



## PROTECTING YOUR SUI RATE: A GUIDE

Employers are often surprised at how easily a former employee can establish a successful unemployment claim. With respect to unemployment claims, the largest misconception among employers is that terminating an employee for substandard performance will disqualify the individual from receiving unemployment benefits. In most states, unless the employee's behavior rises to a level of "misconduct," the claimant will be deemed eligible for unemployment benefits. Thus, terminating an employee for "poor performance," "incompetence" or "inability to perform the job" will almost always result in the former employee being awarded for unemployment benefits, and, as a result, may adversely affect your SUI rate.

To further complicate these unemployment determinations, not only does the employer have to demonstrate that the employee's behavior constitutes misconduct as defined by state law, the employer additionally has the burden of proving that the claimant either was aware or should have known that he could lose his job as a consequence of the behavior. It is, therefore important to develop documentation that clearly illustrates these points to a reasonable person, in order to successfully contest unemployment claims and protect your SUI rate. To assist organizations in proactively preventing successful unemployment claims from being charged to the employer's state unemployment account, we have divided this guide into best practices to consider prior to terminating an employee and best practices to consider following a separation from employment.

### Best Practices Prior to Termination

**Provide the employee with a written warning regarding the misconduct prior to termination.**

Although no labor law requires a private, non-unionized organization to warn an employee prior to termination, doing so may assist the employer in defending a potential unemployment claim. Additionally, if employees have been led to believe that certain steps will occur prior to termination, the employer should make a good faith attempt to follow those specific steps, or else risk losing the unemployment claim.

**Distribute an Employee Handbook and obtain signed acknowledgment forms.** Employers have a much better chance of successfully defending an unemployment claim if they can cite the specific Employee Handbook policy that was violated. Distributing an Employee Handbook is an excellent means of demonstrating how employees were made aware of the policy, and the consequences of noncompliance.

**Investigate all harassment, discrimination, wage and hour and other serious workplace complaints.** In most states, if an employee resigns with "good cause," he will be eligible for unemployment benefits. If the individual can demonstrate that he complained of a serious workplace concern, but the employer

took no effective action to address the allegation or retaliated somehow against the claimant, the former employee is generally eligible for unemployment benefits.

**Remember the “reasonable person” standard.** This is a common guideline used when making unemployment decisions. Considering whether a reasonable person would terminate an employee given the present circumstances prior to making the termination decision is a crucial step in the termination process.

**Treat employees fairly and consistently with respect to termination decisions.** Remember, the state personnel processing claims are themselves employees, not employers, and they naturally have opinions of what they consider fair treatment. It is important to keep this in perspective when terminating employees.

Hopefully these best practices will help the business to take some proactive measures to protect the company’s unemployment account prior to terminating employees. Of course, there are times when the potential cost of an unemployment claim is insignificant when compared with the financial, emotional or opportunity cost of continuing to employ the individual. Therefore, there are certainly strategic elements to consider in conjunction with these best practices when making termination decisions.

## **Best Practices following Termination:**

**Submit all unemployment-related paperwork on time.** This is a critically important step in contesting claims and protecting your unemployment account. If you fail to return the state unemployment division’s request for information relating to the separation, you may be deemed a disinterested party and the claimant may automatically receive unemployment benefits to be charged against your account.

**Include attachments to further your case.** When you submit information regarding the separation reason, be sure to include attachments that support your case.

**Appeal the decision if you disagree.** If you disagree with the initial determination, remember you have the right to appeal. Simply submit the appeal paperwork on time and request a telephone hearing.

**Prepare for the appeal hearing.** We speak with many employers who are shocked after they experience their first unemployment telephone hearing. In general, they report feeling unprepared for the formality of the proceeding and overwhelmed by the legal procedures to which they were required to adhere. In order to effectively prepare for an unemployment hearing, you may either watch an excessive amount of Law & Order reruns, or you may follow these tips:

1. Carefully read the notice regarding the hearing and review the laws in your state to determine what you are attempting to demonstrate to the Officer. Unemployment eligibility varies by state law, and it is important to understand what you must prove in order to disqualify the former employee from being awarded unemployment benefits.
2. Submit all supporting documentation prior to the deadline. This may include disciplinary actions, handbook policies, performance reviews, the handbook acknowledgement form, witness statements, customer/client complaints, etc.
3. Subpoena credible witnesses on or prior to the deadline. The relevant laws in most states will not allow “hearsay” evidence to be presented. If another employee or manager has relevant first-hand information, you must subpoena the witness using the state’s procedure. If attending

a telephone-based unemployment hearing, any statements made, such as, “the Operations Manager told me that,” will be considered to be hearsay evidence and inadmissible.

4. Prepare questions for witnesses and the claimant in advance. Ensure that these questions are designed to illustrate exactly what you are attempting to prove based on state law.
5. Prepare your witnesses. Provide them with a list of questions that you will be asking them, and encourage them to be honest and professional in their responses.
6. Prepare a brief closing argument.

**Attend the appeal hearing.** Hopefully, you will not have to physically attend, but will be able to request a telephone hearing. Here are a few tips for the day of the hearing:

1. Have all of your supporting documentation physically accessible to you prior to the start of the call. Dates and details relating to the termination should be included within the paperwork brought to the hearing.
2. Call in at least five minutes prior to the scheduled hearing appointment. Confirm that your witnesses are easily accessible and prepared to testify.
3. Object to testimony that is irrelevant or hearsay.
4. Focus on the reason for the discharge, not other job-related problems. Employers often are tempted to explain the long history of the employee’s performance concerns; however, the determination will be made almost exclusively based on the employee’s separation reason or “last straw.” While additional warnings may be relevant and supportive to the employer’s case, it is imperative to paint a clear picture of the final termination reason.
5. Be polite, professional and concise.
6. Avoid industry jargon.

**Continue to appeal.** Even if you lose your first appeal, if you are adamant that the former employee should be disqualified from receiving benefits charged to your account, your continued persistence using your state’s appeal system may possibly result in an overturned unemployment award.

Remember, the burden of proof to demonstrate the employee’s ineligibility for unemployment benefits lies solely on the employer. Therefore, it is critically important to become familiar with your state’s law regarding eligibility, and to ensure that employee policy violations, performance issues, and misconduct are documented in writing. Following these guidelines will assist you in maintaining a low SUI rate.