

Unemployment Compensation Hearings – How to Win



The NFIB Small Business Legal Center is the voice for small business in the courts and the legal resource for small business owners nationwide.

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Overview

- When to Contest a Claim
 - Financial Eligibility
 - Able & Available to Work
 - Reason for Termination
- Winning in Unemployment Hearings
 - Before, How to prepare
 - During, What to do at the hearing
 - After, How to follow up



Should You Contest a Claim?

- WHY was the employee terminated?
- WHAT evidence supports decision?
- HOW likely is the former employee to bring some other action? (harassment, discrimination)



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When to Contest – Financial Eligibility

- Financial Eligibility rules vary from state to state
- Usually based on working at least so many weeks in a certain time period.
- Find links to your state's unemployment agency at the [U.S. Department of Labor](#) Web site.

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When to Contest – Able & Available to work

- Able to work
 - Physically & mentally capable of working
 - Still eligible if ability to work is only restricted
- Available to work
 - Registered for work with unemployment office
 - Willing to accept suitable work

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When to Contest – Reason for Termination

- Generally eligible if:
 - Laid off due to lack of work
 - Terminated for work related issue that do not rise to the level of “misconduct”
- Generally ineligible if:
 - Voluntary quit
 - Terminated for work related misconduct.



Reason for Termination – Layoff

- Generally eligible if terminated due to lack of work or as part of a workforce reduction
- Exceptions:
 - Failed to return to work when recalled
 - Refused suitable alternate work
 - Offers to return to work or accept alternate work should be clearly stated in writing



Reason for Termination – Voluntary Quit

Generally ineligible if employee voluntarily quit without good cause.

- Burden of proof on employee to prove good cause
- Burden on employer to prove voluntary
 - Voluntary leave of forced resignation?
 - Can a resignation be revoked?
 - Did employee abandon the job?



Reason for Termination – Voluntary Quit

Other Issues

- Family Issues
- Conditions of Employment
- Child Care
- Health Problems
- Harassment / Discrimination
- Transportation



Reason for Termination – Misconduct

- Misconduct is more than negligence
- Not the same thing as “poor performance”
 - Termination for poor performance will not usually disqualify a person from unemployment.
 - Must be a violation of a uniformly enforced company policy that the employee was aware of



Reason for Termination – Misconduct

Willful misconduct can be:

- Disregard of employer’s interest
 - Mistreating customers
- Deliberate violation of rules
 - Excessive absenteeism
- Disregarding standards of behavior
 - Harassing or mistreating fellow employees
- Action greater than ordinary negligence
 - Criminal acts such as theft, assault



Reason for Termination – Misconduct

Burden of Proof is on Employer

- What, employer interest, rule, standard of conduct, or law was violated?
- Was employee aware of the violation, was it intentional?
- How have other employees who engaged in similar conduct been treated?
- Was the employee's action reasonable given the surrounding circumstances?



Reason for Termination – Misconduct

Other things to consider:

- Did the conduct result in immediate termination?
- Did the termination result from an accumulation of warnings?
- Is there a procedure in place for the employee to protest disciplinary actions?



Reason for Termination – Misconduct

Common issues:

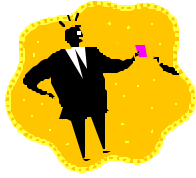
- Absenteeism / Tardiness
- Attitude
- Carelessness / Negligence
- Conditions of Employment / Workplace
- Dishonesty / Falsification
- Incompetence



Reason for Termination – Misconduct

Common issues con't:

- Insubordination
- Intoxicants
- Language
- Licensing issues
- Medical leave
- Refusal to work overtime
- Rules violations



Reason for Termination – Misconduct

Employer should be able to prove:

- Existence of rule that employee violated
- Employee acted intentionally
 - Employee knew or should have known of the rule, and knew that actions violated the rule
- Rule is reasonable / necessary
- Rule was violated
- Rule was uniformly enforced



Unemployment Hearing

Prepare, Prepare, Prepare!



Unemployment Hearing - Before

- Read the notice of hearing - telephone or in person
- Review your case file the day before the hearing
- Bring original and two copies of documents
- Arrive early so you can review documents in the state's file



Unemployment Hearing - Before

- Subpoena witnesses
- If a witness is unable to attend, request a postponement/adjournment
- Review case with witnesses before hearing



Unemployment Hearing - During

- Listen to the Hearing Officer and follow instructions
- Don't speak out of turn or interrupt
- Keep calm demeanor and keep emotions in check
- Be the good guy – show respect



Unemployment Hearing - During

When answering questions:

- Make sure you understand the question being asked
- Answer only the question asked
- Do not elaborate on the answer
- It is acceptable to say "I don't know"



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Unemployment Hearing - After

- If you want to appeal, follow the instructions
- Identify the specific findings or legal conclusions with which you disagree



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Key Points

- Poor performance is not misconduct!
- Establish a formal, written policy for infractions that may lead to discipline/termination
- Have employees sign to acknowledge receipt of the policy
- Apply policy consistently
- Document misconduct with the warning "You are at risk of being fired"
- Have employees sign to acknowledge warnings

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Key Points

- For voluntary quits
 - Get resignation in writing
 - Document no call, no show, and follow up
- For terminations:
 - Document progressive discipline
 - Document last infraction before termination is critical
 - Terminate as soon as possible after last infraction



For More Information

- Find your state's unemployment agency at the [U.S. Department of Labor](http://www.dhs.gov) Web site.
- Sample HR forms, policies, warning letters, etc.
http://humanresources.about.com/od/policiesamples/a/policy_samples.htm



Help is Available!



- **NFIB Employment Law Hotline** provides NFIB members **FREE** legal advice on employment law
- **(866) 678-NFIB**



Help is Available!



- **NFIB Model Employee Handbook** is available **FREE** to NFIB members
- **(866) 678-NFIB**



Thank you!

Contact us at: legalcenter@nfib.org