

# **MANAGING UNEMPLOYMENT LIABILITY AND RESPONDING TO CLAIMS FOR BENEFITS**

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## I. DISPUTING AN UNEMPLOYMENT CLAIM

### A. Key Statutory Language:

1. Section 421.29 - An individual is disqualified from receiving benefits if he or she: (a) Left work voluntarily without good cause attributable to the employer or employing unit. (b) Was suspended or discharged for misconduct connected with the individual's work or for intoxication while at work. (c) Failed without good cause to apply diligently for available suitable work after receiving notice from the unemployment agency of the availability of that work or failed to apply for work with employers that could reasonably be expected to have suitable work available. (d) Failed without good cause while unemployed to report to the individual's former employer or employing unit within a reasonable time after that employer or employing unit provided notice of the availability of an interview concerning available suitable work with the former employer or employing unit. (e) Failed without good cause to accept suitable work offered to the individual or to return to the individual's customary self-employment, if any, when directed by the employment office or the unemployment agency.

### B. Timeline for Unemployment Benefit Requests:

1. Employee files for benefits - Shortly after separation.
2. UIA mails a Request for Information to the employer – Shortly after separation.
3. Employer has 10 or 30 days to respond to the Request for Information.
4. In a short period of time (usually about a week), the UIA will issue a second Request for Information or a Determination stating the worker

is entitled to benefits or is disqualified for benefits.

5. The party that does not agree with the Determination can protest and request a Redetermination. The protest must be **received** by the UIA within 30 days of the mail date of the Determination.
  6. Soon after, the Redetermination will be issued.
  7. The party that does not agree with the Redetermination can protest and request a hearing before an administrative law judge ("ALJ") by submitting a request within 30 days of the mail date of the Redetermination.
  8. A hearing will be scheduled by the Office of Administrative Hearings. Usually, notice will be given only a week or two in advance of the hearing.
  9. All evidence that will be submitted at the hearing must be received by the ALJ and the other parties before the hearing.
  10. At the hearing, the ALJ will take testimony and receive evidence from both the claimant and the employer.
  11. Soon afterwards, the ALJ will issue a written decision which summarizes the ALJ's factual conclusion and legal rationale for the decision.
  12. The ALJ's decision is appealable to the Michigan Compensation Appellate Commission.
- C. New claims for unemployment benefits:
1. When a worker files a new claim for benefits, the UIA must decide two things:
    - a. Did the worker earn enough in wages in his or her recent work history to be entitled to unemployment benefits, and
    - b. What is the reason the worker is no longer working, and whether the worker is eligible and qualified to draw

unemployment benefits. Once the worker files a claim with the UIA, we call the worker the unemployed worker or sometimes the "claimant" for unemployment benefits.

2. The unemployed worker and employer are both interested parties in the claim. As such, both are equally entitled to see the file of the claim, and to formally protest or appeal any adverse determination made by the UIA concerning the claim. The employer's response to the monetary determination must be received by the UIA within 10 calendar days after the mail date shown on the form. If the UIA needs more information from the employer regarding a claimant's separation from employment, computer-generated Form UIA 1713, "Request for Information Relative to Possible Ineligibility or Disqualification" is sent to the employer. If the employer provides information they feel should disqualify the unemployed worker or should result in no benefits being charged to the employer, the UIA may ask for further information from the unemployed worker and the employer.
3. If the UIA does not receive a response from the employer, then the UIA will set up the claim on the basis of wages previously reported or as provided by the unemployed worker. The UIA will also charge the employer for benefits paid to the unemployed worker. Once the UIA has paid benefits based on the information the employer provided or the unemployed worker reported, the law says we cannot credit the employer's account for any overpayments for weeks of benefits paid before we received the employer's information, if the information we used proves inaccurate.
4. The entire benefit payment for each of the first two weeks of the claim will be charged to the claimant's most recent employer at the time the claim was filed if that employer is liable for paying unemployment taxes in Michigan. That employer, known as the last employer, may or may not also be a base period employer. However, if the unemployed worker did not earn, with the separating employer, an amount equal to

at least \$2,072, then the separating employer's account will not be charged the entire first two weeks of benefit payments. Instead, each week of benefits, beginning with the first week, will be charged, proportionally, to all base period employers.

D. Standards for Opposing Claims for Unemployment:

1. Voluntary Leaving.

- a. The worker will be disqualified from receiving unemployment benefits if he or she quits a job without good cause attributable to the employer, unless the worker later requalifies for benefits. A complete explanation of requalification is found elsewhere in this booklet, under the heading, "Requalifying for Benefits, After Disqualification." Good cause attributable to the employer includes reasons that would cause a reasonable person to leave his or her job, but does not include personal reasons such as babysitting problems. Good cause attributable to the employer could include such things as safety hazards on the job or job discrimination the employer allows to continue.
- b. Before a worker quits a job, he or she must bring to the employer's attention the situation the worker feels needs correction, and the employer must be given adequate time to correct the problem. In most cases, an employee who quits a job without giving such an opportunity to the employer to correct the problem will be considered to have quit without good cause attributable to the employer. However, if a worker quits a job after accepting permanent, full-time work with a new employer, and the worker actually goes to work for the new employer, then the worker will not be disqualified for leaving the former employer to accept the new work.
- c. All of the wages earned with the former employer will transfer to the new employer and can be used to pay benefits charged to

the new employer. Also, if a worker accepts a recall to a former employer or a union hiring hall referral, the worker will not be disqualified and the unemployment liability will transfer to the recalling employer or the employer assigned by the hiring hall.

- d. A worker who negligently loses a requirement for the job, such as a driver license, will be disqualified for voluntarily leaving the job. The first thing that must be proved in a case involving voluntary leaving is that the unemployed worker left the job and was not fired. The employer must prove that. Then, the requirement to prove the case shifts to the unemployed worker. To avoid disqualification, the unemployed worker must show either that he/she left the job involuntarily, or that he/she left with good cause (that is, with good reason) attributable to the employer. A good personal reason for leaving a job will not prevent a disqualification. The claimant's good cause for leaving the job must, in some way, be attributable to the employer. To show that he/she left "involuntarily," the worker must provide medical documentation of a condition preventing him/her from continuing in that job, and must have unsuccessfully sought alternative employment from the employer and a leave of absence.
- e. Cases where a worker will likely be disqualified. If, at the time of hire, a worker was informed how to contact the employer in the event of an absence, and the worker is absent for three days or more without contacting the employer, the worker will be considered to have voluntarily left the work without good cause attributable to the employer. If, at the time of hire, a worker was informed that holding a certain license, for example, was a requirement for obtaining the job and remaining employed in the job, and then as a result of his or her negligence the worker loses the requirement and therefore the

job, the worker will be considered to have voluntarily left work without good cause attributable to the employer.

Cases where a worker will likely not be disqualified. In some cases, a worker's medical condition prevents him or her from continuing to work and the worker must "involuntarily" leave employment and will not be disqualified for quitting. But before quitting, the worker must first have (1) obtained a statement from a medical professional showing that continuing in the current job would be harmful to the worker's physical or mental health; (2) unsuccessfully requested alternative work from the employer within the worker's capabilities, and (3) unsuccessfully requested a leave of absence until the worker is again able to do the job.

- f. Unemployment compensation cases say that before quitting, the worker must first tell the employer about the problem and must give the employer a chance to correct it. If the problem continues, and the worker quits the job, he or she would not be disqualified from receiving unemployment benefits [assuming the Unemployment Insurance Agency (UIA) agreed that the employer's conduct provided the worker with an acceptable reason for leaving]. The worker must show that he or she left the job for a reason that would cause a reasonable person, under similar conditions, to leave the job. However, the worker must still be able to work at a job he or she is qualified to do, by past experience or training, to be eligible for benefits.
- g. Example: If a worker quits a job because his or her spouse was transferred, the worker had a good personal reason to quit the job, but since there is no fault by the employer, the worker would be disqualified from receiving unemployment benefits. However, if the worker's spouse was a full-time member of the United States armed forces and the leaving is due to the military

duty reassignment to a different geographic location, the leaving will not be disqualifying, the employer's account will not be charged for those benefits.

2. Misconduct.

- a. The Michigan Supreme Court has defined misconduct in an unemployment compensation case in its decision in the case of *Carter v Employment Security Agency*, 364 Mich 538, 541 (1961): “[Misconduct in an unemployment compensation case is] ... conduct evincing such willful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed ‘misconduct’ within the meaning of the [unemployment compensation] statute.”
- b. Misconduct for which a worker will be disqualified must therefore show an intentional disregard by the worker of the employer’s interests, or must show gross negligence (that is, a high degree of carelessness) by the worker. For example, acts of misconduct could include unexcused absence or tardiness, insubordination to a supervisor, competing against an employer, and other such actions contrary to the interests of the employer. If a worker is discharged for either a single act of misconduct, or the last in a series of acts of misconduct connected with the

work, the worker will be disqualified from receiving unemployment benefits. In the case of a discharge for a series of incidents, the final incident must show some degree of wrongdoing. In most cases, a worker must have been warned of the fact that his or her actions were unacceptable, before the worker can be disqualified.

- c. In some cases of gross misconduct, however, prior warnings are not necessary. For example, a worker who is discharged for a serious incident of insubordination, such as arguing with the employer in front of customers, will probably be disqualified from receiving unemployment benefits. Even a single incident of something that is harmful to the employer is enough to show a substantial and intentional disregard of the interests of the employer. In the case of absence or tardiness, each incident, taken separately, might not be serious enough to disqualify a worker from receiving unemployment benefits. However, if the employer counsels the worker and explains that the pattern of absence or tardiness, or both, is becoming a serious problem, and the worker continues the pattern and is discharged, the worker could be disqualified for misconduct. The fact that the employer gave the worker a warning and the worker continued to be absent or tardy shows that the worker knowingly violated the interests of the employer. The worker will also be disqualified if he or she is discharged for intoxication at work.
- d. A worker who was informed at the time of hire how to contact the employer for an absence, and then is a 3-day no-call/ no-show, will be disqualified for a discharge for misconduct.
- e. Even if the employer fires a worker for misconduct, the employer also has to show that the act of misconduct happened in connection with the work in order for the worker to be disqualified from receiving unemployment benefits. For

example, if a worker is fired because he had a fist fight with a co-worker after working hours, and off of the company property, and the fight was not related to the work, then the worker would not be disqualified. The reason is that the firing was not for an incident that occurred in connection with the work, even though it involved a co-worker. If a worker is fired because he or she is unable to do the job (for example, the worker can't learn the job, or can't meet production standards) then the worker will not be disqualified from receiving unemployment benefits even though the employer may have been perfectly justified in firing the worker. Whether the discharge is for misconduct connected with the work or for intoxication at work, the worker will not receive unemployment benefits, unless the worker later requalifies.

- f. It is important for the employer to explain to the UIA what incident or series of incidents led to the claimant's discharge and why the employer should not be charged for benefits. If warnings were given to the unemployed worker, you should tell the UIA the dates the warnings were given, and who gave the warnings to the unemployed worker. If they were written warnings, copies should be sent to the UIA. Also, the dates of the absences or tardinesses, or other incidents that led to the discharge, should be provided to the UIA. Copies of any warnings should also be taken to the Administrative Law Judge Hearing by a witness who can testify about them. The courts have said that the burden of proof (that is, the responsibility to justify disqualification) is on the employer, when the employer discharges the employee.
- g. What court cases have said: Unemployment compensation cases say that to be misconduct, the actions by the worker must be harmful to the interests of the employer, and must be done

intentionally or in disregard of the employer's interests. Actions that are grossly negligent will also be considered misconduct. A single incident of misconduct or of gross negligence may be enough to disqualify a worker from unemployment benefits. A worker who commits many infractions may be disqualified, even if none of the infractions, alone, would be misconduct resulting in disqualification. However, the final incident in a series, for which the worker is fired, must itself show an intentional disregard of the employer's interests. However, if the actions by the worker show merely the worker's inability to do the job correctly, or show an isolated case of bad judgment or negligence, then the worker will not be disqualified from receiving unemployment benefits. (This does not necessarily mean the employer did not have a good reason for firing the worker.) Acts committed by the worker that have no connection with the work will not result in disqualification if the employer fires the worker for them.

- h. Example: If a worker is consistently absent or tardy from work, without a justifiable excuse, the worker could be disqualified from receiving benefits. If a worker is discharged based on an arrest occurring on the worker's own time and not connected with the job, then the worker would not be disqualified.

#### E. Burdens of Proof

1. In a voluntary leaving case, the burden is on the unemployed worker to prove: (1) That the leaving was voluntary but with good cause attributable to the employer, or (2) That the leaving was involuntary (for example, due to personal health reasons). To show that a leaving was with good cause attributable to the employer, the unemployed worker must prove that some condition existed that would have made continued employment unacceptable to a reasonable person. This condition must have been brought to the employer's attention and the

employer failed to correct it. Unsafe working conditions, failure to pay wages when due, or failure to provide promised benefits or promotions (things over which the employer has control but fails to correct) are examples of situations that could amount to good cause attributable to the employer for the worker to voluntarily leave a job.

2. In a misconduct case, the burden is always on the employer to prove: (1) That the unemployed worker engaged in misconduct, and (2) That the misconduct occurred in connection with the work. In unemployment compensation cases, the Michigan Supreme Court has defined "misconduct" as a willful or wanton disregard of the employer's interest, or negligence of such seriousness as to imply disregard of the employer's interest. However, the mere inability to do the job, or a good faith error in judgment, is not considered misconduct. In some cases, the employer may have a perfectly good and valid reason to discharge an employee, but that reason still might not amount to misconduct for purposes of the unemployment compensation law.
- F. What Happens If I'm Late? What the law says: This issue is covered by Sections 32a, 33, and 34 of the Michigan Employment Security Act, Unemployment Insurance Agency (UIA) Administrative Rule 270, and the Michigan Compensation Appellate Commission's Administrative Rule 109. When the UIA issues a "determination," either the unemployed worker or the employer (whichever party disagrees with the determination) may "protest" the determination and request a redetermination. Also, when the UIA issues a "redetermination," either party may "appeal" the redetermination to a hearing before an Administrative Law Judge. To be received "timely" (on time) the signed or verified protest or appeal must be received by the UIA not later than the end of the 30th day after the date of mailing of the determination or redetermination. In counting the 30 days, every day of the week is counted beginning with the day after the determination or redetermination is mailed. Even weekend days and holidays are counted. But if the 30th day is a Saturday, Sunday, legal holiday, or UIA non-work day,

then the protest or appeal period ends at the end of the next day that is not a Saturday, Sunday, legal holiday, or UIA nonwork day.

- G. Late Protest of a Determination. If an unemployed worker or employer is late in filing the protest, the UIA must first determine whether there was "good cause" for filing late. Good cause can include inability to file due to illness, or having new information that was not available when the determination or redetermination was issued. If the UIA finds there was good cause for late filing, the UIA will issue a redetermination. If the UIA finds there was not good cause, the UIA will issue a "Denial." The Denial can be appealed directly to an Administrative Law Judge.
- Late Appeal of a Redetermination. If an unemployed worker or employer is late in filing an appeal to an Administrative Law Judge, the case cannot be considered by the Administrative Law Judge. The Administrative Law Judge lacks legal authority to hold a hearing when an appeal is filed late. The unemployed worker or employer may wish to withdraw (cancel) the appeal and request the UIA to reconsider the matter. The UIA must then find out whether there was "good cause" for the late filing of the appeal. If the UIA finds there was good cause for the late filing, the Agency will issue a redetermination. The redetermination can then be appealed (on time!) to the Administrative Law Judge. If the UIA finds there was not good cause, the office will issue a "denial." The denial can be appealed (on time!) directly to an Administrative Law Judge.

## II. MANAGING EMPLOYEE DEPARTURES AND UNEMPLOYMENT RISKS

- A. Unemployment as a Negotiation Tool. Unemployment benefits can be used to help secure an employee's execution of a Release Agreement which can protect your business. Unemployment benefits total approximately \$7,000 for the worker and result in no out-of-pocket cost to the employer. Thus, agreeing not to contest unemployment benefits can provide an incentive for the employee to sign a Release Agreement at little immediate out-of-pocket cost to the employer.

- B. Mitigation of Unemployment Liability. Employees are required to offset unemployment payments by income received in weeks they are eligible for benefits. As a result, by spreading out settlement payments to an employee, an employer can mitigate the benefit amount they are entitled to receive. Therefore, when possible, structure Release Agreement payments as a continuation of wages or salary over a period of time to realize some cost savings in the form of a lower unemployment rate in subsequent years.
- C. Preparing for Voluntary Quit. When an employee quits, is absent for several days, or otherwise quits a job, send confirmation in writing. Numerous unemployment cases have been saved because an employer sent a confirming letter the day after separation explaining the circumstances of the quit and requesting the employee contact Human Resources if their understanding of the facts are different.
- D. Preparing for Misconduct Cases. When an employee engages in misconduct, you will be asked to produce information related to the misconduct, the employee's prior knowledge of the policy, and if the misconduct is not severe, you may be asked to produce evidence of prior discipline for the same form of misconduct.

### III. BUSINESS TRANSACTIONS AND UNEMPLOYMENT TAXES

- A. Successorship Transactions.
  - 1. Successorship. Employer includes the definition of "(a) Any individual, legal entity, or employing unit that acquires the organization, trade, or business, or 75% or more of the assets of another organization, trade, or business, which at the time of the acquisition was an employer subject to this act. (b) Any individual, legal entity, or employing unit that becomes a transferee of business assets by any means otherwise than in the ordinary course of trade from an employer, if there is substantially common ownership, management, or control of the transferor and transferee at the time of transfer."
  - 2. Section 22b of the Michigan Employment Security Act prohibits a

person from: transferring the person's trade or business or a portion of the trade or business to another employer for the sole or primary purpose of reducing the contribution rate or reimbursement payments in lieu of contributions, or acquiring a trade or business or a part of a trade or business for the sole or primary purpose of obtaining a lower contribution rate than would otherwise apply under the act. The law also requires the transfer and consolidation of the unemployment history and the unemployment tax rate of a trade or business to prevent or remedy transfers of trade or business that violate the new provisions of the law described above. The law also imposes civil and criminal penalties on both an employer who engages in SUTA Dumping, and on a business advisor who counsels an employer to engage in the practice.

- B. Consolidation of Employment. Situations where it might make sense to consolidate employment businesses with many small centers of operation (franchises or property management) or ease and cost of benefit plan administration.
- C. Forming a New Entity. Registration for Michigan Business Taxes (Form 518). Form 518 requires disclosure of a significant amount of information, including an identification of your type of business, the types of employees you will be employing, and a questionnaire related to successorship. Forming a new business and improperly completing the Form 518 and attached successorship questionnaires can result in unintentionally successor liability and scrutiny. Carefully consider each question and consider the instructions.
- D. Discontinuing an Entity. Form 1772. Form 1772 requires disclosure of entity and owner information of the entity that is being discontinued. The discontinuance should be filed when the entity will no longer have any employees, whether the entity itself is being discontinued, or the employees are being transferred to a new entity. Properly filing Form 1772 will result in termination of the employer account and transfer of any reserve balance.

- E. The Use of PEOs. Businesses that take advantage of PEOs are monitored by the UIA to prevent avoidance of unemployment taxes. PEOs are also subject to specific regulation by the UIA. When a business first enters into an Agreement with a PEO, it will transfer its unemployment history and account to the PEO, and a separate account will be maintained by the PEO and charged back to the business.
- F. Procedure on the Sale of a Business.
1. Not less than **two** calendar days before a sale, the selling entity must provide the purchasing entity a completed copy of the Business Transferor's Notice to Transferee of Unemployment Tax Liability and Rate – Form 1027.
  2. The form requires disclosure of employees as of the date the form is signed, unemployment taxes, disclosures related to quarterly unemployment tax reports, and identification of the unemployment tax rate for the prior five years (if the business has been operating that long).
  3. Penalty for failure to complete the Form 1027 is a **misdemeanor**.