

## Department of Employment and Economic Development

### Proposed Permanent Rules Relating to Unemployment Insurance; Modifying Appeals, Employer Records, and Worker Status Provisions

#### 3310.2901 SCOPE AND PURPOSE.

Parts 3310.2901 to 3310.2924 establish procedures for hearings conducted by unemployment law judges ~~on the appeal~~ following:

A. appeals of department determinations pertaining to eligibility or ineligibility for unemployment benefits, charges to employers' accounts and tax rate assignments, determinations on an employer's liability to pay taxes, determinations on fraudulent payment of unemployment benefits, and all other appeals that are decided by unemployment law judges either by law or rule; or

B. referrals for direct hearing under Minnesota Statutes, section 268.101, subdivision 3a.

#### 3310.2902 DEFINITIONS.

Subpart 1. **Scope.** For purposes of parts 3310.2901 to 3310.2924, the terms defined in this part have the meanings given them.

Subp. 2. [See repealer.]

Subp. 3. [Repealed, 33 SR 999]

Subp. 4. **Department.** "Department" means the Department of Employment and Economic Development.

Subp. 4a. **Hearing.** "Hearing" means the de novo due process evidentiary hearing authorized under Minnesota Statutes, section 268.105, subdivision 1.

Subp. 5. **Party.** "Party" means any ~~unemployment benefits~~ applicant or employer whose legal rights, duties, or privileges will be directly determined in a hearing.

**3310.2905 NOTICE OF ~~APPEAL~~ HEARING.**

Subpart 1. [Repealed, L 2004 c 206 s 53]

Subp. 2. **Information Notice.** The chief unemployment law judge must send a notice of hearing, by mail or electronic transmission, to each party at least ten calendar days before the scheduled date of hearing unless notice is waived by the parties. The notice must state the time, date, method by which the hearing will be conducted, and issues to be considered at the hearing. If the issue to be considered at the hearing involves ineligibility for unemployment benefits because of a separation from employment, the notice must explain that the parties should be prepared to discuss all incidents that arose during the course of the employment that led to the separation. The notice of appeal hearing must also include materials that provide the following information:

A. ~~a statement that a hearing will be scheduled promptly, and that the parties should begin to prepare for the purpose of the hearing;~~ is to take sworn testimony and other evidence on the issues involved, that the hearing is the only procedure available under the law at which a party may present evidence, and that further appeals consist of a review of the evidence submitted at the hearing;

B. a statement of the parties' right to represent themselves or to be represented by an attorney or other duly authorized representative;

C. a brief description of the procedure to be followed at the hearing, including the role of the unemployment law judge;

D. a statement that the parties should ~~bring to the hearing all documents, records, and~~ arrange in advance for the participation of witnesses they need to support their position;

E. a statement that a party may request find out the name of the other parties' attorney or other representative and names of the witnesses and documents that another

~~the other party intends to bring to have testify at the hearing, and an explanation of the process for making the request;~~

F. a statement that subpoenas may be available to compel the ~~attendance~~ participation of witnesses or the production of documents, and an explanation of the process for requesting a subpoena;

G. a statement that documents contained in the department's records, and documents submitted by the parties that will be introduced at the hearing as possible exhibits ~~are available upon request, and an explanation of the process for making the request.~~ will be sent to the parties in advance of the hearing;

H. ~~If a decision issued under Minnesota Statutes, section 268.105, subdivision 1, paragraph (c), could result in an applicant being overpaid unemployment benefits, the notice must contain the following statement:~~

~~"You have a statement that even if the applicant already received unemployment benefits on your benefit account, it is important for you to attend this hearing even if you are back to work and not receiving unemployment benefits now to participate in the hearing, because if you lose the appeal, you the applicant is held ineligible, the applicant will not be able to receive further unemployment benefits and you the applicant will have to pay back all the unemployment benefits you have already received. These unemployment benefits are called overpaid unemployment benefits and they could be deducted from your state income tax refund, rent credit refund, or from a future benefit account."~~

I. a statement that the unemployment law judge will determine the facts based upon a preponderance of the evidence along with the statutory definition of "preponderance of the evidence";

J. a statement that a party who fails to participate in the hearing will not be allowed a rehearing unless the party can show good cause for failing to participate, along with the statutory definition of "good cause"; and

K. a statement that an applicant, if unemployed, must file weekly continued requests for unemployment benefits while the appeal is pending.

### **3310.2908 RESCHEDULING AND CONTINUANCES.**

Subpart 1. Rescheduling. Requests to reschedule a hearing must be addressed to the ~~appeals office~~ chief unemployment law judge in advance of the regularly scheduled hearing date. The request may be made in person, by telephone or other electronic transmission, or in writing by mail. ~~Unless a determination is made by the appeals office that a request to reschedule a hearing is made for the purposes of delay,~~ A hearing must be rescheduled ~~by the appeals office~~ based on a party's need for additional time to obtain necessary evidence or to obtain representation or adequately prepare, ~~inability to be present at the regularly scheduled time due to illness, other judicial or quasi-judicial proceedings that have previously been scheduled,~~ or other compelling reasons beyond the control of the party that prevent attendance participation at the originally scheduled time. A hearing may be rescheduled only once by each party except in the case of an emergency. If requested ~~by the appeals office,~~ a written statement by mail or electronic transmission confirming the reasons for requesting that the case be rescheduled must be provided to the ~~appeals office by the requesting party~~ chief unemployment law judge.

~~Unless a determination is made by the unemployment law judge that a request to reschedule a hearing is made for the purpose of delay, a judge who has been assigned a case for hearing must reschedule a hearing at the request of a party provided grounds for rescheduling have been established. The failure of subpoenaed witnesses to appear at the hearing or the failure to produce subpoenaed documents may constitute grounds~~

for rescheduling. The ten-calendar-day notice requirement for hearings does not apply to rescheduled hearings.

Subp. 2. Continuances. If a request for rescheduling is made because of the unavailability of a witness or the need to obtain documents, the unemployment law judge may direct that the hearing take place as scheduled. After obtaining the testimony and other evidence then available, the unemployment law judge must determine whether the hearing should be continued to obtain the testimony of the unavailable witness or the unavailable documents. The ten-calendar-day notice requirement for hearings does not apply to continued hearings.

The unemployment law judge has the discretion to continue a hearing if the judge determines that additional evidence is necessary for a proper result.

### **3310.2910 NOTICE OF HEARING; CONSOLIDATION OF ISSUES AND NEW ISSUES.**

~~The notice of hearing must be mailed to each party at the last known address at least ten days before the scheduled date of hearing unless notice is waived by the parties. The notice must state the time, date, and place of the hearing, the name of the unemployment law judge who will hear the case, the issues to be considered at the hearing, and must contain the information required by part 3310.2905, subpart 2, items B to H. If the issue to be considered at the hearing involves ineligibility for unemployment benefits because of a separation from employment, the notice must explain that the parties should be prepared to discuss all incidents that arose during the course of the employment that led to the separation. The parties must also be advised of their right to represent themselves or to be represented by an attorney or other duly authorized representative. Upon the motion request of a party to a hearing or on the unemployment law judge's motion, the unemployment law judge may consolidate for hearing issues involving the same parties and. The unemployment law judge may take testimony and render a decision on issues not listed on the notice of hearing if each party is so notified on the record at the hearing, is~~

advised of the right to object, and does not object on the record. If a party objects, the unemployment law judge must:

A. continue the hearing to allow the party to prepare for consideration of the issue; or

B. direct the department to address the issue and send to the parties a determination by mail or electronic transmission.

### **3310.2911 INTERPRETERS.**

The ~~department~~ chief unemployment law judge must provide an interpreter, when necessary, upon the request of a party. The requesting party must notify the ~~appeals office~~ chief unemployment law judge at least ~~seven~~ five calendar days before the date of the hearing that an interpreter is required. ~~If no request is made,~~ The unemployment law judge must continue any hearing where a witness or ~~principal party in interest is a disabled person so that~~ needs an interpreter can be appointed in order to be understood or to understand the proceedings.

All notices and other ~~documents distributed~~ written materials sent to parties and witnesses by the ~~appeals office~~ must be prepared in easily understood English.

A written statement in English, Spanish, ~~Laotian,~~ Vietnamese, ~~Cambodian,~~ Somali, and Hmong which states that the accompanying documents are important, and that if the reader does not understand the documents, the reader should seek immediate assistance, must accompany all notices and written ~~documents distributed by the appeals office to the party whenever the office has reason to believe the primary language of the party is one of those previously listed other than English~~ materials sent to the parties.

### **3310.2912 EXHIBITS IN TELEPHONE CONFERENCE HEARINGS.**

Upon receipt of the notice of a ~~telephone conference~~ hearing, and no later than five calendar days before the scheduled ~~time~~ date of hearing, parties may submit to the ~~department~~ chief unemployment law judge, by electronic transmission or mail, any

documents ~~they wish~~ a party would like to offer as exhibits at the hearing. Copies of the documents submitted by the parties, as well as all documents that are contained in the department's records that will be introduced as exhibits, must be mailed, or sent by electronic transmission, to all parties or the parties' representative by the ~~appeals office~~ chief unemployment law judge in advance of the hearing.

If a party ~~moves~~ requests to introduce additional documents during the course of the hearing, and the unemployment law judge rules that the documents should be admitted into evidence, the ~~moving~~ requesting party must send, by electronic transmission or mail, copies of the documents to the unemployment law judge and the ~~opposing~~ other party. The record must be left open for sufficient time for the submission of a written ~~objection and~~ for response to the documents. The response may be ~~in writing~~ sent by mail or electronic transmission ~~or~~. The unemployment law judge may, when appropriate, reconvene the ~~telephone conference~~ hearing to obtain a response or permit cross-examination regarding the late filed exhibits.

### **3310.2913 ACCESS TO DATA.**

The parties to a hearing must be allowed reasonable access to department data necessary to represent themselves ~~properly in proceedings under parts 3310.2901 to 3310.2924~~ the hearing. Access to data ~~under parts 3310.2901 to 3310.2924~~ must be consistent with ~~Minnesota Statutes, chapter 13; Minnesota Statutes, section 268.19; and other~~ all laws relating to data practices. ~~Upon oral or written request by a party or the party's representative, the appeals office must provide copies of documents that are in the department's records that will be introduced as exhibits.~~ The ~~copies~~ data must be provided by the chief unemployment law judge at no cost and, ~~upon request, must be mailed or sent~~ by electronic transmission to the party or the party's representative.

**3310.2914 SUBPOENAS AND DISCOVERY.**

Subpart 1. **Subpoenas.** ~~The unemployment law judge may issue subpoenas are available to a party to compel the attendance of witnesses, the production of documents or other exhibits, upon a showing of necessity by the requesting party applying for subpoenas. Requests for issuance of subpoenas may be obtained by calling or writing the appeals office must be made to the chief unemployment law judge, by electronic transmission or mail, sufficiently in advance of the scheduled hearing to allow for the service of the subpoenas. The requesting party must identify the person or documents to be subpoenaed, the subject matter of the evidence requested, and their necessity. A request for a subpoena may be denied if the testimony or documents sought would be irrelevant, immaterial, or unduly cumulative or repetitious. A request for a subpoena may be renewed when a party finds an additional basis or need for evidence.~~

~~If a party whose request for a subpoena has been denied may request at the time of the hearing that, the unemployment law judge who conducts must reconsider the request during the hearing issue the subpoena and determine whether the request was properly denied. If the unemployment law judge grants determines that the request for a subpoena was not properly denied, the unemployment law judge may adjourn must continue the hearing to allow a sufficient time for service of and compliance with the subpoena.~~

The unemployment law judge may issue a subpoena on the judge's own motion.

Subp. 2. **Discovery.** Each party, within three ~~working~~ calendar days following ~~demand request~~ by another party, must disclose the name of the party's attorney or other representative and the names of all witnesses the party intends to ~~call~~ have testify at the hearing and ~~identify any written documents that the party intends to introduce at the hearing.~~ The ~~demand request~~ and the response may be made by mail or by ~~telephone~~ electronic transmission. ~~The demanding party must be permitted to inspect any identified documents at a mutually agreeable time and location prior to the hearing if a demand to inspect is made at least three working days before the hearing. Unless otherwise agreed,~~

~~the demanding party must be permitted to reproduce copies of any identified documents only when reproduction is possible without removing them from a party's possession. Any witnesses unknown at the time of the disclosure request must be disclosed as soon as they become known. If a party fails to comply with the disclosure requirements of this subpart, the unemployment law judge must~~ may, upon request notice by the demanding requesting party, ~~consider rescheduling~~ continue the hearing under ~~part 3310.2908~~.

### **3310.2915 DISQUALIFICATION OF UNEMPLOYMENT LAW JUDGE.**

An unemployment law judge ~~must remove himself or herself~~ request to be removed from any case by the chief unemployment law judge where the judge believes that presiding over the case would create the appearance of impropriety. ~~No~~ The chief unemployment law judge may hear must remove an unemployment law judge from any case where any of the parties to the appeal are related to the judge by blood or marriage or have a personal relationship with the judge. ~~A~~ The chief unemployment law judge must not hear remove an unemployment law judge from any case if the judge has a financial or personal interest in the outcome. ~~A judge having knowledge of such a relationship or interest must immediately remove himself or herself from the case.~~

Any party may ~~move for~~ request the removal of a an unemployment law judge by ~~written application of the party together with a~~ submitting to the chief unemployment law judge, by mail or electronic transmission, a written statement of the basis for removal. ~~Upon the motion of the party,~~ The chief unemployment law judge must decide the fitness of the unemployment law judge to hear the particular case.

### **3310.2916 REPRESENTATION BEFORE UNEMPLOYMENT LAW JUDGE.**

~~Any individual may personally appear in any proceeding~~ In a hearing before an unemployment law judge ~~and,~~ a party may be represented by an attorney or a duly authorized representative. ~~Any partnership may be represented by any of its members, an attorney, or other duly authorized representative. Any corporation or association may be~~

~~represented by an officer, an attorney, or other duly authorized representative. Except for an attorney-at-law, no person may charge an applicant a fee of any kind.~~

An unemployment law judge may refuse to allow ~~any~~ a person to represent others in ~~any proceeding before an unemployment law judge~~ a hearing if that person is ~~acts~~ in an unethical ~~in conduct or intentionally and~~ manner or repeatedly fails to observe the provisions of the law or rules relative to the proceedings or ~~follow~~ the instructions of the unemployment law judge.

### **3310.2917 PUBLIC ACCESS TO HEARINGS AND RECORDING OF HEARINGS.**

Subpart 1. **Public access.** ~~Appeal Hearings are public hearings. If a member of the public requests to listen in on a hearing conducted by telephone conference, or requests to sit in on a hearing conducted in person, the unemployment law judge must make the appropriate accommodation. An unemployment law judge may exclude nonessential persons~~ a member of the public only when necessary ~~due to physical space limitations or to maintain decorum. Upon the judge's motion or upon the motion of a party, a judge may sequester witnesses due to space limitations or to avoid prejudice or collusion.~~

Subp. 2. **Recording.** The unemployment law judge must make a recording of all testimony that is the official record. No other voice recordings or pictures may be made ~~in the hearing room of any party, attorney, representative, or witness involved in the hearing while~~ during the hearing ~~is in session.~~

### **3310.2920 ADMINISTRATION OF OATH OR AFFIRMATION.**

An unemployment law judge has authority to administer oaths and affirmations. Before testifying, every witness is required to declare to testify truthfully, by oath or affirmation. ~~The mode of administering an oath is as practiced in this state. Minnesota Statutes, sections 358.07 and 358.08, provide the form of the oath or affirmation is as set forth in Minnesota Statutes, sections 358.07 and 358.08.~~

**3310.2921 CONDUCT OF HEARING.**

The chief unemployment law judge has discretion regarding the method by which the hearing is conducted. The hearing must be conducted by an unemployment law judge as an evidence-gathering inquiry, without regard to a burden of proof. The order of presentation of evidence is determined by the unemployment law judge. The judge must inform the parties of the statutory provisions on burdens of proof before the taking of testimony.

Each party may present and examine witnesses and offer their own documents or other exhibits. ~~To the extent permitted by Minnesota Statutes, section 268.19, and other laws pertaining to the protection of data, a party must be provided with a copy of any document or exhibit accepted into evidence upon the request of the party. Opposing Parties have the right to examine witnesses, object to exhibits and testimony, and cross-examine the other party's witnesses. The unemployment law judge should~~ must assist ~~unrepresented~~ all parties in the presentation of evidence. The unemployment law judge must rule upon evidentiary objections on the record. The unemployment law judge must permit rebuttal testimony. Parties have the right to make closing statements. Closing statements may include comments based upon the evidence and arguments of law. The unemployment law judge may limit repetitious testimony and arguments.

The unemployment law judge must exercise control over the hearing procedure in a manner that protects the parties' rights to a fair hearing, including the sequestration of witnesses to avoid prejudice or collusion. The unemployment law judge must ensure that all relevant facts are clearly and fully developed. The unemployment law judge may, on the judge's own motion, obtain testimony and other evidence from department employees and any other person the judge believes will assist the judge in reaching a proper result.

Before taking testimony, the unemployment law judge must inform the parties of the following:

A. that the purpose of the hearing is to take testimony and other evidence on the issues;

B. that the hearing is the only opportunity available to the parties to present testimony and other evidence on the issues involved;

C. an explanation of how the hearing will be conducted, including the role and obligations of the unemployment law judge;

D. that the parties have the right to request that the hearing be continued so that additional witnesses and documents can be presented, by subpoena if necessary;

E. that the facts will be determined upon a preponderance of the evidence, along with the statutory definition of "preponderance of the evidence";

F. the statutory provision on burden of proof;

G. that certain government agencies may have access to the information provided at the hearing if allowed by statute and that the information provided may be disclosed under a district court order; and

H. that after the hearing is over, the unemployment law judge will issue a written decision, which will be sent to the parties by mail or electronic transmission.

### **3310.2922 RECEIPT OF EVIDENCE.**

Only evidence received into the record of any hearing may be considered by the unemployment law judge. The parties may stipulate to the existence of any fact or the authenticity of any exhibit.

All competent, relevant, and material evidence, including records and documents in the possession of the parties that are offered into evidence, are part of the hearing record. ~~A~~ An unemployment law judge may receive any evidence that possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs. ~~A~~ An unemployment law judge may exclude any evidence that is irrelevant, immaterial, unreliable, or unduly repetitious. ~~A~~ An unemployment law judge is not bound by statutory and common law

rules of evidence. The rules of evidence may be used as a guide in ~~a determination of~~ determining the quality ~~and priority~~ of evidence offered. ~~A~~ An unemployment law judge may draw adverse inferences from the refusal of a ~~party or~~ witness to testify on the basis of any privilege. ~~A~~ An unemployment law judge may only use reliable, probative, and substantial evidence as a basis for decision.

### **3310.2923 OFFICIAL NOTICE.**

An unemployment law judge may take official notice of ~~adjudicative facts and~~ matters of common knowledge and may take notice of facts within the judge's specialized knowledge in the field of unemployment insurance. Any fact officially noticed must be ~~noticed~~ so stated on the record ~~in the decision~~ during the hearing. Parties must be notified of any facts officially noticed by the judge and must be given an opportunity to contest the noticed facts.

~~A judge may officially note any facts that are subject to judicial notice in the courts of Minnesota.~~

### **3310.2924 EX PARTE COMMUNICATIONS.**

Private communication between an unemployment law judge assigned to ~~an appeal~~ conduct the hearing and one ~~or more~~ of the parties ~~to an appeal~~, in the absence of the other ~~parties to the appeal~~ party, is forbidden if it relates to the substance of the matter at issue. Private communication is to be avoided even when it does not relate to the subject matter of the ~~appeal~~ hearing if it would create the appearance of impropriety.

### **3315.0555 DETERMINING WORKER STATUS.**

Subpart 1. **Essential factors.** When determining whether an individual is an employee or an independent contractor, five essential factors must be considered and weighed within a particular set of circumstances. ~~Of~~ The five essential factors to be considered, ~~the two most important~~ are those:

A. ~~that indicate~~ the right or the lack of the right to control the means and manner of performance; ~~and~~

B. the right to discharge the worker without incurring liability. ~~Other essential factors to be considered and weighed within the overall relationship are;~~

C. the mode of payment;

D. furnishing of materials and tools; and

E. control over the premises where the services are performed.

The two most important essential factors are items A and B.

Other factors, ~~including some~~ not specifically identified in this part, may be considered if a determination is inconclusive when applying the essential factors, ~~and~~. The degree of their importance may vary depending upon the occupation or work situation being considered and why the factor is present in the particular situation.

Subp. 2. [Repealed, L 2012 c 201 art 3 s 16]

Subp. 3. [Repealed, L 2012 c 201 art 3 s 16]

Subp. 4. [Repealed, L 2012 c 201 art 3 s 16]

Subp. 5. [Repealed, L 2004 c 206 s 53]

### **3315.1001 SCOPE.**

Parts 3315.1001 and 3315.1010 clarify an employer's duty with regard to records ~~and reports~~ as required under Minnesota Statutes, ~~chapter 268~~ section 268.186.

### **3315.1010 RECORDS.**

Subpart 1. **Record keeping.** Each employer must establish, maintain, and preserve records with respect to individuals performing ~~personal~~ services for it, ~~including individuals who perform or assist in performing the work of any employee of the employer if the employer had actual or constructive knowledge that the work was being performed.~~

The records must be preserved for a period of not less than ~~eight~~ four years after the in addition to the current calendar year in which the compensation for the services was paid or payable, and. The records must show for each individual the following:

- A. name;
- B. Social Security number;
- C. days and the number of hours each day in which the individual performed ~~personal~~ services;
- D. location where services were performed;
- E. wages paid and wages due but not paid for ~~personal~~ services, ~~showing separately;~~
  - (1) ~~money wages, excluding special payments;~~
  - (2) ~~wages paid and wages due but not paid, in any medium other than money, excluding special payments;~~
  - (3) ~~special payments such as bonuses, gifts, and prizes, showing separately money payments, other special payments, and the character of the payments; and~~
  - (4) ~~tips and gratuities paid to an employee by a customer and accounted for by the employee to the employer as defined in part 3315.0211, subparts 1 and 2;~~
- F. rate ~~and base unit~~ of pay;
- G. amounts paid as allowances or reimbursement for travel or other activity ~~pertaining to the furtherance of the employer's business~~ which were not included as wages. The ~~account~~ records must show each item of expense incurred during each pay period or calendar month; and
  - H. ~~the date of separation and the reason, in detail, for the termination;~~
  - I. H. the complete resident address of the employee;

J. ~~for each pay period:~~

(1) ~~the beginning and ending dates of the period;~~

(2) ~~the total amount of wages paid and wages due but not paid for personal services performed; and~~

(3) ~~the date of payment; and~~

K. ~~for each calendar month or, if less, the established pay period of the employer, the hours spent performing services in employment and the hours spent performing noncovered employment, by each employee for which the provisions of Minnesota Statutes, section 268.035, subdivision 15, paragraph (a), clause (5), apply.~~

Subp. 2. **Instate and outstate.** For services performed ~~within and without~~ both in Minnesota and outside Minnesota the records required by subpart 1 must include:

A. ~~the city or county and state in which the employer maintains a base of operations, as defined in Minnesota Statutes, section 268.035, subdivision 12, clause (1), used by the individual;~~

B. ~~the city or county and state from which the services are directed and controlled, if the employer does not have a base of operations in the states in which an individual performs services; and~~

C. a list of the states in which the individual performs services, other than temporary or incidental services, and the dates services were performed at in each location state.

Subp. 3. **Covered and ~~uncovered~~ noncovered employment.** For services performed in both covered employment and noncovered employment within a pay period the records required by subpart 1 must include the hours spent performing services in covered employment and the hours spent performing noncovered employment.

**REPEALER.** Minnesota Rules, parts 3310.2902, subpart 2; 3310.2919; 3315.0200, subpart 1; 3315.0203; 3315.0211; 3315.0212, subparts 2 and 3; 3315.0213; 3315.0801; 3315.0805; 3315.0810; 3315.0815; 3315.0820; 3315.0825; 3315.0830; 3315.0835; 3315.0840; 3315.0845; 3315.0901; and 3315.0905, are repealed.