



MORE ON UNEMPLOYMENT COMPENSATION – TIPS FROM THE AWI DIRECTOR OF OPERATIONS

Florida Employment Law Letter Editor Tom Harper recently sat down with Rose O’Leary, director of operations in Tallahassee for the Agency for Workforce Innovation (AWI), Office of Unemployment Appeals. This office handles appeals from employers who want to challenge a former employer receiving unemployment benefits. Their conversation is reprinted below.

In November’s edition of this newsletter, we printed an article discussing the cost of paying an unemployment claim to a fired or laid-off employee. Here are some additional insights to consider on the unemployment process.

Why do you get forms about employees more than a year later?

When an employee leaves your company, the unemployment compensation process begins when he files a claim for benefits. An investigator in the state office calls a random number of the employee’s former employees to ask why he left work. A notice is sent to the employee’s last employer and all former employers in the past three years. An initial determination is made about his eligibility for benefits. The employer has 20 days to appeal the initial decision unless the employer can show good cause for not responding in a timely fashion.

It is very important for you as an employer to

respond to unemployment notices in a timely manner. If the former employee left your employment to go to work for another company, you have no liability for unemployment benefits. If you don’t respond to the notice in a timely manner, however, your account will be charged for all or a portion of the benefits paid to the employee.

What if you suspect fraud?

In Florida, employees who are receiving unemployment benefits are required to be available and actively seeking employment. However, job searches are not monitored. As a practical matter, until they have been collecting benefits for 13 weeks, the state usually doesn’t do much to check on whether they’re actively trying to find work.

If you suspect fraud, AWI’s website has a page you can use to report it: www.floridajobs.org/Benefits/BPC/fraud.asp. You may receive reports from the state that a former employee is still collecting benefits, but you know that he’s working for another company for wages under the table. The agency also has a fraud hotline. Of course, any information you submit, such as cell phone photos and letters, will be investigated.

What is the most common reason employers lose employment hearings?

The most common problem for employers in an unemployment compensation hearing is that they don’t bring along a witness with direct knowledge about the reasons for the discharge. Your Human Resources director (if you have one) may show up at the hearing with a well-documented personnel

file, but unless you can present a witness with **direct** knowledge of the events that resulted in the firing, you'll lose. That's because you, the employer, have the burden to prove the employee's misconduct, and "hearsay" testimony isn't enough.

The employer can lose an unemployment hearing even if the fired employee fails to show up for the hearing. That's right, you can lose even when the other side doesn't show up. How? By failing to carry your burden of proof to show that the employee engaged in work-connected misconduct. A recent Second District Court of Appeals decision provides an excellent example.

Facts. Sunshine Chevrolet claimed that Zahid N. Roy was fired for racist and sexually inappropriate remarks, poor job performance, and unsatisfactory attendance. The company went to the unemployment hearing and was represented by Jim Breakman, its vice president and chief financial officer, who testified that he was responsible for Human Resources and was the custodian of the company's records.

Breakman submitted a compilation of more than 50 pages of documents relating to Roy's job performance, including a number of observations about his shortcomings at work. The appeals referee, however, failed to admit the documents into evidence as *business records*, which can be an exception to the rule that prohibits hearsay evidence. At the end of the hearing, the referee issued a decision that Sunshine had failed to meet its burden of showing that Roy had been discharged for misconduct.

Court's decision. The court of appeals agreed and upheld the referee's decision, stating that it was Sunshine's duty to prove a business-record exception and that it had failed to do so. *Sunshine Chevrolet Oldsmobile v. Unemployment Appeals Commission and Zahid N. Roy, Case No. 2D04-406 (Fla. 2d DCA, September 23, 2005).*

What about probationary employees?

Florida's unemployment compensation law provides that an employer won't be charged for

benefits if the employee quits during the first 90 days of employment *for work performance reasons*. It's no longer necessary to have employees sign a probationary policy form when they're hired. When you receive notice that a former employee has applied for benefits, all you need to do is check the box stating that he was fired for unsatisfactory performance within the first 90 days of his employment.

Tips on severance pay

If you give an employee "wages in lieu of notice," then he won't be allowed to collect unemployment benefits until those wages have "run their course." If, on the other hand, you call payment "severance pay," he may begin collecting the benefits immediately.

Final note on referees

In 2004, approximately 85,000 unemployment appeals were filed in Florida. A group of about 50 to 60 appeals referees hear those cases. Primarily because of security reasons at the unemployment offices around the state, the appeals process has gone to almost all telephone hearings. If both parties agree, it's still possible to request an in-person hearing.

As a general rule, each appeals referee is scheduled for one hearing per work hour. Since hearings are rarely held in person, referees are listening very carefully to witnesses' voices to make credibility determinations. Inconsistent and changing reasons for the firing become very damaging to an employer in that situation. Be careful which words you select as the reasons for the discharge since you don't want to change reasons at the hearing. If you do change reasons, a referee may use that to find that your explanation isn't credible.

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If you have questions about unemployment compensation, please call the FUBA offices at 800-262-4483.