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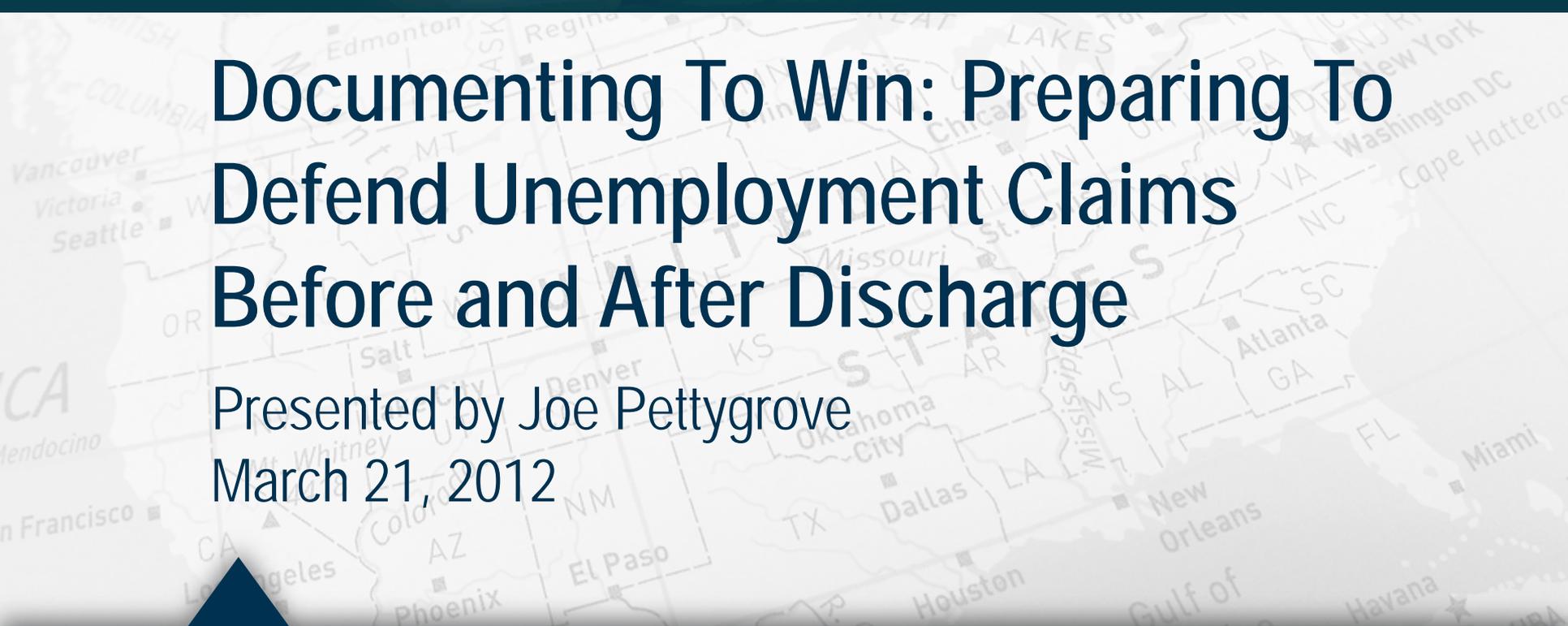


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# Documenting To Win: Preparing To Defend Unemployment Claims Before and After Discharge

Presented by Joe Pettygrove  
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The purpose of the Indiana Unemployment Act is to provide unemployment benefits to persons unemployed through no fault of their own.

Indiana Code § 22-4-1-1

# Indiana Unemployment By The Numbers

Since 1980...

- ▶ Highest rate was 12.7% (1983)  
(Believe it or not, we haven't topped that *yet.*)
- ▶ Lowest rate was 2.9% (2000)



Like the economy, unemployment numbers go up and down, but some level of unemployment is a fact of life (and business)

# Funding The System

Most employers fund Indiana's unemployment system through quarterly payroll taxes, and each valid claim against an employer affects that employer's tax rate.

Non-profit and government employers can register to become a "reimbursable employer" and pay the full amount of each valid claim as it is made.

# Funding The System: 2011 Legislative Direction

State Senator Dennis Kruse (R-Auburn): "Indiana's Unemployment Insurance Trust Fund has been structurally imbalanced since 2001. Before Senate action two years ago, our state had some of the lowest premiums while paying some of the most generous benefits when compared to other states."



# Funding The System

As of February 2011, Indiana owes more than **\$2 billion** to the federal government – money borrowed to ensure a continued flow of unemployment insurance benefits during challenging economic times.

This past session, the Indiana Legislature passed significant amendments to Indiana's unemployment law designed to (begin to) address this problem.

# Overview Of The Big Changes

## House Enrolled Act No. 1450:

- ▶ Simplifies benefit calculation after July 1, 2012 (weekly benefit amount = 47% of claimant's prior average weekly wage)
- ▶ Increases employer payroll taxes (less than expected)
- ▶ Restricts eligibility for certain types of employees



# Overview Of The Big Changes

DWD has made several internal administrative changes, and general ALJ behavior has changed in the past years indicating the Department is somewhat more cost-conscious:

- ▶ New Class Of ALJs
- ▶ Appeals Hearings By Phone (default)
- ▶ Increased responsiveness to inquiries (if you find the right person)

Remember...

The purpose of the Indiana  
Unemployment Act is to provide  
unemployment benefits to persons  
unemployed through no fault of their  
own.

What about employees who are  
voluntarily unemployed?

Indiana Courts (for years): If an employee enters “an employment contract which provides for a mandatory shutdown or vacation period, then the employee is voluntarily unemployed during the shutdown or vacation period and is ineligible for unemployment benefits.”

## HEA 1450: Provides that claimants are ineligible for benefits for certain periods in which they are “on vacation”:

- per a written agreement;
- providing reasonable assurance of subsequent employment;
- where the employer has filed all DWD required notices, reports, etc. regarding separations associated with the “vacation period.”

What does all this mean?  
Properly drafted employment  
contracts can save you from  
unemployment liability!

BUT...



# Take Careful Note...

- ▶ Such contracts must be CAREFULLY drafted, as they will take employees out of the “at-will” doctrine and must be properly structured to comply with Indiana law; and
- ▶ DWD has not historically recognized such contracts, and the precise meaning of the new statutory provisions is still unclear (Translation: You may have to enforce them in court).

# Responding To A Claim Before The “New” DWD

“First thing’s first...”

CONSIDER CONSULTING, AND PERHAPS, WORKING  
WITH COUNSEL!



# Responding To A Claim

## Is contesting the claim worth it?

### ▶ Pro's

- ▶ Unemployment findings are not binding in other agency proceedings or litigation
- ▶ Use the possibility of a benefits contest as a bargaining tool

### ▶ Con's

- ▶ Record of unemployment proceedings is admissible as impeachment evidence
- ▶ "Free discovery"
- ▶ The benefit of the doubt still often goes to the claimant.

# Responding To A Claim

1. WATCH ALL STATED DEADLINES
2. Initial Notice of Claim & Requests For Information – two documents, usually received around the same time.
3. New Initial Protest Form (“check the box”). Get it in right away to preserve right to protest. Must be filed in 10 days. Must get form off DWD’s web page.

# Responding To A Claim

4. RFI – consider whether and how much to respond
5. New penalty for failure to respond – if you later get an ALJ to reverse an eligibility finding, you pay 50% of any benefits the claimant erroneously received to that point.
6. Claims Deputy makes initial determination of eligibility (“paper trial”)
7. Appeals from initial determinations are heard by DWD Administrative Law Judges (ALJs)

# The Hearing



- ▶ ALJ takes testimony and evidence.
- ▶ Employer bears the burden of proving a discharge for just cause.
- ▶ Claimant bears the burden of proving he/she voluntarily quit for good cause.
- ▶ Hearings presumptively conducted by phone; consider request for in-person hearing.

# The Hearing

- ▶ Each judge is different!
- ▶ “Old School” – runs the show
- ▶ “New School” – typically allows each side to present their case with minimal involvement/interruption.
- ▶ ALJ’s now subject to much stricter internal expectations re: “turnaround time.” Opinions typically drafted within hours of the hearing.



# Appeals To/From The DWD Review Board

- ▶ Generally, the ALJ does not spend much time reviewing the record. The high points and impressions made at the hearing drive the result.
- ▶ 3-person DWD Review Board will listen to entire hearing audio – just need 2 who view it differently from the ALJ for reversal.
- ▶ If still unhappy, can appeal to Indiana Court of Appeals, but subject to formal appellate rules, deadlines, and costs.

# Eligibility For Benefits

- ① Out of work through no fault of his/her own.
- ② Ready and able to work.
- ③ Actively seeking full-time work.



# Out Of Work Through No Fault Of Claimant's Own

- ▶ Discharged Without Just Cause
- ▶ Voluntarily Quit With Good Cause

# Discharge For Just Cause

(Ind. Code § § 22-4-15-1(d) & 22-4-15-6.1 )

- ① Falsification of employment records
- ② Knowing violation of a work rule
- ③ Unsatisfactory attendance
- ④ Damaging employer's property
- ⑤ Refusal to obey instructions
- ⑥ Reporting to work under the influence
- ⑦ Dangerous misconduct
- ⑧ Post conviction incarceration
- ⑨ Breach of duty
- ⑩ Gross misconduct

# Discharge For Just Cause

- ▶ Surprise! Discharge for Just Cause does not include common reasons for termination such as poor performance.



# Knowing Violation Of A Work Rule

## Most common justification for discharge offered by employers

*Prima facie case:* Employer must show that the claimant:  
knowingly violated  
a reasonable and  
uniformly enforced rule

# Knowing Violation Of A Work Rule

“Knowingly violated” means the employee knew of the rule and knew his conduct violated the rule.

The asserted work rule must be reduced to writing and introduced into evidence to determine whether an employee was discharged for “just cause” for a knowing violation.

So...an acknowledgment of receipt signed by the claimant is the single best piece of evidence you can offer the Department of Workforce Development or a court.

# “Documenting To Win”

- State reason for discipline/discharge in terms of claimant’s conduct.
- If citing policy(ies), include “among other reasons.”
- Note claimant’s “conscious/knowing/ intentional/negligent” disregard of obligations and/or employer’s interests
- Tie disciplinary documentation, file notes, warnings, etc. to written policies.
- If no policy clearly applies, document how employee should have known of obligations (trainings, meetings, 1:1s, etc.)

# “Documenting To Win”

- AVOID justifying discharged based on the claimant’s “insubordination.” DWD’s definition is nonsensical.
- Instead, describe behavior using all of the following that arguably apply:
  - ① Refusing to obey instructions;
  - ② Breaching duties, obligations, or required standards of conduct/professionalism;
  - ③ Violating specific policies.

# “Documenting To Win”

- AVOID justifying discharged based on the claimant’s “poor performance.” Too vague.
- Instead, describe claimant’s “failure” or “refusal” to follow specific policies/directives/standards of behavior.
- Or, describe claimant’s repeated violation of specific policies/directives/standards as “consistent,” “frequent,” or “repeated.”

# “Testifying To Win”

How do you prove uniform enforcement if the claimant’s misconduct has never happened before?

- ① Cite the most similar situations you can find; and/or
- ② Have the relevant decision-maker and Human Resources testify that they would make the same decision in similar circumstances.

# Voluntary Quit

- ▶ Employee who voluntarily leaves employment for a good cause is entitled to full benefits.
- ▶ Good cause: reasonable person would have left the job and reasons for leaving are employment-related.
- ▶ *Keep/create as much documentation as possible reflecting the claimant's stated reason for leaving!*

# Ready And Able? Actively Seeking Work?

- ▶ Some ALJs limit the hearing to reasons for separation. However, consider asking claimant under oath whether he/she:
  - ▶ Has failed to go to a job referral.
  - ▶ Refused a suitable offer of employment.
  - ▶ Is unavailable for work due to illness or injury.
  - ▶ Is actively seeking employment, etc.

# Let's Practice: Billy Blogger

- ▶ Billy Blogger has been having performance problems at work. His supervisor, Henry Hammer, has been coming down on him hard, establishing expectations and monitoring Billy's performance daily. Billy's prior supervisor let him work at his own pace and just fixed his mistakes instead of addressing the problem. Billy decides he needs to "vent" his frustration over Henry's new style and decides to do it on his Facebook account. After a particularly frustrating day, Billy posts "I hate that idiot Henry. He's a Nazi and an ass kisser who is only on my case because he is vying for a promotion. That married @\$shole is also sleeping with his boss."
- ▶ What to do?

# Billy Blogger Take-Aways

Lots of things to consider besides unemployment eligibility...

- ▶ How did you find out about Billy's posting?
- ▶ What if you address Billy and he claims you're violating his constitutional rights?
- ▶ Has Billy engaged in "protected concerted activity?"
- ▶ How likely is Billy's behavior to impact the workplace and how much?
- ▶ Whatever you decide to do with Billy, don't forget to follow up on the allegation of an inter-office romance between direct reports.

# Billy Blogger Take-Aways

- ◆ Assuming you decide to discharge Billy, how would you explain it to him and how would you document it?

# Billy Blogger Take-Aways

- ▶ First, describe the facts upon which his discharge is based, i.e., “your employment is being terminated due to your inappropriate statements regarding your supervisor [and any other incidents, prior history, if they factored into the decision].”
- ▶ Then state the conclusions/results that flow from those facts: “your conduct, among other things, violates Policy #123 as well as your obligation to behave in a professional and respectful manner to your coworkers.”
- ▶ This sets you up to argue “violation of a reasonable uniformly enforced work rule” and “breach of duty.”

THE END

