

PRESENTATION

THE  EMPLOYEE

Nakimuli O. Davis-Primer, Esq.

Baker Donelson Bearman Caldwell & Berkowitz, P.C.

ndavis@bakerdonelson.com

BAKER DONELSON

EXPAND YOUR EXPECTATIONS™

Overview . . .

- Unemployment Insurance
 - Federal and State Taxes
- The Numbers
- Unemployment Claims Process
 - Employers are now required to respond to claims
- Tips to Avoid Claims and Negative Experience-Ratings
- Importance of Documentation

What is Unemployment Insurance (“UI”)?

- Goals of Unemployment Insurance:
 - Pay benefits to workers when they lose their jobs through *no fault of their own*.
 - Promote economic stability by rewarding employers who minimize their workforce turnover, and by maintaining the flow of dollars through the economy even when there is widespread unemployment.

Interesting Facts about UI

- Unemployment insurance has kept 11 million people out of poverty since 2008.
- 69 million Americans either received or lived with someone who received unemployment benefits during the past five years.
- More than 60% of those who receive benefits are between the ages of 25 and 54.

Read more: <http://www.businessinsider.com/here-are-the-states-that-most-need-an-extension-of-unemployment-benefits-2014-1#ixzz34oAgkuhJ>

How is UI funded?

- By employers
 - Through federal **and** state unemployment taxes.
- Federal Unemployment Tax Act (FUTA)
 - Imposes payroll taxes on employers based on wages.
 - The employer must pay the FUTA tax; do not withhold the FUTA tax from an employee's wages.
- State
 - Based on various factors.
 - In Mississippi, the **employer** pays the cost of UI; employees pay no part of it.

Federal Unemployment Tax Act

- In his presidential message of June 8, 1934, President Franklin D. Roosevelt declared that the American people wanted "some safeguard against misfortunes which cannot be wholly eliminated in this man-made world of ours."
- In the summer of 1934, President Roosevelt created the Committee on Economic Security to draft legislation that would help alleviate the pain of the Great Depression and prepare for future economic downturns.
 - Resulted in the FUTA, which established the framework for a joint state and federal scheme of unemployment insurance

Federal Unemployment Tax Act “FUTA”

- Required to pay FUTA tax if either of the following:
 - Employer pays wages of \$1,500 or to employees in any calendar quarter *or*
 - Employer has at least one employee during any part of a day in any 20 or more different calendar weeks.
 - 20 weeks need not be consecutive
 - the “one employee” need not be the same individual
 - count all full-time, part-time, and temporary employees
 - the “calendar week” is a period of 7 consecutive days beginning Sunday and ending close of Saturday
- Once you meet **either** test you become liable for the FUTA tax ***for the entire calendar year and for the next calendar year as well.***

FUTA continued . . .

- The FUTA tax rate is 6.0%
 - Employer can receive a credit of 5.4%, which would make the FUTA tax rate 0.6%.
 - Entitled to the credit if you pay your state unemployment taxes in full and on time.
- Tax applies to the first \$7,000 paid to each employee as wages
 - Once the wages exceed \$7,000, employer has no further FUTA liability for that employee for the year.
 - This means the maximum payment, if the full credit is received, is 0.6% of \$7,000 = \$42 per employee per year.
- Used to finance all administrative expenses of the federal/state unemployment insurance system and the federal costs involved in extended benefits.

State Unemployment Tax

- Each state has a system that bases the tax rate on the amount of benefits the employer has paid to former workers.
 - Employers' state UI tax rates rise in direct proportion to unemployment claims of former workers.
- State unemployment tax rate is generally based on:
 - Amounts employers pay their employees,
 - Type and age of business, and
 - Unemployment claims filed against the business.
- State tax is used to pay unemployment benefits to qualified unemployed workers.
- State unemployment insurance remains the **only payroll tax** that **employers can control** by prudent human resource management and careful handling of UI claims.

Mississippi Facts. . .

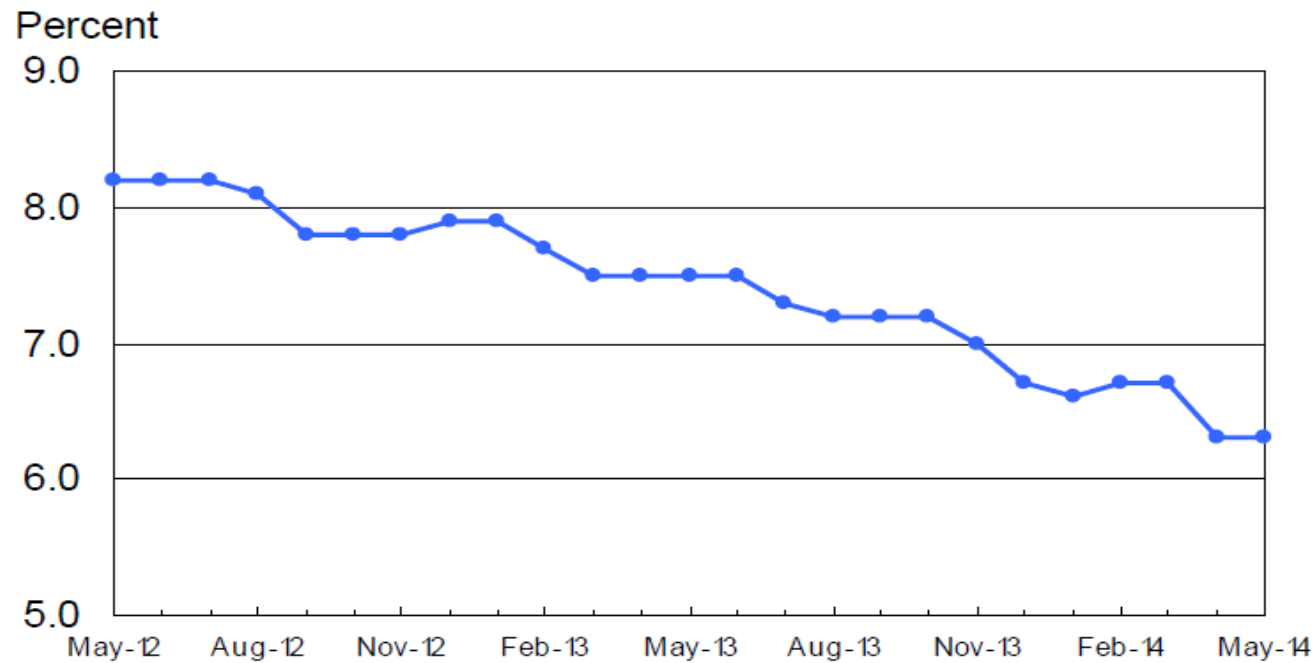
	BENEFITS						COVERAGE	TAXES	
	Earnings/employment Needed in Base Period to Qualify	Computation of Weekly Benefit Amount	Weekly Benefit Amount	Weekly Earnings Disregarded	Calculation of Number of Benefit Weeks	Num of Benefit Weeks	Size of Payroll (length of employment/wages Paid)	2014 Wages Subject to Tax	2014 Min & Max Rates New Employer Rate
MS	40xWBA; \$780 in HQ; wages in 2 qrts	1/26 HQW	\$30 (min) \$235 (max)	\$40	Lesser of 1/3 BPW or 26 x WBA	13-26	20 Weeks or \$1,500 in any qtr	\$14,000	0.2% 5.4% 1.16% (yr1)

- Minimum WBA is \$30; Maximum is \$235
- Tax Rates
 - Minimum Employer Tax Rate is 0.2%
 - Maximum Employer Tax Rate is 5.40%
 - New Employer Rate is 1.16% (yr1), 1.26% (yr2), & 1.36% (yr3)
 - These rates include the workforce investment and training contribution rate that might be applicable for the rate year. If the organization acquired a business that is already liable for unemployment taxes in Mississippi, the organization may be immediately eligible for a modified tax rate. This rate may be higher or it may be lower than the new employer rate.

The Numbers . . . Unemployment Rate

Bureau of Labor Statistics, U.S. Dept. of Labor

**Chart 1. Unemployment rate, seasonally adjusted,
May 2012 – May 2014**

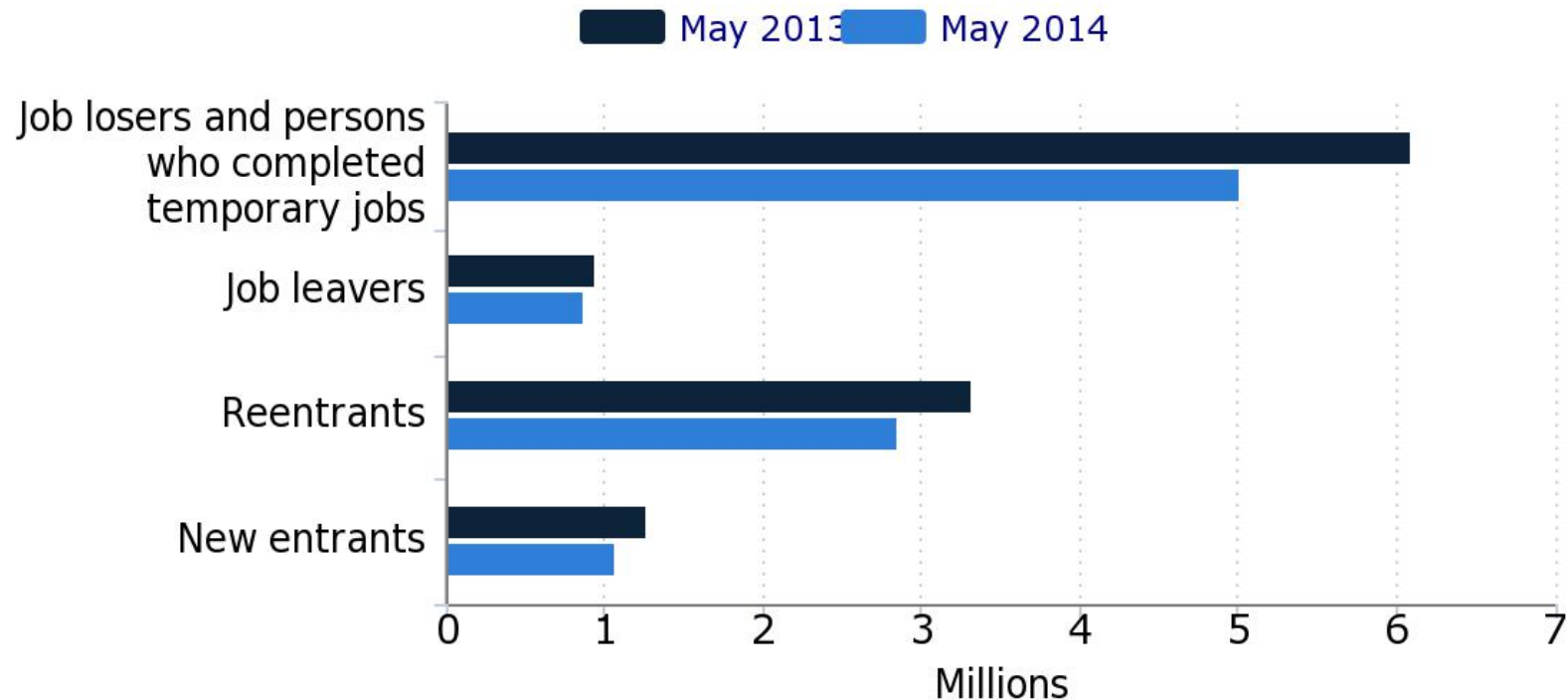


- The unemployment rate held at 6.3% in May 2014
- Number of unemployed persons unchanged in May at 9.8 million

The Numbers . . . Reasons for Unemployment

Bureau of Labor Statistics, U.S. Dept. of Labor

Reason for unemployment (seasonally adjusted)



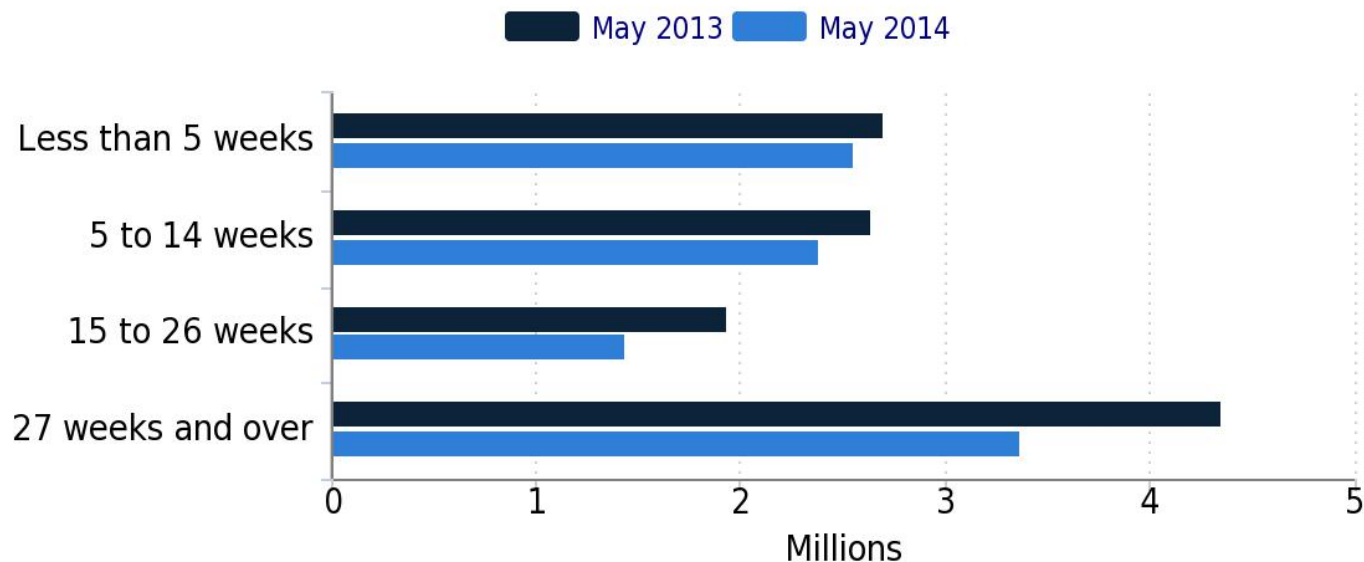
- Among the unemployed, the number of job losers and persons who completed temporary jobs declined by 218,000 in May, and by 1.1 million over the year.

The Numbers . . . Long-Term Unemployed

Bureau of Labor Statistics, U.S. Department of Labor

- 3.4 million people are unemployed for 27 weeks and over.
- Accounts for 34.6% of the unemployed.
- Number of long-term unemployed essentially unchanged in May. But over the last year, the number has declined by 979,000.

Duration of unemployment (seasonally adjusted)



What Starts the Unemployment Claims Process?



- Discharge an employee
- Lay off an employee
 - An employee who loses a job through a layoff or RIF is always eligible



What is the Process?

- Unemployed Employee files a claim for benefits.
- Employer Responds.
- Claims Examiner renders opinion based on employer's response. and any documents provided by employer.
- Decision is final unless employee or employer appeals.

Unemployed Employee Must File a Claim & Qualify for Benefits

- Unemployed Employee must file for unemployment benefits.



- Monetary Qualifications:
 - Must have worked in at least two quarters of base period;
 - Must have earned at least \$780 in the highest quarter; and
 - Must have earned forty times his or her weekly benefit amount in base period.

Other Qualifications . . .

- Must file a claim for benefits.
- Must wait one week before receiving benefits.
- Must certify eligibility weekly.
- Must be registered for work at the WIN Job Center.
- Must be unemployed through no fault of his or her own.
- Must be willing and able to work.
- Must be available for work and seeking full time work.

Disqualifications

- Voluntarily left work without good cause.
 - Circumstances such that an ordinary prudent employee would leave employment. Must also show explored alternatives to quitting and made reasonable efforts to preserve employment.
- Discharged for misconduct connected with work.
- Fail to apply for or accept suitable employment.
- Unemployed because of a labor dispute.
 - *E.g.* strike, lockout, or other dispute
- Receiving a pension toward which a base period employer contributes.
- Receiving or seeking unemployment benefits from another state.

Misconduct

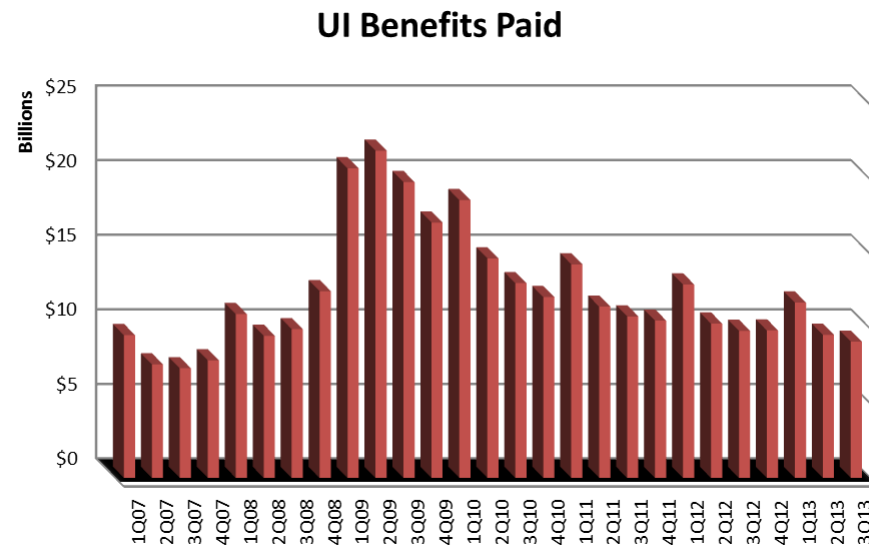
- “[C]onduct evincing such **willful and wanton disregard** of the employer’s interest as is found in deliberate violations or disregard of the standards of behavior which the employer has the right to expect from his employees. Also, **carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability, wrongful intent or evil design, and showing an intentional or substantial disregard of the employer’s interest or of the employee’s duties and obligations to his employer**, came within the term.”
- “Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, or inadvertences and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion were not considered ‘misconduct’ within the meaning of the statute.”

What happens after a claim is filed?

- Employer receives a notice of claim and request for information
 - In the past, employers would not contest or simply ignore claims
 - *E.g.* Laid employee off or term in separation agreement
 - If you don't respond or respond late, employee automatically gets benefits
 - These “nonresponses” are no longer acceptable

Recession Blues . . .

- In light of the recession, UI claims significantly increased.

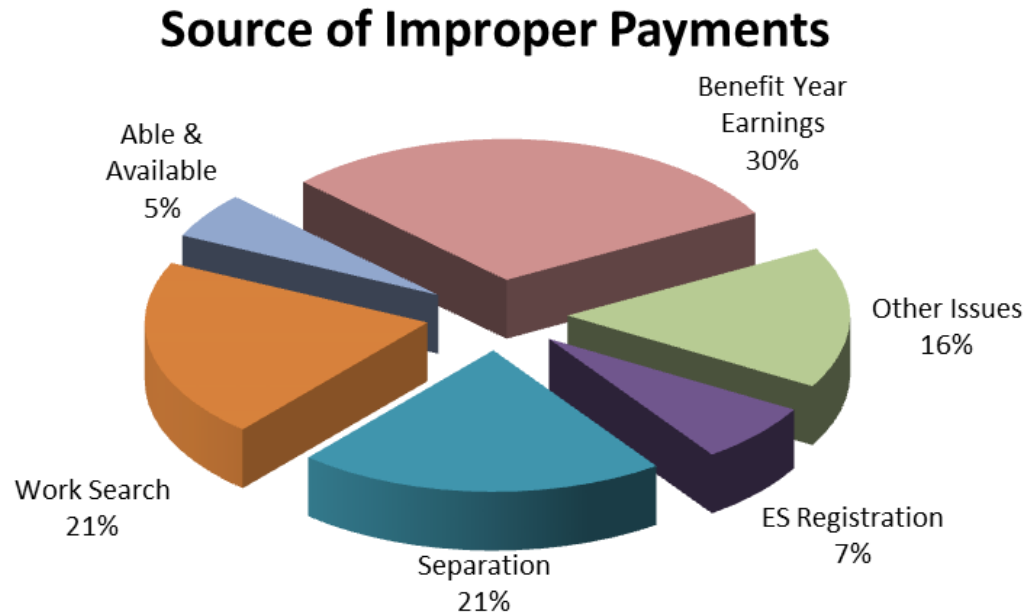


- This surge resulted in increased errors in payments, affecting the integrity of the UI system.
- The **integrity** of a state unemployment program is measured by the accuracy of unemployment benefit payments and denied claims.
 - In 2012, 10.8% of the \$90.2 billion (or \$9.7 billion) spent on UI claims was paid by mistake.
 - In 2013, 11.5% of the \$66.7 billion (or \$7.68 billion) spent on UI claims was paid by mistake.
 - More than \$1 out of every \$10 spent on UI recipients in 2013 was paid in error.

Overpayments

- “For FY 2013, the Department reported improper payments totaling approximately \$7.68 billion for the UI program alone,” \$7.3 billion was in overpayments.
- According to PaymentAccuracy.Gov, improper payment occurs when:
 - “funds go to the wrong recipient;
 - the right recipient receives the incorrect amount of funds (including overpayments and underpayments);
 - documentation is not available to support a payment; or
 - the recipient uses funds in an improper manner.”

Causes of Improper Payments



- Poor and late employer responses tend to result in unemployment benefits being approved and paid when a disqualification should have been imposed.
- Causes more appeals of initial determinations, unnecessarily burdening the appeals system.
- When benefits are paid erroneously, it is difficult for the state to recover the overpayments, and often they are never recovered.

Unemployment Insurance Integrity Act

- Purpose:
 - Strengthen the “integrity” of the unemployment system.
- Prohibits states from relieving employer from charges to their unemployment tax when:
 - Payment was made because the employer, or an agent of the employer, was at fault for failing to respond timely or adequately to the request, and
 - Employer or agent has established a pattern of failing to respond timely or adequately to such requests.
- Result in Mississippi
 - Employers must Respond to all unemployment claims
 - unless *good cause* (*i.e.* natural disaster, sickness, emergency, agency error causing delay/failure to deliver notice)
 - Must respond within 14 days of receipt of notice
 - No response is charge to individual experience rating

Responses to Claims

- Employer should:
 - Provide the last date of employment.
 - Provide wage information.
 - Explain why the person was discharged.
 - Provide a copy of any documentation that is requested or that is relevant to the discharge.
 - past performance issues, previous warnings
 - Provide a copy of any separation notice.
- In Mississippi, if an employer fails to provide the requested information within the time allowed, it is presumed the individual claiming benefits is not subject to disqualification.
 - Charge to individual experience rating for employer.
- After employer responds, the claims examiner renders an opinion.

Why Should Employers Care about Unemployment Claims' Decisions?

- Want to keep tax rate as low as possible.
 - Awarding benefits results in a negative impact on the employer's experience rating, which increases state unemployment tax rate.
 - Denial of relief from charges is invisible at first, but the impact over time can be substantial, costing several thousand dollars in increased taxes.
- If there's a chance a former employee may sue the employer for discrimination or wrongful discharge, it may discourage the lawsuit.
 - If suit is filed, could still increase employer's changes in lawsuit because of an independent body's finding that discharge was because of employee misconduct.
- NOTE: do not allow a potential unemployment claim to prevent you from firing someone. Even if the tax rate increases, do not keep an otherwise unproductive employee.
- Consider appealing decision if not favorable . . .

Appeals Process

- Appeal to ALJ
 - Must file within 14 days of the mailing date of the determination.
 - Can appeal in writing, online or by phone.
 - Telephonic Hearing will be scheduled by the ALJ usually within 15 days of receipt of appeal.
 - Can request videoconference or in person hearing. Consider:
 - timeliness of request, cost factors, number of witnesses or exhibits, credibility issues, interpreter issues, safety concerns, etc.
 - Notice of hearing will be sent about 7 days before hearing.
 - Get testimony and exhibits on the record.
 - Must send exhibits to employee and ALJ at least 3 days prior.
 - Witnesses may be sequestered if requested or directed.
 - Expect ALJ decision within 14 days.
 - ALJ authorized to reverse, modify or affirm original decision.

Appeals Process Continued . . .

- Appeal to Board of Review
 - File written appeal within 14 days of mailing date on ALJ decision.
 - Board may affirm, modify, reverse or set aside the ALJ decision.
 - Appeal to Board is heard based on evidence in the record.
 - may also, at its discretion, consider written arguments or briefs filed by any party
 - may, at its discretion, remand any claim for additional evidence the board deems necessary
 - Decision becomes final 10 days after mailing date.
- Appeal to Court
 - Must appeal within 10 days of receipt of Board's decision.
 - Consult your attorney.
 - Circuit Court in the County where employee lives.
 - Mississippi Supreme Court.

Why Appeal?

- Cannot necessarily avoid paying the unemployment tax, but can reduce the rate of tax by reducing the number of claims filed and the amount of benefits paid on those claims.



Tips to Reduce Unemployment Claims

- Hiring Decisions
 - Hire the best-qualified applicants.
 - Background checks, work history
 - Do not over-hire.
- Weed out unsatisfactory workers as soon as possible.
 - Goal is to limit amount of liability.
- Have clear written and **signed** policies.
- Provide training to hired employees on company policy, expectations, and other company rules.
 - If rules change, provide additional training.
 - This is useful for showing misconduct.
 - In Mississippi, the employee shall not be found guilty of misconduct for violating a rule/policy unless:
 - employee knew or should have known of the rule,
 - rule is lawful and reasonably related to the job environment and performance, and
 - the rule is fairly and consistently enforced.

Tips Continued . . .

- Investigate all personnel actions and infractions
 - Soon after incident occurs
 - Keep notes from meetings/verbal counselings
 - Follow usual progressive discipline process
 - Record all acts that could have resulted in termination or discipline regardless of whether action was taken
 - Request employee sign off on forms
- Avoid allowing one person to make the termination decision if possible
- Termination Meeting
 - Keep meeting short and to the point
 - Avoid offhand remarks that could be misinterpreted
 - Have a witness especially if you expect controversy
 - Draft termination letter explaining termination reasons
 - Keep it simple
 - Refer to policy violations, repeated warnings, blatant failures
 - Ensure reasons are same in all documentation
 - Document the meeting, including what the employee was told and how he or she responded

Best Ways to Avoid Charges to Experience Rating

- Investigate and document all employment performance issues, particularly policy violations.
- Follow consistent progressive discipline practices.
- Train Human Resource Personnel on responding to UI claims.
- Process a “No call/no show” as a voluntary quit.
 - Obtain written letters of resignation when possible.
- Respond to unemployment claims timely and adequately.
 - Give details and the facts, without being excessive.
 - *E.g.*, Instead of simply saying “discharged for absenteeism”, say when the absences occurred, how many there were, and when prior warnings were given. Also mention the final incident that lead to the separation.
- Attend and participate in all unemployment claims hearings.

Importance of Documentation

- ***Document, document, document***
- Notifies employee of performance issues
- Can prove *misconduct*
 - shows employee violated company policy
 - shows employee received warnings but engaged in repeated violations
 - supports reason for termination
- Can prove employee voluntarily left
 - *E.g.*, resignation letters
- Could be used in later litigation for wrongful termination or other issues
 - Discrimination, Harassment, Etc.



Conclusion



We don't need management consultants, we let the destiny decide: You're fired... you're fired... you're fired...

Questions

