

HOW TO PROTECT YOUR COMPANY'S INTERESTS IN VIRGINIA UNEMPLOYMENT COMPENSATION CLAIMS

Unemployment insurance benefits provide temporary financial assistance to workers who are unemployed through no fault of their own and who meet Virginia's eligibility requirements. It is reasonable to want those who are unemployed through no fault of their own to receive financial assistance as the law allows, but prudent to not want to bear the cost of providing compensation to those who should not receive it. At each stage of an unemployment compensation claim, employers need to be aware of how the claim will be processed and what they must do at that point to protect the company or association. Because of the way the process is structured, great care needs to be taken both during the termination and at early stages of any unemployment compensation claim. Failure to understand the process could lead to an unwarranted finding of eligibility.

In Virginia, most employers are required to pay unemployment insurance tax. The unemployment insurance tax funds unemployment compensation programs for eligible employees. The state unemployment tax is paid based upon each employee's wages up to a maximum annual amount, which is currently \$8,000.00. Even if the employer is a non-profit entity, it may be required to pay unemployment tax. The tax exemption under Internal Revenue Code Section 501(c)(3) is only for corporate income tax – it does not apply to unemployment taxes. Virginia law exempts from unemployment tax only nonprofit entities that are exempt under IRC Sec. 501(c)(3) and have less than four employees for 20 weeks in the year. All other non-profit employers are required to file returns and pay the tax, as is any other business. However, churches are exempt from unemployment tax reporting.

When a former employee collects unemployment compensation, the employer does not pay the claim directly. Instead, like an insurance premium, the tax rate applied to taxable wages is dependent on the employer's particular account history and circumstances. As with any other form of insurance, successful claims (called "benefit charges" in the law) charged against the employer's account will increase the tax rate applied to taxable wages. That is why, when an employee is terminated or laid off, it is important to understand the employee's potential eligibility for unemployment compensation and to understand potential courses of action from the beginning.

A person is eligible for unemployment compensation if he or she is unemployed for reasons other than his or her own fault, such as a layoff. If the person quits, or is fired for some form of misconduct connected with the job, then he or she is unlikely to be eligible for unemployment. Generally, misconduct connected with work has been defined by the Virginia Supreme Court to mean when an employee deliberately violates a company rule reasonably designed to protect the legitimate business interests of the employer or "when the employee's acts or omissions are of such a nature or so recurrent as to manifest a willful disregard of those interests and the duties and obligations he owes his employer." If a person is terminated for poor performance, or because they are a "bad fit", that is not "misconduct." However, there may be situations where the performance issues arise out

of an intentional failure to follow instructions, in which case there may be an issue of misconduct.

A common mistake employers make is not being completely candid with their terminated employee in the course of termination. It is understandable to not want to make an uncomfortable situation even more uncomfortable, or to be thought of as “adding insult to injury.” However, not giving the truthful reason for their termination in their exit interview or notice can be detrimental. If an employee is terminated for misconduct, and that reason is not what they are told at the time of termination, or in a termination notice, it will undermine the employer’s credibility in any subsequent hearing.

After a former employee files his or her claim for unemployment compensation, the employer will generally receive a form from the Virginia Employment Commission entitled “Employer’s Report of Wage and Separation Information.” If the former employee quit or engaged in misconduct, it is important to specify this in the employer’s report.

Once a former employee applies for benefits, there are five steps in the adjudication of an unemployment compensation claim, including appeals. Special attention needs to be paid to the first two steps because they will be your only chances to make an evidentiary record. Further appeals (steps three, four, and five) are based solely on the record.

The first step is the Deputy’s Determination. A representative of the Virginia Employment Commission (“VEC”) will conduct a telephone interview to determine the facts and circumstances of the termination. The VEC will then issue a written decision called the Notice of Deputy’s Determination. If either party is not satisfied with the determination, that party must appeal the determination within 30 days, or it becomes final.

The second step is a hearing before an Appeals Examiner. This is a hearing on the record, where each party has the opportunity to present witnesses and documents. Testimony is under oath and the VEC can issue subpoenas to compel the attendance of witnesses or the production of documentary evidence. Each party needs to submit its documentary evidence in advance of the hearing, as the hearing is most often conducted by telephone conference call. The important point is that, with limited exceptions, this is the last chance each party has to put evidence into the record.

If either party is not satisfied with the decision of the Appeals Examiner, the third step is an appeal to the Virginia Employment Commission. All appeals to the Commission are decided on the basis of a review of the evidence in the record, although in limited circumstances the Commission may direct the taking of additional evidence.

The fourth step is judicial review, by an appeal to Circuit Court in the county in which the individual who filed the claim was last employed. An appeal from the VEC is not heard in Circuit Court like any other case – it is strictly on the record. There is no trial, and parties do not get a second chance to present evidence or cross-examine witnesses.

The Circuit Court can set aside a finding of the VEC if there was error in the application or interpretation of the law. However, there is a very deferential standard of review for findings of fact. In the absence of fraud, a finding of fact by the VEC, if supported by any evidence, is conclusive. This standard of review in VEC cases is more deferential than that applied in judicial review of decisions of other administrative agencies.

If either party wishes to appeal the decision of the Circuit Court, the fifth step is an appeal to the Virginia Court of Appeals. This is handled like any appellate case, and is strictly on the existing record.

If an employer asserts that a former employee was terminated for misconduct and is therefore ineligible for unemployment compensation, the initial burden of proof is on the employer (although once misconduct is established and the employee asserts mitigating circumstances, the burden of proof is on the employee to show mitigation). So, if an issue of eligibility is presented, it needs to be thought through at the earliest stages. Great care needs to be taken or the opportunity to submit evidence that would support your case could be lost.

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