notice of Hearing** carefully, in its entirety. Note applicable statutes and administrative rules pertaining to the issue or issues on appeal. Note deadlines for submitting exhibits. Note the exact date and time of the hearing. Note participation logistics.

2. **Read the applicable statutes and rules** for each hearing. Each state agency has its own governing statutes and rules for the substantive issue(s) and procedural matters for various types of administrative appeals.

3. **Read relevant court opinions** relating to the subject matter and procedure. Some common issues are considered and interpreted by Iowa’s appellate courts on a regular basis.

4. **Prepare for the hearing.** Submit exhibits to the ALJ assigned to your hearing and to the opposing party’s representatives, at least five days before the hearing. Submit exhibits to the ALJ and other parties via email or fax if feasible. Obtain contact information for your witnesses to enable the ALJ to connect them to the telephone conference call at the time their testimony is needed during the hearing. Better yet, ask most witnesses to attend the hearing with you and your client, to help the hearing run as efficiently as possible. Hearsay is generally admissible in these administrative hearings, so you may submit written statements in lieu of live testimony if necessary. Request an administrative subpoena for witnesses and/or exhibits if needed. (See 481 IAC 10.14.)

5. **Show up for the hearing** at the exact time it is scheduled to begin. You snooze, you lose. Most of these hearings are conducted via telephone conference call, utilizing a conference calling system. The ALJ need not wait more than five minutes for all the parties to call in to participate in the hearing. Often, the ALJ will immediately prepare and upload a default decision after a party fails to appear for the hearing. (See No. 7)

6. **Know your burden of proof** and the opposing party’s burden of proof. (See Nos. 1, 2, 3 above.) The burden of proof varies widely depending on the agency involved and the issues involved. The burden of proof in the administrative proceeding may be completely different from the corresponding criminal proceeding. For example, in a DOT OWI license revocation proceeding, the individual appellant bears the burden of proof. In most DHS public assistance denial hearings, the Department bears the burden of proof. The governing statutes and rules typically set forth the burden of proof for appeals from other agency decisions.

7. **Use your time wisely.** Present your case efficiently during the hearing. You are probably limited to an hour, or less, to present your case, due to the ALJ’s daily hearing schedule. The ALJ most likely has several hearings scheduled that day, in one hour time slots, with another hearing immediately following yours. For example, hearings for the Department of Transportation (DOT), the agency with the highest volume of ALJ hearings, are usually scheduled every hour on the hour. Likewise, hearings for the Department of Human Services (DHS), the other agency with the highest volume of ALJ hearings, are usually scheduled in one hour time slots, with another hearing scheduled immediately following your client’s hearing. More time is typically allotted for more complicated cases, but the general efficiency rule applies to all administrative hearings.

8. **Read the decision.** Note the result. Note the next step for further appeals. Each state agency (and sometimes each division within an agency) has its own appeal process. The next step may be an appeal to the agency director. The next step may be an appeal to another designated state agency. The ALJ’s decision may be the final agency action, and the next step would be to the district court. Each written decision will include this information.

9. **Note deadlines** for any next steps in the review process. Some deadlines are jurisdictional.

10. **Respect the tribunal.** ALJs make decisions that often impact the daily lives of your clients. Treat an administrative hearing and the ALJ with the same deference you would use in a district court proceeding.
GENERAL RESOURCES

General website for Division of Administrative Hearings: http://dia.iowa.gov/page10.html

The website includes a FAQ – Intended for the general public, but may be useful for attorneys who are unfamiliar with the administrative hearing process.

General Statutory and Iowa Administrative Rule Resources:
Iowa Code Chapter 17A
481 Iowa Administrative Code Chapter 10

DOT Administrative Rules for contested case hearings: 761 IAC 620.4

DHS Administrative Rules for contested case hearings: 441 IAC Ch. 7

IWD Administrative Rules for contested case hearings: 871 IAC Ch. 26

GENERAL RULES FOR DIA AHD CASES

**Hearsay** is admissible. An ALJ is likely to allow hearsay in testimony and via exhibits. An objection to the proper weight or reliability of the hearsay evidence is appropriate, but please do not object to evidence purely on hearsay grounds.

**Exhibits** are accepted, by the DIA AHD (central panel) ALJs, via email, fax, or regular mail. Email attachments are preferred, to make sure that the ALJ assigned to your hearing actually receives your exhibits. Regular mail can take at least five days to actually reach the ALJ, so allow extra time when mailing exhibits.

**Motions** for continuances and withdrawals may be communicated via email. Be sure to include the opposing party in any communications with the ALJ. Faxed motions and withdrawals are also acceptable. BE SURE TO INCLUDE THE ALJ’S NAME AND THE CASE NUMBER ON ALL MOTIONS AND COMMUNICATIONS!!

**Ex parte communications** are not allowed, of course. Most ALJs are happy to answer procedural questions for attorneys who are not familiar with a certain type of administrative hearing. All or most ALJs in the DIA AHD will accept continuance requests or appeal withdrawals or dismissals via telephone in DOT cases, because of a general DOT policy regarding these matters. An ALJ may ask you to contact the other party and agree on a new date. Or, the ALJ will start an email message series with the appropriate parties to avoid *ex parte* communications and to be efficient.

**Clear and Concise** is best. Cite relevant statutes, administrative rules, and case citations to the ALJ in your closing argument. Formal briefing is rarely required.
The Iowa Code of Administrative Judicial Conduct

481—10.29(10A) Code of administrative judicial conduct. The code of administrative judicial conduct is designed to govern the conduct, in relation to their adjudicative functions in contested cases, of all persons who act as presiding officers under the authority of Iowa Code section 17A.11(1). The canons are rules of reason. The canons shall be applied consistent with constitutional requirements, statutes, administrative rules, and decisional law and in the context of all relevant circumstances. The canons must be harmonized with the dictates of the administrative process as established by the legislature. While Canons 1, 2, and 3 are generally applicable to both administrative law judges and agency heads or members of multimember agency heads when these persons act as presiding officers, these canons shall be applied to agency heads and members of multimember agency heads only as expressly mandated by statute and as reasonably practicable when taking into account the fact that agency heads and members of multimember agency heads, unlike administrative law judges, have multiple duties imposed upon them by law. The provisions of Canon 4 concerning the regulation of extrajudicial activities are not applicable to agency heads or members of multimember agency heads. This code is to be construed so as to promote the essential independence of presiding officers in making judicial decisions.

Whether disciplinary action is appropriate, and the degree of discipline to be imposed, shall be determined by the appointing authority through a reasonable and reasoned application of the text and shall depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity, and the effect of improper activity on others or on the administrative system. This code is not designed or intended as a basis for civil liability or criminal prosecution.

10.29(1) Canon 1. A presiding officer shall uphold the integrity and independence of the administrative judiciary.
   a. An independent and honorable administrative judiciary is indispensable to justice in society.
   b. A presiding officer shall participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the administrative judiciary will be preserved.
   c. The provisions of this code are to be construed and applied to further that objective.

10.29(2) Canon 2. A presiding officer shall avoid impropriety and the appearance of impropriety in all adjudicative functions in contested cases.
   a. A presiding officer shall respect and comply with the law and at all times shall act in a manner that promotes public confidence in the integrity and impartiality of the administrative judiciary.
   b. A presiding officer shall not allow family, social, political, or other relationships to influence the presiding officer’s judicial conduct or judgment. This provision shall not be construed as prohibiting the development of public policy by contested case adjudication. A presiding officer shall not lend the prestige of the office to advance the private interests of the presiding officer or others; nor shall a presiding officer convey or permit others to convey the impression that they are in a special position to influence the presiding officer.
   c. A presiding officer shall not hold membership in any organization that the presiding officer knows practices invidious discrimination on the basis of race, sex, religion or national origin.

10.29(3) Canon 3. A presiding officer shall perform the duties of the office impartially and diligently.
   a. Adjudicative responsibilities. A presiding officer in the performance of adjudicative duties in contested case proceedings shall follow these standards:
      (1) A presiding officer shall be faithful to the law, unswayed by partisan interests, public clamor, or fear of criticism.
      (2) A presiding officer shall maintain order and decorum in proceedings before the presiding officer.
      (3) A presiding officer shall be patient, dignified, and courteous to litigants, witnesses, attorneys, representatives, and others with whom the presiding officer deals in an official capacity, and shall require similar conduct of attorneys, representatives, staff members and others subject to the presiding officer’s direction and control.
(4) A presiding officer shall not, in the performance of adjudicative duties by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon sex, race, national origin or ethnicity and shall not permit staff and others subject to the presiding officer’s direction and control to do so.

(5) A presiding officer shall accord to all persons who are legally interested in a proceeding, or their representatives, full right to be heard according to law, and neither initiate nor consider ex parte communications prohibited by Iowa Code section 17A.17.

(6) A presiding officer shall dispose of all adjudicative matters promptly, efficiently and fairly.

(7) A presiding officer shall abstain from public comment about a pending or impending contested case proceeding that might reasonably be expected to affect the outcome or impair the fairness of the proceeding, and shall require similar abstention by agency personnel subject to the presiding officer’s direction and control. This subparagraph does not prohibit a presiding officer from making public statements in the course of official duties or from explaining for public information the hearing procedures of agencies.

(8) A presiding officer shall not disclose or use, for any purpose unrelated to adjudicative duties, nonpublic information acquired in an adjudicative capacity except as lawfully permissible in the performance of official duties by an agency head or member of a multimember agency head.

(9) A presiding officer shall report any violation of this code to the appropriate authority for any disciplinary proceedings provided by law.

b. Disqualification. A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

(1) Has a personal bias or prejudice concerning a party or a representative of a party;

(2) Has personally investigated, prosecuted or advocated, in connection with that case, the specific controversy underlying that case, or another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

(3) Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

(4) Has acted as counsel to any person who is a private party to that proceeding within the past two years;

(5) Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

(6) Has a spouse or relative within the third degree of relationship that:
   1. Is a party to the case, or an officer, director or trustee of a party;
   2. Is an attorney in the case;
   3. Is known to have an interest that could be substantially affected by the outcome of the case; or
   4. Is likely to be a material witness in the case; or

(7) Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

c. Disclosure on record. In a situation where a presiding officer knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, the presiding officer shall disclose the relevant information on the record and shall state reasons why voluntary withdrawal is unnecessary.

10.29(4) Canon 4. An administrative law judge shall regulate extrajudicial activities to minimize the risk of conflict with judicial duties.

In general, an administrative law judge shall conduct all of the administrative law judge’s extrajudicial activities so that the administrative law judge does not:

1. Cast reasonable doubt on the administrative law judge’s capacity to act impartially as a judge;

2. Create the appearance of impropriety or demean the adjudicative office; or

3. Interfere with the proper performance of adjudicative duties.
To Do or Not to Do; That is the Question in UI Hearings
Dévon M. Lewis, ALJ, IWD UI Appeals Bureau

DO:

- Have employer participate in fact-finding interview to avoid potential overpayment waiver and charge to employer’s account if allowance reversal upon appeal from fact-finding unemployment insurance (UI) decision.
- Put scheduling conflicts or preferences in appeal letter or appearance. We schedule about three weeks out.
- If client needs interpreter, put request for specific language and dialect in appeal letter. No charge for interpreter.
- One hour allotted for double party separation appeal hearings is generally enough. Ask for more than one hour for the hearing if you think you will need it (multiple witnesses, many exhibits). Otherwise the ALJ may reschedule or continue the conclusion of the hearing at a later date and/or time to avoid running into another hearing’s start time.
- Organize any intended exhibits. Provide to the other party or ask agency to do so ASAP in advance of hearing. Generally, claimants use letters; employers use numbers.
- Read all hearing notice information front and back. Follow instructions.
- Take advantage of information available online to claimants, employers and about appeal hearings.

ONLINE RESOURCES:
Employer account access and information: https://www.myiowai.org/UITIPTaxWeb/

- Have witness/es with direct, first-hand knowledge participate.
- Interpreter
  - Allow an interpreter to relay the question/answer before going on to the next.
  - Speak in brief, pointed sentences/questions/objections for interpreter. Pause as necessary for lengthy communication.
- Evidence
  - Relaxed rules of evidence. Hearsay is allowable in administrative hearings. Your objection goes to weight given the evidence, not its admissibility.
  - If objecting, make it short and to the point. “Objection. Hearsay.” “Foundation.” “Relevance.” “Materiality.” “Asked and answered.” If the ALJ needs clarification or argument they will ask for it.
- The ALJ will seek basic employment information including start and end dates, full-time/part-time, job title/basic duties, last day worked.
- Advise your witness not to seek information from another witness if they are not certain of the answer. They may reply they do not have that information and refer the ALJ to the witness who may know.
• Have information available regarding the final/last act triggering the separation, history of similar incidents, warnings, policy, resignation reasons, history of similar complaints, etc.

• Bring pertinent documents to ALJ’s attention during relevant portion of testimony if documents are not addressed at the beginning of the hearing record.

• Focus on the issue that is the subject of the hearing: the reasons for the separation, whether the claimant is able to work and available for work, etc. If a separation is for attendance, there is no need to get into job performance.

• Know that an employer’s policy is not necessarily dispositive; such as attendance point system, vague language, or unreasonable procedure.

• Ask which party initiated the separation if there is a dispute between quit and discharge.

• Keep cross-examination short and to the point. Save the rest for direct examination of your witness/es.

**DO NOT … or try not to (sorry, Yoda):**

• Do not cover background *ad nauseum.* Because of limited time available get to the substance ASAP.

• Do not submit duplicate proposed exhibits or multiple copies. This costs extra clerical time to process as well as copying and mailing costs.

• Do not be concerned about the ALJ asking questions. The ALJ has a duty to develop the record according to the Department of Labor and the Iowa Court of Appeals.
  
  o Because of presumed expertise, the administrative law judge has a heightened duty to develop the record from available evidence and testimony. *Baker v. Emp’t Appeal Bd.*, 551 N.W.2d 646 (Iowa Ct. App. 1996).

  o The ALJ will likely ask more questions and be more involved if one party is not represented by an attorney.

• Try not to repeat questions the ALJ has already asked.

• Avoid frequent minor and repetitive objections. This is a relatively informal proceeding.

• Do not ask leading questions on direct exam. Let your witness/es provide the facts.

• Do not ask speculative questions. “Why did he do that?” “If you did not do that, why did the employer fire you?”

• Do not ask questions or offer exhibits about events that happened after the discharge even if it appears to reinforce the reason/s for the discharge. The ALJ’s decision must be based upon what the employer knew at the time its decision was made. There may be a limited argument to address the claimant’s credibility, especially as to admissions/statements against interest made at or shortly after the discharge.

• In a discharge, do not make an apples-to-oranges comparison, *ie,* attendance to job performance, etc. Prior acts and warnings must be based upon similar conduct.

• Do not use an appeal hearing to conduct discovery about a collateral case elsewhere.

• You may, but do not need to plan to make opening or closing statements or submit briefs due to time limitations. If you choose to do so, please keep them short and to the point.
GENERAL INFORMATION:

- Due to a high volume caseload UI Appeals Bureau ALJs generally hold six hearings per day and up to 30 per week giving them an average of 75 minutes per hearing and decision, including returning phone calls, ruling on postponement requests, etc.

- DOL metrics require most decisions be submitted 30 days from date of appeal, including seven days’ notice of the hearing, although we try to mail ten days out. Depending on the current level of appeals that may mean a decision is due within a day or two of the hearing. Otherwise you should generally be able to expect a decision within seven to ten days of the hearing date. If you do not receive a decision within two weeks, call the number on the hearing notice and inquire.

- An employer cannot prevent filing or assure benefit payment. Settlements and mediation do not lend themselves well to this process. Call and ask an ALJ (not the one assigned to hear the case) questions about how that may affect the claim/charges.

- Part of our job is educating the public and answering questions. Do not hesitate to call with procedural or other questions. Unless it is a procedural question, you will be referred to an ALJ not assigned to your pending appeal. You may also ask procedural questions at hearing.

- BOP: Discharges, involuntary separation – employer. Quits, voluntary separation, able and available – claimant.

- The Appeals Bureau hearing is de novo and does not automatically include any fact-finding information from the Benefits Bureau.

- In the event of appeal from an ALJ decision, the Employment Appeal Board is the final agency action/finder of fact, even though its decision is based upon the Appeals Bureau’s hearing record.

Several Tip Sheets for various procedural and substantive aspects of UI hearings are included below.
Discharge
The general rule is that an individual is disqualified for unemployment insurance benefits if discharged for misconduct in connection with the individual’s employment. Misconduct is found in deliberate acts or omissions that constitute a material breach of the worker’s duty to the employer or in repeated acts of carelessness or negligence. Poor performance due to inability and good faith mistakes are not considered misconduct.

The employer has the burden of proof to establish misconduct. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a “current act” of misconduct. Information acquired after the discharge will not be considered, because as a general rule, it could not have been the basis for the decision to discharge.

Although the definition of misconduct excludes “good faith errors in judgment or discretion,” a worker’s subjective understanding and intent is not the end of the analysis. The key question is what a reasonable person would have believed under the circumstances.

Quit
Claimants who voluntarily leave employment without good cause attributable to the employer are disqualified for benefits. Claimants have the burden of proof in cases involving quits. In general, a voluntary quit requires evidence of an intention to sever the employment relationship (e.g. letter of resignation, verbal resignation).

The District Court has ruled in the past a claimant with limited English skills did not leave work voluntarily when he mistakenly believed he had been discharged.

Prior notification to the employer before resigning for medical reasons is required. The evidence must show before resigning the worker:
- Put the employer on notice of the condition
- Warned the employer that he/she may quit if the situation is not addressed
- Gave the employer reasonable opportunity to address legitimate grievances

Prior notification to the employer before resigning for other reasons is not required, but must still be for a good cause reason attributable to the employer.

Procedural Issues
Unemployment insurance hearings before an administrative law judge from Iowa Workforce Development or the Department of Inspections and Appeals are contested cases proceedings pursuant to Chapter 17A. The rules of evidence are found in section 17A.14(1).

Irrelevant, immaterial or unduly repetitious evidence “should” be excluded. There is no residuum rule. All evidence may be hearsay. Even though admissible, hearsay is often NOT the best evidence (if possible witnesses that have first-hand information should participate in the hearings). In evaluating hearsay, the administrative law judge will conduct a common sense evaluation of:
• the nature of the hearsay,
• the availability of better evidence,
• the cost of acquiring better evidence,
• the need for precision, and
• the administrative policy to be fulfilled.

An amendment to section 17A.10 provides that contested cases in which the agency is a named party or real party in interest shall be heard by an administrative law judge from the Department of Inspections and Appeals (DIA). Iowa Workforce Development adopted a regulation whereby it transfers to the DIA those cases in which it is the employer and those cases in which a subdivision of the agency desires to participate in the contested case hearing.

For additional information, please reference the Iowa Admin. Code r. 871-26 for IWD’s rules of procedure for contested cases.

Timeliness of Protest or Appeal
Iowa Code 96.6(2) allows ten days for filing an initial protests and appeals from first level fact finding determinations.

The Code of Iowa gives an automatic extension until the next regular business day if the last day for filing an appeal fall on a Saturday, Sunday, or other legal holiday.

The time limits do not apply if the party does not receive the Notice of Claim or fact-finding decision in time to file a timely protest or appeal (the question becomes whether the party filed within a reasonable amount of time after learning of the Notice of Claim or fact finding decision).

If filed by mail, an appeal must be postmarked by the final day.

If filed by any other means besides mail, the agency must receive it by the end of the final day.

The statute gives 30 days to appeal the Employer’s Statement of Charges or, in the case of a reimbursable employer, a billing statement (this applies if the employer did not receive a Notice of Claim).

The Supreme Court of Iowa has ruled that the time limit for filing appeals is jurisdictional (Franklin v. Iowa Dep’t of Job Serv., 277 N.W. 2d 877, 881 (Iowa 1979) meaning that in the absence of a timely protest or timely appeal, the agency does not have jurisdiction to rule on the merits of the case.

Note: The above is legal information, it is not legal advice.  
http://www.iowaworkforcedevelopment.gov/unemployment-insurance-benefits-tip-sheet-general-fact-finding-information
IWD Tip Sheet
Unemployment Insurance Benefits: **Employer Participation at Fact-finding Interview**

Effective July 1, 2013, an employer’s account may be charged for failure to participate at a fact-finding interview even if the employer prevails on the appeal in the unemployment insurance hearing. See Iowa Code § 96.3(7)b.

**Personal participation** by an employer representative with *first-hand* knowledge will usually suffice to prevent charges to the employer’s account.

**Participation by documentation** is also allowed. The employer must submit factual and *detailed* information that, if unrefuted, would be sufficient to allow the employer to win. See Iowa Admin. Code r. 871-24.10(1).

Mandatory requirements when participating via documents:

- Employer must provide the name and telephone number of a representative with first-hand information who is available to be contacted at the time of the fact-finding interview.
- Employer must provide detailed written statements giving dates and specific circumstances of the discharge incident or reasons for a quit.
- The specific rule or policy relied upon must be submitted for a discharge case.
- For an absenteeism discharge the statement must include circumstances of all absences relating to the discharge with proof that the absences are unexcused under Iowa law.

The following are *inadequate* participation for a fact-finding interview:

- Written or oral statements and/or general conclusions without supported factual and detailed information
- Information submitted after a fact-finding interview has concluded

Note: The above is legal information, it is not legal advice.

IWD Tip Sheet

Unemployment Insurance Benefits: Absenteeism and Misconduct

The employer has the burden to prove misconduct in order to deny unemployment insurance benefits. Absenteeism that is both unexcused and excessive is a form of misconduct. Absenteeism includes tardiness and leaving early from scheduled work hours and extending scheduled breaks. An employer is entitled to expect its employees to report to work as scheduled or to be notified in a timely manner as to when and why the employee is unable to report to work.

Absenteeism Policy
It is helpful for an employer to have a policy or work rules about attendance to give to employees. Get a signed receipt or acknowledgement for the policy. Include information about reporting an absence. The employee should be made aware in the employer’s policy or work rules how to proceed with the following during their absence:

- To whom they must report the absence (supervisor, receptionist, coworker, etc.)
- How they should report the absence (direct conversation, voicemail message, email, text message, etc.)
- Time they should report their absence (minimum number of minutes before the shift start time, no later than the shift start, within a certain time after the shift start time, etc.)

Absences must be properly reported in order to be excused due to the reason for the absence. A fact-finder or administrative law judge (ALJ) may disregard unreasonable policies or work rules.

Excused and Unexcused Absences
Absences related to personal responsibility such as transportation, lack of childcare, and oversleeping are not excused. Failure to find a shift replacement worker does not necessarily make the absence unexcused. Properly reported absences due to illness or injury are excused, regardless of a no-fault or point attendance policy. If there is a pattern of absences or multiple day absences related to illness or injury, an employer may request medical documentation, such as an excuse and release to work. A good faith inability to find childcare for a sick child or family emergency may be excused. A third unexcused absence within a year after a warning will usually be considered excessive. Absences more than one year prior to the separation date may be too old to be considered in the excessive absenteeism analysis. The last absence must be for an unexcused reason in order to deny benefits. A final excused absence, even with previous multiple unexcused absences, will result in benefit allowance.

Attendance Records and Warnings
Deciding if unexcused absenteeism is also excessive requires review of past absenteeism and warnings. Written records of attendance violations and warnings may be used in a fact-finding interview or appeal hearing to help prove misconduct. Keep track of the date of the absence, appropriate time records for tardiness or leaving early, and the reason for the absence. If an employee violates the attendance policy more than once or twice, consider giving an initial verbal, but documented, warning. Then graduate to a written warning with clearly stated consequences for any further violations, including possible suspension or termination from employment. Sign and date the warning on the day it is given. Have the employee sign and date for the receipt of the warning and allow a space for employee comments, if they want to provide any. They do not have to agree with the warning, but should acknowledge receipt. Give a copy of signed warnings to the employee so they have specific notice that their attendance must improve in order to keep the job. Warnings about other issues, such as job performance, will not count as a warning towards a discharge for absenteeism, and vice versa. Follow the policy or work rules and progressive discipline the same for each employee.
**Last Straw**
Employers must take prompt action when an employee is discharged after a final instance of absenteeism. The Iowa Court of Appeals has suggested that an employee should not be allowed to continue working for more than ten work days after the last absence or act of misconduct, or the final incident or absence will be stale, the discharge will not be for a “current act” of misconduct, and benefits will be allowed.

**No-call/No-show Absences as Quitting**
If a worker fails to report for work or notify the employer of absences for three consecutive workdays in violation of a specific employer policy, the employee will be considered to have voluntarily quit the employment without good cause attributable to the employer and benefits will be denied.

Note: The above is legal information, it is not legal advice.
Unemployment Insurance Benefits: **Intoxication at Work**

An employer may always terminate an employee for being “impaired on the job”. Based on the credibility and quality of the evidence, the employer may establish a claimant committed work-connected misconduct.

The employer should question the employee about what led to that condition. This questioning is conducted immediately with a witness and documented. Local law enforcement may be of assistance with a specific line of questioning.

Allowing the employee to remain on the job in an impaired state may result in a conclusion of no misconduct.

If an employee is suspected of using drugs or alcohol, but does not appear to be impaired, a judge may look to the employer’s **work rules**. If an employer has work rules which forbid using drugs or alcohol before or during work and that rule is violated, misconduct may be found. An employer will be asked to provide evidence of the employee’s knowledge of the work rule either through signed work rules or prior warning.

Example: Employer X has a rule against using alcohol 8 hours before coming to work or during work hours. Worker Y has an alcoholic beverage at lunch. Worker Y is not “impaired” by any normal meaning of the word. However, since employer X has a policy (that Worker Y is aware of and Employer X consistently enforces), Worker Y may have committed misconduct by violating a known work rule. If Employer X has no work rule, then Worker Y’s conduct is probably not misconduct under Iowa law absent a prior warning.

Proof is the key variable. **Hearsay** from a second-hand source may not establish work-connected misconduct in an appeal hearing.

Example: A supervisor’s hearsay testimony that co-workers observed a claimant impaired at work will rarely hold up in an administrative hearing. The supervisor should have first-hand observations or have this witness testify at the hearing. The witness should testify about what was seen, heard, smelled, rather than give a general conclusion statement that the worker was impaired. (Hearsay information includes all out of court witness statements and reports. Hearsay information will normally be admitted at an administrative hearing, but the credibility or reliability of that information may be questionable. Some sources of hearsay information are given more weight than other sources. Witness testimony should include what was seen (condition of eyes, facial complexion, behavior, balance, etc.), heard (speech pattern, admissions, etc.) or smelled (type of odor, location of odor, etc.).

A private employer can choose to perform **drug and alcohol testing** pursuant to **Iowa Code § 730.5**. Positive drug tests under chapter 730.5 may prove misconduct. An employer should seek legal counsel to ensure compliance with the procedural requirements of this law. Failure to comply with any provisions of chapter 730.5 will usually result in a finding of no misconduct. However, a drug or alcohol test is not required if the employer has sufficient proof of the impairment.

Proof may include firsthand observations by a credible witness:

- smelled like alcohol
- staggering
- slurred speech
If the witness is not available for the hearing, a signed document from the witness with a full account of what they observed is helpful. However, if the worker denies the allegation, a signed statement from a witness who is not at the hearing to testify is usually given less consideration.

Note: The above is legal information, it is not legal advice.
http://www.iowaworkforcedevelopment.gov/unemployment-insurance-benefits-tip-sheet-intoxication-work
Unemployment Insurance Benefits: **Off-duty Conduct**

**Misconduct** resulting in a denial of unemployment insurance benefits must be an act of any of the following:

- malicious or willful disregard of the employer’s interest
- deliberate violation of the employer’s rules
- disregard of standards of behavior which the employer has the right to expect of its employee
- negligence manifesting wrongful intent
- show an intentional and substantial disregard of the employer’s interest or of the employee’s duties and obligations to the employer

It has been recognized that an employee continues in **off-duty hours** to:

- regard the employer’s interests
- observe the rules laid down by the employer in connection with the proper conduct of business
- honor the standards of behavior which the employer has a right to expect of an employee

If the violation of any of these requisites during the employee’s off-duty hours leads to discharge, unemployment benefits may be denied for misconduct connected with the work. For off-duty conduct to be **grounds for disqualification** of unemployment benefits the conduct must be work related or the conduct must have direct, negative effect on the employer. Violation of a reasonable employer rule that is work related (such as a rule prohibiting illegal, immoral or indecent conduct) will constitute misconduct.

The Iowa courts have found the following circumstances to be off duty misconduct:

- truck driver was discharged for misconduct due to repeated off duty traffic violations that made him uninsurable, and thus unemployable
- claimant was disqualified from unemployment insurance benefits as a result of being convicted of selling cocaine off duty at home (the court ruled the claimant violated the employer’s work rule prohibiting immoral or illegal conduct, and the claimant’s act of selling cocaine in the face of that rule constituted misconduct)

**Establishing Off-duty Conduct**

Have a written policy outlining expected behaviors, and disciplinary action that could result from a violation of work rules, up to and including, discharge for a single act.

Have a work rule prohibiting illegal, immoral or indecent conduct, and loss of trust of management or board of directors (the work rule may include conduct subjecting the employer to public humiliation, scorn, or damage to reputation).

Have the work rules reviewed and signed by each employee (this is best accomplished by having the employee sign and date the work rules acknowledging that they have read, understand and are responsible for its contents). Anytime the work rules are updated each employee should be review and sign the updated version.

Note: The above is legal information, it is not legal advice.

Disqualifying Factors
The general rule is that an individual is disqualified for benefits for refusing a suitable offer of work, refusing a referral by the agency to suitable work or refusing a recall to suitable work.

To qualify as a suitable offer there must be a bona fide offer of work for an actual vacancy, specifying such things as duties, rate of pay, days and hours of work, etc. In addition, the offer must be made by personal contact and preferably in writing, (a registered letter constitutes personal contact only for recall to work). Both the offer and the refusal must occur during the unemployment insurance claimant’s benefit year for the agency to have jurisdiction to determine if the refusal was a disqualifying event. An individual who willfully discourages a prospective employer from making a suitable work offer will also be disqualified for benefits.

Determining “Suitability”
Part 1: Wage Suitability is a percentage of the claimant’s average weekly wage declining over the duration of the unemployment insurance claim:
- 100% of the average weekly wage in the base period if work is offered in the first five (5) weeks of claiming unemployment insurance.
- 75% if offered in the 6th through 12th weeks of unemployment.
- 70% if offered in the 13th through 18th weeks of unemployment.
- 65% if offered after the 18th week.
Part 2: Job Suitability includes the following factors:
- Prior training and experience
- Individual’s physical fitness
- Degree of risk to health, safety, and morals
- Prospects of finding employment in claimant’s normal occupation
- Commuting distance
- Other “reasonable” factors

Exceptions
An individual will not be disqualified for unemployment insurance benefits for the following:
- refusing a job offer that pays less than the federal minimum wage
- refusal to fill a vacancy caused by a strike or lockout
- refusing a job offer where the pay, hours and/or conditions are “substantially less favorable” than similar work in the area
- refusal of work requiring union membership, resignation from union membership or a promise to refrain from union membership

An offer of temporary work will not always disqualify if the unemployment insurance claim is based on wages earned in full-time or part-time permanent employment.

Reporting Refusal of Work
There are two ways to report a refusal of work.
- http://www.iowaworkforce.org/ui/forms/jobdecline.asp
- 1-866-239-0843

Note: The above is legal information, it is not legal advice.
http://www.iowaworkforcedevelopment.gov/unemployment-insurance-benefits-tip-sheet-refusal-work-or-recall
“Advice from Administrative Law Judges- Do’s and Don’ts”

Miki McGovern, Deputy Iowa Workers’ Compensation Commissioner

INTRODUCTION:
The Iowa Division of Workers’ Compensation is a division of Iowa Workforce Development. The mission of IWD states:

Iowa Workforce Development (IWD) strives to improve the income, productivity and safety of all Iowans. In conjunction with state and local economic development efforts, IWD also assists businesses to fulfill their workforce needs. The majority of IWD services are mandated by state and federal laws and regulations.

Iowa Workforce Development (IWD) will contribute to Iowa’s economic growth by providing quality customer driven services that support prosperity, productivity, health and safety for Iowans.

A strong and well-functioning division is necessary to fulfill the mission statement of IWD and the core functions of the division. Additional enhancements to the division – primarily in technology advancements – will allow the division to move forward toward the goal of being timely and responsive to the needs of workers and employers.

NEWS FROM THE DIVISION:
Commissioner Christopher J. Godfrey resigned as the Iowa Workers’ Compensation Commissioner effective August 21, 2014. He had served in the capacity of commissioner since 2006. He is now the Chief Judge of the Federal Workers’ Compensation Board of Appeals in Washington, D.C.

The citizens of Iowa, as well as the staff members at the Division of Workers’ Compensation, owe Chris a big thank you for all he has done for the workers’ compensation system in Iowa. I want to personally thank Chris for all he has done to make the division what it is today.

Governor Branstad appointed Miki McGovern, Acting Workers’ Compensation Commissioner effective September 9, 2014. She held the position until February 15, 2015. On February 16, 2015, Mr. Joseph S. Cortese II became the Iowa Workers’ Compensation Commissioner. Mr. Cortese has more than 30 years in private practice as a defense attorney working primarily in the area of workers’ compensation.
STAFFING
Deputy Commissioner Joseph L. Walsh was appointed to replace Deputy Rasey and commenced his employment with the division on January 17, 2014. Deputy Walsh practiced in labor and workers’ compensation law for 11 years before serving as Deputy Director of Iowa Workforce Development beginning in 2007. In 2011, he accepted the position of Chief Administrative Law Judge of the Unemployment Insurance Appeals Section. In addition to hearing unemployment cases, he managed 23 staff, including 12 Administrative Law Judges. During his tenure the Appeals Bureau moved from 36th to 18th in efficiency in the United States and the unit dramatically improved its timeliness while maintaining quality.

Deputy Commissioner Erin Q. Pals was hired as a Deputy Workers’ Compensation Commissioner with the Iowa Division of Workers’ Compensation and commenced her duties with DWC on March 28, 2014. Deputy Pals is a new employee of Iowa Workforce Development. She has previously been in private practice in Des Moines, Iowa. She practiced primarily in the area of workers’ compensation and has represented both claimants and defendants with a local Des Moines law firm. Deputy Pals is a 1997 graduate of Central College and a 2000 graduate of the Drake University School of Law.

The former Director of IWD approved an open docket position. The position has now been filled. The docket section of the division is one of the most important areas of the division. It is where the contested case procedure actually commences.

MUST USE CURRENT SUBPOENA FORM
The only valid subpoena form is the one bearing the signature of Joe Cortese II, the Iowa Workers’ Compensation Commissioner. The subpoena must have an indented stamp with the seal of the division stamped onto the form. No subpoena with the name of former Commissioner Godfrey, or the former acting commissioner will be considered valid. Please contact the agency for subpoena forms.

Rule 4.8(2) of the Iowa Administrative Code- Filing Fees
Please check Rule 4.8(2) of the Iowa Administrative Code before sending in a petition. This rule governs filing fees. The $100.00 filing fee is not required in every contested case. Review the rule before sending a check. If in doubt, contact the division.

Hearing Reports
Effective immediately, the parties in a contested hearing may determine whether to use the old hearing report or the new hearing report. Both forms are available on the division website. It is up to the parties to determine which report to use.

2015 Road Schedule
The dates for 2015 road schedule are listed on the division website. The names of the deputies have been assigned as of the date of the writing of this outline. The names of the hearing deputy are revealed approximately 30 days prior to the date of the hearing.

Petitions for Judicial Review
When filing a petition for judicial review, please remember to send a copy of the petition to the division. The division has 30 days from the date it receives notice of the petition to certify the record and deliver the record to the Iowa District Court. If the petition is filed in Polk County, members of the division usually hand deliver the certified record to the Clerk of Court. The
problem occurs if the parties do not notify the division that the petition for judicial review has been filed. Then one of the law clerks for the Iowa District Court is contacting the division because the case is before the judge and there is no certified record. This causes a burden on the staff and adds delay to the case being resolved before the district court.

Also, once the Iowa District Court has filed its ruling, a copy of the decision must be sent to the division. The parties are absolutely required to ensure the certified record is returned to the division if the case is remanded to the workers’ compensation commissioner.

**Settlement Documents**
Please remember to have all of your documents in order prior to presenting them to one of the workers’ compensation compliance administrators. Please have the following:

1. First Report of Injury on File;
2. Payment Activity Report (Form PAR 14-1047);
3. Signature of all parties/attorneys — THIS SEEMS SO OBVIOUS;
4. Adequate copies for all files and for copies to be returned;
5. A self-addressed stamped envelope;
6. Appropriate settlement form;
7. Correct rate, if appropriate.

**2013-14 Weekly Minimum and Maximum Rates**
Beginning July 1, 2014,
Maximum weekly rate for TTD, HP, PTD and death benefits is $1,572.00.
Maximum weekly rate for PPD benefits is $1,447.00.
The minimum weekly benefit amount for TTD or HP is equal to either the weekly benefit amount of a person whose gross weekly earnings are thirty-five percent (35%) of the statewide average weekly wage OR the spendable weekly earnings of the employee, WHICHEVER IS LESS. The minimum weekly benefit amount for PPD, PTD or death benefits is equal to the weekly benefit amount of a person whose gross weekly earnings are thirty-five percent (35%) of the statewide average weekly wage.
Statewide average weekly wage is $786.23.
35% of statewide average weekly wage is $275.00.
140% of statewide average weekly wage is $1,100.72.

**Mileage Rate**
The Iowa Division of Workers’ Compensation rule 876 IAC 8.1(2) provides: “For annual periods beginning July 1, 2006, and thereafter, the per mileage rate shall be the rate allowed by the Internal Revenue Service for the business standard mileage rate in effect on July 1 of each year.” The IRS has continued the business standard mileage rate of $.555 per mile as of July 1, 2012. Therefore, for all mileage accrued between July 1, 2012 and June 30, 2013 shall be reimbursed at the rate of $.555 per mile.

The IRS has increased mileage rates in 2013. The mileage rate increased to $.565 per mile effective July 1, 2013. The mileage rate per rule will update on July 1, 2015 and reimbursement shall be made at the present $.56 per mile until July 1, 2015. This notification is provided to confirm the published reimbursement rate set forth in the annual rate book and all other publications from the Iowa Division of Workers’ Compensation.
Please visit the Division’s website (www.iowaworkforce.org/wc) to determine if there is an additional change to the mileage reimbursement rate.


Proof of Coverage Link:
At: http://www.iowaworkforce.org/wc/ncci.htm
Please check to determine whether a given employer has workers’ compensation insurance. This is an on-going issue. Make sure the contested case captions are correct when filing or answering a petition.

Self-Insured Link
You may look for the employer's workers' compensation carrier on our site, or use this link to take you to the Iowa Insurance Commissioner's office and the list of approved self-insured employers in Iowa:
http://www.iid.state.ia.us/docs/wclisting.pdf
Or you can contact a compliance analyst for assistance.

Workers’ Compensation Research Institute
The Workers’ Compensation Research Institute (WCRI) recently issued four state-specific studies in hopes of identifying predictors of workers’ outcomes after employees sustain work-related injuries. One of the states studied is Iowa. The report will be available until February 12, 2015. After February 12, 2015, the reports may be purchased through the WCRI web site.

FURTHER REVIEW
On January 21, 2015, the Iowa Supreme Court decided to grant further review of the case Iowa Insurance Defense v. Core Group, No. 13-16278 (Polk County). This case originally started as a declaratory ruling from Former Commissioner Godfrey.

STATUTORY CHANGES
There were no statutory changes of substance during the 2014 legislative year. The budget/appropriation bill obviously is of utmost importance to the Division each year.

The Iowa Division of Workers’ Compensation proposed no legislation and did not take any position on legislative initiatives in 2014. At the time of the drafting of this outline, the following proposed bills were introduced:

HF 21 EXPLANATION
This bill relates to the choice of a physician to treat an injured employee under the state's workers’ compensation laws. The bill allows the employer to choose care unless the employee has predesignated a physician as provided in the bill.

The bill gives an employee the right to predesignate a physician who is a primary care provider, who has previously provided treatment to the employee and has retained the employee's medical records, to provide treatment for a work-related injury. The employer is required to provide written notice to employees of this right upon hire, and periodically during employment, and upon receiving notice of an injury from an employee who has not yet predesignated a
physician of their right to do so, in a manner prescribed by the workers’ compensation commissioner. An employer or an employer’s insurer shall not coerce or otherwise attempt to influence an injured employee’s choice of a physician.

If the employer fails to provide such notification, an injured employee has the right to choose any physician to provide treatment for the work-related injury and that treatment shall be considered authorized care.

If the employer or employee is dissatisfied with the care chosen by the other party, the dissatisfied party is required to communicate the basis of dissatisfaction to the other party in writing and the parties may agree to alternate care reasonably suited to treat the injury. If the parties cannot agree to such alternate care, the dissatisfied party may make an application for alternate care to the commissioner.

An application for alternate care is an original proceeding and is treated as a contested case. A party may request that the hearing be held in person, by telephone, or by audio-video conference. The commissioner is required to issue a decision within 10 working days of receipt of an application made pursuant to a telephone hearing or audio-video conference hearing and within 14 days of an in-person hearing.

Iowa Code section 85.39 is amended to provide that if the employee has chosen care, when it is medically indicated that no significant improvement from an injury is anticipated, the employee may obtain a medical opinion regarding the extent of the employee’s permanent disability from the employee’s physician. If the employer believes that the evaluation of permanent disability obtained by the employee is too high, the employer has the right to obtain another medical opinion from a physician of the employer’s choosing.

The bill applies to injuries occurring on or after January 1, 2016.

**HF 22 EXPLANATION**

This bill requires certain weekly workers’ compensation benefits to be calculated by including an employee’s overtime and premium pay, and to include an annual cost-of-living adjustment.

The bill amends Iowa Code section 85.36 to require the calculation of the amount of weekly workers’ compensation benefits to include, not exclude, an employee’s earnings for overtime and premium pay. A coordinating amendment is made to Code section 85.61.

The bill also amends Iowa Code section 85.36 to require the basis of compensation for weekly workers’ compensation benefits payable for permanent total disability benefits or death benefits to increase on January 1 each year for compensation which becomes due that year, by a percentage equal to the cost-of-living adjustment made to disability benefits payable by the United States social security administration in December of the immediately preceding year.

Technical corrections are also made to Iowa Code section 85.36 to remove an unnumbered paragraph and for purposes of clarity.
HSB 54 EXPLANATION
This bill relates to certain persons who are excluded from workers’ compensation coverage requirements.

The bill provides that the workers’ compensation commissioner shall maintain a list of corporate officers that reject workers’ compensation coverage or that terminate their rejection of the coverage. The list shall be a public record that is open to public inspection.

The bill also requires a proprietor, limited liability company member or partner, who does not elect workers’ compensation coverage by purchasing valid coverage that specifically includes that person, to sign a nonelection of that coverage which must be attached to the workers’ compensation or employer’s liability policy or filed with the workers’ compensation commissioner. The workers’ compensation commissioner is required to maintain a list of persons who do not elect such coverage or that terminate that nonelection of coverage. The list shall be a public record that is open to public inspection. The bill also provides a form for such a person to indicate that the person is not electing workers’ compensation coverage.

The bill provides that when a corporate officer terminates a rejection of workers’ compensation coverage by filing a notice of termination with the workers’ compensation commissioner, the notice of termination restores the officer to the same status as if the rejection of coverage had not occurred although the termination of rejection is not effective as to any injury sustained or disease incurred less than one week after the notice is filed.

The bill provides also that a proprietor, limited liability company member or partner, may terminate a nonelection of workers’ compensation coverage by filing a notice of termination with the workers’ compensation commissioner. The notice of termination restores that person to the same status as if the nonelection of coverage had not occurred and the person may elect to be covered by the workers’ compensation law of this state by purchasing valid workers’ compensation insurance specifically including that person, as provided in Code section 85.1A. However, the election of coverage shall not be effective as to any injury sustained or disease incurred less than one week after the notice is filed.

MOVING DAY!
In May of 2015, the Division of Workers’ Compensation is moving to 150 Des Moines Street. You and your clients will find the new facilities to be more professional in appearance with hearing rooms that are clean and secure. The offices will have temperature control, and improved sound capabilities. There will be conference rooms for attorneys to speak with their clients too. The parking should be an improvement over the parking situation at 1000 East Grand Avenue. I am confident all the customers will find the offices to be a vast improvement over the present facilities.