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# Eligibility for Benefits

Lee G. Williams

# ELIGIBILITY FOR BENEFITS

LEE G. WILLIAMS*

The various state unemployment compensation statutes measure eligibility for unemployment "benefits" or "insurance" or "compensation" by means of a variety of yardsticks. "In the Federal-State system of unemployment insurance established in this country under the Social Security Act, the individual states have been free to develop the particular program that seems best adapted to conditions prevailing within the State. Consequently no two state laws are alike; and the differences are increased by amendments from year to year."[1]

The term "eligibility," as used in the unemployment compensation field, includes many statutorily prescribed factors which themselves differ from state to state. These factors embrace the status of unemployment itself, registration for work at an employment office and continued reporting thereafter, the filing of a claim for benefits, the serving of a waiting period, qualifying wages and employment, physical and mental ability to work, and availability for work, including a so-called active search for work in more than half the states.

The concept of eligibility for benefits may be said to include all of the requirements of a positive nature which the claimant must meet,[2] as distinguished from the negative disqualifying factors[3] which, if they are found to be present, prevent the claimant's receipt of benefits even though he meets all of the eligibility requirements.[4]

It is quite impossible in a brief treatment of the subject of eligibility for benefits to do more than note major similarities between state statutes and point out a few interpretations of commonly-found provisions. Each state unemployment law and the regulations adopted thereunder must be examined in order to arrive at the true state of the law on any eligibility factor in that state. It is not possible to over-emphasize the

* General Counsel, Texas Employment Commission. The opinions expressed herein are those of the author and are not intended to reflect the official views of the Texas Employment Commission.

1. COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS AS OF AUGUST, 1954, Preface, p. iii. An excellent "comparison" containing many helpful tables is published periodically by the Unemployment Insurance Service, Division of Legislation and Reference of the Bureau of Employment Security, in the Department of Labor. It may be purchased from the Superintendent of Documents, United States Government Printing Office, Washington, D.C.

2. Muraski v. Board of Rev., 136 N.J.L. 472, 56 A.2d 713 (1948), speaks of eligibility as "a status indispensable to the operation of the Act."

3. See Sanders, *Disqualification for Unemployment Insurance*, p. 307 *infra;* and Williams, *The Labor Dispute Disqualification*, p. 338 *infra.*

4. Krauss v. Karagheusian, Inc., 13 N.J. 447, 100 A.2d 277 (1953), reversing 24 N.J. Super. 277, 94 A.2d 339, makes the distinction clear.

fact that each state statute contains definitions of terms and that those definitions vary markedly. There is no uniformity, for example, in the definitions of the term "unemployment" itself. "Week" may mean a "calendar week" in one state and "any seven consecutive days" in another. State legislatures, in brief, have set up forty-eight laboratory experiments in the unemployment insurance field.

What follows is an attempt to identify in general the eligibility requirements for the receipt of unemployment benefits and to comment briefly upon some of the factors involved.[5]

*Unemployment*

All state laws contain definitions of "unemployment."[6] Total unemployment is usually defined as a week of no work and no wages,[7] while partial unemployment is defined as a week of less than full-time work and wages less than the claimant's weekly benefit amount would be if he were totally unemployed. Thus, if the claimant's qualifying wages would entitle him to benefits of $15 a week, if he were totally unemployed, the fact that he earned wages of less than $15 during the week for which he claimed benefits would not prevent his being partially unemployed within the meaning of the statute.

Some states employ the usual definition of partial unemployment, but permit a small amount of earnings during the week over and above the weekly benefit amount for total unemployment. There are still other definitions of the term which employ various combinations of wages, days of work, and weekly benefit amount. It is apparent from all definitions, however, that there is an attempt to define the term in such a way as not to penalize the claimant for taking any suitable part-time or temporary work which is available to him after he has become "unemployed" in the broad sense of the word.

*Registration at an Employment Office*

The requirement found in all state laws that the claimant for benefits must be registered for work at a public employment office is traceable to the requirement of federal law that a state law shall include provision for payment of unemployment compensation "solely

5. No attempt is here made to review or discuss decisions treated in works such as ALTMAN, AVAILABILITY FOR WORK (1950); Freeman, *Availability: Active Search for Work*, 10 OHIO ST. L.J. 181 (1949).

6. BENEFIT SERIES SERVICE, UNEMPLOYMENT INSURANCE, prepared by the Division of Determinations and Hearings, Bureau of Employment Security, United States Department of Labor, contains reports of all significant administrative and court decisions and is so arranged and indexed as to be an excellent tool. Publication, now monthly, began in 1938. See BEN. SER. SERV. U.I., *Total and Partial Unemployment*, for decisions involving the terms.

7. A few states disregard small earnings from odd jobs.

through public employment offices or such other agencies as the Secretary of Labor may approve."[8] This eligibility requirement reflects the clear philosophy of an unemployment insurance system designed to supply suitable work for the unemployed worker and, failing that, to replace a part of his wage loss. The employment service division of each state unemployment compensation system receives orders for workers from employers and receives applications for work from workers; it operates as a labor exchange, rendering service both to employer and employee, and it contributes greatly to the integrity of the unemployment insurance program.

Registration for work and its accompanying requirement of reporting, usually weekly, at the public employment office afford an opportunity for the placement of the claimant in suitable work during his "waiting period," which is another eligibility requirement and which is mentioned below. Registration and weekly reporting likewise insure that the claimant for benefits is available for suitable work offers and that he does not refuse such work with impunity. Disqualification from benefits for refusal of suitable work is provided in all state laws.[9]

Although it has often been said that when he registers for work, the claimant "exposes" himself to job offers, the use of a word of such unpleasant connotation would appear inappropriate. Registration at a public employment office, like registration at a union hiring hall or at a professional society, seems rather to be a reasonable move by the claimant in the direction of his goal: a good job.

### *Claim and Waiting Period*

A claimant for unemployment benefits is required, in all states except three,[10] to serve a noncompensable waiting period during which he must meet all other eligibility requirements. Of the states which require a waiting period, all but two fix the period at one week.[11] In two states, the waiting period may become compensable at a later time.[12]

The reason for the waiting-period requirement has been said to be that it serves the administrative purpose of allowing time in which to process a claim and eliminates payments to claimants unemployed for brief periods. But the elimination of the waiting period has been proven administratively feasible.[13]

8. § 303(a)(1), (2), Tit. III, Social Security Act of 1935, 42 USCA § 503; § 1603(a) (1), Federal Unemployment Tax Act.
9. See Sanders, *supra* note 3.
10. Maryland, Nevada, and North Carolina.
11. Colorado, Montana—two weeks.
12. New Jersey, Michigan.
13. Maryland, Nevada, and North Carolina require no waiting period.

*Qualifying Wages and Employment*

Unemployment insurance systems are designed to afford some measure of protection to unemployed persons who are genuinely in the labor force or labor market.[14] The eligibility requirement, which is in terms of wages and employment, is, therefore, a keystone in the unemployment insurance edifice. Not only do wages and employment during a specified prior period (commonly called the claimant's "base period") serve as a guarantee of the worker's recent, and likely his present, attachment to the labor market and a guarantee that "premiums" (taxes) have been paid on his "insurance policy," they also serve as a measure of the amount of the weekly benefit payment[15] and a measure of the total number of weeks for which benefits may be paid.

The qualifying wage or employment requirements are, in many statutes, expressed as a multiple of the weekly benefit amount. Some laws prescribe a flat qualifying amount; others, weeks of employment; and, still others, combine employment and wage specifications. Absence of uniformity is evidenced by the fact that minimum wage requirements for minimum benefits presently range from less than one hundred dollars to six hundred dollars, and these figures disregard requirements as to distribution of earnings and length of employment during the claimant's base period.[16]

*Able to Work*

All state statutes prescribe, as an eligibility requirement, that the claimant for unemployment benefits must be able to work.[17] Six states provide, however, that claimants who have filed a claim and registered for work shall not be considered ineligible during an uninterrupted period of unemployment because of illness or disability,

14. But, being genuinely in the labor force or labor market and having a work history of lifetime duration does not guarantee this protection to the worker; he must have been in "covered" employment. See Willcox, *The Coverage of Unemployment Compensation Laws* p. 245 *supra.*

15. At present, eleven states (including Alaska and the District of Columbia) increase the weekly benefit amount by adding a sum for dependents: Arizona, Connecticut, Maryland, Massachusetts, Michigan, Nevada, North Dakota, Ohio and Wyoming. See Unemployment Insurance Program Letter No. 344, Bureau of Employment Security, Department of Labor, September 10, 1954, dealing with eligibility formulas.

16. See COMPARISON, *op. cit. Supra* note 1, at 48.

17. Alabama, Arkansas, Connecticut, Kentucky: "physically and mentally able." New York: "capable, ready, willing and able." Massachusetts: "capable of . . . work." See Hinkle v. Lennox Furnace Co., 150 Ohio St. 471, 83 N.E.2d 521 (1948), affirming 83 N.E.2d 903, and holding that "capable of and available for work" means the same as "able to work and available for work in his usual trade or occupation, or in any other trade or occupation for which he is reasonably fitted."

so long as no work which is suitable, but for the disability, is offered and refused.[18]

Although it is generally recognized that "availability for work" necessarily demands that the claimant be able to work,[19] the latter requirement is within itself a distinct statutory eligibility requirement.[20]

The obvious reason for requiring that the claimant be able to work is to distinguish unemployment compensation from workmen's compensation and from temporary disability insurance.[21] At the same time, however, in three of the four states which have provided benefits for unemployment due to disability, the program is administered by the state employment security agencies in coordination with the unemployment insurance program.[22] Perhaps the absence of temporary disability programs accounts in large measure for the fact that administrative agencies, as well as the courts, have interpreted the statutory requirement of ability to work very leniently in favor of the claimant.[23]

There seems to be no question but that "able to work," as used in unemployment compensation statutes, means physical and mental ability to perform some suitable work. The decisions of the agencies administering unemployment compensation laws, as well as the decisions of the courts, reflect agreement with the principle that "an individual is able to work, despite his age and physical condition, if there is a market in the geographical area in which he is willing to work for services which he is able to perform."[23a]

### *Active Search for Work In Connection with the Availability Concept*

All of the state statutes contain the eligibility requirement that

18. Idaho, Maryland, Montana, Nevada, Tennessee and Vermont.

19. Valenti v. Board of Rev., 4 N.J. 287, 72 A.2d 516 (1950).

20. ALTMAN, AVAILABILITY FOR WORK, 139 (1950); 55 YALE L.J. 128 (1945). It is easy to confuse "able to work," as an eligibility requirement, with health, etc., as related to refusal of suitable work. See Note, 14 A.L.R.2d 1301 (1950).

21. Rivers v. Director, 323 Mass. 339, 82 N.E.2d 1 (1948), wherein the court says that unemployment compensation is not health insurance.

22. California, New Jersey, Rhode Island. In New York, the Workmen's Compensation Board administers the disability benefits.

23. Unemployment Ins. Comm'n v. Fischer Packing Co. (Ky. Ct. App. 1953), CCH-UIR 8174, BEN. SER. AA-235.25-17; Fischer Packing Co v. Unemployment Ins. Comm'n, 259 S.W.2d 436 (Ky. 1953); Krauss v. Karagheusian, 13 N.J. 447, 100 A.2d 277 (1953); Hoffstot v. Unemployment Comp. Bd. of Rev., 164 Pa. Super. 43, 63 A.2d 355 (1949); Department of Ind. Rel. v. Tomlinson, 251 Ala. 144, 36 So.2d 496 (1948); but see Brown-Brockmeyer v. Board of Rev., 70 Ohio App. 370, 45 N.E.2d 152 (1942), which was criticized in Craig v. Bureau of Unempl. Comp., 83 N.E.2d 628 (1948). See also, ALTMAN, AVAILABILITY FOR WORK 139-57 (1950); 55 YALE L.J. 128 (1945).

23a. 55 YALE L.J. 129 (1945). See cases under *Able and Available,* BEN. SER. SERV. U.I., *supra* note 6.

the claimant for benefits be available for work. Twenty-six of the states have, however, added statutory references to "actively seeking work" or have employed similar language.[24] These additional provisions and their effect upon the general rule as to the meaning of availability are treated below. Some state laws likewise include special provisions concerning the unavailability of students and married or pregnant women.[25] This is true even though students who are not available for work while attending school, women who are unable to work because of pregnancy, and women whose marital obligations make them unavailable for work would not be eligible for benefits under the normal statutory requirements concerning ability to work and availability for work.

The established general rule has been stated:

> "An individual is said to be available for work when he is genuinely attached to the labor market, that is, when he is ready, willing, and able to accept suitable work that he does not have good cause to refuse, provided, of course, that there is a market for his services. A labor market for an individual has been said to exist when there is a market for the type of services which he offers in the geographical area in which he offers them. 'Market' in this sense does not mean that job vacancies must exist; the purpose of unemployment compensation is to compensate for the lack of appropriate job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which he is offering them. The fact that there is no work available for a worker, however, does not render him unavailable for work."[26]

Inherent in this general rule is the requirement that a claimant must be making a reasonable effort to secure work.[27]

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24. See note 46 *infra*.

25. See COMPARISON, *op. cit. supra* note 1, at 94; *Pregnancy as a Condition of Disqualification for Benefits*, BEN. SER. SERV., U.I., 4-BP-1 (1953).

26. Freeman, *Active Search for Work*, 10 Ohio St. L.J. 181 (1949); *Claim of* Sapp, 266 P.2d 1027 (Idaho 1954); Krauss v. Karagheusian, *supra* note 4; Reger v. Administrator, 132 Conn. 647, 46 A.2d 844 (1946); Ashmore v. Unemployment Comp. Comm'n, 86 A.2d 751 (Del. 1952); Stricklin v. Annunzio, 413 Ill. 324, 109 N.E.2d 183 (1952); Mohler v. Department of Labor, 409 Ill. 79, 97 N.E.2d 762 (1951), 24 A.L.R.2d 1393 (1952) and cases there cited; Dwyer v. Appeal Bd. of Mich. Unempl. Comp. Comm'n, 321 Mich. 178, 32 N.W.2d 434 (1948); Bliley Elec. Co. v. Unemployment Comp. Bd. of Rev., 158 Pa. Super. 548, 45 A.2d 898 (1946). No attempt is here made to discuss or identify the many decisions which deal with particular aspects of availability. ALTMAN, AVAILABILITY FOR WORK, does so in the chapters, *Wages and Work, Hours and Other Time Limitations, Residence and Work Location, Women Workers,* and *Self-Employment.* And Freeman, in 55 YALE L.J. 123 (1945), discusses willingness to work, ability to work, and readiness to work. BEN. SER. SERV., U.I., *supra* note 6, reports all of the precedent decisions in its *Able and Available* division, which is carefully coded. See, generally, Notes 25 A.L.R. 2d 1077 (1952), 14 A.L.R.2d 1308 (1950), 13 A.L.R.2d 874 (1950), 165 A.L.R. 1382 (1946), 158 A.L.R. 396 (1945); and Treatise in la CCH-U.I. REP., 4631.

27. Dan River Mills v. Unemployment Comp. Comm'n, 81 S.E.2d 620, BEN. SER. SERV., U.I., AA-160.1-37 (Va. 1954); Krauss v. Karagheusian, *supra* note 4; Hermsen v. Employment Sec. Dep't, 39 Wash.2d 903, 239 P.2d 863 (1952); Shannon v. Bureau of Unempl. Comp., 155 Ohio St. 53, 97 N.E.2d 425 (1951)

Obviously, the whole inquiry as to whether a particular claimant for benefits is available for work is an inquiry designed to find out whether the claimant actually wants to work and whether he is so situated that he can work. Every fact which is to be ascertained must be a fact which is evidence of this attitude and this condition. "The availability requirement is a test to discover whether claimants would, in actuality, now be working, were it not for their inability to obtain work that is appropriate for them."[28]

The relationship between the requirement of availability for work and the requirements of registration and reporting at an employment office is quite obvious. Registration and reporting, though the statutes mention them in addition to availability, are themselves evidence that the claimant wants a job. Stronger still is the relationship between the availability-for-work requirement and the provision contained in all state laws which disqualifies the claimant for refusal of suitable work.[29]

Disqualification for work refusal has been said to be the second line of defense against claimants who, in spite of having a long history of work and in spite of having registered for work and reported weekly at the employment office, are actually mentally unwilling to work or so situated that they cannot take a suitable job.[30] But, since not all employers list their job openings with the employment service, the work-refusal test, insofar as it can be applied by the unemployment insurance agency, cannot be said to be infallible. It is true, however, that every claimant for benefits is registered at the employment service office and that any employer who is, in accordance with the requirements of experience-tax-rate plans, notified of the claimant's having made a claim for benefits can, if he wishes, reach the claimant with a job offer through the system.

In this latter connection, and in view of the fact that the question of availability has consistently been the basis for the largest number of denials of benefits,[31] it may be in order to ask, without attempting

[citing Jacobs v. Office of Unempl. Comp. & Placement, 27 Wash.2d 641, 179 P.2d 707 (1947); Hunter v. Miller, 148 Neb. 402, 27 N.W.2d 638 (1947); and Huiet v. Schwob Mfg. Co., 196 Ga. 855, 27 S.E.2d 743 (1943) in support]; Boyer v. Board of Rev., 4 N.J. Super. 143, 66 A.2d 543 (1949); Director of Industrial Relations v. Tomlinson, *supra* note 23; Dwyer v. Appeal Bd., *supra* note 26; Wagner v. Unemployment Comp. Comm'n, 355 Mo. 805, 198 S.W.2d 342 (1946). See also 55 YALE L.J. 183 (1945). Some state statutes employ language which in itself constitutes recognition that the availability concept includes a reasonable search for work: Arkansas, Missouri, North Carolina, Oklahoma, and Washington.

28. ALTMAN, *op. cit. supra*, note 5, at 259, quoted in Krauss v. Karagheusian, Inc., 13 N.J. 447, 100 A.2d 277 (1953).

29. See Sanders, *supra* note 3.

30. See ALTMAN, *op. cit. supra*, note 5 at 87.

31. REP. BUR. EMPL. SEC. 38, 40 (1953). Perhaps the great number of decisions on availability is due, in part, to the fact that administrative agencies, as well as the courts, confuse eligibility concepts with disqualification con-

to answer, two questions: First, does the indefiniteness of the availability requirement result in its use in a "shot-gun" fashion to deny benefits when the facts do not bring the case squarely within one of the disqualifying provisions of the law?[32] Second, has experience-rating of employers for tax purposes caused unemployment benefit decisions to reflect considerations other than the claimant's entitlement to benefits under a given state of facts?[33]

Although the worker's claim for benefits is logically a nonadversary proceeding,[34] it has nonetheless been too often regarded as one of adversary character, and some of the decisions, particularly on the point of availability, seem to reflect the mentality which regards property more highly than people. Perhaps the recognition of benefit payments as a *right* of the worker would remedy the situation.

> "The class of employers who come under this Act provide or create the fund out of which the unemployed covered by the Act are paid a certain compensation for a prescribed time. To our minds such a plan should not be condemned as providing for or creating a gratuity. It is true that the employers alone directly create the unemployment fund, but is is created for the benefit of their employees. Therefore, the right of such employees to enjoy or participate in the fund in times of unemployment should be regarded as a part of their compensation or wages. All employees who

cepts. They seem often to talk about availability, job refusal, voluntary leaving, and ability to work in a single breath. Not all courts distinguish between eligibility and disqualification, as did the Virginia Supreme Court of Appeals in Unemployment Comp. Comm'n v. Tomko, 192 Va. 463, 65 S.E.2d 524, 528 (1951): "We are here concerned with the *eligibility* of claimants to compensation under section 60-46, which is an entirely different matter from their *disqualification* under section 60-47." Although the dissent in State v. Hix, 54 S.E.2d 198 (W. Va. 1949), recognized the distinction, the majority refused to do so. This distinction becomes extremely important under statutes which impose a benefit forfeiture, as opposed to a postponement of payment, for disqualification. A decision that the claimant is unavailable for work applies to a particular week, and availability may be shown in succeeding weeks.

32. See cases cited in note 53 *infra*.

33. The following quotation is from Unemployment Compensation Program Letter No. 78 (1944) addressed to "All State Employment Security Agencies" by the then Director of the Bureau of Employment Security:

> "Several State agencies have informally suggested the desirability of liberalizing the eligibility and disqualication provisions of their State unemployment compensation laws and have indicated that such liberalization is not possible if benefits paid under certain circumstances are charged to employers' accounts under the experience-ratmg provisions of their laws.
>
> "Many experience-rating systems have had a marked effect upon the disqualification provisions in State laws. This is because experience-rating laws have had a tendency to merge two different determinations, the one as to whether the worker is entitled to benefits and the other as to whether an employer should be charged with those benefits. One major difficulty in the operation of experience rating to date is that the issues involved in these two determinations are not identical, and the decisions may be different. The consequence has been to distort the disqualification provisions of the law. Severe penalties have been imposed in cases of disqualification because it has not appeared reasonable that benefit payments in such cases should be charged to a specific employer."

34. See Krauss v. Karagheusian, Inc., 13 N.J. 447, 100 A.2d 277 (1953).

> labor or perform services for employers who are covered by this Act labor or serve in part for the right to enjoy the benefits of this unemployment fund."[35]

Certainly there is no hard and fast rule as to what constitutes availability in unemployment compensation cases.[36] The answers to two questions must be sought: Is there a market for the type of services the claimant is offering? Does he want to work, or does he prefer idleness and meager unemployment benefits? In this latter connection, and as a logical starting point for reaching a decision as to a claimant's availability, it must be remembered that "for most of us a well-paid job is the most important economic fact of life. Our welfare and that of our families depend upon it."[37]

It is indispensable to proper administration of unemployment insurance laws that the claimant be presumed to be available for work unless cause for doubting that availability appears. There is sound basis for the presumption.[38] The quotation immediately above recognizes the fact that we are a working people, have always been. It is the normal thing to do, and it is required for our existence. The claimant's labor-market attachment is further attested by his record of recent earnings on file with the employment security agency; by his registration for work,[39] that registration including his work history and a listing of his skills; and by his weekly reporting to the employment office, which is the central labor exchange for his area. Finally, weekly benefit payments are so small that they cannot possibly replace wages nor the necessity of working to earn them. The presumption has court recognition.[40]

Certainly, the presumption of availability is readily rebuttable. It may be destroyed immediately by the reason for his unemployment which the claimant gives on his benefit claim. And it may be dissolved by the claimant's reaction when the employment service offers him "referral" to suitable work. The point is that the employment security

35. Friedman v. American Surety Co., 137 Tex. 149, 151 S.W. 2d 570, 578 (1941).
36. 81 C.J.S., *Social Security & Public Welfare*, § 203 (1953).
37. Introduction to U.S. CHAMBER OF COMMERCE, *Investment for Jobs* (1954).
38. See ALTMAN, *op. cit. supra*, note 5, at 98.
39. Western Printing & Lithographing Co. v. Industrial Comm'n, 260 Wis. 124, 50 N.W.2d 410 (1951); *contra* Lore v. Unemployment Comp. Comm'n, 86 A.2d 856 (Del. 1952); see also Boyer v. Board of Rev., *supra* note 27; Unemployment Compensation Program Letter No. 63, Supp. 7, March 31, 1947, issued by Bureau of Employment Security.
40. Mattey v. Unemployment Comp. Bd. of Rev., 164 Pa. Super. 36, 63 A.2d 429 (1949); Hassey v. Unemployment Comp. Bd. of Rev., 162 Pa. Super. 14, 56 A.2d 400 (1948); Bliley Elec. Co. v. Unemployment Comp. Bd. of Rev., *supra* note 26; Department of Lab. & Ind. v. Unemployment Comp. Bd. of Rev., 159 Pa. Super. 567, 49 A.2d 260 (1946). The statutes of Arkansas and Oklahoma recognize the presumption by providing that registration and reporting are not *conclusive evidence* of availability.

agency should consider the claimant available for work until and unless it has a reasonably based doubt on the point.

In this connection, courts have announced that a claimant has the burden of proving that he is entitled to benefits.[41] The introduction of this legalistic concept into a social program designed to alleviate, in some small measure, the distress of unemployed people, seems regrettable. Claimants in general not only do not understand the legal theory of burden of proof, they do not even understand the legal concept of availability. Unless the agency itself explains to the claimant what is expected of him and itself inquires after the facts, he will likely be defeated; for he is effectively defeated if his insurance payments are long postponed. It is unlikely that the unemployed worker will have a lawyer, and it is equally unlikely that many lawyers would be interested in a case involving such small weekly payments. Certainly the claimant must furnish all the pertinent information which he has and must cooperate fully in the agency's search for the facts,[42] but if there is a burden of proof in the unemployment field, it should rest squarely upon the employment security agency. The Supreme Court of New Jersey has so placed it:

> "Plainly the statute casts upon the agency, as respects both original and appellate determinations, the role actively to press the interested parties to produce all relevant proofs at their command and, when necessary, independently to take steps to get the facts, as, for example, when the record made by the parties is unsatisfactory or there is fair reason to doubt the reliability of the proofs as a basis for decision or the agency in any case has reason to believe that additional facts obtained and made part of the record on its own initiative will contribute to a correct result."[43]

The New Jersey court had already commented that "the contest of a claim before the agency is not, therefore, an adversary proceeding in the usual sense." It discussed the broad powers and facilities of the agency and recognized that "the matter of burden of proof must necessarily be viewed in the light of the superior position in which the

41. *In re* Sapp, *supra* note 26; Director of Ind. Rel. v. Haynes, 67 So.2d 62 (Ala. 1953); Unemployment Comp. Comm'n v. Tomko, *supra* note 31; Ashford v. Appeal Bd., 328 Mich. 428, 43 N.W.2d 918 (1950); Director of Industrial Relations v. Tomlinson, *supra* note 23; Dwyer v. Appeal of Mich. Unempl. Comp., *supra* note 26; Hunter v. Miller, *supra* note 27; Jacobs v. Office of Unempl. Comp. & Placement, *supra* note 27; Reese v. Hake, 184 Tenn. 423, 199 S.W.2d 569 (1947); Copeland v. Oklahoma Empl. Sec. Comm'n, 197 Okla. 429, 172 P.2d 420 (1946); Loew's, Inc. v. California Empl. Stabilization Comm'n, 76 Cal.App.2d 231, 172 P.2d 938 (1946); Wolpers v. Unemployment Comp. Comm'n, 353 Mo. 1067, 186 S.W.2d 440 (1954); Berthiaume v. Christgau, 218 Minn. 65, 15 N.W.2d 115 (1944); Haynes v. Unemployment Comp. Comm'n 353 Mo. 540, 183 S.W.2d 77 (1944) (see criticism of Haynes case at 303 n. 21, of ALTMAN, *op cit. supra* note 5); Queener v. Magnet Mills, Inc., 179 Tenn. 416, 167 S.W.2d 1 (1942).

42. *Claim of* Haller, 281 App. Div. 737, 177 N.Y.S.2d 736 (3d Dep't 1952); Sorrentino v. Corsi, 277 App. Div. 1073, 100 N.Y.S.2d 794 (3d Dep't 1950).

43. Krauss v. Karagheusian, Inc., 13 N.J. 447, 100 A.2d 277, 282 (1953).

statute places the agency to enable it to know and get the facts."[44]

The employment security agencies which administer unemployment compensation statutes are in a most unusual position. When the agency collects disputed taxes, it is very definitely engaged in an adversary proceeding. When, on the other hand, it is dealing with a claim for benefits, it is not engaged in such an adversary proceeding. It is then engaged in the administration of a piece of social legislation, and its obligation is two-fold: It must, through its employment-service facilities, help the unemployed person find suitable work, or, failing that, pay him unemployment benefits if he is entitled to them. There can be no over-emphasis of the role of the employment service in the unemployment insurance field. Its function is to assist workers who want work and employers who want workers. Its primary objective is to get the right worker in the right job.

Already mentioned is the fact that twenty-six state laws contain language specifying a so-called "active search for work" on the part of the claimant.[45] In 1945, only six laws contained such language; but, in the period 1947-1949, sixteen more states amended their laws to include it. This was, of course, during the post-war readjustment period when many women and other war-workers, whose entire employment experience was in such work, were unemployed because their jobs vanished with the coming of peace. There is marked variation among the states as to the statutory language employed;[46] but, whatever the language, it permits reasonable interpretation.

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44. See ALTMAN, *op. cit. supra*, note 5, at 105: "The agency, however, is in a superior position to get the facts surrounding the individual's availability. It has legal powers and investigative facilities with which the claimant cannot compete. The agency can get needed information not only from the claimant, but also from previous and prospective employers and anyone else who may have it. Its informational pipe lines to the labor market will produce the necessary factual background." *See* Garcia v. California Empl. Stabilization Comm'n, 71 Cal. App.2d 107, 161 P.2d 972, 975 (1945); Hagadone v. Kirkpatrick, 66 Idaho 55, 154 P.2d 181, 182 (1944).

45. COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, *op. cit. supra*, note 1, at 76.

46. Arkansas: "Mere registration and reporting at a local employment office shall not be conclusive evidence of ability to work, availability for work, or willingness to accept work unless the claimant is doing those things which a reasonably prudent individual would be expected to do to secure work."

California: ". . . made such effort to seek work on his own behalf as may be required in accordance with such regulations as the director shall prescribe." (The regulation is set out in the text, *infra*.)

Colorado, Delaware, New Mexico, Wyoming: ". . . is actively seeking work."

Connecticut: ". . . has been and is making reasonable efforts to obtain work."

Georgia: ". . . has actively and in good faith sought employment and is actively and in good faith seeking employment, and is bona fide in the labor market."

Idaho: ". . . during the whole of any week . . . seeking work."

Illinois: ". . . during the period in question he was actively seeking work."

Indiana: ". . . found by the Division to be making an effort to secure work; Provided that such 'effort to secure work' shall be defined by the Board through rule or regulation which shall take into consideration whether such

In three states, the active-search provision is not mandatory;[47] the administrative agency may, depending on the particular facts involved, require that the claimant, in addition to registering for work, make other efforts to obtain suitable work.[48] This kind of a provision is a reasonable one, and, in some measure, it constitutes statutory recognition of the fact that it is the duty of the agency to guide the claimant in his job search. Actually, such duty exists under all state statutes by virtue of the requirement that the claimant be available for work. It is impossible to administer the availability requirement properly unless the employment security agency, through its employment service,

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individual has a reasonable assurance of re-employment and, if so, the length of the prospective period of unemployment."

Kansas: ". . . is making reasonable efforts to obtain work."

Maine: ". . . is himself making a reasonable effort to seek work at his usual or customary trade, occupation, profession or business, or in such other trade, occupation, profession or business as his prior training or experience shows him to be fitted or qualified . . . ."

Maryland: "In determining whether or not the claimant has actively sought work, the Board shall consider whether the efforts he has made to obtain work have been reasonable and are such efforts as an unemployed individual is expected to make if he is honestly looking for work. The extent of the effort required shall depend on the labor market conditions in the claimant's area." (If the claimant has not actively sought work he is disqualified.)

Michigan, Montana: ". . . is seeking work."

Missouri: ". . . no person shall be deemed available for work unless he has been and is actively seeking work."

New Jersey: ". . . and has demonstrated that he is actively seeking work . . . provided, that the director may, in his discretion, modify the requirement of actively seeking work if, in his judgment, such modification of this requirement is warranted by economic conditions."

North Carolina: ". . . no individual shall be deemed available for work unless he establishes to the satisfaction of the commission that he is actively seeking work."

North Dakota: ". . . actively seeking employment."

Ohio: ". . . actively seeking such work, either at a locality in which he has earned wages . . . during his base period or at a locality where such work is normally performed."

Oklahoma: "Mere registration and reporting at a local employment office shall not in every case be conclusive evidence of ability to work, availability for work, or willingness to work. In those cases where appropriate, the Commission shall direct and require the claimant to do those things, in addition to registering and reporting at the local employment office, which a reasonably prudent individual could be reasonably expected to do to secure work."

Oregon: ". . . actively seeking and unable to obtain suitable work."

Vermont: ". . . in determining the availability of any individual . . . the commission may require, in addition to registration at any employment office, that the individual at any time make such other efforts to secure suitable work as the commission may reasonably direct under the circumstances and to supply proper evidence thereof."

Washington: "To be available for work an individual . . . must be actively seeking work pursuant to customary trade practices and through other methods when so directed by the commissioner or his agents."

Wisconsin: "Any claimant, thus registered, may also be required at any time to make such other efforts to secure work as the commission may reasonably direct under the circumstances, and to supply proper evidence thereof . . . ."

47. Oklahoma, Vermont, Wisconsin.

48. See *Principles Underlying Availability for Work*, Unemployment Compensation Program Letter No. 103, dated December 10, 1945, at 11, where the Bureau of Employment Security approved the principle involved.

affords professional guidance and counsel to the unemployed worker.[49]

In New Jersey, the statute provides that the agency which administers the law may modify the search-for-work requirement when economic conditions warrant its modification.[50] Such a provision recognizes the fact that labor markets are not static things[51] and that an active search might be indispensable when jobs are vacant but completely ridiculous at a time when there are no jobs to be filled and additional workers are being released.

The "actively seeking" provision found its way into our state statutes in spite of British experience with it. The British discovered that it is not an instrument suitable for probing into the claimant's mind to discover whether he really wants to work. They used the requirement as an administrative device from 1921 to 1928, when Parliament provided, as a statutory eligibility requirement, that the claimant must be "genuinely seeking work." It was allowed to remain a part of the British unemployment system for only two years. Parliament repealed it in 1930.[52]

The propriety of requiring that a claimant for unemployment benefits do those things which a reasonable man so situated could be expected to do to secure suitable work is beyond question. Such a requirement is necessary to the integrity of the unemployment insurance system. But if the enactment of statutory active-search provisions indicates legislative recognition of this fact, the interpretation of these provisions quite often leaves entirely out of account the broad social policy inherent in all unemployment laws.

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49. The decision of a Wyoming appeals examiner contains the statement: "The enactment of the eligibility requirement of 'actively seeking work' into the law did not relieve the employment office of the responsibility to assist unemployed workers in finding employment. . . . There is nothing in the record to indicate that the employment office counseled claimant in the proper methods of searching for employment in her new place of residence or that they suggested other employers for her to contact. It is the responsibility of the claims taker to do these things." 478-AT-53, Wyo. (1953). See ALTMAN, *op. cit. supra*, note 5 at 115-21; Garcia v. California Empl. Stabilization Comm'n, 71 Cal. App. 2d 107, 161 P.2d 972, 973 (1945); Hagadone v. Kirkpatrick, 66 Idaho 55, 154 P.2d 181, 182 (1944); Krauss v. Karagheusian, Inc., 13 N.J. 447, 100 A.2d 277 (1953).

50. This action was recently taken. See CCH-U.I., N.J. 8242, 8243. September 1951 adjustment recited that employers were bothered by "abortive searches." BEN. SER. SERV. U.I. AA-160.1-7.

51. See "Policies of Interpretation in the Mobilization Period," accompanying Unemployment Insurance Program Letter No. 248, Bureau of Employment Security, April 30, 1951, which is a statement and discussion of the unemployment insurance benefit issues anticipated as a result of industrial mobilization.

52. Freeman, *Active Search for Work*, 10 OHIO ST. L.J. 181, 187 (1949); *Active Search for Work* issued by the Bureau of Employment Security as Unemployment Insurance Program Letter No. 213, June 28, 1950, and reproduced in BEN. SER. SERV., U.I., 2-BP-1, at p. 3. See Nelson v. Van Horn Const. Co., 45 Ohio Opin. 378, 62 Ohio L. Abst. 160, 102 N.E.2d 57, 59-60 (Ct. Com. Pleas 1951).

If active-search provisions were placed in state laws for the purpose of making it easier for the administrative agency to decide whether a claimant is really available for work, the attempt seems to have failed. In actual practice, these provisions seem often to have been used as a new basis for denial of benefits which, though ultimately paid, did nothing to help the worker at the time when he most needed income.[53]

It has been held that the addition of the actively-seeking provision to the statute "merely clarifies and does not change the meaning of the word 'available' as it appeared in the statute previous to the amendment."[54] The Supreme Court of New Jersey regards the addition of the words "and has demonstrated that he is actively seeking work" as importing that "credible evidence from the claimant of reasonable efforts on his part may suffice to prove his attachment to the labor market." The Court says: "Registration alone, however, is not sufficient to support a finding of availability. The minimum of additional evidence made necessary by the 1948 amendment is credible evidence of the claimant's own independent job-hunting efforts, at least when there is no showing of any placement work by the public employment service in the claimant's behalf."[55]

It is only when all of the facts in the case have been examined that it is possible to reach a conclusion as to the reasonableness of the claimant's efforts to find suitable work.[56] Thus, registration with his

53. Mills v. Marquette Mineral Products Co. (Ct. Com. Pleas 1954), CCH-UIR Ohio 8450; Copas v. B.U.C. (Ct. Com. Pleas 1953), CCH-UIR Ohio 8381; Impson v. Board of Rev. (Ct. Com. Pleas 1953), CCH-UIR Ohio 8399; *In re* Massi (Ct. Com. Pleas 1953), CCH-UIR Ohio 8388; Nofzinger v. La Choy Food Prod., 52 Ohio Opin. 396, 116 N.E.2d 773 (1953); Schroeder v. La Choy Food Prod., 52 Ohio Opin. 434, 116 N.E.2d 775 (1953); Rychener v. La Choy Food Prod., 116 N.E.2d 777 (1953); Saxon v. Pyramid Rubber Co. (Ct. Com. Pleas 1953), CCH-UIR Ohio 8366; Sex v. Board of Rev. (Ct. Com. Pleas 1953), CCH-UIR Ohio 8364; Zettler v. Board of Rev. (Ct. Com. Pleas 1953); CCH-UIR Ohio 8350; Inboden v. B.U.C. (Ct. Com. Pleas 1952), CCH-UIR Ohio 8348; King v. Board of Rev. (Ct. Com. Pleas 1952), CCH-UIR Ohio 8338; Krieger v. Cowles Tool Co. (Ohio Ct. App. 1952), CCH-UIR Ohio 8337; Webb v. State (1952), CCH-UIR Ohio 8271, *aff'd* by Ct. of Appeals at ¶ 8334; Nelson v. Van Horn Const. Co., *supra* note 52; Bergsnev v. E.S.D. (Super. Ct. 1951), CCH-UIR Wash. 8204.

54. Shannon v. Bureau of Unempl. Comp., *supra* note 27; Dwyer v. Michigan App. Bd., *supra* note 26; *but see* Honeycutt v. Appeal Bd. (Mich. Cir. Ct. Wayne County, No. 263045, 1951), CCH-UIR Mich. 1950.29; *see also,* Jacobs v. Office of Unempl. Comp. & Placement, *supra* note 27, which mentions actively-seeking as "one" of the eligibility requirements; and *compare* Hermsen v. Employment Sec. Dep't, *supra.* See also Wagner v. Unemployment Comp. Comm'n, *supra* note 27; *In the matter of* Sawdey (1954), Cal. U.I. App. Bd. Ben. Dec. 6167, Case No. 24250.

55. Krauss v. Karagheusian, Inc., 13 N.J. 445, 100 A.2d 277 (1953).

56. Actively seeking: Atley v. Board of Rev. (Ct. Com. Pleas 1954), CCH-UIR Ohio 8410; Copas v. B.U.C., *supra* note 53; Fitch v. Trumbull Co. (Ct. Com. Pleas 1953), CCH-UIR Ohio 8375; Impson v. Board of Rev., *supra* note 53; *In re* Massi, *supra* note 53; Nofzinger v. LaChoy Food Prod., *supra* note 53; Rychener v. LaChoy Food Prod., *supra* note 53; Saxon v. Pyramid Rubber Co., *supra* note 53; Sex v. Board of Rev., *supra* note 53; Krieger v. Cowles Tool Co., *supra* note 53; Webb v. State, *supra* note 53; Nelson v. Review Bd. of Ind. Emp.

union has been held to be a reasonable effort and to constitute an active search.[57] And, in view of the policy reflected by the enactment of unemployment insurance statutes, it would seem that the active-search provision should be liberally interpreted in favor of the claimant;[58] but not all tribunals agree.[59]

Some of the language in *Stricklin v. Annunzio*[60] may indicate that the court indulged confusing reasoning. There, the claimant had applied for work at a few establishments. The court said, "Applicant had also applied for work with various businessmen, but these employed few, if any, employees. These establishments had an employment range so small as to make it unlikely that the applicant would receive jobs with them." And the court then said, "His applications to small business concerns which employed few, if any, employees did not constitute an active search for work." If the court was saying that the active-search requirement is not met when it is unlikely that the claimant will find an open job, it is saying that no claimant could meet the active-search requirement in any labor market which is in a depressed condition and in which workers are being laid off rather than being employed. Such reasoning is, of course, diametrically contrary to the whole purpose of unemployment insurance laws;[61] however, another court has employed it.[62]

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Sec. Div., 119 Ind. App. 10, 82 N.E.2d 523 (1948). Not actively seeking: Ludwigsen v. Dep't of Lab. and Ind., 12 N.J. 64, 95 A.2d 707 (1953); Turner v. Appeal Bd. of Mich. Unemp. Comp. Comm'n, 332 Mich. 704, 52 N.W.2d 561 (1952) (answered "No" when asked if had looked for work); Thompson v. Administrator, Case 436-E-54, decided by Connecticut Commissioner, June 22, 1954, *aff'd* by Super. Ct. on Dec. 1, 1954, No. 21742, Super. Ct., New Haven County, at Waterbury, not yet reported. *See* Treakle v. Unemployment Comp. Comm'n, 83 A.2d 842 (Del. Super. Ct. 1951) and Williams v. Unemployment Comp. Comm'n, 83 A.2d 677 (Del. Super. Ct. 1951), wherein the claimant was required to seek work away from home when he customarily worked away from home eight months of the year.

57. Spohn v. Appeal Bd. (Mich. Cir. Ct. 1954), CCH-UIR Mich. 8457; Nelson v. Van Horn, *supra* note 52. *Contra*: Alexander v. Appeal Bd. (Mich. Cir. Ct. 1953), CCH-UIR 8435 (but only during period of strike when claimant had other skills); Avram v. Appeal Bd. (Cir. Ct. 1954), CCH-UIR Mich. 8449; Hermsen v. Employment Sec. Dep't, *supra* note 27 (but union, without contract with employer, was merely attempting reinstatement).

58. *In re* Shove (Super. Ct. 1954), CCH-UIR Wash. 8236; King v. Board of Rev., *supra* note 53, where claimant not required to make a search every day of the week; Bergsnev v. Employment Sec. Dep't, *supra* note 53.

59. Avram v. Appeal Bd., *supra* note 57; Alexander v. Appeal Bd., *supra* note 57; Stricklin v. Annunzio, 413 Ill. 324, 109 N.E.2d 183, 185-86 (1952) (where the court relied on "evidence in this record from which certain presumptions arise which support the findings of the administrative board" to discover a mental attitude justifying a holding that the claimant was not actively seeking work and where, under a statute requiring that the claimant be actively seeking work "during the period in question" benefits were denied on the basis of what the claimant had done or not done prior to filing his claim).

60. 413 Ill. 324, 109 N.E.2d 183, 186 (1952).

61. Ashmore v. Unemployment Comp. Comm'n, *supra* note 26; Roukey v. Riley, 96 N.H. 351, 77 A.2d 30 (1950); Reger v. Administrator, *supra* note 26.

62. Department of Lab. & Ind. v. Unemployment Comp. Bd., 154 Pa. Super. 250, 35 A.2d 739 (1944), which the Delaware court criticizes in Ashmore v.

The Oklahoma statute at once states the proper rule of construction and recognizes the proper role of the employment security agency:

> "Mere registration and reporting at a local employment office shall not in every case be conclusive evidence of ability to work, availability for work, or willingness to work. In those cases where appropriate, the Commission shall direct and require the claimant to do those things, in addition to registering and reporting at the local employment office, which a reasonably prudent individual could be reasonably expected to do to secure work."[63]

The recognized rule that a claimant's availability for work depends upon the facts in his own case applies as well to the actively-seeking-work requirement: "The most reasonable construction of the requirement is that an individual is actively seeking work when he has done what a reasonable man in the same circumstances would do to attempt to find work suitable for him."[64] And what a reasonable unemployed worker would do to find suitable work for himself must necessarily depend upon what kind of a job is suitable for him, how that kind of a job is usually filled, and whether there are currently few or many of that kind of jobs open in his geographical labor market.[65] In certain cases, it may also be necessary to consider, along with these factors, the length of time he has been unemployed.[66]

If the claimant's occupation is one in which jobs are usually filled by the employment service, he has actually made an active search when he registers for work and is ready to accept any suitable job offers which he does not have good cause to refuse. If jobs in his occupation are usually filled by nongovernment agencies, such as nonprofit vocational organizations, unions,[67] colleges or nurses' registries, the claimant may reasonably be required to seek work through those facilities in addition to registering with the employment service. Such would constitute an active search for work. But, if, in the claimant's occupation, jobs are usually filled neither by the employment service nor by nongovernment placement agencies, he may be directed to make

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Unemployment Comp. Comm'n, 86 A.2d 751 (Del. 1952).

63. Oklahoma Employmnt Security Act., OKLA. STAT. tit. 40, § 214(c) (Supp. 1953).

64. Freeman, *supra* note 52 at 181, 184; Shannon v. Bureau of Unempl. Comp., *supra* note 27, in which the court stated that the amendment requiring that the claimant be actively seeking work added nothing to the requirement that the claimant be available for work. The court said that the claimant "must at least show that he acted in good faith and made a reasonable effort to secure suitable employment." *See* Nelson v. Van Horn Const. Co., 45 Ohio Opin. 378, 62 Ohio L. Abst. 160, 102 N.E.2d 57, 60-61 (Ct. Com. Pleas 1951).

65. Nelson v. Van Horn, 45 Ohio Opin. 378, 62 Ohio L. Abst. 160, 102 N.E.2d 57 (Ct. Com. Pleas 1951).

66. *See* Guidice v. Board of Rev., 14 N.J. Super. 335, 82 A.2d 206 (1951); DeRose v. Board of Rev., 6 N.J. Super. 164, 70 A.2d 516 (1950). *But see* Impson v. Board of Rev., *supra* note 53.

67. See note 57 *supra*.

personal application to employers, but only when jobs are available in his occupation. If the employment service is aware of the fact that there are no such vacancies, such direction should, of course, not be given.[68] An Ohio court has said that "it is not required that one seeking employment should frantically or futilely rush from door to door of employers daily or weekly."[69]

It is perfectly obvious that unless the claimant is given labor market information and specific guidance as to the manner of search best calculated to result in his employment, the active-search requirement is no true test of availability. It may even work as an open invitation to dishonesty. A list of the employers whom the claimant has "visited" can easily be fabricated, and it is an administrative impossibility to check every such list.[70] Further, if the active-search provision is interpreted to require an independent door-to-door search by every claimant, it must be based on the assumptions (1) that the employers with job openings at any particular time do not use the public employment service, because, if they did, the claimant would already be in direct contact with the job openings when registering and reporting; and (2) that there are suitable jobs open for the claimant, because, if there are no openings, it would be useless to contact employers; or (3) that, even though there is no suitable job opening for him, a claimant should be kept busy doing something to "earn" his unemployment benefits.

Though the interpretation of the active-search requirement as calling for efforts by all claimants independent of the employment service has been criticized with very good reason,[71] perhaps one good result could follow its adoption. Employers could be so harassed by large numbers of claimants who are seeking work that they would use, and encourage all other employers to use, the employment service facilities. There is, however, genuine concern about the potential damage to the national system of employment services operated by the states. "Unorganized applications to employers by large numbers of claimants may disrupt the local-office relations with those employers without increasing placements or proving the claimants' availability."[72]

If the "actively seeking" requirement is interpreted to require all claimants to make a work search independent of the state agency, that agency faces a dilemma. If it requires a search independent of its employment-service arm, that service loses its standing. The claimant is not permitted to rely on it and his confidence therein is destroyed.

68. See *Active Search for Work*, BEN. SER. SERV., U.I., 2-BP-4, at 3.
69. Saxon v. Pyramid, *supra* note 53.
70. Under the Vermont and Wisconsin statutes, the claimant may be required "to supply proper evidence" of his efforts to secure suitable work.
71. UIP Letter No. 213, *supra* note 52.
72. *Ibid.*

But if the independent search is not required of each claimant for benefits, the agency is violating the law which it administers.

Many state agencies have solved the problem by placing a reasonable interpretation on the "search" requirements of their laws.[73] The California interpretation is in the form of a regulation authorized by the California statute. It constitutes a clear statement of the principles to be followed. Because of its importance and because it is capable of application in the other states which have active-search language in their statutes, it is quoted:

> "A claimant is ineligible for unemployment compensation benefits for any period for which the Department finds that he has failed to make reasonable effort to seek work on his own behalf. The facts and circumstances in each case shall be considered in determining whether such reasonable effort has been made. The claimant shall be required to show that he has, in addition to registering for work pursuant to Section 1326-2 of these regulations, followed a course of action which is reasonably designed to result in his prompt reemployment in suitable work, considering the customary methods of obtaining work in his usual occupation or for which he is reasonably suited, and the current condition of the labor market. Subject to the foregoing, actions of the following kind will be considered reasonable effort to seek work on his own behalf if found by the Department to constitute effective means of seeking work by the particular claimant:

73. It is likewise significant that the vast majority of those states having an active-search provision adhere to the following policy with respect to interstate claims:

"All interstate benefit claimants shall make such personal efforts to find work as are customarily made by persons in the same occupation who are genuinely interested in obtaining employment.

"The phrase 'efforts to find work' does not mean haphazard application for work with a fixed number of employers.

"It means that the claimant shall use the facilities and methods which are normally used by persons in his occupation when seeking work. Information concerning the facilities and methods that are available to the individual claimant and the claimant's use of such facilities shall be transmitted to the liable State. Appropriate specific action by the claimant, including action supplementing the efforts of the Employment Service to find work for him will be required if any one of the following conditions exists:

"(a) The area in which he resides is not within the service radius of a full-time employment office, or

"(b) He is seeking suitable work in an occupation in which jobs are normally filled through channels other than the State Employment Service, such as jobs which are usually filled through trade unions or professional societies, or

"(c) The employment prospects in the claimant's occupation in the area where he is claiming are sufficiently favorable to justify an opinion by the agent-State local office that personal efforts by the claimant to find work have reasonable probability of success.

"As a claimant's length of unemployment increases and he has been unable to find work in his customary occupation, he may be required to seek work in some other occupation in which job openings exist or, if that does not seem likely to result in his employment, he may be required to accept counseling for possible retraining or a change in occupation."

See HANDBOOK FOR INTERSTATE CLAIMS TAKING, published by the Bureau of Employment Security, U.S. Department of Labor, page ii, Standard Interstate Policy Statement on Active Search for Work.

a. Registering with the claimant's union hiring or placement facility.

b. Registering with a placement facility of the claimant's professional organization.

c. Applying for employment with former employers.

d. Making application with such employers who may reasonably be expected to have openings suitable to the claimant.

e. Registering with a placement facility of a school, college, or university if one is available to the claimant in his occupation or profession.

f. Making application or taking examination for openings in the civil service of a governmental unit with reasonable prospects of suitable work for the claimant.

g. Registering for suitable work with a private employment agency, or an employer's placement facility.

h. Responding to appropriate 'want ads' for work which appears suitable to the claimant.

i. Any other action which the Department finds to constitute an effective means of seeking work suitable to the claimant.

"No claimant, however, shall be denied benefits solely on the ground that he has failed or refused to register with a private employment agency or any other placement facility which charges the job-seeker a fee for its services.

"A claimant shall be deemed to have failed to make a reasonable effort to seek work on his own behalf if the Department finds that he has wilfully followed a course of action designed to discourage prospective employers from hiring him in suitable work.

"Notwithstanding any of the foregoing, if the Department finds that for a particular locality, occupation or class of claimant during a certain interval, the prospects of suitable job openings other than those listed with the public employment service are so remote that any effort to seek work other than by registration for work pursuant to Section 1326-2 of these regulations would be fruitless to the claimant and burdensome to employers, then such registration by the claimant shall be deemed a reasonable effort to seek work on his own behalf.

"The provisions of this section do not apply to claimants applying for benefits for a week of partial unemployment."[74]

Without question, a claimant must be able to work in order to be available for work. At the same time, he can be able to work and still not available for work. It is likewise the rule that, in order to be available for work, the claimant must be making a reasonable effort to secure work, that is, actively seeking work.[75] Thus, he cannot be available for work without making a reasonable effort to secure work. But, can he be actively seeking work and yet be unavailable for work? The Supreme Court of Idaho has answered this question in the affirmative.[76] Such a decision can mean only that the court regards the seeking-work requirement as being fulfilled if the claimant is going

74. California Reg. 1253(c)-1 under California Unemployment Insurance Code, § 1253(c), CCH-UI Calif. 5250A.

75. See note 27 *supra*.

76. *Claim of* Sapp, 266 P.2d 1027 (Idaho 1954).

through the motions, for the court holds the claimant unavailable because he went to a small town where there was no market for the services which he was offering. If going through the motions is what the seeking-work provision requires, it is a senseless provision. But unless it means that the claimant must be doing those things which a reasonable man similarly situated would do to get himself suitable work, the Idaho court is right.

Perhaps there would have been no rash of actively-seeking amendments had it not been for a failure of some employment security agencies to recognize that the phrase "available for work" requires more than the physical presence of the claimant in the employment security office and that the job-refusal test of a claimant's availability cannot always be employed. In brief, a proper application of the availability test would have eliminated the necessity for a statutory provision spelling out the actively-seeking test. The danger inherent in such statutory provision is the fact that, instead of applying the true availability yardstick, the deciding agency may resolve the eligibility question solely upon the fact that the claimant has or has not called upon so many employers this week or that.

Some decisions have mentioned the purpose clauses of unemployment compensation statutes which contain the active-search language in arriving at the conclusion that a claimant who is not constantly calling on employers is not involuntarily unemployed and is therefore not entitled to benefits. Such reasoning, of course, assumes the existence of suitable job openings. And, again, the actively-seeking provision can have no reason for existence except that it be designed to get the claimant into suitable work and, if that is not possible, to test his availability for work. If there are no job openings, neither purpose can be accomplished by the search. All of which is to say that, since the concept of availability embraces the fact that the claimant must be situated where there is a market for his type of services (as opposed to job openings) and also embraces the fact that he must be making a reasonable effort to find an employer who has need of those services, the statutory active-search requirement is either surplusage or undue statutory emphasis of only one of the factors inherent in the phrase "available for work."

### *Conclusion*

Even a cursory examination of the eligibility requirements for the receipt of unemployment compensation is enough to establish the fact that the claimant must cross over many bridges before he is in a position to receive his small benefit check. Of the many positive con-

ditions imposed, the requirement of availability for work is the hardest to satisfy. The generality of the test applied will inevitably cause unjust denial of benefits unless the deciding authority is constantly aware of the fact that the decision must depend *both* on the condition of the labor market *and* upon the claimant's individual situation. No truly just availability decision can leave out of account either the rule that the action or inaction on the part of the claimant must be judged in relationship to the kind of labor market in which he finds himself or the rule that, in the absence of a reasonably based doubt, the claimant should be presumed available. And, above all, the deciding authority must be completely aware of the fact that the purpose of unemployment compensation laws is to pay benefits to people who would be working if they could get suitable work.