

RISK MANAGEMENT

Must you have an attorney at an unemployment compensation hearing?

Defending A UC Challenge

By Kevin M. Gold, Esquire

As a result of a recent decision by Pennsylvania's Commonwealth Court, corporate entities, at least for a brief period of time, were required to be represented by counsel in unemployment compensation proceedings. Although the Pennsylvania legislature quickly overruled the decision through legislation, the issue is not completely resolved. Therefore, employers are well advised to consider whether and how to use counsel effectively in their defense of unemployment compensation hearings.

In a February 2005 decision that caused great concern for employers and the business community, the Commonwealth Court held in *Harkness v. Unemployment Compensation Board of Review* that an employer was not permitted to be represented by a private unemployment compensation services company but, instead, must be represented by a lawyer if they intend to do anything other than testify as fact witness. This would prohibit, for example, cross-examining witnesses, making legal arguments, or asserting objections without having counsel. The Court found that corporations using a representative other than an attorney amounted to the non-attorney representative being engaged in the unauthorized practice of law.

As a result of "Harkness," the Unemployment Compensation Board of Review revised its guidelines regarding representation at unemployment hearings. Although individual claimants were still permitted to represent themselves or be represented by an attorney or an advocate of their choice, the representation rules concerning employers changed substantially.

Specifically, under the revised guidelines, a corporation had to be represented by an attorney. The same requirement was applied to a government agency (including a state agency, local authority, or school district), a trust or association, and a limited liability company. There were also special rules for sole proprietors, who could be represented by an attorney or the proprietor or owner. Partnerships also could be represented by an attorney or a general partner, who is an individual. Individual employees of corporations can still testify as fact witnesses without having counsel present.

However, in practice, procedures varied widely by individual referee as to whether a corporation could conduct a hearing without attorney representation, and many referees continued or postponed hearings if counsel was not present. Further, even filing an appeal to a decision required an attorney's signature to be valid.

The recent legislation, which became law in June, permitted either an employer or claimant to "be represented by counsel or other duly authorized agent." The law thus returned the status quo to unemployment compensation proceedings, in which employers could, but were not required, to have counsel present.

Although employers are now relieved of the requirement of using an attorney, the "Harkness" decision is on appeal, and the issue of whether counsel is required will ultimately be resolved by the

Pennsylvania Supreme Court. Even though employers are free to use non-lawyers as representatives, there are often compelling reasons to involve counsel, regardless of whether the law requires their presence.

For example, unemployment compensation appeals are heard by a referee, and the proceedings are conducted under oath and recorded. In those instances in which a party appeals the decision of the referee, the hearing will be transcribed. As a result, although the decision will not necessarily be binding in other legal proceedings, the testimony and evidence presented may nevertheless be used elsewhere.

The concerns are particularly relevant when an employer believes that it may be subject to subsequent legal action by the claimant involving claims such as discrimination, harassment, or other misconduct. Where these claims are potentially at issue, there are a number of scenarios in which the employer or its decision makers can make admissions in the unemployment proceeding that can be used in subsequent proceedings. As a result, in these situations, particularly where there are allegations of willful misconduct, it is usually wise to engage counsel either to help prepare an appropriate strategy for the hearing or to assist in conducting the hearing itself.

There may also be valid reasons not to appear before a referee at all because of the risks noted above concerning the use of the testimony and evidence in a subsequent proceeding. It is not uncommon to be in situations in which the unemployment compensation hearing is used merely as a discovery tool by the claimant and/or claimant's counsel for a subsequent lawsuit.

Employers' counsel can also be helpful in minimizing the number of claims that proceed to a hearing. For example, many employers consider unemployment compensation consequences before an employee is terminated and consult with counsel prior to making a termination decision. In addition, by using counsel to help prepare the responses to unemployment compensation claims when they are initiated, an employer can put its best case forward early and provide a great likelihood of prevailing. Many claims are lost at the beginning when an employer fails to provide a detailed account, with supporting evidence, of the reasons for an employee's termination or why an employee quit. Thus, an employer can improve its chances for success by properly addressing these key issues at the initial stages.

Regardless of the ultimate legal outcome of whether counsel is required to represent companies in unemployment compensation proceedings, it is still incumbent upon employers to carefully consider each claim and the risks involved by proceeding without the advice of counsel. Effective use of counsel can help increase an employer's chances to defend successfully unemployment claims and properly protect the company from the consequences of an unemployment compensation proceeding.

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