

How to Prepare for and Present an Unemployment Insurance Appeal

by Lori N. Nacht, Esq.

This article includes information and tips on preparing for and presenting the employer's case based on my observations and experience in my former position as a UI hearing examiner for the state of Maryland. If you follow this basic advice and bone up on the specific requirements and procedures for your state, you will have gone a long way toward making the UI appeal process efficient and effective for your organization.

Preparing for the Hearing

Review the hearing notice

The first thing to do when confronted with an upcoming UI appeal hearing is to read the entire hearing notice—front and back—to find out what is required of you before the hearing. Some examples of preliminary issues to deal with are:

- Decide if you want to request a telephone hearing.
- Immediately request a postponement if you or your witnesses are not available to attend the scheduled hearing.
- Gather exhibits for the hearing and send them in before any required deadline.

If the hearing date is acceptable, immediately note its date, time and place. When I was a hearing examiner, I was amazed at how many people went to the wrong hearing site or went to a hearing on the wrong day. Make sure that you and your witnesses show up at the right place, at the right time, on the right date.

Tip: Make sure to keep track of all hearing notices that you receive and check their dates to ensure that you rely on the most current one.

Next, reread the hearing notice specifically to determine what issues are going to be decided at the hearing. In Maryland, for example, the hearing notice has an issue section that can state one or more issues, such as the separation, whether the case should be reopened, whether the appeal was timely, etc. There might even be more than one hearing notice for the same case for the same day and time. For instance, you might have a separation issue on one hearing notice and an "able and available" or fraud issue on another hearing notice for the same date and time. Make sure to read the issue on each hearing notice to find out all the issues that will be decided at the hearing. If you prepare for the wrong one or only some of the legal issues, the case probably will not be postponed because you are unprepared.

Identify and prepare your witnesses

- Go over the employee's file with your witnesses so that the witnesses can refresh their memories about the employee.

- Have your witnesses tell you in their own words what happened that led up to the separation so they are familiar with testifying about the employee and the separation.
- If they think it will help them testify, have your witnesses make a short written chronology of the events that led up to the employee's separation to keep them on track during their testimony at the hearing. However, do not have your witnesses write out their testimony because most hearing examiners will not allow a witness to read a statement into the record.
- Make sure you prepare your witnesses for the thorny questions so they know how to answer them.

Know the basics about the employee and the law

HR professionals representing companies at UI hearings should always come equipped with the basic information about the employee who is applying for unemployment insurance benefits. Specifically, you should have the individual's start and end dates, pay rate, position, supervisor and the reason the person no longer works for your company.

Be sure you know at least the fundamental elements of the state's unemployment compensation law. In certain states, for example, if a person is discharged solely for poor performance then the discharge is for "no misconduct" and no penalty is imposed. Therefore, it would be unproductive to go into a hearing simply arguing that a person was discharged for poor performance or just for being incapable of doing the job. In other words, do not make a big production arguing an issue about which the law is clear. If, however, the employee was discharged for another reason that could be construed as some form of misconduct—negligence, for example—then you should make that argument.

Tip: If you are not familiar with the UI statute or case law in your state, call your local UI appeals office and ask someone, preferably the legal supervisor on duty, whether there is a manual or handbook on the current case law that you can either purchase or possibly review online.

It also is usually unproductive to argue that an employee quit and, therefore, should be denied benefits. An employee present at the hearing can simply argue that something occurred in the workplace that caused him or her to quit. Then, the burden falls to the employer to rebut the employee's argument. Really, the only time an employer should argue simply that the employee quit is when the employee is not present at the hearing and the employer's representative has no knowledge of why the employee quit. In that case, the employer's witness should testify only that the employee quit and you do not know why, and, therefore, the employee should be denied benefits.

Tip: Know what penalty already has been imposed and whether your company is being charged for the employee's benefits. If you are not being charged for the employee's benefits before an appeal hearing, there is no benefit—only a

downside—to appealing the UI determination. The only other possible result is for your company to start being charged. Leave well enough alone.

What to bring to a hearing

Employers should *not* go into a hearing empty-handed. Employers are expected to have all the relevant documents relating to the employee's employment with your company. A UI appeal hearing might seem simple, but it is a formal administrative hearing and you need to treat it accordingly. You should bring copies of the documents that you want to have entered into the record at the hearing, and you should bring at least three copies of all your documents so that you have one copy each for yourself, the hearing examiner, and the employee.

Tip: Some states might require you to send in all of your documents before the hearing. If that is the case, make sure you follow that state's procedures. However, you should also bring a copy of the documents to the hearing in case the copies you sent in did not make it into your file in time for the hearing. Also, put all the documents in some sort of order that makes it easy to find a document if you are asked for it.

If you do not have proof of when the appeal letter was mailed or faxed, then take the person who sent the appeal letter with you to testify as to when the appeal letter was sent. If that person is unavailable, then at least take a signed, notarized document stating the procedure the person went through to mail or fax the appeal letter and when it was sent. If a third party sends your appeal letters, then get some documentation from the third party indicating why the appeal was late.

Preliminary procedural issues are important. If you do not overcome the burden on the procedural issues, then the hearing examiner usually will not make a decision on the substantive legal issues.

If the employee was separated due to a policy violation, you should have a copy of the relevant policy with you. This situation will also require a copy of the employee's signed acknowledgment of having received the policy to prove that the employee did know about the policy. Also, take documents that are related to the reasons the person was separated. For example, if an employee was discharged for lateness or absenteeism, take the documentation showing the dates she was out and, if possible, the reason she was out and whether she called in. If an employee was discharged for using drugs or alcohol on the job, take the drug policy and the drug test with the positive result.

The Hearing Itself

Treat the hearing examiner with respect

The most important thing to keep in mind at the hearing is to treat the hearing examiner with respect. Each state has different titles for the individuals who conduct UI hearings. Regardless of whether the individual's title sounds like they are a judge or not, remember that the person who is conducting the hearing will be the one

making the decision in your case. Therefore, do not unnecessarily antagonize or argue with the hearing examiner. As with all judges, hearing examiners might be easily annoyed or simply be having a bad day.

Tip: Whether or not the hearing examiner is an attorney, it is best to address him or her as "Your Honor."

Testify in an orderly fashion

During the hearing, you and your witnesses should testify in an efficient, concise and orderly manner. The witnesses who testify should not repeat one another's testimony or "paper" the hearing examiner with too many documents. Testify about and enter only those exhibits that are relevant to the separation or to the issue that is before the hearing examiner.

Tip: Do not try to enter every document in the employee's personnel file into the record; only enter documents that are relevant to the separation or legal issue at hand.

As to the order of testimony, one effective way to have witnesses testify is in chronological order about the events that led up to the separation. First have a witness testify, in one or two sentences, as to the reason the person was separated to lay a foundation for the testimony. This is helpful because it gives the hearing examiner an idea of where you are going with your testimony and the hearing examiner can eliminate irrelevant testimony and keep the witnesses focused. Then it is helpful to lay out the case in chronological order. However, if the hearing examiner instructs you to offer the testimony in some other order, do not argue; just comply with the instructions.

Do not unnecessarily interrupt or object to anything the hearing examiner says. The hearing examiner is the fact finder in the case and will sometimes ask questions to determine the facts of the case. Each hearing examiner conducts a hearing differently. Some will allow you to present your case and will ask only minimal questions. Others will ask questions of you and your witnesses to gather relevant information. Sometimes the hearing examiner's questioning will disrupt your planned presentation. When that happens, just do your best to go with the flow and answer the questions as concisely and correctly as possible. Always remember that although the hearing might seem like a relaxed environment because it usually is not in a courtroom and there is no court reporter, the hearing examiner is still the decision-maker and wants to be treated as such.

The rules of evidence are usually relaxed in UI appeals hearings, so the hearing examiner typically will allow hearsay and accept all documents and testimony that appear relevant. Therefore, if the employee or the employee's representative objects to any evidence that you offer, you should politely say that the evidence is relevant and should be accepted for the hearing examiner to weigh. By the same token, unless the employee offers evidence that is clearly irrelevant to the issue at hand, you should avoid making objections to the employee's evidence because it will only prolong the hearing. And that will not engender the hearing examiner's good will

toward you. One way or another, hearing examiners will get all the evidence they think they need.

Tip: It is in your best interest to appear as the reasonable party, which does not include jumping up and down hollering "objection" during the hearing. Real-life legal hearings are not like what we see on television so do not try to be an "Ally McBeal" or act like you are on The Practice. The hearing examiner will see right through you, which will not help your credibility.

Cross-examination

When you are given an opportunity to question your former employee or any of the employee's witnesses, be sure to ask questions and do not make statements during this time. Many people try to use cross-examination to add testimony. That is not allowed and will only earn you a reprimand from the hearing examiner. Ask your former employee only relevant questions or questions needed to clarify any part of the employee's testimony. Do not try to play Perry Mason and "trap" the former employee through cross-examination. Instead, use rebuttal time to address any testimony you felt was incorrect. In addition, when your former employee in turn questions you or your witnesses during cross-examination, be sure to answer any questions directly and concisely.

Closing statement

Give a short and concise closing statement. The best closing statement is a brief summary of what has been said and one that asks for a remedy, for example, that benefits be denied.

Tip: If at any time during the appeal hearing process you do not understand something, you should call the appeals office. The burden is always on you to know what is going on and, like the old adage, ignorance is no excuse. The employees in the appeals offices know the ins and outs of the appeals process; they are the experts, so use their knowledge to help yourself.

Post-hearing

If you do not get a favorable outcome after the first appeal hearing, most states allow you to appeal to a board of review which is usually a panel of about three people who will review your case and either make a decision based upon the record or have a new hearing. Either way, it is almost always in your best interest to appeal an unfavorable decision to the next level. The board might find in your favor and reverse the hearing examiner's decision.

Conclusion

Dealing with UI issues and appeal hearings is usually only one small part of an HR professional's many duties. However, becoming familiar with UI law and procedure will dramatically reduce the frustration in the UI hearing and in your days as a whole. If you have the staff, training them in this area could be a good professional

development opportunity. Most of all, if you can reduce your company's UI premiums by becoming a pro in the applicable law and procedure you can be the star employee that we all wish to be.

This article is not intended to be legal advice, but should be considered general information. Particular questions should be directed to legal counsel.

© Copyright 2004 Harmon & Davies, P.C.