



From Unemployment to Reemployment: Preparing Your Business for HB4



House Bill 4

- > Goal: pay off debt to federal government in near term by increasing revenue and decreasing spending
- > How?
 - > Higher UI taxes on employers
 - > Reduced payments to claimants over shorter periods
 - > Fewer opportunities for employees quitting jobs to get benefits
 - > Fewer situations in which employers may avoid charges in discharge cases
 - > Drastic restrictions on use of “attached claims”

Elimination of “Good Cause” Reasons for Quitting

- > Claimant who quits must show s/he left work for “good cause attributable to the employer” to receive benefits
- > New law eliminates all but two reasons that currently constitute good cause, including:
 - > Health condition/disability of claimant or family member
 - > Work relocation of spouse (except military spouses)
 - > Inability to work particular shifts because of undue family hardship
- > Only two specific reasons for which an employee may quit work and still qualify for benefits remain
 - > Relocation of a military spouse
 - > Domestic violence, if claimant believes continued employment would jeopardize his/her or family’s safety

Elimination of “Good Cause” Reasons for Quitting

- > New law raises threshold for using reduction in work hours as good cause for leaving work from more than a 20% reduction to more than a 50% reduction
- > New law retains existing threshold for using reduction in pay as good cause at a 15% reduction
 - > Employers may rebut these good cause claims by showing reductions in hours or pay were temporary or caused by claimant’s malfeasance, misfeasance or non-feasance
- > New law increases the maximum period the employer may suspend an employee without triggering eligibility for benefits from 10 days to 30 days

“Substantial Fault” Repealed

- > Currently, employer accounts not charged where the claimant is terminated for “misconduct” or “substantial fault”
 - > For substantial fault, claimants are disqualified for 4 to 13 weeks and then receive benefits, but their employers’ accounts are not charged
- > On or after June 30, 2013, substantial fault will be eliminated
 - > Employers must establish termination for misconduct in discharge cases to prevent charges to their accounts

“Substantial Fault” Repealed

> Practical Effects:

- > More claimants will receive benefits for discharges based on minor to intermediate infractions of work rules not rising to misconduct
- > Claimants and employers no longer may create a “win-win” situation by stipulating to facts to achieve a substantial fault finding

Higher Burden to Prove Misconduct in “Discharge” Claims

- > The burden is on employer to show:
 - > 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, or
 - > Conduct evincing carelessness or negligence of such degree or recurrence as to manifest an intentional and substantial disregard of the employer’s interest or of the employee’s duties and obligations to the employer

Proving Misconduct

- > Relatively new statutory examples of misconduct:
 - > Violation of written alcohol or illegal drug policy
 - > Reporting to work significantly impaired by alcohol / illegal drugs
 - > Consumption of alcohol / illegal drugs on employer's premises
 - > Arrest or conviction for offenses involving violence, sex crimes or illegal drugs
 - > Physical violence related to work
 - > Unlawful harassment / creating a hostile work environment
 - > Theft
 - > Forging / falsifying documents or data, including previously submitted employment applications
 - > Violation of written absenteeism policy
 - > Refusal to perform reasonable assigned work tasks
 - > Failure to adequately perform employment duties as evidenced by no fewer than three written reprimands in the 12 months preceding discharge

Remember . . .

- > An employer's account is not charged for benefits granted to claimant terminated within first 100 days for *bona fide* inability to do job for which s/he is hired
 - > Consider establishing/revitalizing 90-day introductory periods
 - > Implement process to assess and act upon performance issues within first 100 days

Action Items

- > Review handbooks, policies and codes of ethics/conduct
 - > Ensure existence of written policies covering each statutory example of misconduct and other acts considered to be misconduct
 - > Assess sufficiency of policies
 - > Do they address in detail specific acts that run afoul of policy?
 - > Do they include clear consequences for non-compliance?
 - > Consider point/occurrence systems for absenteeism policies
 - > Revisit corrective action policies
 - > Consider dropping “verbal,” “coaching,” “counseling” language
 - > Consider using “written reprimand” instead
 - > Ensure employees acknowledge in writing their receipt and understanding of, and agreement to abide by, policies

Action Items

- > Carefully document performance issues
 - > Include facts to show “deliberateness” and lack of good cause to justify conduct/failure to perform, if appropriate
 - > Confirm in documentation that employee had notice of policy
 - > Document employee’s response

- > Provide written documentation to employees for all counseling sessions, performance improvement plans, reprimands and warnings, regardless of whether characterized as “written” or “verbal” in discipline policies
 - > Provide copy of applicable policy with documentation

Action Items – Focus on Effective Documentation

- > Prepare soon after event
- > State facts – not conclusions/opinions
- > Include:
 - > Date prepared
 - > Name/signature of preparer
 - > Date/time/place of event
 - > What happened and who was involved
 - > How it impacted business
 - > Applicable policies (and attach)
 - > References to past relevant documentation (and attach)
 - > Corrective action taken and consequences of additional issues
 - > Date/time/place of discussion with employee
 - > Employee's response
 - > Employee's signature and date

After a Claim is Filed . . .

Provide Adequate Response to NCUI 500 AB

- > Employers now have 14 days to respond
- > New DES standard for employer responses:
 - > Employer must provide “sufficient facts to enable DES to make a correct determination under the law without having to contact the employer to obtain any additional information”
- > If benefits are erroneously paid to a claimant at the initial stage, and the employer later appeals and proves misconduct, benefit charges to employer’s account may not be reversed if the employer has pattern of failing to respond timely or adequately to DES requests

Responding to NCUI 500 AB

- > When providing reason for termination:
 - > Be truthful and consistent – provide the same reason you gave employee, and the same reason you would give in court
 - > Be concise, but include key facts, especially in performance-based cases
 - > “Ms. Doe was terminated for failure to adequately perform job duties despite 5 written reprimands over the past 8 months. See attached documentation.”
 - > Highlight potential for non-charging, if applicable

Responding to NCUI 500 AB

- > DES expects to receive:
 - > Applicable policies
 - > Signed acknowledgement forms
 - > Written documentation regarding policy violations
 - > Previous warnings, reprimands, PIPs, coachings/counselings

Handling Appeals Hearings

- > Consider whether potential benefit (avoiding charges) outweighs costs and potential risks:
 - > Time, resources, energy
 - > Opportunity for free and early discovery for claimant and counsel through cross-examination of company witnesses and subpoenas for documents
- > Consider engaging counsel

Handling Appeals Hearings

- > Proceed cautiously in cases involving:
 - > Problematic facts for company
 - > Claimant with history of complaints about discrimination, harassment, retaliation, pay issues, etc.
 - > Claimant who has filed, or threatened to file, charge/complaint with EEOC, DOL, court, etc.

Handling Appeals Hearings

- > Remember – hearing is the only opportunity to create a record and present testimony
- > Consider requesting in-person hearing
- > Use witnesses with first-hand knowledge of essential facts/issues
 - > Hearsay not sufficient
- > Submit key documents, and serve on claimant or counsel prior to hearing
- > Follow special rules for hearings on controlled-substances related discharges

Resources

- > www.ncesc.com
- > HB4questions@nccommerce.com
- > House Bill 4 – available at
<http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=hb4&submitButton=Go>
- > House Bill 743 (technical corrections) – available at
<http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=H743&submitButton=Go>
- > NCDES Q&A – available at
<http://www.ncesc1.com/individual/2013LawChangeQA.asp>
- > NCDES Memo to NC Employers – available at
<http://www.ncesc1.com/HB4/Memo-on-HB4-Changes-to-UI.pdf>
- > NCDES Employer Training videos – available at
<http://www.youtube.com/user/DESofNC/videos>

Resources

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