

Labor & Employment Inner Workings





Labor & Employment **Inner Workings**

Successfully Defending Unemployment
Compensation Claims
Dream or Reality?

Kevin E. Hyde, Esq.



The Most Important Thing to Remember About UC Claims

- The Deck is Stacked Against An Employer
 - Florida law provides: “ This chapter [Florida law on u.c.] shall be liberally construed in favor of a claimant of unemployment benefits who is unemployed *through no fault of his or own.*” (emphasis added) F.S. 443.031
 - Don’t be mislead about the “no fault” language. There is a presumption that the employee is not at fault, at least not enough to disqualify from receiving benefits.

The Unemployment Compensation Process

- Rules vary between the states but the framework is generally the same:
 - Employers pay a tax based on payroll to fund the u.c. system
 - The contribution rate in Florida has increased dramatically
 - If a claim for u.c. is made, the employer's account is charged for that payment
 - How does this affect your rate?
 - Employees must work a prescribed number of weeks for its account to be charged for benefits payable to that employee
 - If not enough weeks the prior employer must be charged
 - If not enough weeks with any employer, employee must work the required weeks and then may become eligible for benefits

The Unemployment Compensation Process

- The Claims Process
 - Employee leaves employment for whatever reason
 - Employee files claim for u.c. benefits
 - In Florida the responsible agency is known as the “Agency for Workforce Innovation.” (AWI)
 - AWI sends form to employer asking for information regarding reasons for employee’s separation
 - This is very important step: Opportunity to frame and tell the employer’s story as to why employee was terminated from employment
 - AWI reviews employer’s response and makes “Initial Determination” as to whether benefits will be paid

The Unemployment Compensation Process

- The Claims Process
 - The “Initial Determination” will be based on a number of factors:
 - Has the employee worked long enough with your business to be qualified for benefits?
 - Was the separation based on a business need (e.g. reduction in force) or employee misconduct?
 - If misconduct, was it so severe as to warrant denial of benefits?
 - What rule or policy was violated?

The Unemployment Compensation Process

- The Claims Process
 - Either party may appeal the “Initial Determination.”
 - If either party (employee or employer) appears then a telephone hearing is scheduled with an Appeals Referee
 - The Hearing before the Appeals Referee is the most important step in the process
 - It is a “trial” of the employee’s u.c. case
 - Sworn testimony will be taken
 - Documentary evidence can be produced
 - Testimony is presented by both parties through questioning by their counsel or representative, and also by the Appeals Referee

The Unemployment Compensation Process

- The Claims Process
 - The Hearing before the Appeals Referee is the most important step in the process
 - The Appeals Referee will make credibility determinations of the witnesses
 - Difficult because testimony is taken by phone
 - Documents are faxed in and are sometimes difficult to read
 - The Appeals Referee makes a written determination, including Findings of Fact and Conclusions of Law, as to whether the employee will receive u.c. benefits

The Unemployment Compensation Process

- The Claims Process
 - Either party may appeal the Appeals Referee decision to the Unemployment Appeals Commission
 - This is an “appellate court.”
 - There are inherent limitations to appealing a decision to the Unemployment Appeals Commission
 - The Unemployment Appeals Commission can only consider evidence that was presented to the Appeals Referee
 - In other words, no new evidence can be presented
 - The Unemployment Appeals Commission looks only to see whether the Appeals Referee made a correct decision based on its review of the evidence presented to the Appeals Referee
 - The process requires written briefs -- \$\$ to prepare
 - The Unemployment Appeals Commission issues a written opinion
 - Either party may appeal the decision of the Unemployment Appeals Decision to the District Court of Appeals or ultimately state Supreme Court

The Unemployment Compensation Process

- The Claims Process
 - The Unemployment Appeals Commission issues a written opinion
 - Either party may appeal the decision of the Unemployment Appeals Commission to the District Court of Appeals or ultimately state Supreme Court

How to Defend A Claim for Unemployment Compensation

- Understand why an employee is disqualified from receiving benefits:
 - An employee leaves work *without good cause attributable to the employer...* (F.S. 443.101(1))
 - An employee is discharged *for misconduct connected with his or her work...* (F.S. 443.101(1))

How to Defend A Claim for Unemployment Compensation

- Understand why an employee is disqualified from receiving benefits:
 - An employee leaves work *without good cause attributable to the employer...* (F.S. 443.101(1))
 - *Good cause for leaving are circumstances that would “impel the average, able bodied, qualified worker to give up employment.”*
 - An employee is discharged *for misconduct connected with his or her work...* (F.S. 443.101(1))
 - If the discharge is due to misconduct connected with individual’s work, consisting of drug use, as evidenced by a positive, confirmed test

How to Defend A Claim for Unemployment Compensation

- Examples of when employee is awarded benefits (when you might think they were otherwise disqualified)
 - Employee resigned because unable to do physical requirements of job
 - Employee leaves work because there is no reasonable, available grievance procedure to use in complaining about work issues
 - Employee resigns because of excessive overtime
 - Employee strikes another employer for “invading his space.”
- The key to all of these cases is to realize each is fact specific, and depends on the credibility of the witnesses and documentation presented



How to Defend A Claim for Unemployment Compensation

- How to best position your business to win a u.c. claim:
 - If the employee is terminated for violating a policy, establish the following:
 - The policy exists, preferably in writing
 - If not in writing, establish through oral testimony that it is known and followed as a practice
 - The employee knew of the policy
 - Handbook acknowledgement, discussion at orientation or group setting, postings at work, etc.
 - Employee was reminded of the policy

How to Defend A Claim for Unemployment Compensation

- How to best position your business to win a u.c. claim:
 - If the employee is terminated for violating a policy, establish the following:
 - Employee was repeatedly warned that he or she was violating the policy, and warned of the consequences of further violations
 - Employees violating the same policy were disciplined the same way

How to Defend A Claim for Unemployment Compensation

- How to best position your business to win a u.c. claim:
 - If the employee is terminated for violating a policy, establish the following:
 - Employee was repeatedly warned that he or she was violating the policy, and warned of the consequences of further violations
 - Employees violating the same policy were disciplined the same way
 - The importance of the policy to your operations
 - Why was it necessary to terminate the employee?
 - How did the employee's policy violation hurt your business?

How to Defend A Claim for Unemployment Compensation

- How to best position your business to win a u.c. claim:
 - Use live witnesses and documents
 - Witnesses at the Appeals Referee hearing should have personal knowledge of the events leading to the employee's termination. Examples:
 - An employee is terminated for sleeping on the job
 - » Have the employee who personally saw him sleeping on the job testify rather than only the supervisor who was told the employee was sleeping on the job
 - » Understand the sensitive nature of having one employee testifying against another

How to Defend A Claim for Unemployment Compensation

- How to best position your business to win a u.c. claim:
 - Use live witnesses and documents
 - Witnesses at the Appeals Referee hearing should have personal knowledge of the events leading to the employee's termination. Examples:
 - An employee is terminated for falsifying time records
 - Have employee who saw him punch in late testify
 - Have supervisor testify as to his personal work in investigating whether the time records were altered
 - Have human resources or payroll testify as to the authenticity of the pay records and policy against altering time records

How to Defend A Claim for Unemployment Compensation

- How to best position your business to win a u.c. claim:
 - Use live witnesses and documents
 - All of this goes to hearsay. Hearsay is evidence that is offered to prove the “truth of the matter asserted.”
 - Hearsay – “Ben told me that George hit Sam,” if you are trying to prove that George was terminated for hitting Sam.
 - Non-hearsay – “I know George has a reputation for being a hothead because Sam told me that George hit him.”

How to Defend A Claim for Unemployment Compensation

- How to best position your business to win a u.c. claim:
 - Use live witnesses and documents
 - All of this goes to hearsay. Hearsay is evidence that is offered to prove the “truth of the matter asserted.”
 - Hearsay – “Ben told me that George hit Sam,” if you are trying to prove that George was terminating for hitting Sam.
 - Non-hearsay – “I know George has a reputation for being a hothead because Sam told me that George hit him.”
 - At U.C. hearing hearsay testimony can be offered (unlike real court) but it cannot be the basis for deciding whether benefits will be awarded
 - In example above, hearsay can’t support termination for George hitting Sam but can be used to establish something about credibility of George (if George denied hitting Sam)

How to Defend A Claim for Unemployment Compensation

- How to best position your business to win a u.c. claim:
 - Use live witnesses and documents
 - The moral of the story:
 - Use the most direct evidence possible, with the greatest degree of eyewitness testimony as you can
 - Establish a “chain of custody”
 - Critical in drug testing cases, but useful in all others

How to Defend A Claim for Unemployment Compensation

- How to best position your business to win a u.c. claim:
 - Establish a “chain of custody” (and ask, who is the best witness?)
 - A typical scenario to establish:
 - Employee was hired and received a copy of the employee handbook
 - The handbook contains the policy the employee violated
 - Employee acknowledged receipt of the handbook
 - Supervisors spoke about the policy
 - Supervisor disciplined employee for violating the policy and warns of future consequences
 - Supervisor speaks to HR about employee’s violation of policy
 - Employee violates the policy again and is terminated

How to Defend A Claim for Unemployment Compensation

- How to best position your business to win a u.c. claim:
 - Establish any requirements particular to your business
 - Particularly important with safety or security issues
 - Assume the Appeals Referee will have no idea why these issues are important to your business; explain them in elementary terms
 - “Everyone must wear protective equipment because....”
 - “There are security regulations our employees are subject to because...”
 - Document employee’s misconduct
 - These notes can be introduced at Appeals Referee hearing
 - Again, have the author testify about the notes (why take notes, are they accurate, do they reflect what was said)
 - If business records are introduced, have someone with knowledge of the records, as opposed to a custodian, introduce them

How to Defend A Claim for Unemployment Compensation

- Document employee's misconduct
 - What is good documentation?
 - Something an outsider reader can pick up, read and understand the situation without a great deal of other explanation
 - Who was involved?
 - What happened?
 - When did it happen?
 - What are consequences of repeated mistakes?
 - What policy was violated and what is the harm?
 - Time, date and parties are noted
 - All attachments included (if there are any)

How to Defend A Claim for Unemployment Compensation

- How to best position your business to win a u.c. claim:
 - If the employee quits:
 - Establish that other employees work in the same conditions and did not quit
 - Example – physical requirements are reasonable
 - Example – supervisor treated all employees the same way



Some Miscellaneous Rules

- Never ask an employee to waive u.c. benefits
 - It is prohibited by law (F.S. 443.041)
- Never promise u.c. benefits to employee
 - “If you go ahead and quit you will get u.c. benefits”
 - We can choose not to contest a claim but the ultimate determination belongs to AWI
- An unfavorable u.c. decision cannot be used to establish another claim
 - Example – Employee cannot prove he was “wrongfully discharged” just because he received u.c. benefits



Some Final Thoughts

- In periods of high unemployment claimants are likely to receive benefits
- You should use contest of u.c. claims as means of reinforcing your policies
 - Don't concede u.c. claim where employee was accused of breaking important policy
 - Other employees need to know you will vigorously enforce policies



Questions?

Kevin E. Hyde, Esq.

Foley & Lardner LLP

One Independent Drive

Suite 1300

Jacksonville, Florida 32202

(904) 359-2000

khyde@foley.com

Questions?

Kevin E. Hyde, Esq.
Foley & Lardner LLP
(904) 359-2000
khyde@foley.com