



Appealing Unemployment Benefits

By Karen S. Aframe | Published in Business NH Magazine Wednesday, June 1, 2011

You would think any headaches associated with a problem employee would end with the words, "You're fired." However, that employee can continue to cost you money. When an employee receives unemployment compensation benefits, it can increase the employer's unemployment tax rate. Many employers wonder whether they should appeal unemployment benefits being awarded when the former employee has been "fired for cause" or resigned.

While winning an appeal means avoiding a hike in the unemployment tax rate, filing an appeal creates its own risks for the company. Employers spend considerable time and expense in the appeals process, so companies must be sure they have a stronger case than the employee. In addition, employers should consider the possibility that the former employee will be able to use the unemployment appeals process to develop a more serious employment-related claim. So before rushing off to appeal an award of unemployment benefits, evaluate whether such a challenge will be a productive use of your company's resources and is worth the risk of spurring additional litigation.

Unemployment for the Fired

According to NH law, a person is disqualified from obtaining unemployment benefits if he or she was discharged for misconduct connected with work. The general rule is that isolated or inadvertent instances of unsatisfactory conduct do not disqualify a person from benefits, but recurring careless or negligent acts will.

That said, a single instance of misconduct may be sufficient to disqualify someone from receiving unemployment benefits if the former employee deliberately violated a company rule he or she knew about and the rule was designed to protect the legitimate business interests of the employer.

If the employee's termination is connected with work and is the result of recurring carelessness or negligent acts, the employer must be able to present evidence of multiple instances—preferably written documentation generated and presented to the employee when the carelessness or negligence occurred. This documentation should demonstrate that the employee knew the employer considered the carelessness or negligence to be unacceptable conduct that could lead to termination.

An employer does not have to wait until after an employee has done tangible harm before firing an employee. However, the employer's mere dissatisfaction with the quality of an employee's work is not enough to demonstrate that the employee was careless or negligent, especially if the employer did not clearly explain to the employee how he or she failed to meet expectations.

In order to successfully appeal unemployment benefits to an employee who has been fired for a single instance of misconduct, the employer must show that the employee violated a company rule and that the violation was deliberate. The employer should be able to demonstrate the employee was aware of the rule prior to the violation, such as having a written employment manual and an acknowledgment

receipt signed by the employee. The employer should also be able to articulate how the violated rule was designed to protect its legitimate business interests.

Employers need to maintain a solid paper trail about the reason for any termination. Because the burden of proving misconduct rests with the employer, a company generally will be unable to prevail based solely on its mere assertion of misconduct without any supporting evidence. Consider whether such evidence is available before objecting to the fired employee's benefits application.

They Quit! Can They Collect?

Employees who quit can seek unemployment benefits. The general rule is that an individual who leaves work without a good cause that can be attributable to the employer will be disqualified from obtaining benefits. Benefits are usually paid to a quitting employee when he or she can prove the decision was connected to the job and was reasonable under the circumstances. If an employee claims that she quit because she found her supervisor difficult, the question will be whether the supervisor was so abrasive that quitting was reasonable under the circumstance. The burden of proof is then on the employee.

Most decisions to quit for personal reasons will result in the disqualification from unemployment benefits. There are, however, exceptions that permit someone to collect benefits even after quitting a job for personal reasons, including:

- The employee has a non-work related illness or injury (other than pregnancy), which a doctor says will prevent the employee from performing some or all of the job duties.
- The employee quit to accompany a spouse to a place from which it is impractical to commute.
- The employee quits due to the illness or disability of a member of his or her own family.
- The employee quits because he or she reasonably believed it was necessary to protect him or herself or a family member from domestic abuse.

Moreover, employees who are otherwise eligible for benefits will not be disqualified if they are unable to accept new employment for reasons relating to public policy, such as having to care for a mentally or physically disabled adult or being the only adult available to care for a child under 16.

What To Do

In addition to the costs involved in preparing for and attending the unemployment hearing, an employer should resist reflexively objecting because of the potential risk involved, especially where the relationship with the employee has been acrimonious. Having an unemployment hearing about the basis for a former employee's separation will result in the employer, supervisors and other workers having to testify under oath and being subject to cross-examination by the former employee or his or her lawyer. This will give the disgruntled former employee an excellent chance to engage in fact-finding to develop a claim for illegal discrimination, wrongful termination or some other serious employment-related claim.

The NH unemployment compensation statute is complicated, so before deciding to object to an unemployment benefits application or appeal a benefits award, an employer should consider consulting with counsel to determine the likelihood of success in mounting a challenge and evaluate the risk involved in bringing the challenge. n

Karen S. Aframe is an attorney with the Manchester office of Bernstein Shur. She is a member of the firm's Labor and Employment Practice Group. She can be contacted at 603-623-8700 or kaframe@bernsteinshur.com.