

Multiple unemployment insurance claims mean higher taxes...

but a few minutes on future claims may save big bucks later



Dear Employer:

Our records show you have received multiple unemployment insurance (UI) claim notices in the past year. Those claims can affect your tax rate for the next three years. Through active participation in the dispute and appeals process provided by unemployment insurance you may avoid the initial claim cost on subsequent claims and mitigate the multi-year tax impact to your company. The dispute and appeals process on future claims will require some timely work on your part, but it could mean a three-year savings of up to \$1,600 per employee.

The first step you need to take is to respond quickly and completely to any UI claim notification. The following suggestions are designed to assist you in understanding the process and preparing your response. They are not intended to replace legal advice. Prompt action can mean big savings for several years to come.

If, after reviewing the information presented here, you need more assistance or would like to receive general employment law information or forms, call your nearest TWC office or refer to TWC's World Wide Web site at <http://www.twc.state.tx.us>.

Protesting an Unemployment Claim Notice

- ◆ Do not miss a protest or appeal deadline. A late protest means the employer forfeits appeal rights, including the right to protest benefits or chargebacks to the employer's account.
- ◆ What if a claim notice arrives when I am away from the office for an extended time? If you are going to be unavailable when a claim notice might arrive, designate a trusted person to check your mail for you and file a quick response that will preserve your appeal rights.
- ◆ What if you do not recognize the name of the claimant? Search all of your records thoroughly, ask others within your company, or call TWC for help. Never delay your response just because you cannot locate records. If nothing else, respond timely with, "We are unable to locate records on this claimant, but we wish to preserve our protest rights. More information will follow later."
- ◆ Take prompt action if a protest or appeal deadline is near. Simply mail, fax, or hand-deliver a quick written response stating, "We protest. More information will follow later."
- ◆ Be as specific and fact-oriented as possible. Your protest can help the claim examiner determine what questions to ask the claimant during the claim investigation. You can attach additional sheets on your letterhead if needed. Be careful to include only what you can prove with either eyewitnesses or credible documentation.
- ◆ When protesting a claim, document your case. If you fired the claimant for a policy or warnings violation, attendance problems, or customer complaints, submit copies of the policy, attendance records, warnings or complaints.
- ◆ Be consistent with your explanations! Explain the situation correctly the first time. If you give one account on the protest and something else at the hearing, conflicting statements may lose the case for you.
- ◆ Consider other types of claims or lawsuits when responding to a claim. Many plaintiffs' lawyers use UI claims as a strategy to determine how good their clients' cases are. They may use evidence discovered during the claim and appeal process in other claims or lawsuits. Employers who want to defend against UI claims and other claims and lawsuits should take care how and under what circumstances they reply.
- ◆ Find out about the claim. Call the local office, identify yourself as the employer in the case and ask for copies or printouts of the statements of fact the claimant has made. This kind of documentation can be extremely valuable in preparing your claim protest or appeal, or in preparing for an Appeals Tribunal hearing. If the claimant changes his or her story at the appeal hearing, let the hearing officer know the specifics.
- ◆ Make sure that TWC has your correct address. If the address is incorrect, note the correct address. If you want subsequent mailings to go to a particular address, note that in your protest. Failure to let TWC know of an address problem will work against you if you miss a hearing or miss an appeal deadline because you did not receive notice or ruling.
- ◆ How to file the protest: As long as you protest in writing, you may file by mail, by fax or by hand-delivery to any TWC office. Recommended: Mail a copy by certified mail, return receipt requested, and fax a copy to any TWC office.
- ◆ Respond to calls from the claims examiner. A call from a claims examiner indicates the examiner thinks there may be a good reason to disqualify the claimant and that evidence from your company can finish the case. Put the examiner in touch with your firsthand witnesses, the ones who have personal knowledge of the situation that preceded the claimant's discharge or resignation.
- ◆ Follow up. If you do not get a ruling within two weeks of filing your protest, call your nearest TWC office or local workforce development board workforce center and ask them to check the computer. Be prepared to give the claimant's name and social security number.



Appealing the Initial Determination

- ◆ Appeal on time and in writing. You have only 14 calendar days from the date TWC mailed the decision to you to file. If you want a hearing sooner, appeal immediately. If you want as much time as possible to prepare for the hearing, wait until the 14th day. Try to appeal within 10 days. Your appeal can be as simple as, "We disagree. We would like an appeal hearing to discuss the matter." Save your energy and preparation for the appeal hearing.

If you file a late appeal, the Appeals Tribunal will have no choice but to dismiss it. If you file late due to late receipt or non-receipt of the initial determination, or because of misinformation from a TWC representative, highlight that fact in the first paragraph of your appeal. That can get you a hearing on the timeliness problem, where you can prove the receipt or misinformation problem.

- ◆ Make a copy of your appeal and carefully note when you sent it. If you send it by certified mail, request a return receipt. Whether you mail, fax or special deliver it, keep receipt documentation.
- ◆ Use the time between your appeal and the appeal hearing to get copies of the claimant's statements to TWC. This will help you know how to rebut the claimant's contentions. Research the case. Line up

your witnesses and find out what they know. Assemble your documentation. Outline your presentation. Practice presenting the case. Decide who will be the primary representative during the hearing. Decide what questions you will ask the claimant during cross-examination.

- ◆ If you do not get a notice of hearing within four weeks of filing your appeal, call any TWC office and check on the appeal status. Do not let up until you get a clear answer!
- ◆ If you cannot participate in the hearing, call in and let the hearing officer know. Document the call and make sure the hearing officer or receptionist makes a record of your call. If you have a good reason for missing the hearing, simply file a timely written appeal. State the problem. TWC will schedule a new hearing, where you can show you had good cause for missing the first hearing.
- ◆ Good cause to miss a hearing includes business emergencies; traffic accidents; illness of a major witness; and a witness being out of town and unable to call from a remote location, on a prearranged business trip, or on a prearranged vacation. Calling the hearing officer to notify them you will not be able to participate will help you prove good cause for missing the first hearing.

- ◆ You must fully document what you are trying to show. If you fired the claimant for a policy or warnings violation, attendance problems or customer complaints, you should submit copies of the policy, attendance records, warnings or complaints.
- ◆ Follow the instructions on the hearing notice *exactly* regarding evidence. Send copies of any documents you wish to enter into the record to both the claimant and the hearing officer prior to the hearing. If you fail to do that, you run the risk of being unable to use such documents on your behalf. Send the copies to the claimant by certified mail, return receipt requested.
- ◆ Call in on time for the appeal hearing. Follow the instructions exactly. Note that you have to make the first call. State that you are calling in for a particular hearing, and make sure the person answering the phone takes your phone number correctly. Get that person's name and record the time.
- ◆ Have all your witnesses ready. Tell your company receptionist to watch for the hearing officer's return call and to give that call priority. If the hearing officer fails to call around the time the hearing is due, call the toll-free number on the hearing notice again to be sure they know you are still waiting. Document that call as well.

in the Appeal Hearing

Participating

- ◆ Be prepared for the unexpected. If the claimant says something unexpected, get an appropriate witness to a telephone. If the witness is not at the office that day, tell the hearing officer how they might contact the witness. If the problem is an unexpected need for certain documents, ask the hearing officer and ask for a "continuance" so you can send copies to the claimant and the hearing officer. If the continuance is denied, register your objection so it will be on the record for your appeal to the Commission. Explain why you think the evidence is important enough to continue the hearing on another date.
- ◆ Let the hearing officer know if the claimant gives conflicting or wrong information. In addition to bringing it up at the hearing, mention it in your appeal letter to the Commission.
- ◆ Your demeanor during the hearing is important. In general, stay calm and present an organized case.
- ◆ You can get time to prepare an appeal for the Commission by waiting until the 14th day to file. If you think 14 days is too short for a good appeal, simply state, "We disagree. More information will follow later." Then take an additional week or two to research and write your appeal. Commission appeals take four to six weeks to process, so a week or two after filing should not be too late to submit additional comments.
- ◆ At the appeal hearing, present testimony from firsthand witnesses. Firsthand testimony is by far the strongest evidence. Affidavits or secondhand testimony are not worth much in the face of a credible claimant's denials. Hearing procedures allow witnesses to participate by phone, which should make testimony from even the busiest witnesses more practical.
- ◆ If there are criminal charges pending, let the hearing officer know that in your testimony.

APPEALING TO THE COMMISSION

- ◆ **Appeal on time!** A late appeal must be dismissed. If you are appealing late due to late receipt or non-receipt of the Appeals Tribunal decision, or due to misinformation from a TWC representative, highlight that fact in the first paragraph of your appeal to the Commission. That gets a hearing on the timeliness problem at which you can prove the receipt or misinformation problem.
- ◆ **Be brief and specific.** Help the Commissioners understand your case by highlighting your specific points of disagreement with the hearing officer's ruling. An item-by-item outline is best.
- ◆ **Bring up new evidence.** If after the hearing you discover new evidence, mention it in your appeal to the Commission. You might just get a rehearing!
- ◆ **If criminal charges are pending against the claimant, mention that in your appeal to the Commission and ask the case be held pending trial. Let the Commission know of the outcome.**

Responding to the claim and handling appeals with the above cautions in mind will decrease your chances of losing an otherwise winnable claim and help you protect your company from unwarranted chargebacks. If you need more assistance, please check the employers section on TWC's World Wide Web site at <http://twcdirect.twc.state.tx.us/employer.htm>.

Special Things You Need to Know About the Law of Unemployment Claims

"Inability" is not misconduct. Neither is "incompetence." Do not use those terms in responding to a claim or testifying at an appeal unless the claimant truly had no ability to do the job. Instead, show how the claimant failed to do the best he or she could.

- ◆ Personal illness is not misconduct. Tending to the illness of one's minor children is not misconduct. Failure to give proper notice of an absence can be considered misconduct.
- ◆ You will need to show how the claimant, before discharge, either knew or should have known their job was in jeopardy. Show evidence of written or verbal final warnings or of policies warning of dismissal for certain violations.
- ◆ Show the claimant was not singled out for discharge.
- ◆ Show the discharge occurred when it did due to a specific act of misconduct that happened close to the discharge. Too much time between the final incident and discharge can work against you.
- ◆ If you discharged the claimant, show that you followed whatever progressive disciplinary policy you have in your company.
- ◆ If possible, point out that before discharge, you confronted the claimant with the reason for discharge and gave them a chance to explain their side of the story. If you told the claimant an incorrect reason for discharge, be prepared to explain how you did so to avoid anticipated violence or defamation charges, or to spare the claimant's feelings.
- ◆ If the claimant quit, be prepared to demonstrate how a reasonable employee would not have resigned under the same circumstances.
- ◆ Try to get the departing employee to explain his or her reasons for leaving in writing.
- ◆ If it is clear the claimant quit without any pressure to resign, do not waste time talking about misconduct or poor work performance issues.
- ◆ If a claimant offered two weeks' notice of resignation, and you accepted the notice early, the work separation remained a resignation. Just make sure to tell the employee something like, "We're accepting your notice early," or "You can make today your last day," instead of, "We're terminating you early."
- ◆ If the claimant quit because of alleged problems with working conditions, rebut the allegations one by one. If the claimant failed to complain to anyone in authority, point that out. Show how you investigated and dealt with complaints from the claimant.
- ◆ If the claimant quit because of a pay cut of 20 percent or more, there is a good chance they will get benefits. Benefits may be denied if you show that at the same time, the job was favorably changed to become easier or better, such as an increase in company benefits, decrease in commute, transfer to a management track, etc.
- ◆ If the claimant quits and alleges you violated wage and hour laws, be prepared to offer evidence about the pay agreement, the hours worked and the amount of pay.



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