

# **The Unemployment Claim and Appeal Process in a Nutshell**

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## The Unemployment Claim and Appeal Process in a Nutshell

### I. Introduction

The Texas Legislature established the Texas Employment Commission in 1936 in response to federal legislation mandating unemployment compensation systems in all 50 states. In 1996, the Legislature created a new agency, the Texas Workforce Commission (TWC), rolled TEC into the new agency, and also added a number of new workforce development programs. However, TWC has retained the responsibility for the state unemployment compensation program. The agency is headed by a board consisting of three commissioners appointed by the Governor to staggered six-year terms. One board member represents labor, another represents employers, and the chairman represents the public at large. Although TWC administers several employment law statutes, much of the agency's resources are devoted to carrying out the Texas Unemployment Compensation Act (TUCA) (V.T.C.A. Labor Code, Title 4, Subtitle A, Chapter 201 et seq.).

### II. The Unemployment Insurance System: The Basics

#### a. Initial Claim

Once a worker is no longer performing personal services for pay, a "work separation" has taken place, and the worker is free to file an initial claim for unemployment benefits. Benefits are payable if the claimant shows that he is out of work through no fault of his own and is otherwise eligible. Immediately following the filing of the claim, TWC mails a notice of the initial claim (a "notice of application for unemployment benefits") to the "last employing unit", the organization or individual identified on the claim form where the claimant last performed work for pay. The employer has 14 calendar days in which

to file a timely written response and make itself a "party of interest" with appeal rights.

#### b. Initial Determination

The claim examiner at the local TWC office where the claim is filed makes an initial determination ("determination on payment of unemployment benefits"), and TWC then mails copies to all interested parties. If the employer has filed a late response, its initial determination will be a "late protest" ruling. If it has filed no response at all and the claimant begins to draw benefits, it will receive a notice of maximum potential chargeback ("wage verification notice"). No matter which form the initial determination takes for the employer, it should file an appeal and request for a hearing within 14 calendar days of the date that TWC mails the ruling. The wage verification notice is not itself an appealable ruling, but if the employer responds with a written appeal, it should receive a ruling it can appeal. In the case of any ruling that states that the employer filed a late protest, the employer should allege some problem outside its power to control as the reason for not protesting the claim notice in a timely manner, if it wishes a hearing on the underlying merits of the unemployment claim.

#### c. Appeal Tribunal

Once an appeal has been filed, the Appeals Department will either dismiss the appeal, issue an on-the-record decision, or set up an appeal hearing. It will dismiss the appeal if it is filed outside the 14-day appeal period. It will issue an on-the-record decision affirming the late protest ruling if the employer fails to disagree with the fact that it filed a late protest to the initial claim notice. In all other cases, the Appeals Department will mail notices of the appeal hearing to the

claimant, the employer, and any representatives they may have designated.

The hearing will usually be held by telephone. The employer should treat the occasion as if it will be the only chance it ever receives to explain its side of the situation. In general, firsthand testimony from witnesses with direct, personal knowledge of the events leading to the claimant's work separation takes precedence over all other forms of evidence. Documentary evidence may be entered as exhibits. When a hearing is by telephone, the employer must be careful to send copies of any exhibits to both the hearing officer and the claimant. Failure to send copies to the claimant may result in the hearing officer refusing the items as exhibits. The parties may offer direct testimony, conduct cross-examination, and make concluding statements. The hearing officer will issue, usually within one calendar week, a written decision either affirming, reversing, or modifying the determination which was appealed.

For much more detail on appeal hearing procedures, see sections IV and V of this article.

#### **d. Commission Appeal**

Any party may appeal an adverse Appeal Tribunal decision to the three-member Commission, but must do so in writing within 14 calendar days of the date the hearing officer's decision is mailed. In case of a timely appeal, the Commission may either affirm, reverse, or modify the Appeal Tribunal decision, or it may order a further hearing. The Commissioners review the records in the appeal and cast their votes in a weekly docket meeting. They do not take testimony from the parties, but may consider relevant written materials submitted after the hearing. In such a case, the Commission will order a rehearing to officially admit the new evidence into the record. The Commission's decision is in writing and signed by all three Commissioners. At this point, the losing party may either file a motion for rehearing or an appeal to a court.

#### **e. Motion for Rehearing**

The final stage of the administrative appeal process is the motion for rehearing, which

must be filed in writing within 14 calendar days of the date the original Commission decision is mailed. In order for the Commissioners to grant a rehearing, the motion must offer new evidence, give a compelling reason why it could not have been offered earlier, and show specifically how it could change the outcome of the case. If the Commission denies the motion, it will mail to each party a written decision that is appealable to a court.

#### **f. Court Appeal**

After the Commission decision has become final, the losing party may file a court appeal within 14 calendar days. Since the Commission decision does not become final until 14 calendar days have passed from the date it is mailed, the court appeal period is between the 15th and 28th calendar days following the mailing of the last Commission decision. Since the standard of review is that of the "substantial evidence rule", there is no right to a jury trial in an unemployment compensation case. However, because the law provides for a trial de novo, the parties may put on their entire cases again for the judge. The judge makes no formal findings of fact, but rather decides as a matter of law whether substantial evidence exists to uphold the TWC ruling. The court's decision may be further appealed as in any other civil case.

#### **g. Evidence Needed for a UI Claim and/or Appeal**

Different situations require different types of evidence in order for the employer to win, but there are some types of evidence that will always be required no matter what happened to cause the claimant's work separation:

- (1) Firsthand testimony from witnesses with direct, personal knowledge of the events leading to the claimant's work separation, i.e., "the ones who saw it happen".

- (2) Documentation of policies, warnings, attendance, or any other subjects relating to the claimant's work separation.
- (3) In a discharge case, evidence relating to a specific act of misconduct that happened close in time to the discharge, i.e., the event that precipitated the discharge; in a resignation case, evidence relating to whatever motivated the claimant to resign.

If the appeal hearing concerns other important unemployment insurance issues, such as the claimant's ability to work, availability for work, whether the claimant refused an offer of suitable work without good cause, or receipt of other types of benefits that might affect UI benefit eligibility, the employer should be prepared with any witnesses or documentation that might help show that the claimant should not be considered entitled to benefits.

### III. Resignations And Discharges: The Basics

The vast majority of TWC cases deal with work separation issues involving resignations, layoffs, and discharges, and there are some basic principles to keep in mind.

As noted before, unemployment benefits are for those who are out of work through no fault of their own. The burden of proving "fault" is on the party initiating the work separation. A claimant who quit his last work must show that he had good cause connected with the work for resigning. TWC has long defined "good cause" as any reason, connected with the work, that would lead an employee who is otherwise interested in remaining employed to nonetheless leave employment. This, of course, is a "reasonable employee" standard. Good cause to quit has been found in cases involving drastic cuts in pay or hours, other substantial and adverse changes in the work, prolonged and unaddressed harassment of the worker by the employer or its agents, or egregious acts of

misconduct by the employer toward the worker. In most cases, the claimant must also show that he gave the employer reasonable notice that he was so dissatisfied he was considering resignation.

In any case involving discharge, the employer bears the burden of proving two main things. First, the employer must show that the claimant was discharged for a specific act or acts of misconduct connected with the work that happened fairly close in time to the discharge. Second, the evidence must indicate that the claimant either knew or should have known he could lose his job for the reason given by the employer.

### IV. Focus: Telephone Appeal Procedures

- TWC will mail copies of documents that are relevant to the hearing and to the determination under appeal to all parties. "Parties" include the claimant; the claimant's representative if there is one; any employer involved in the claim, regardless of whether the employer happens to be a "party of interest" with respect to the initial claim; and the employer's representative, if there is one.

- The above documentation will be mailed to the parties in the same envelope that contains the notice of hearing.

- The packet includes the following:

1. The date of the claim notice
2. Any claim protests
3. Any information received by TWC in response to a claim
4. Fact-finding statements taken by TWC during the claim investigation
5. Any appeal letters or forms

- The documents contained in the packet will be formally entered into the record of the case.

- The procedures for hearings, including the Gutierrez settlement procedures, will be outlined in a variety of documents sent to parties in connection with claim filing,

determinations, and hearing notices, as well as posted on TWC's Web site at [www.texasworkforce.org](http://www.texasworkforce.org).

- Parties who need access to a telephone, speakerphone, or fax machine in connection with the hearing need only call the TWC Appeals Department to have arrangements made, up to and including private space in TWC local offices.
- Witnesses giving testimony will first have to give identifying information to verify their identity. The nature of such information is explained and, if necessary, modified by the hearing officer.
- The hearing officer will inform the parties that they have the right to request that witnesses be placed "under the rule". Of course, a party may not be excluded from any portion of the hearing.
- The hearing officer must also remind parties that they may not prompt their witnesses or refer to documents not previously disclosed to the other party.
- Documents sent in by the parties to the hearing officer will be entered into the record only if relevant and must be disclosed to the other party. Irrelevant documents will be excluded from the record and not considered in any way.
- If the hearing officer has a relevant document from one party that is not in the possession of the other party, the hearing officer will first attempt to fax a copy to the other party. Failing that, the hearing officer will ask the other party if the party is willing to waive receiving a copy of the document. If a waiver is not granted, the hearing officer must grant a continuance to allow the other party a chance to receive a copy of the document.

Many employers carefully review the claimant's statements to TWC at various levels of the claim and appeal process and to bring any discrepancies to the attention of

hearing officers and the Commission. Because employers automatically receive copies of the fact-finding statements of the claimant, more employers than ever before are learning to use claimants' prior inconsistent statements against them in the appeal process.

#### **V. What Happens During The Appeal Tribunal Hearing?**

This is the first level of appeal. If you lose the initial determination, the appeal you file is to the Appeal Tribunal. A hearing officer will be appointed to hear your case. The Appeals Department will send you and the claimant a hearing notice, usually about 10 - 14 days in advance of the hearing. Most hearings are held by telephone. Follow the instructions on the hearing notice; in a nutshell, you should call in prior to the start of the hearing and leave your phone number with the receptionist. The hearing officer will then call you and the claimant and any witnesses at other locations and hold a "teleconference".

It is vitally important that you have all of your evidence ready to present at the AT hearing. If you have written documentation to offer as exhibits for your case, you must send copies to both the hearing officer and to the claimant in advance of the hearing. Send the copies to the claimant by registered mail, return receipt requested for your own protection.

Have any witnesses ready to go. Nothing is worse than to claim you have somebody who can support your version of the facts, only to have to confess that you do not have that person ready to testify or do not know where the witness is. The very worst thing is to have to admit that you did not know that witnesses were necessary. **OF COURSE WITNESSES ARE NECESSARY!!** This is the United States; under our system of justice, an accused has the right to face his accusers. If you allege that the claimant was fired for some type of misconduct, but have no eyewitnesses, and the claimant is giving what sounds like a credible denial,



**YOU WILL LOSE THE CASE.** It is as simple as that. To have a good chance of winning a case, you need what are known as “firsthand” witnesses. Firsthand witnesses have direct, personal knowledge of what the claimant did to bring about his discharge or of what happened to cause the claimant to quit.

**Example Of Losing Testimony:** “We fired the claimant after his supervisor told us he saw the claimant removing company property without permission.” The claimant then wins by stating “No, I didn’t.”

**Example Of Winning Testimony:**

“I was the claimant’s supervisor. I saw him removing boxes of company property, and he did it without my permission.” At this point, the claimant either knows he is going to lose, or else tries a last-ditch excuse by stating that he had permission from someone else, whereupon the well-prepared employer immediately offers to let the hearing officer take testimony from that person as well.

It is not a sufficient excuse for failing to present firsthand testimony that you cannot believe the claimant would deny the charges of misconduct or change their story at the hearing; that you thought written statements or even notarized affidavits would be “good enough”; that the eyewitnesses no longer work for you; or that you thought testimony from people who only heard the reports was “firsthand”. Claimants have been known to deny misconduct when their UI benefits are on the line. The problem with written statements and affidavits is that they cannot be cross-examined: you can’t ask a piece of paper questions. Sworn testimony subject to cross-examination carries by far the greatest weight in a case. If the eyewitness is a former employee, call him or her and ask for their testimony. If they refuse to cooperate, contact the hearing officer and ask that the person be subpoenaed. If they cannot be located in time for the hearing, then and only then will you have a decent argument that a

rehearing should be granted if and when you locate them.

Remember, testimony based on reports from others is secondhand. The person who made the original report is the firsthand witness.

During the hearing, remain calm. It might help to make an outline of your testimony to assist you in hitting all the important points. However, do not read from a prepared statement. It will sound obviously scripted and artificial and might create an unfavorable impression in the mind of the hearing officer. In addition, hearing officers appreciate brevity. Employers who sound well-organized and in command of their facts always appear more credible. In a close case, that might well tip the balance in your favor. If the claimant seems to be trying to provoke a confrontation, do not accept the invitation. How the parties conduct themselves during the hearing has at least a subtle effect on how the hearing officer evaluates the relative credibility of both sides. Again, if the case is a close one, that can make all the difference.

AT hearings are meant to be informal hearings and are designed to bring out all the important facts without getting bogged down in courtroom-style procedures. Here is the way a normal hearing proceeds:

- 1) Identification of the parties and witnesses; confirmation of addresses; explanation of the law and basic hearing procedures; oath or affirmation given by witnesses; designation of who the parties’ primary representatives will be.
- 2) Brief statement of case history.
- 3) Determination of whether the work separation was voluntary or involuntary; if voluntary, the claimant testifies first; if involuntary, the employer testifies first.
- 4) Whoever testifies first gives their explanation of the work separation; the party representative then presents testimony from each witness in turn; after each witness testifies, the representative can ask them questions and the other party’s representative can cross-examine them.
- 5) The other party then presents its side of the story and presents any witnesses in turn; the party representative can ask questions

and the other party's representative can cross-examine those witnesses.

**6)** The parties are asked if they have anything to add, and a final opportunity for cross-examination is given if more new testimony comes up.

**7)** The hearing officer tells the parties to expect a written decision and closes the hearing.

All hearings are tape-recorded. If a further appeal is necessary, it can sometimes help to order a copy of the tape so that the party filing the appeal can determine what might have gone wrong. Do not be concerned about being under oath and about being tape-recorded. Presumably, you followed your own policies and were fair with the claimant, and thus you have nothing to worry about. In the absence of a court order, the tape of the hearing cannot be released to anyone but the claimant and employer.

Most employers do not hire attorneys to represent them during appeal hearings. As noted before, the hearings are designed to bring out the facts, not to subject ordinary people to strict courtroom procedures. However, if the situation involves a disgruntled former employee who has threatened a lawsuit over the discharge or related matters, it might be a good idea to hire an attorney. This is especially true if the claimant hires an attorney and is represented by the attorney at the hearing -- there is always the risk of saying the wrong thing with a hostile attorney listening to every word. If you hire an attorney, be sure that the attorney is at the very least an experienced employment law attorney; it would be preferable if the attorney also has experience with TWC claims and appeals. Once the hearing is completed, the hearing officer makes the decision as promptly as possible, usually within a day or two. The decision is always made in writing and is signed by the hearing officer. If a further appeal is necessary (the so-called "Commission appeal" - the second level of appeal), there is a 14-day deadline from the date the Appeal Tribunal decision is mailed.

## **VI. Conclusion**

By keeping certain basic principles in mind before, during, and after employees are employed, an employer can prepare itself against the day when an unemployment claim is filed. It can also know which claims are likely to be winners, which ones run the risk of being losers, and which are simply timewasters. By developing sensible workplace policies, documenting problems as well as successes, being consistent in employee relations, and keeping on top of developments in the law, an employer can approach TWC claims and appeals with much greater confidence.

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Information contained in this report can be found in the Texas Workforce Commission's book, *Especially for Texas Employers*.