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DEFENDING UNEMPLOYMENT COMPENSATION CLAIMS: WHAT EMPLOYERS NEED TO KNOW

2017 Labor and Employment Law Conference

Cami L. Davis

(412) 394-2357

cdavis@clarkhill.com

Andrew J. Ruxton

(412) 394-2573

aruxton@clarkhill.com

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THE BASIC PROCESS

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STEPS IN THE UNEMPLOYMENT PROCESS

- Employee files an initial claim
- Employee and Employer receive a Notice of Financial Determination
- If Employee is financially eligible, determination of whether the job separation is qualifying
 - Employee and Employer may be contacted as part of this process
- Notice of Determination is issued

STEPS IN THE UNEMPLOYMENT PROCESS

- Qualification for benefits – unemployment or reduced hours through no fault of the employee
- Disqualifications for benefits:
 - Voluntary quit without cause of compelling nature
 - Discharge or suspension for willful misconduct
 - Discharge or suspension for failure to submit to or pass a drug or alcohol test
 - Work stoppage determined to be a strike
- Employee must maintain eligibility for benefits

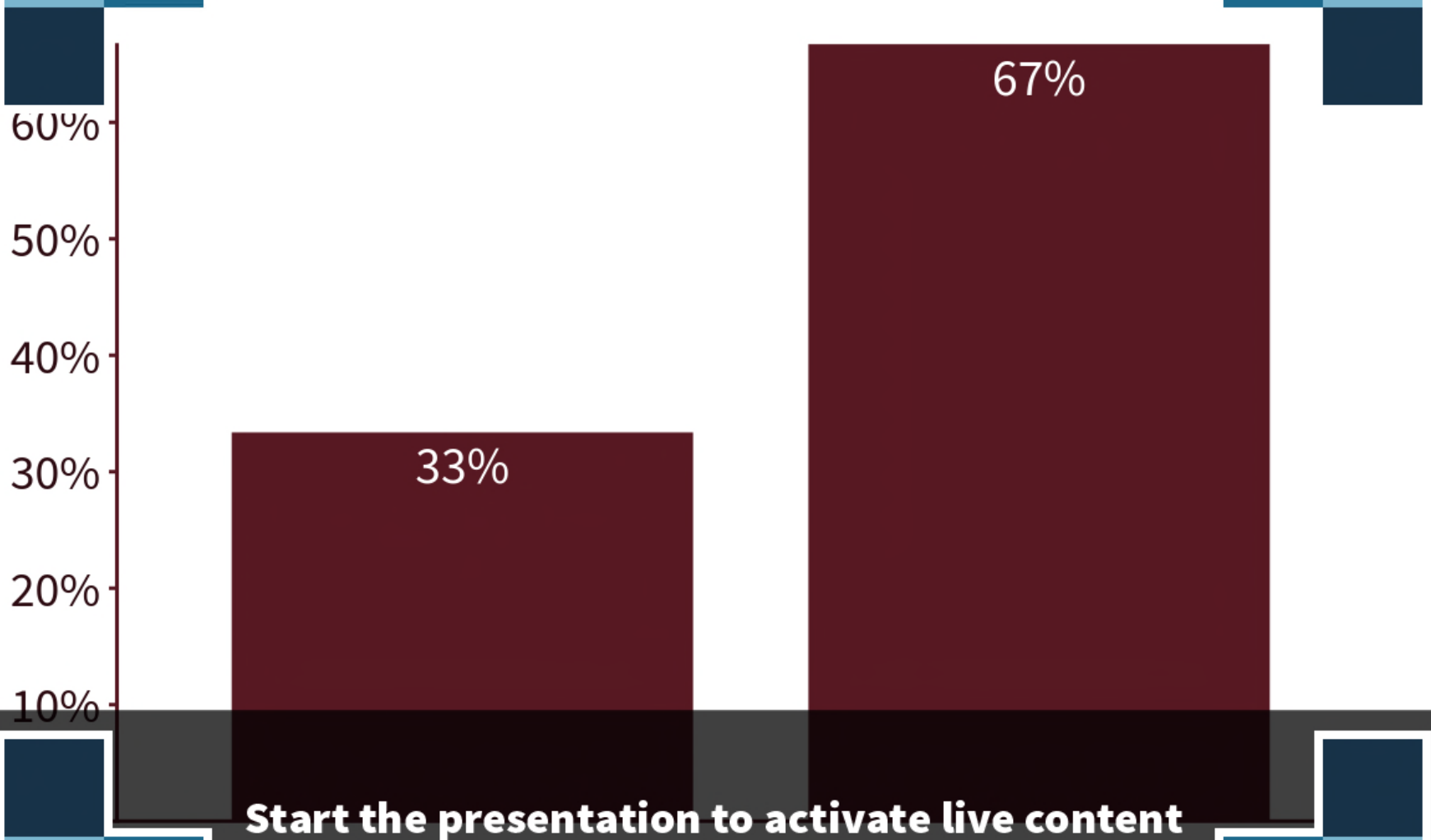
WILLFUL MISCONDUCT

- An act of wanton or willful disregard of the employer's interests
- Deliberate violation of rules
- Disregard of standards of behavior that an employer can rightfully expect from an employee
- Negligence that manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations

DISQUALIFICATION?

- Violation of attendance policy
 - True
 - False

Qualification for violation of attendance policy

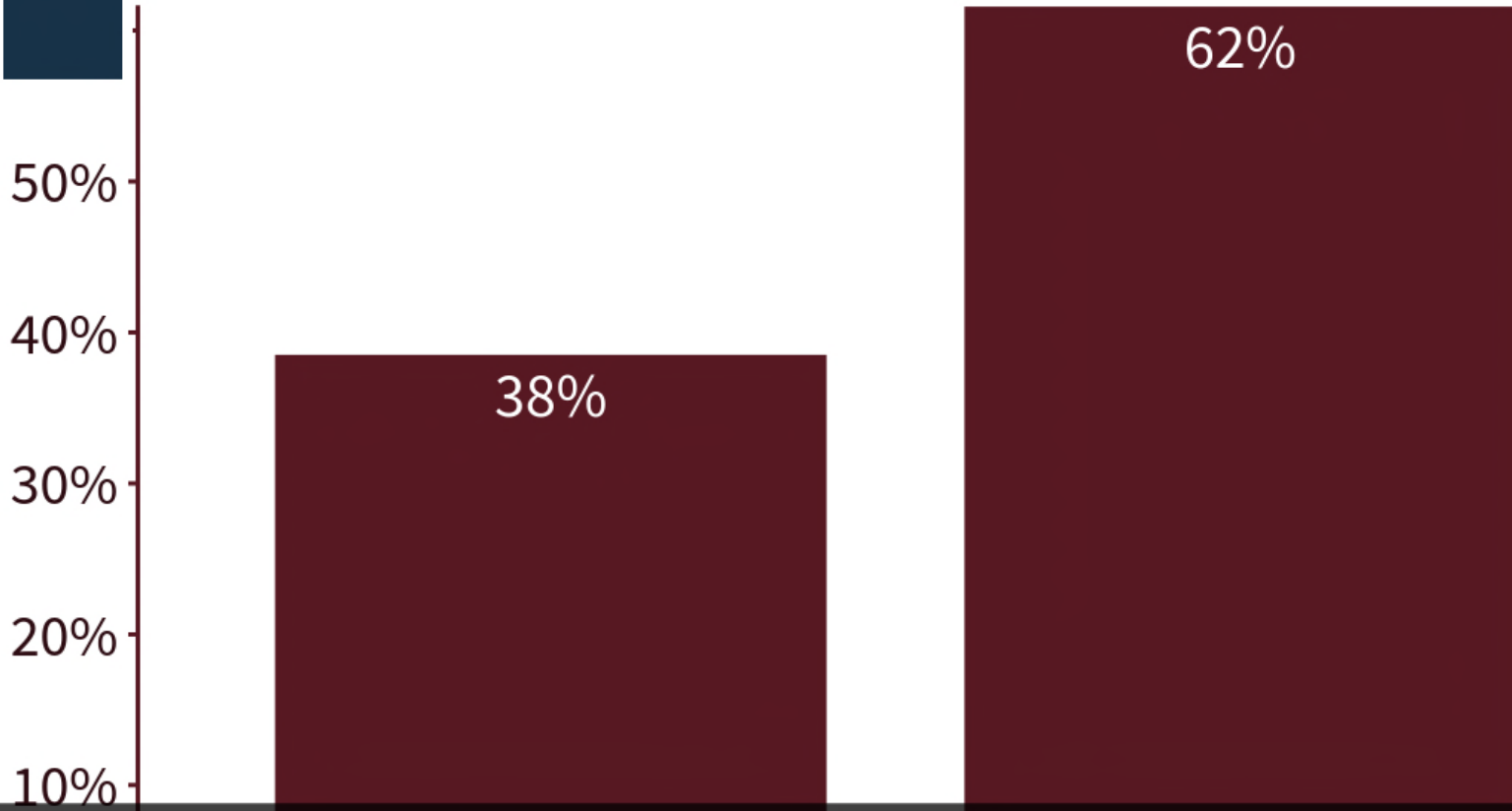


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DISQUALIFICATION?

- Falsification of time records
 - True
 - False

Disqualification for falsification of time record



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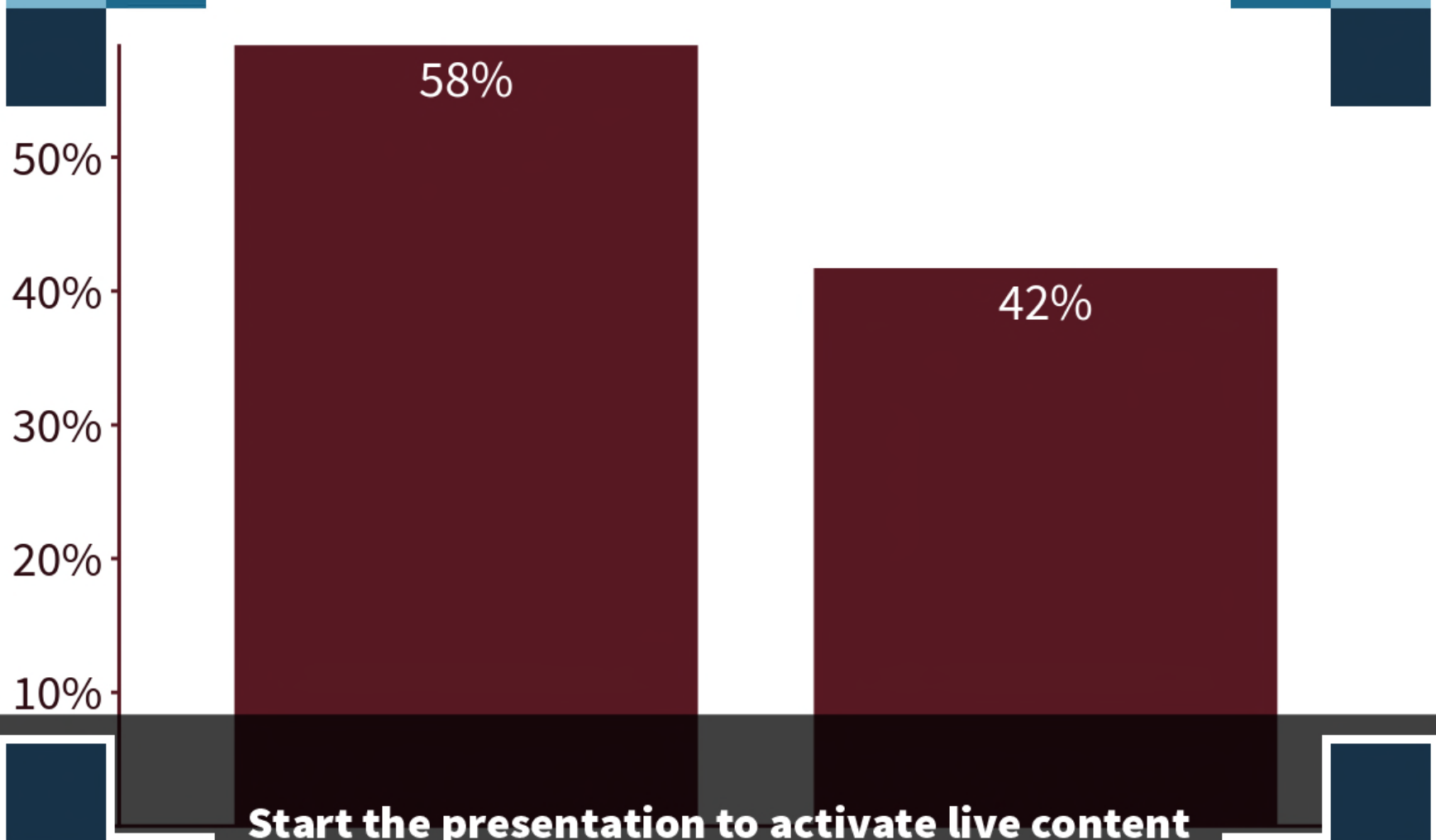
No

Yes

DISQUALIFICATION?

- Violation of harassment policy
 - True
 - False

Qualification for violation of harassment policy



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DISQUALIFICATION?

- Resignation
 - True
 - False

Disqualification for resignation?

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SEVERANCE PAY CAN OFFSET UNEMPLOYMENT BENEFITS

- Severance pay will be deducted from a claimant's benefits if it exceeds more than 40% of Pennsylvania's average annual wage
- Example: Fred received severance pay of \$22,000. For Benefit Years that begin in 2017, 40% of Pennsylvania's average annual wage is \$20,279.79. $\$22,000 - \$20,279.79 = \$1,720$ in deductible severance pay.
- Fred's regular full-time weekly wage is \$500. Therefore, \$500 will be attributed to each of the first three weeks following his separation, and \$220 will be allocated to the fourth week.

THE CONTESTED HEARING

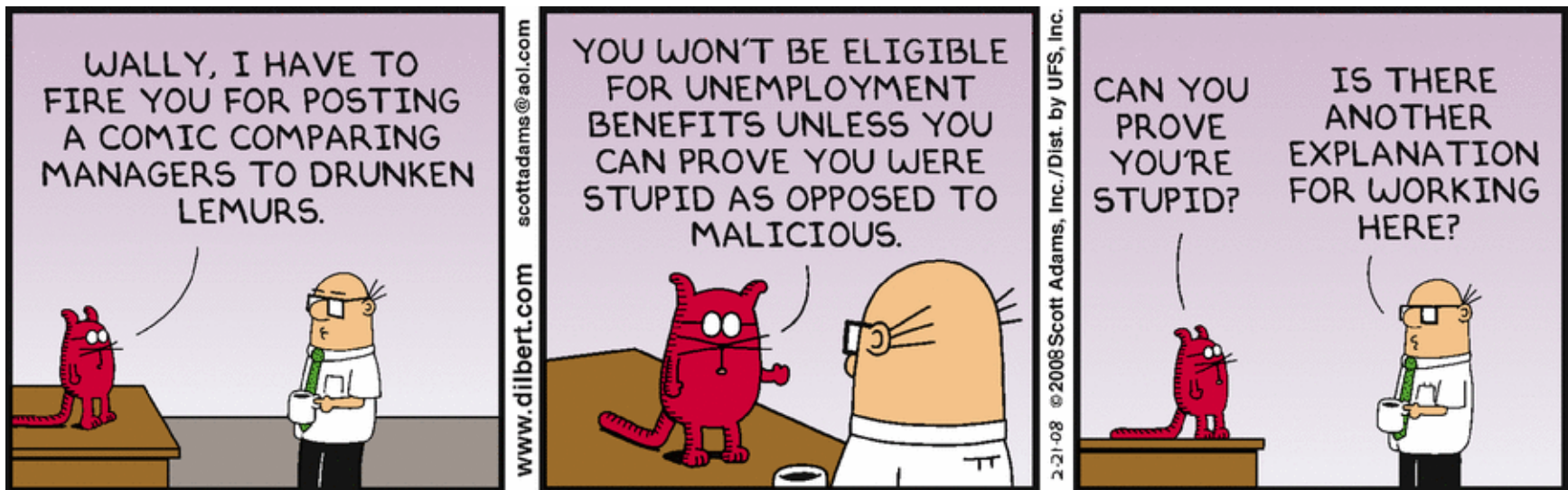
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THE CONTESTED UC PROCESS

- Submission of claim by employee
- Submission of information by employer as requested
- Determination by UC whether to grant benefits
- Either employer or employee can appeal
- Short time deadline and limited exceptions if you miss the deadline
- Referee will provide you with notice of the hearing date – usually within 30 days of the denial
 - Must present all your evidence supporting your position because this will be the only opportunity

THE CONTESTED UC PROCESS

- Whether employer or employee bears the burden of proof depends on the reason for termination
 - Employee bears the burden of providing a good cause reason for voluntary quit; burden then shifts to employer
 - Employer bears the burden in terminations based upon willful misconduct



- Keep in mind, not contesting an unemployment claim won't prevent you later from showing you fired the employee for a legitimate reason

LEVELS OF APPEAL

- Initial determination by the Department
- Appeal to UC Referee
 - 15 days
- Appeal from Referee to UC Board of Review
 - 15 days
- Appeal from the Board of Review to the Commonwealth Court
 - 30 days from the date of mailing of decision

WHAT TO BRING TO THE CONTESTED HEARING

- What was the reason for termination?
 - All policies that relate to the reason for termination
 - Evidence that employee knew of the policy
 - Policy or handbook receipts
 - Testimony of pertinent discussion
 - All employee warnings or notices relating to termination
 - Witnesses
 - Decision-makers who can testify about the events giving rise to termination
 - Persons who have first hand information regarding the events that gave rise to the termination

PRESENTING EVIDENCE


- The Pennsylvania Unemployment Compensation Board of Review and its referees are not required to conform to common law or statutory rules of evidence
 - Why?
 - Common that parties are not represented by counsel
 - Agencies are not bound by technical rules of evidence at agency hearings
 - Practically, unrealistic for hearing officers to apply strict evidentiary rules with vast amount of claims filed
 - Mandating that parties be represented by counsel would undermine the informal, speedy, and low cost nature of unemployment compensation proceedings

HEARSAY EVIDENCE


- If hearsay evidence is properly objected to, it is not competent to support a finding of fact
 - However, properly objected to hearsay evidence may be used as a basis for further questioning by the referee and testimony elicited through questions based on objected to hearsay is admissible even though the hearsay itself must not be given substantive evidentiary value
- Where hearsay evidence is admitted without objection, it will be given its natural probative effect and may support a finding of fact ***IF*** corroborated by any competent evidence of record
- Evidence not intended to establish the truth of the matter asserted, but to establish another fact, is not hearsay

COMPETENCY OF EVIDENCE

- Will the Hearing Referee require evidence to be presented in the same way as in court?
 - Yes
 - No



Hearing Referee require evidence to be presented
the same way as in court?



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Yes

No

USE OF THE CONTESTED PROCESS IN CIVIL LAWSUITS

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ATTORNEYS WHO REPRESENT EMPLOYEES AND THE UC PROCESS

- Employee attorneys are using the UC hearing process to support civil lawsuits
- Use sworn testimony under oath
 - Testimony given at the contest hearing is under oath
 - Failure to give testimony on a key point may preclude raising it later
 - Sworn testimony can be used in civil lawsuits
 - Depositions
 - Court hearings
 - Inconsistencies can be used to impeach (affect your credibility)
- Employee may raise unexpected issues at the hearing
- Hearing decision as evidence

SURPRISE – CLASSIFICATION IS AN ISSUE

Facts

- Independent contractor worked with your organization
- Company decided to end the independent contractor relationship
- Independent contractor files for unemployment benefits
- Company thinks this is a non-issue
 - Only employees eligible for benefits
- Go to the contested hearing unprepared to address the legal issues and facts that give rise to a finding of employee vs. independent contractor

DEMONSTRATION



AND THE CONSEQUENCES

- Sworn testimony adverse to company that makes it likely a finding will be the individual is an employee vs. independent contractor
- Unemployment benefits awarded
- Now the employer may be fined for not contributing taxes, social security, state disability and unemployment contributions
- Exposure on not offering employee group benefits
 - Health
 - 401 (k)
 - Paid vacation or sick time

SURPRISE – IT’S A CONSTRUCTIVE DISCHARGE AND SEX HARASSMENT CLAIM

Facts

- Employee resigned without providing a reason
- Employee filed for unemployment benefits
- HR witness comes to hearing prepared with the voluntary resignation letter
 - Slam dunk, right?
- At hearing, employee presents evidence that she was sexually harassed by her boss
 - Requests for sexual favors
 - Inappropriate texts on cell phone
 - Reported to a manager – but no investigation done
 - Other employees who reported were terminated or not believed

DEMONSTRATION



CONSEQUENCES

- Unemployment benefits awarded
- Unprepared testimony under oath by HR
 - Admissions of aware of prior complaints
 - Admissions that the other employee was discharged
 - Admissions that no investigation for this employee was done
- Worst case, finding that the employer did not have an effective complaint, investigation and remediation policy

TIPS AND STRATEGIES

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TO CONTEST OR NOT TO CONTEST?

- Before objecting to unemployment benefits, consider
 - Why was the employee terminated
 - Do you have strong or weak documentation
 - Do you have good witnesses to tell your story
 - What work rules or policies were involved
 - How was employee made aware of policies (e.g., signed acknowledgement?)
 - Were other employees terminated or disciplined for engaging in same conduct
 - Are there any extraneous circumstances that are problematic
 - Does the employee have an attorney

TO CONTEST OR NOT TO CONTEST, CONT.

- Termination decision
 - What was communicated to the employee about the reason
 - Is the documentation consistent with the reason provided
 - If the documentation reflecting the rationale doesn't match the communication to the employee – there is a problem
 - Some managers like to “soften the blow” and provide an ambiguous reason or no reason (ex: lay off)

ADVERSE CONSEQUENCES IN CIVIL ACTIONS

- Some courts have ruled that testimony showing inconsistent reasons for termination was enough to defeat the employer's motion for summary judgment
 - It created an issue of fact
 - Was the reason for termination a pretext to mask the real reason for termination (discrimination, retaliation)

QUESTIONS?



Cami L. Davis

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cdavis@clarkhill.com



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aruxton@clarkhill.com

THANK YOU

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