**Unemployment Insurance Hearing Decisions – To Appeal or Not To Appeal?**

Most state Unemployment Insurance (UI) programs provide parties to the process an avenue of administrative appeal to a decision issued as a result of an initial UI hearing before an appeals referee or administrative law judge. A few states (e.g., DC, HI, NE and MN) do not have such a second level of administrative appeal, but, instead, allow for review of a hearing decision by a judicial or appellate court (e.g., a Superior Court or a Court of Appeals). For those that do offer a level two administrative appeal, the review may be conducted by a politically-appointed Commission or Board – usually comprised of three or five members, or by a reviewing judge. Most Boards permit interested parties to submit argument in writing only, but some (e.g., NV, SC, VA and WV) will accept either written or oral argument, while others (e.g., IL) allow oral argument if requested.

So, what subject is proper to consider before a Board of Review? While some state laws provide that a Board may conduct its own hearing anew, the majority allow only for a review of the record made at the first hearing. And, while a Board may remand a hearing record for new evidence on a particular point or may, itself, conduct a limited evidentiary hearing for the same purpose, their review generally is limited to deciding whether or not the record at hand contains *substantial evidence* to support the initial UI hearing decision. If the Board finds that it does, their decision will affirm the hearing decision; if not, their decision will overturn the hearing decision.

What is substantial evidence? In the matter of a UI hearing decision, it is credible evidence or proof, the greater weight of which tends to establish the elements of the matter in issue. For example, in the context of a UI hearing, where the matter at issue is whether or not the claimant was discharged for work-connected misconduct, the essential elements are

- a knowing – evidenced by warnings or counseling
- violation – evidenced by the “last incident”
- of a standard of behavior – evidenced by an employer policy
- which the employer had the right to expect of the employee--evidenced by a showing that the policy furthered a legitimate employer interest.

What criteria should employers consider in deciding whether or not to appeal a hearing decision? Employers must keep in mind the essential elements required to prove or establish the matter at issue, whether they are the elements of “misconduct” for a discharge separation or “good cause” for a quit separation:

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State Updates

AK – Two bills in Alaska, SB 120 and HB 59, introduced in the last legislative session, will be carried over to the session beginning January 15, 2008. They propose to increase the state’s maximum weekly unemployment insurance benefit amount from $248 to $370 and to tie subsequent changes to an economic indicator not to exceed 50% of the state’s average weekly wage from the prior calendar year.

HI – The weekly unemployment insurance weekly benefit amount increased effective January 1, 2008, from $475 to $523. The minimum benefit amount remains $5. Legislation passed last session changed the formula for calculating the maximum weekly amount to 75% of the state’s average weekly wage for the benefit years beginning January 1, 2008 through December 31, 2010.

LA – House Bill 345 became law on June 22, 2007. Currently, experience-rated employers who report 250 or more employees in any calendar quarter must file their contribution and wage reports on a magnetic medium. Employers with fewer than 250 employees may elect to use magnetic reporting and the employers who do not elect to use magnetic reporting file on hardcopy. This bill authorizes the secretary by administrative rule to require employers with specified numbers of employees to file such reports by magnetic media or by other electronic means. The following employers may be required to file contribution and wage reports at the following times:
• For employers employing 200 or more employees, reports due after January 31, 2010;
• For employers employing 100 or more employees, reports due after January 31, 2012; and,
• For employers employing fewer than 100 employees, reports due after January, 31, 2014.
The secretary may waive reporting requirements for an employer if hardship is shown by the employer in a request for waiver.

MA – Effective October 1, 2007, the maximum weekly unemployment insurance benefit amount changed from $575 to $600. In Massachusetts, one can draw benefits for up to 30-weeks. In addition, a dependents’ allowance of $25 per dependent is payable in an amount not more than one-half of a qualifying claimant’s weekly benefit amount.

MD – The maximum weekly unemployment insurance benefit amount, effective October 7, 2007, increased from $340 to $380. The minimum remains $25.

MO – The maximum weekly unemployment insurance benefit amount increased for claims filed on or after January 1, 2008, from $280 to $320. The minimum weekly amount is $45.

NC – The maximum weekly unemployment insurance benefit changed to $476 from $457 on August 1, 2007. The minimum amount changed from $35 to $41.

NE – Effective with claims filed on and after January 1, 2008, the maximum weekly unemployment insurance benefit amount changed from $288 to $298. The minimum weekly amount is $30.

NJ – Effective January 1, 2008, the maximum weekly unemployment insurance benefit amount increased from $536 to $560.

For governmental employers who elect to pay the unemployment tax, the rate will increase from .4% to .5%.

UI Issues Conference Slated for May 2008

The 27th Annual UI Issues Conference presented by UWC – Strategic Services on Unemployment & Workers’ Compensation will be held May 20-22, 2008, at the Renaissance Cleveland Hotel in Cleveland, OH.

Conference topics to be covered in general sessions and workshops include: UI trends and statistics, the impact on employers of emerging consolidated entity policies, the impact of immigration to the UI system, electronic UI reporting, re-employment efforts, and 2008 UI tax increases, benefit expansions and federal mandates.

Conference registration information can be found at www.uwcsstrategy.org

UWC, Inc. is considered the “voice of business,” as the only national organization serving the interests of employers on matters of Unemployment Insurance and Workers’ Compensation.

“Save the Date” to attend this exciting event.
Performance Reviews and Unemployment Insurance

Accurate and complete worker performance reviews are often helpful in the unemployment insurance claim adjudication process. Employers experience problems in the process when they have carried along a worker with satisfactory (or better) scores and then decide to discharge the employee due to performance issues. The claimant or adjudicator surely will call attention to past evaluations – especially ones which are favorable or satisfactory. In reviewing performance, careful attention should be given to making an honest assessment of the worker’s abilities, strengths and weaknesses and clear instruction provided on how the employee can make necessary improvement. Properly prepared evaluations always improve employer credibility in the unemployment process.

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• Does the hearing decision omit or misstate material facts which, if included or restated accurately to reflect evidence on the record, would lead to a different conclusion?
• Where certain evidence or testimony is deemed more credible by the referee or administrative law judge than other evidence or testimony, is the credibility conclusion of the referee supported by findings of fact in the hearing decision to support that conclusion?
• Is hearsay evidence inappropriately given greater weight than firsthand evidence on an essential element?

While it is often natural to be upset when the hearing officer “takes the other side,” employers should keep in mind that UI laws afford another opportunity when the initial hearing decision is not the expected outcome. This second opportunity to appeal is not necessarily a “second bite of the apple” by having another hearing. It is largely a measured process where the accuracy of the established hearing record is considered. Employers, with the help of their ADP Unemployment Group representative, should review and discuss the initial UI hearing decision before deciding that an appeal to the next level is appropriate.

New QETP Initiative between IRS and State Workforce Agencies

The Internal Revenue Service (IRS) and more than two dozen state workforce agencies recently entered into a program to share data for the purpose of better identifying employment tax avoidance schemes and illegal practices, and to increase voluntary compliance with employment tax rules and regulations. Such schemes include plans or practices to avoid payment of unemployment tax, fraudulent filings and improper worker classification. The program has been labeled the “Questionable Employment Tax Practices” (QETP) initiative.

The issue of tax avoidance and noncompliance was undertaken by the IRS, the National Association of State Workforce Agencies, the U.S. Department of Labor, the Federation of Tax Administrators and five state workforce agencies - CA, MI, NJ, NY and NC. This group developed the QETP initiative and endorsed a Memorandum of Understanding (MOU) as a tool to increase employment tax compliance at the federal and state levels. At present, the MOU participants are AR, AZ, CA, CO, CT, HI, ID, KY, LA, MA, ME, MI, MN, ND, NE, NH, NJ, NY, OH, OK, RI, SC, SD, TX, UT, VA, VT, WA and WI.

The QETP initiative and the MOU provide a uniform and centralized mechanism for IRS and state employment tax data exchanges. The MOU:
• Enables the IRS and state workforce agencies to exchange audit reports and audit plans and to participate, as warranted, in collaborative investigations;
• Promotes consistency among the IRS and states in examination results and in rules and regulations (e.g., where the IRS classifies a worker as an independent contractor while a given state might classify the same worker as an employee); and,
• Provides employment tax training opportunities for the business community.

Participants must have systems to insure the security of the data received through the exchange agreements.

Foremost in this QETP effort is a desire to achieve a level playing field for all employers, by reducing noncompliance with federal and state employment tax laws, by eliminating inconsistencies in such laws and by enhancing employers’ knowledge of the requirements of employment tax laws and regulations.
The US Department of Labor (US DOL) oversees and influences how states manage their individual unemployment insurance programs. In this regard, they periodically review detail about how claims are adjudicated to assure quality standards are met uniformly across the nation. Benefit Accuracy Measurement (BAM) is the name of the program responsible to insure that state and federal unemployment insurance (UI) eligibility requirements are correctly applied by state adjudicators and that trust funds are protected as a result.

Each quarter states are directed to sample the UI work being done by their staffs. The BAM unit is given a fixed number of randomly-selected claims to audit. BAM auditors will ask interested parties, including employers, again for information that was previously submitted as the evaluation process takes place. They seek wage and separation information and they may even adjudicate the claim with a different result. For example, a claim previously denied may be changed so that UI benefits are paid.

The BAM audit results for calendar year 2006 have been published by the US DOL. More specific information is available using this link: [http://ows.doleta.gov/unemploy/bam/2006/bam-cy2006.asp](http://ows.doleta.gov/unemploy/bam/2006/bam-cy2006.asp).

Recognizing that the results are estimates of overpayments based upon the investigation and analysis of a statistical sample of all UI cases processed, the report estimates that nationally $3.021 billion in benefits were overpaid in 2006. This equates to a national BAM Annual Report Rate of 9.99%. The report shows benefit overpayment rates for each state, but strongly cautions that differences—in some cases remarkable—among states are attributable to variations in states’ laws, rules and policies—and the interpretation of these—which are applied to determine UI eligibility. Not only does the report show such information by state, but it, also, shows it by responsible party (e.g., claimant, employer, state agency, and combinations of each of these) and by issue type (e.g., separation, work search, ability and availability, earnings, etc).

BAM statistics provide a valuable tool for the US DOL, states, employers and claimants to measure the performance of the UI system.