Unemployment Insurance Reform: What Employers Need to Know

LABOR & EMPLOYMENT LAW FROM A DIFFERENT ANGLE

Presented By:

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Road to Reform

- Reform efforts started in 2011
  - In November 2011, Employment Security Commission (ESC) moved from stand-alone agency to a division of the N.C. Commerce Department (renamed Division of Employment Security or DES)
  - Three-member Board of Review created to write new regulations governing agency operations and hearing procedures. Will also hear appeals of decisions from appeals referees and hearing officers.
    - Board of Review to consist of one employee representative, one employer representative, and a chair (must be a lawyer) appointed by Governor and confirmed by General Assembly
    - To date, no one has been appointed to Board of Review
    - Appointments to come before end of Summer 2013?

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Road to Reform

- Effective November 2011, the General Assembly clarified the definition of “misconduct” by adding specific examples of conduct that should disqualify an employee from receiving unemployment such as:
  - Theft
  - Illegal harassment of co-workers/subordinates
  - Consumption of alcohol or drugs on employer’s property or reporting to work significantly impaired by alcohol or drugs
  - Forgery or falsification of documentation or data, including information in an employment application
  - Violation of written absenteeism policy
  - Refusal to perform assigned work tasks
  - Arrest or conviction for violence, sex crimes or illegal drugs if related to work or in violation of work rule

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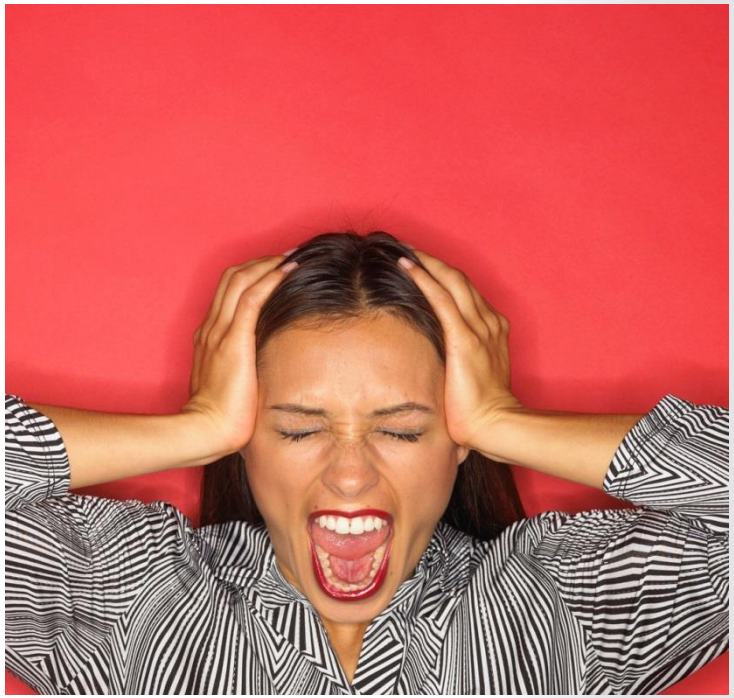
Why amend the law to include these examples?

- **Employer outrage**
- People who did the things now listed in the misconduct statute were getting unemployment benefits



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Road to Reform

- By 2012, North Carolina owed $2.5 billion to federal government for benefits paid to claimants that exceeded revenue from unemployment tax collections

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How Did This Happen?

- Payments to claimants that never should have happened:
  - USDOL estimates NC paid $179 million in improper payment in 2012 alone
  - 42% of claimants accepted benefits after returning to work
  - 36% of claimants initially determined to be eligible later disqualified for benefits
- “Non-charging” of benefits paid to certain claimants further depleted the state UI fund
- Not recouping costs of “attached claims”
- Series of benefit reductions left many employers, i.e. 30,000, not paying any unemployment insurance taxes

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Comprehensive Reform Arrives

- Passed in Feb. 2013 and applies to new claims filed on or after July 1, 2013
- Changes benefit amount and duration
- Changes eligibility in both “discharge” and “quit” cases
- Virtually eliminates “attached” claims
- Changes when someone must accept “suitable work”

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Changes to benefit amount and duration

- Maximum weekly benefit reduced from $535 to $350
  - Amount now determined by divided wages earned in last two quarters in base period by 52 and capping at $350.
  - So for $30K a year worker, weekly benefit is $288 ($15,000 ÷ 52)
  - Cap affects earners making over $36,400
- Maximum number of benefit weeks reduced from 13-26 to 12-20
  - For claims filed on or after July 1, maximum number of benefit weeks likely to be 13 if NC's seasonal adjusted unemployment rate stays above 9%

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Changes to Discharge Cases

- Biggest change: "Substantial fault" eliminated
- Under current law, employers could avoid charges to their account where an employee is discharged by showing that **either**:
  - The employee was discharged for "misconduct"
  - The employee was discharged for "substantial fault"
- For claims filed on or after July 1, 2013, "substantial fault" will be eliminated so employers must show higher "misconduct" standard to avoid charges to UI account in discharge cases

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Changes to Discharge Cases

- The benefits of having “substantial fault” in current law:
  - Employees discharged for violating work rules (or other reasons) not rising to the level of misconduct, would be disqualified for a period of 4 to 13 weeks if employer could show employee was discharge due to “substantial fault” connected with work
  - Employee drew benefits after disqualification period but employer’s UI account was not charged for benefits drawn
- The problem:
  - No one paying for the “free” benefits drawn by “substantial fault” claimants (at least 1 out of 3 discharge cases)

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What Kinds of Cases Does Eliminating Substantial Fault Impact?

- Discharges involving repeat violations of “minor” work rules, e.g. tardiness, that hearing officer felt were not significant enough to amount to “misconduct”
- Other acts or omissions that might have been “misconduct” in absence of mitigating circumstances
  - Employee with otherwise good work record “blows up” and uses profanity toward supervisor
  - Employee engages in repeated violation of work rule but earlier warnings poorly documented

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The Bottom Line

- The bad news: Elimination of substantial fault likely means that more discharged employees will be eligible to draw UI benefits because the misconduct standard remains high and is unchanged by new law
  - Attorneys for claimants likely to look at extensive case law involving "substantial fault" findings and argue that employees with similar violations must now be permitted to draw benefits because their conduct did not meet higher "misconduct" standard
- The good news: Discharged employees deemed eligible for benefits will draw for much shorter amounts of time reducing the impact to employer's UI tax rates

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Changes to "Quit" Cases

- Burden still on employee to show "good cause attributable to employer" but this is now a harder showing for employees under new law:
  - No "good cause" for quitting unless work hours reduced by more than 50% (only 20% under current law)
  - Under new law, can suspend employees w/o pay for disciplinary reasons up to 30 days (only 10 days under current law)
  - Same as current law: Unilateral and permanent reduction in rate of pay of 15% or more is "good cause" for quitting
    - But does not apply to performance-based reductions

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Changes to "Quit" Cases

- Many "non-charging" grounds eliminated under new law:
  - Leaving work due to "health condition" of employee or immediate family member no longer enables employee to draw benefits
  - Employee who quits because spouse must move for work not eligible to draw benefits under new law (except where spouse is active duty military)
  - Employee who is notified of impending separation (i.e. facility closing) but shows it is impractical to work until date of layoff cannot show "good cause" under new law

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Changes to Attached Claims

- What is an “attached claim”?
  - A claim filed by an employer on behalf of an employee who remains “attached” to the employer’s payroll
  - Covers work weeks where employee works less than three “customary scheduled full time days” or there is no work is available at all
  - These currently make up about half of all claims filed with DES

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Attached Claims Limited to One Per Calendar Year

- Current law: Employer can file attached claim for employees during any weeks with slow/no work
- On or after July 1: Employer can only file **one** attached claim per calendar year. Must also meet the following requirements:
  - Employer's UI account must have a balance of $0 or greater at time of filing or make payment to DES to bring account balance to at least $0
  - Employer must pay **full costs** of attached claims to DES **at the time the claim is filed**
  - Maximum length of time is six weeks

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Increased Waiting Period for All Claims

- Current law:
  - Only one week per calendar year
  - If “unemployed” twice in one year, immediately eligible to begin drawing benefits the second time, etc.
- On or after July 1:
  - One week waiting period for each claim
  - If unemployed multiple times in calendar year, must wait a week **each** time a claim is filed
  - If layoffs last only a single week at a time, attached employees would not ever be eligible to draw benefits even if employer meets other requirements to file attached claims for employees

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Changes to Suitable Work

- Under both current and new law, claimant can be disqualified from receiving unemployment benefits if he or she refuses to accept “suitable work”

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What is Suitable Work?

- Current Law:
  - Regardless of length of time claimant had received benefits, DES considered:
    - Degree of risk involved to claimant's health, safety, and morals
    - Claimant's physical fitness and prior training
    - Claimant's experience and prior earnings
    - Claimant's length of unemployment and prospects for securing local work in his customary occupation
    - Distance of the available work from his residence

- July 1:
  - During first 10 weeks, DES to consider factors under current law
  - But after 10 weeks of benefits, **any job** paying 120% of claimant's weekly benefit amount is "suitable work"
    - So, for claimant drawing $350 maximum benefit, this is any job paying $420 per week ($10.50 per hour)
  - Key question: How will this be enforced when new law takes effect? Under current law, failure to accept suitable work is rarely a basis for disqualification

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With all these changes, where do employers go from here?

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Consider the most important goals of an unemployment hearing

- Non-Charging of Benefits
- Discourage Lawsuit by Separated Employee
- Avoid Liability if Complaint or Lawsuit Arises from Employee's Separation

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Proving Your Case

- **Objective:** Prove the reason for the separation
  - Important for the unemployment claim **and** any lawsuit filed by the employee
- Starts with initial documentation
  - After claim is filed, employer must complete response to Notice of Claim and Request for Separation Information by deadline on form
  - Provide short, clear explanation of your position aimed at getting the claims adjudicator to decide in your favor
  - Attach related prior written warnings and work rules to the response

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Initial Documents Now More Important Under New Law

- Under new law, initial documentation more important
  - New provision would allow employer UI accounts to be charged for erroneously paid benefits if employer fails to "timely or adequately" respond to written request for information **and** "has a pattern of failing to respond timely or adequately"
  - So, employer could prove claimant discharged for misconduct at hearing stage but still be charged for benefits paid to claimant before the hearing if employer failed to "timely or adequately" respond to Request for Separation Information
- Statements made in initial documentation difficult to "retract" or "reel back in" if incorrect
- A "win" before the claims adjudicator places burden of timely appeal on employee

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Proving Your Case

- After claims adjudicator makes initial determination about claimant's eligibility, losing party has 30 days to appeal and get a hearing
- Prepare for hearing:
  - Pay careful attention to **deadlines** (i.e. any documents must be received by opposing party in advance of hearing) and **details** (i.e. is the hearing by telephone or in-person?)
  - Call ahead to find out if employee has a lawyer
  - Understand the elements that must be proven in your case
  - Be clear on which party has the burden of proving these elements
- Almost every case is won or lost at hearing stage

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Proving a “Discharge” Case

- **Employer** must put on evidence first in hearing
- Under new law, burden on **employer** to show employee discharged for “misconduct” connected with work
- Misconduct is **either** of the following:
  - Conduct evincing a willful or wanton disregard of the employer's interest as is found in deliberate violation or disregard of standards of behavior that the employer has the right to expect of an employee or has explained orally or in writing to an employee
  - Conduct evincing carelessness or negligence of such degree or recurrence as to manifest an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer

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Definition of Misconduct

- New law includes specific examples of misconduct from 2011 amendments:
  - Theft
  - Illegal harassment of co-workers/subordinates
  - Consumption of alcohol or drugs on employer's property or reporting to work significantly impaired by alcohol or drugs
  - Forgery or falsification of documentation or data, including information in an employment application
  - Violation of written absenteeism policy
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Definition of Misconduct

- In addition to these examples, the new law also includes one example of misconduct from the 2011 amendments that was suspended by DES due to objections by USDOL:
  - “Failure to adequately perform employment duties as evidenced by no fewer than three written reprimands in the 12 months immediately preceding the employee's termination”
- Open question: After July 1, can employers rely upon this provision to show misconduct?
- Likely Answer: Yes—At least until USDOL completes its review of the new law later in 2013

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Language to Avoid in Discharge Cases

- "Poor job performance" cases are almost always losers
- While it is essential to always be completely truthful in any documentation or testimony presented to the DES, where possible, avoid using language that suggests that the employee was simply a "poor performer" or did not have the ability to do the job
  - Exception: Discharges for "bona fide inability to do the work" within first 100 days of employment
- Instead, document instances where employee was warned about performance (i.e. failure to follow instructions, company policy, etc.), told to correct it, and informed that future violations would jeopardize job

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Essential Documents in Most Discharge Case

- Copy of rule or policy employee violated and, if available, consequences for violation
- Proof that employee was informed of this rule or policy and consequences (i.e. signed acknowledgement, orientation attendance sheet, etc.)
- Documentation of employee's violation of work rule or policy (i.e. attendance sheets, write-up, customer complaint, etc.)
- Any documentation that employee was previously warned about this conduct and told that repeating same conduct would jeopardize employee's job

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Proving a “Quit” Case

- **Employee** must put on evidence first in hearing
- Burden on **employee** to demonstrate “good cause attributable to employer”
- “Good cause” means a reason for leaving work that would be deemed by reasonable men and women as valid and not indicative of an unwillingness to work
- “Attributable to employer” means a cause that is “produced, caused, created or as a result of actions by the employer”
- This standard remains unchanged by new law

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Examples: “Good Cause” Attributable to Employer

- Employee quits due to sexual, racial (or other) illegal harassment
- Employee quits because employer required employee to perform work that violates ethical or moral standards
- If employee says they quit for one of these reasons, employer must show these reasons aren’t true to avoid benefit charges
- If these issues are likely to come up, hiring a lawyer for hearing is a good idea

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Avoiding Future Liability

- **Objective**: Protect the record
- Carefully consider whether employee is likely to pursue complaint with state or federal agency or lawsuit arising from separation
  - Has employee threatened to sue or file complaint with government agency?
  - Is employee building a “paper trail”?
  - Does employee have an attorney?
- Unemployment hearing may be used by employee as a “free shot” at exploring potential legal claims against employer, however, this can work both ways

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Evaluate Your Case

- Do the **costs** (i.e. attorneys fees, lost productivity) and **risks** (i.e. damaging the record) of fighting the claim outweigh the potential **reward** (i.e. non-charging of benefits)?
- How likely are you to win?
  - Do you have evidence that employee clearly violated a work rule and that the rule and consequences for violation were communicated to or known by employee?
  - Do you have sufficient first-hand testimony to make your case?
- Not challenging one employee's claim doesn't prevent you from challenging others

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Questions?

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