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Hidden Traps at the Texas Workforce Commission

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Introduction

This paper presents a survey of some of the hidden traps and pitfalls for attorneys representing clients in matters before the Texas Workforce Commission. The items covered are traps and pitfalls because they might be unanticipated by anyone other than long-time agency professionals. It includes some entry-level hazards of the sort that might catch non-employment law attorneys off guard, covers areas that can catch attorneys unaware who have some experience with general employment law, and finally offers some little-known puzzlers that leave even seasoned employment law professionals scratching their heads and calling TWC for assistance. The author hopes that every reader will find at least one new thing to put into his or her TWC toolkit.

Keep in mind that with a program as large and complex as the unemployment compensation system, enforced by a large state agency with hundreds of different individuals who make decisions on claims, no particular outcome is guaranteed. Each case is different, and the decisions are highly fact-specific. Outcomes can hinge not only on the facts, but also on less-tangible factors such as who the investigator or hearing officer is, how well the claimant and employer explain their respective positions and come across in terms of relative credibility, the egregiousness of the specific final incident, small differences in number, types, content, and timing of warnings, and even plain and simple luck.

Before An Unemployment Claim Arises – Work Separations

Since the burden of proof on the issue of whether a claimant qualifies for unemployment benefits depends upon the nature of the work separation, it is very important to understand how TWC determines whether a work separation is voluntary or involuntary. In general, a work separation is voluntary if initiated by the claimant, while a work separation initiated by the employer is involuntary. The main traps that catch many parties to claims off guard are the following:

1. **Resignation in lieu of discharge:** if an employee has no choice but to resign, the work separation will be considered involuntary.¹
2. **Mutual agreement:** in most cases, TWC will decide that a work separation by “mutual agreement” is involuntary, especially if the evidence shows that the employer initiated the discussion and guided it toward the employee leaving the company.²
3. **Suspension without pay:** under a Commission precedent case, a suspension without pay for three days or less is not a discharge, and if the employee files an unemployment claim, the work separation will be analyzed as voluntary. If the unpaid suspension lasts four days or longer, and the employee files an unemployment claim rather than return to work, TWC will handle the case as an involuntary work separation.³
4. **Quit with two weeks’ notice or less:** TWC follows a standard two-week notice rule, under which a resignation with notice of intent to resign by a definite date that is two weeks or less in the future may be accepted by the employer at any time within the two-week notice period without the nature of the work separation changing from voluntary to involuntary.⁴

This area of unemployment law is extremely complex. For a much more in-depth discussion of the issues involved in determining the nature of a work separation, see Appendix A.

Last Employing Unit

The law requires a claimant to name the last employing unit (LEU) on the initial claim. The LEU is in an important position, since that entity is the one to receive the notice of application for unemployment insurance (notice of initial claim) and is the entity whose explanation of the

¹ TWC Appeals Policy and Precedent Manual (AP&P), VL 440.00, Appeal No. 1689-CA-77, online at <http://www.twc.state.tx.us/files/jobseekers/appeals-policy-precedent-manual-voluntary-leaving-twc.pdf>.

² *Id.*

³ AP&P, MC 135.45(2), Appeal No. 96-012206-10-102596, online at <http://www.twc.state.tx.us/files/jobseekers/appeals-policy-precedent-manual-misconduct-twc.pdf>.

⁴ AP&P, VL 135.25 (2), online at <http://www.twc.state.tx.us/files/jobseekers/appeals-policy-precedent-manual-voluntary-leaving-twc.pdf>.

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