

## **CHAPTER 300-2-9      QUALIFICATIONS AND PENALTIES FOR UNEMPLOYMENT INSURANCE BENEFITS CLAIMS**

300-2-9-01	Separation by Discharge and the Application of the Provisions of O.C.G.A. Section 34-8-194(2)	300-2-9-05	Separation by Quitting
300-2-9-02	Disqualification for Failure to Apply for or Accept Work	300-2-9-06	Vacation
300-2-9-03	Drug Adjudication Policy	300-2-9-07	Educational Service Workers
300-2-9-04	Alcohol Adjudication Policy	300-2-9-08	Eligibility of Temporary/Intermittent Workers
		300-2-9-09	Services in Professional Sports

### **300-2-9-01 Separation by Discharge and the Application of the Provisions of O.C.G.A. Section 34-8-194(2). Amended.**

(1) An individual shall be disqualified for violation of an employer's rule whenever the employee knew or had reason to know (as an ordinarily prudent person) of the rule, either having been made aware thereof by the employer or through common knowledge; provided, however, no employee shall be disqualified for violating any rule, order or instruction unless the same shall be lawful and reasonably related to the job environment and job performance. Such factors as inconsistency of prior enforcement, unlawfulness and unreasonableness of the rule may be proven by the individual to show that the individual is entitled to benefits. In instances in which there is a dispute as to the true cause of discharge, the claimant shall be afforded the opportunity to challenge or rebut the employer's version of the facts as to the stated reason for the discharge. The employer has the burden of persuasion as to the true cause of discharge.

(2) In determining whether an individual should be disqualified for benefits under OCGA Section 34-8-194(2), the Commissioner shall consider the factors as set out in (a) through (f) below. In each instance, the warning factor shall not be essential, but may be considered under the totality of circumstances; the absence of a warning may likewise be considered, particularly with respect to mitigation of an offense committed by an employee. In each instance, the Commissioner shall not be limited to a consideration of the factors enumerated herein but may consider such other factors as the totality of circumstances dictates. Once an employer has met its burden of proof with respect to a failure of a claimant to obey rules, orders or instruction or to perform the duties for which he was employed, the Commissioner shall consider any of these factors in mitigation of the offense, action or inaction of the employee.

(a) Where the employee was discharged for absenteeism or tardiness, the Commissioner shall consider:

1. The employer's policy on absenteeism or tardiness and whether the policy was communicated to the employee;
2. Whether the employee had been absent or tardy on prior occasions and had been warned about absenteeism or tardiness;
3. What the employer's policy is with respect to notice of the absence or tardiness and whether the employer was properly notified by the employee;
4. The reason(s) for the absenteeism or tardiness;

5. The frequency of the absenteeism or tardiness; and
  6. Whether, upon consideration of the totality of circumstances which surrounded the absences or tardiness, the employee was at fault in the discharge.
- (b) Where the employee was discharged for a violation of rules, orders, instructions or failure to discharge the duties for which employed, the Commissioner shall consider:
1. The manner in which the rules, orders, instructions or duties were made known to the employees including, but not limited to, whether or not the rules were posted or otherwise published prior to the incident causing discharge;
  2. Whether a violation of the rules, orders, instructions or duties occurred;
  3. Whether the employee failed to discharge the duties for which employed;
  4. Whether the violation or the failure to discharge duties was a result of the employee's fault, intentional conduct, conscious neglect or misconduct as defined in these Rules;
  5. The extent of the infraction;
  6. The impact of the infraction on the employer's operation.

- (c) Where the employee was discharged for property loss or damage, the Commissioner shall consider:
1. Whether the behavior that caused the loss or damage was due to negligence on the part of the employee or was due to intentional conduct on the part of the employee;
  2. Whether the employee had been warned (the warning factor is not essential to a disqualification but shall be weighed in light of the circumstances);
  3. The extent and amount of the loss or damage;
  4. Other aggravating or mitigating circumstances.

**NOTE:** Although a disqualification will be imposed if the loss or damage was found to be the fault of the claimant but there was no evidence of intentional conduct, for a disqualification to be imposed under the provisions of OCGA Section 34-8-194(2)(A)(ii)(I), the Commissioner must determine the act was intentional and the loss or damage amounted to \$ 2,000.00 or more;

- (d) Where the employee was discharged for intentional conduct which results in bodily injury to the employer, fellow employees, customers, patients, bystanders or the eventual consumer of products, the Commissioner shall consider:
1. Whether the act was intentional;
  2. The extent of the physical harm resulting from the act;
  3. Any other aggravating or mitigating circumstances (e.g., past provocation; the

warning factor is not essential but shall be weighed in light of the circumstances); and

4. The foreseeability of the injury as a result of the act.

5. The term "bystanders" shall include anyone who was legally entitled to be in such close proximity to the location of the occurrence of the act as to be physically injured. The term "bystanders" could include, but shall not be limited to, governmental officials, independent contractors or other persons.

**NOTE:** Although a disqualification will be imposed if the act by the claimant was found to be the fault of the claimant but there was no evidence of intentional conduct, for a disqualification to be imposed under the provisions of OCGA Section 34-8-194(2)(A)(i)(I), the Commissioner must determine the act was intentional;

(e) Where the employee was discharged for engaging in a physical fight or threatening behavior on the employer's premises or while on the job under the provisions of OCGA Section 34-8-194(2)(A)(i)(I), the Commissioner shall consider:

1. Whether or not the discharged employee used a weapon;

2. Whether or not anyone was injured;

3. The extent of any provocation to or threat to the discharged employee; and

4. Whether or not the discharged employee had been involved in fighting on the employer's premises on prior occasions and had been warned about fighting.

**NOTE:** Although a disqualification will be imposed if the act by the claimant was found to be the fault of the claimant but there was no evidence of intentional conduct, for a disqualification to be imposed under the provisions of OCGA Section 34-8-194(2)(A)(i)(I), the Commissioner must determine the act was intentional.

(f) Where the employee was discharged for the falsification of employer records, the Commissioner shall consider:

1. Whether the omission/misstatement was intentional;

2. Whether the omission/misstatement was material; and

3. Information or documentation with respect to proof of citizenship as required by, or in compliance with, the Federal Immigration Reform and Control Act of 1986 including any subsequent amendments to said Act and applicable state laws.

(3) Federal law protects freedom of expression through the First Amendment and it protects an employee's right to protest hours, working conditions and job safety under the National Labor Relations Act and other legislation. A claimant may not be disqualified for action protected under federal law.

*Authority O.C.G.A. Secs. 34-8-70, 34-8-150, 34-8-158(2), 34-8-191.*

### **300-2-9-.02 Disqualification for Failure to Apply for or Accept Work. Amended.**

(1) Disqualification under OCGA Section 34-8-194(3) is required if a claimant was offered employment that is suitable work or was directed to apply for such employment by the department, but the offer was refused, or the claimant failed to apply and the refusal or failure to apply was without good cause, or after acceptance of a job offer made by the employer, claimant failed to report to work for that employer.

(a) An offer of work or referral to employment shall be considered properly made when:

1. A job opening existed at the time the offer was made or referral was given and claimant had been given sufficient information concerning the conditions of the job (such as, but not limited to, the duties, location of work, hours of work, wages, working conditions and equipment needed, if any) to determine the suitability of the offer or the referral; and
2. The claimant knew and understood that an offer or referral was being made, and had been notified of the job offer or referral in adequate time to respond; and
3. The claimant, upon accepting a referral, was given adequate information as to where and how to apply.

(2) No claimant shall be ruled ineligible for benefits where new work is offered, but the distance or time for commuting is substantially greater than that distance to all other places to which an ordinarily prudent person living in the same locality, town or city would travel for work which utilizes similar or related skills or services, and also to where the claimant earned base period wages.

(3) Notwithstanding any other provisions in this section, no work shall be deemed suitable and benefits shall not be denied under OCGA Section 34-8-194(3) to any otherwise eligible individual for refusing to accept new work if:

- (a) The position offered is vacant due directly to a strike, lockout, or other labor dispute;
- (b) The wages, hours or other conditions of the work are less favorable to the individual than those prevailing for similar work in the locality; or
- (c) As a condition of being employed the claimant would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

(4) Disqualification shall not be imposed if claimant did not apply for or accept work due to occurrences such as:

- (a) An "act of God" or similar event beyond the control of the claimant which prevented the claimant from timely responding to a call-in notice, job referral or job offer, (e.g., an automobile accident involving the claimant's vehicle which prevented the claimant from responding on time);
- (b) Death of an individual's immediate family member. The eligibility requirements of availability and reporting shall be waived for the day of the death and for four (4) consecutive calendar days thereafter. As used in this subparagraph, "immediate family member", means a spouse,

child, stepchild, adopted child, grandchild, parent, grandparent, brother or sister of the individual or his or her spouse and the spouse of any of the foregoing;

(c) Personal illness or disability of a temporary nature of claimant or a dependent family member which occurred in such a way to prevent the claimant from timely appearing in person, and the claimant made diligent efforts to give notice to the department or the employer prior to the time for the scheduled call-in or report to work date;

(d) The offer of work or referral to a job opening was for a job opening with an employer who previously employed the claimant and from which the claimant quit or was discharged from employment under such adverse conditions that the ordinarily prudent person would not be expected to return to work with the former employer. The Commissioner shall consider the totality of circumstances in such a case.

*Authority O.C.G.A. Secs. 34-8-70, 34-8-150, 34-8-151, 34-8-158(3), 34-8-191.*

### **300-2-9-.03 Drug Adjudication Policy. Amended.**

(1) These policies are general guidelines for adjudication of drug usage and drug testing related cases. The policies do not, and are not intended to establish what employers may or may not do in their own businesses. The policies address only the payment or denial of benefits under the Employment Security Law.

(2) "Drug" means any controlled substance as defined in O.C.G.A. Section 16-13-20 et seq.

(3) Drug testing must be based upon "reasonable grounds." The following are reasonable grounds for testing:

(a) If the employer has a reasonable suspicion that an individual has used drugs. Reasonable suspicion includes, but is not limited to:

1. Unusual change in behavior;
2. Substantial loss of productivity;
3. Repeated tardiness;
4. Repeated absences;
5. Noticeable signs of drug intoxication;
6. Reliable information or credible report that the employee is using a drug; and
7. Other reasonable indicators that suggest the individual is taking drugs.

(b) An on-the-job accident resulting in a personal injury or more than minor property damage;

(c) If the employee has previously tested positive for a drug and has been given a second

chance;

- (d) Random or blanket testing of employees if all the employees in a job group are equally subject to the random or blanket test;
- (e) Testing of applicants if either all applicants or all persons offered a job for a job group are subject to the test (pre-employment drug test);
- (f) Any testing required by local, state or federal law or regulations;
- (g) Testing pursuant to an employer's "Drug-Free Workplace Program", established in accordance with OCGA Section 34-9-410 et seq. (Georgia Workers' Compensation Drug-Free Workplace Program Premium Credit Discount); or
- (h) Any testing policy established by an employer to discourage the use of drugs by its employees which complies with the provisions of this rule.

(4) An employer requirement that a job candidate take a drug test does not, by itself, render the work unsuitable. An employer may require that job candidates show that they are not users of illegal drugs.

- (a) If, after being referred to work by the department, an employee fails to apply for work because the employer requires a preemployment drug test, the claimant has failed to apply without good cause.
- (b) If the employee refuses work because he or she is required to take a pre-employment drug test, the employee has refused work without good cause.
- (c) Failing a pre-employment drug test, by itself, is grounds for disqualification under OCGA Section 34-8-195, provided, however, the drug test must comply with the provisions of these rules.

(5) When employers with a drug-free workforce policy require employees and prospective employees to consent to participate in the employer's program:

- (a) The requirement that an employee consent to drug testing is not unreasonable when the consent is designed to inform the employee of the program and to secure the employee's acknowledgement that the employee will participate in the program. Mere agreement to participate in a drug testing program is not, by itself, inimical to an employment situation, unless the agreement calls for submission to an unreasonable testing program. In disputes over consent, where there is reasonable drug testing as described in these rules, the following applies:
  1. If, after being referred to work, the employee fails to apply because he/she is required to consent to participate in a reasonable drug testing program, the employee has failed to apply for work without good cause;
  2. If an employee fails to accept work rather than consent to participate in the employer's reasonable drug testing program, the employee has failed to accept work without good cause;
  3. If an employee quits rather than consent to participate in the employer's reasonable

drug testing program, the employee has left work without good cause;

4. If the employee is discharged for refusing to consent to participate in the employer's reasonable drug testing program, the employee is discharged under disqualifying conditions and is considered to be at fault in the separation.

(6) Where an employer has reasonable grounds for drug testing and an employee quits rather than be tested, the employee has quit without good cause. When an employee is discharged for refusal to submit to such drug testing, the employee shall be deemed discharged for cause.

(7) For purposes of unemployment insurance it is reasonable for an employer to require employees to submit to blanket or random drug testing.

(a) If the employer has reasonable grounds for blanket or random drug testing and the employee quits rather than be tested, the employee has quit without good cause connected with the work.

(b) If the employer has reasonable grounds for blanket or random drug testing and the employee is discharged for refusing to submit to such a test, the employee is discharged for misconduct.

(8) For drug test results to be a determinative factor under this rule, proper custody, testing and confirmation procedures must be followed; and the individual must have tested positive for a drug. Unless gas chromatography is used as the initial test, a second test of a different type must be conducted to confirm the accuracy of the first test. The laboratory which conducts the test must meet or exceed the minimum standards specified in OCGA Section 34-9-415. The results must be admitted in conformity with the requirements of OCGA Section 34-8-194.

(9) When test results are properly authenticated and the individual tested positive for a drug, the following apply:

(a) If an employee is discharged for failing a drug test it is a disqualifying discharge;

(b) If an employee fails a test and quits because a discharge is imminent, the quit is treated the same as any other quit in lieu of discharge. If discharge is not imminent and the employee quits, the quit is without good cause.

(10) When an employee fails a reasonable drug test; was previously shown to have been under the influence of drugs on the job; admits to use of drugs on the job; or violates Section (11) of these Rules, an employer may, as a condition of continued employment, require the employee to adhere to certain reasonable conditions.

(a) Reasonable conditions include, but are not limited to:

1. Agreeing to remain drug free;
2. Attending, at reasonable cost to the employee, rehabilitation or similar programs; and
3. Submitting to random drug testing to demonstrate the employee remains drug free.

(b) In adjudicating violations of last chance agreements, the following apply:

1. A discharge is disqualifying if:

- (i) The employee refuses to agree to reasonable conditions required by the employer; or
- (ii) The employee fails to adhere to reasonable conditions required by the employer.

2. An employee voluntarily leaves work without good cause if:

- (i) The employee leaves work rather than agree to reasonable conditions required by the employer; or
- (ii) The employee leaves work rather than adhere to reasonable conditions required by the employer.

(11) If the employee is discharged for illegally possessing a drug, distributing a drug, or selling a drug, the employee is considered to be at fault in the separation.

(12) Drug tests shall not be used to discriminate against employees for reasons prohibited by law.

*Authority O.C.G.A. Secs. 34-8-70, 34-8-158(1), 34-8-170, 34-8-190.*

#### **300-2-9-04 Alcohol Adjudication Policy. Amended.**

(1) These policies are general guidelines for adjudication of alcohol related cases. These policies do not, and are not intended to establish what employers may or may not do in their businesses. The policies address only the payment or denial of benefits under the Employment Security Law.

(2) For purposes of OCGA Section 34-8-194 an employer may require a breathalyzer, blood alcohol or similar test of an employee or prospective employee, as part of the employer's substance abuse program, or if there are reasonable grounds to believe the individual is under the influence of alcohol.

(3) An individual is deemed under the influence of alcohol when the individual's blood alcohol content exceeds the amount prescribed in a collective bargaining agreement, or in the absence of a collective bargaining agreement, exceeds the amount prescribed in the employer's published work rules, or in the absence of either of the foregoing, meets or exceeds the amount prescribed in OCGA Section 40-6-391 as constituting being under the influence of alcohol. In the absence of a test, an individual may be found to be under the influence of alcohol when there is clear observable evidence of intoxication.

(4) An individual who is discharged as a result of being under the influence of alcohol while on the job, is discharged under disqualifying conditions.

(5) An individual who is discharged for failing to appear for work as a result of the use of alcohol is discharged under disqualifying conditions, unless the individual establishes that the absence was resulting from the individual seeking treatment for alcoholism from a recognized treatment program, and the individual followed the employer's procedure for notifying the employer of his/her absence from work.

(6) Alcohol testing shall not be used to discriminate against employees for reasons prohibited by law.

(7) An employee who violates a known work rule of the employer which forbids the consumption of alcohol during the working day can be disqualified from receiving unemployment compensation even without proof that the employee is under the influence of alcohol.

*Authority O.C.G.A. Secs. 34-8-70, 34-8-151, 34-8-170, 34-8-190.*

### **300-2-9-.05 Separation by Quitting. Amended.**

(1) An employee who voluntarily quits is to be disqualified unless he/she can show that the employer had changed the terms and conditions of work in a manner that the employee, applying the judgment of a reasonable person, would not be expected to continue that employment. Factors which the Commissioner shall consider in making this determination may include, among others, the following:

- (a) Whether the employee was downgraded for reasons other than the fault of the claimant;
- (b) Whether the employee had undergone harassment on the job of a substantial nature which would induce a reasonable person to quit in order to seek other employment;
- (c) Whether the hiring contract had otherwise been broken in a material way;
- (d) An economic downgrade based on the employer's inability to continue the former salary will not be considered as a good cause to quit if the reduction in salary is not a substantial reduction below a reasonable rate for that industry or trade. However, a seasonal or temporary reduction in pay or work hours does not constitute good cause for quitting; or
- (e) Whether the employee's health was placed in jeopardy by conditions on the job. There must be some clear connection between the health problem and the performance of the job, and professional medical advice is required unless the reason would be obvious that harm to the employee would result from continued employment. This includes such obvious things as broken limbs, violent reactions such as allergies due to the environment on the job and similar circumstances. Provided, however, the employee must discuss the matter with the employer to seek a solution by another assignment or other changes that would be appropriate to relieve the medical problem before the employee can show good work-connected cause for quitting.

(2) Disqualification is not required if an employee quits because the rules of the employer prove to be unreasonable as related to proper job performance.

(3) In situations in which it is not clear whether a quit or a discharge occurred to cause the separation, the burden of persuasion shall be on the employer to show that a quit rather than a discharge occurred. If the employer meets this burden of persuasion, then the burden of proof is then placed on the claimant to show that the quit was for good cause connected with the work. If the employer fails to meet this burden of persuasion, the separation shall be treated as a discharge and the burden of proof of just discharge shall be on the employer.

(4) When an individual accepts a separation from employment due to lack of work, pursuant to a labor

management contract or agreement, or pursuant to an established employer plan, program, policy, layoff, or recall, the Commissioner will determine eligibility based on the individual circumstances of the case. In such cases, to show that the individual quit for good cause connected with the most recent work the facts must demonstrate at minimum:

- (a) That the individual was advised of an actual impending layoff with a date certain, and
- (b) That the effective date of the layoff was no more than six (6) months after the announcement date.

*Authority O.C.G.A. Secs. 34-8-70, 34-8-152, 34-8-190.*

### **300-2-9-.06 Vacation. Amended.**

(1) An individual shall not be considered available for work if on vacation. An individual shall not be considered to be on vacation if the employer-employee relationship no longer exists. However, this relationship shall be deemed to exist if:

- (a) An employer is submitting Form DOL-408 for partial unemployment on behalf of the individual; or
- (b) The individual has a firm return to work date within six (6) weeks of the date the individual last worked for the employer.

(2) No individual shall receive unemployment insurance:

- (a) While on vacation at his own request regardless of whether or not the individual was paid by or on behalf of the employer during the vacation period; or
- (b) For any week of vacation if paid vacation pay.

(3) When an individual is separated, any money paid for previously accrued vacation rights will not affect claimant's benefit payments.

(4) Any claimant who is not receiving pay during a period of vacation shutdown shall not be denied benefits for any weeks of such shutdown unless the employer has established a vacation plan as set forth in OCGA Section 34-8-195(a)(3)(A).

- (a) For purposes of computing two (2) weeks discussed in OCGA Section 34-8-195(a)(3)(B), if the last week of December has three (3) or more work days, that week is to be considered in the prior calendar year, even though the week ending date is in January of the current calendar year.

*Authority O.C.G.A. Secs. 34-8-70, 34-8-170, 34-8-190.*

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### **300-2-9-07 Educational Service Workers. Amended.**

(1) Benefits based upon service in employment described in subparagraphs (a)(1) and (a)(2) of OCGA Section 34-8-196 performed for, with, or on behalf of an educational employer (including service for an educational institution, educational service agency or an entity providing services to or on behalf of an educational institution) are subject to the benefit payment limitations described in OCGA Section 34-8-196(a) with respect to all service in covered employment under any provisions of OCGA Section 34-8-35, including private employment.

(2) Benefits shall be denied to an individual in accordance with OCGA Section 34-8-196(a) only if such individual has earned base period wages with an educational employer (as defined above) or the individual's most recent employer in accordance with OCGA Section 34-8-43 is an educational employer (as defined above).

(3) Retroactive benefits with respect to non-professional educational workers in accordance with OCGA Section 34-8-196(a)(2) are payable only under the following conditions:

- (a) Despite reasonable assurance having been provided to the individual that the same or substantially similar work would be available in the second academic term or year, no such work is available; and
- (b) Timely claims for benefits were filed for each week claimed during the break between terms or years; and
- (c) All other eligibility conditions of the Employment Security Law including, but not limited to, OCGA Section 34-8-195 were met for each week claimed; and
- (d) The individual reopens the claim within fourteen (14) calendar days after the beginning of the next successive school term or year or after being informed by the educational employer (as defined above) that the expected work would not be available, whichever date occurred first.

*Authority O.C.G.A. Secs. 34-8-70, 34-8-190, 34-8-196.*

### **300-2-9-08 Eligibility of Temporary/Intermittent Workers.**

(1) An individual who is working on a part-time, intermittent, or temporary assignment basis shall not be denied benefits solely as a consequence of such employment. When such individuals are between assignments, it shall be considered that a rebuttable presumption of voluntary unemployment exists. In determining eligibility for such persons, the Commissioner may consider, but is not limited to, the following facts:

- (a) Whether the claimant's employment was of a temporary/intermittent nature;
- (b) Whether the claimant and employer are maintaining an ongoing employment relationship;

(c) Whether the claimant considers temporary/intermittent work as an occupation, or as "stop-gap work" to earn income while seeking employment; and

(d) Whether the claimant is seeking and is available for full time work.

(2) In accordance with paragraph (c) of OCGA Section 34-8-195, an individual who is contracted to a temporary help contracting firm may not be considered unemployed with respect to any work week, during which a comparable work assignment is offered by the employer and is refused by the claimant without good cause.

(3) Such temporary help contracting firm must promptly notify the department in writing, providing proof of the work assignment offer, such as a copy of a telephone call log sheet. The burden of proof shall be on the employer to show the temporary assignment is comparable to previous work or assignments performed by the individual or otherwise meets the conditions of employment as previously agreed. If the job or assignment offer was comparable, then the claimant must establish he or she had good cause to refuse the job or assignment. To be eligible for benefits the claimant must have complied with all of the employer's reasonable rules with respect to work assignments, such as providing the employer a current address and telephone number by which to contact the claimant concerning possible work assignments, and otherwise meet all reasonable communication requirements of the employer to stay in touch with the employer. The employer must likewise comply with all of its own communication rules.

(4) To be considered a timely response, an employer's response to a claim for benefits filed by an employee of a temporary help contracting firm must be postmarked or received by the date the individual was scheduled for a predetermination interview. This date shall typically be seven (7) days or more after the claim for benefits was filed. The employer's written response as to the work assignment offer must be sent to the department on or before the claimant's scheduled predetermination interview date. Any subsequent refusal which occurs within the claimant's benefit year requires the employer to notify the department within four (4) days of such refusal. Notification shall be in writing, addressed to the local office of the department where the claim was filed.

(5) Claimants whose most recent work, or work last performed, was for a temporary help contracting firm must report his or her refusal of all job offers or job assignments to the department promptly. The department will then make a determination of whether the job assignment was comparable to work previously performed or agreed to be performed and whether such refusal was for good cause.

Authority O.C.G.A. Secs. 34-8-70, 34-8-190.

### **300-2-9-.09 Services in Professional Sports.**

(1) Pursuant to OCGA Section 34-8-196, paragraph (b), an individual shall be considered as "participating in professional sports or athletic events or to be in training or preparing to so participate" if such individual is a professional athlete, coach, manager or trainer who is employed by the professional team or as a referee or umpire employed by a professional league or association or other individual in similar situations who performs services in professional sports.

(2) For purposes of this paragraph and OCGA Section 34-8-196, "substantially all" means 90% or more of the wages shown in the base period of an individual worker's claim for unemployment

insurance benefits.

*Authority O.C.G.A. Sec. 34-8-196.*