

How to Prepare for an Unemployment Hearing

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If you have terminated an employee or are in a business with regular personnel turnover, you have probably been faced with the prospect of attending an unemployment hearing. Here are some tips on how to get ready for a hearing.

Do you need to participate?

The first question is whether to contest a claim for unemployment. If you lay off an employee for lack of work, they are going to be eligible for benefits and there is no reason to contest the claim. If they are fired for sleeping on the job, they should be disqualified from receiving benefits and you should make sure to present your evidence and fight the claim. If the discharge is related to either misconduct or poor performance, you will generally want to consider contesting the claim for benefits.

Do you need to use an attorney?

Generally speaking, unemployment hearings do not have enough at stake and are often straight forward enough that they do not require you to have an attorney. The hearing officers are generally accustomed to dealing with non-lawyers and are helpful with the basics of the process. While there is no guarantee the hearing officer will agree with your position, they will generally make sure you have a chance to tell your story. In making your decision, you will need to weigh the cost of paying for an attorney against the cost to your business of losing the claim for benefits. I generally recommend clients use me to talk through the issues, review the exhibits they will want to use and then talk through how the process works. I only occasionally am asked to represent a client at the hearing.

What do you need for the hearing?

In order to get organized for the hearing, start first with understanding your “story.” Going to a hearing, just like a trial, is a contest of stories, and usually the person best prepared to tell their story is most likely to succeed. Make sure you can articulate, in a logical and linear fashion, what happened, why the decision to terminate was made and what the claimant will likely say and how you will respond. If you are contesting benefits because of misconduct, how are you going to tell your story of what you believe happened? Keep in mind that an important factor in telling your story is having someone capable of doing so. If your best witness doesn’t communicate well, you are going to need to find other ways to get your story out.

With or without a good storyteller, you still need to have your documents in order. Look at your documentation from the perspective of how it relates to or proves each step or part of your story. Sometimes documents can tell your whole story. If you have gaps in your documents, you will need to decide who or what can fill in those gaps.

As an example, if the discharge was for absenteeism, do you have the records that show your policy on attendance, accurate time records to show the absenteeism, communications to the employee warning about the consequences? Is there any kind of performance improvement document, giving the employee a last chance? Finally, what document shows why they were terminated and does it tie back into the policy and the attendance records? If the discharge is for misconduct, do you have a policy that applies to that conduct and makes clear that it is unacceptable? (For some misconduct, like sleeping on the job or stealing, there really doesn't need to be a policy since everyone understands that it is misconduct.) Do you have statements from the witnesses to the misconduct? Is there disciplinary documentation leading up to and consistent with the misconduct?

Prepare your questions ahead of time.

One of the most difficult things in any hearing is to ask good questions. A good practice point is that if you have a witness for your side and you are going to be asking them to testify, think of it as a conversation rather than an examination. Don't think about how they do it on Law & Order, think about how you would ask someone to explain how they made a complicated dinner recipe. Keep it simple, logical and listen to what they say. Most people get so wrapped up in asking questions that they forget to listen to hear whether they got the answer they were looking for. Finally if you are going to be cross-examining the ex-employee, write your questions out ahead of time, and try to make sure every question you ask can be answered by either yes or no. You don't want to give the claimant extra opportunities to tell their story.