

Misconduct & Unemployment Benefits

Labor & Employment Law Update

on January 12, 2016

Finally! As of 1/3/2016, Illinois statutorily enhanced employers' rights to conduct business through enacting statutory misconduct as a basis for terminating an employee and denying unemployment benefits. Other jurisdictions may follow suit to protect business rights.

Statutory misconduct now includes:

- **Falsification of employment information** (application, references, education/work history, SSN) is now terminable misconduct and allows denial of benefits.
- **Failure to maintain reasonably required licenses, registrations, etc.**
- **"Insubordination"** – refusal to obey reasonable and lawful instructions.
- **Attendance**, provided that there is a written policy and employee has received at least one prior written warning. This is a "two strike" policy.
- **"Grossly negligent" conduct** that damages employer property or endangers the employee or coworkers (the Act is silent as to endangering third-parties, such as customers)
- **Drugs & Alcohol** – use of, or reporting to work under the influence of any impairing substance (including off-label use of lawful medication).

Of course, there are **exceptions** and circumstances which may cause the administrative agency to still allow benefits. These include:

- Employer delay between discovery of misconduct and termination;
- Government shutdown delaying issuance of a license;
- "Significant" time passing between attendance issues, or circumstances beyond the employee's control;
- Employer forcing an unscheduled/not on-call employee to report for work after the employee has disclosed he/she is impaired (legally or otherwise);
- Employee refusal to obey instructions which are unsafe or not legal, or where the employee is not appropriately trained;

While laws are evolving, employers should still follow best practices:

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- **Have employment policies/handbooks** that are enforceable, understandable, and acknowledged by the employees. This includes attendance, licensure, and acceptable conduct standards policies.
- Just as employers should have faithfully done before these amendments, documentation is the lynchpin of demonstrating misconduct, including prior warnings.
- **Investigate the misconduct.** Determine in good-faith that the employee is “at fault” (so to speak), and that there are no mitigating exceptions which might allow benefits, or worse, set the company up for a potential discrimination/retaliation claim.
- **Consider non-statutory bases for misconduct termination.** Just because it is not statutory, does not mean the employer may not safely terminate. Examples include overt threats of violence, fraud, and other obvious types of misconduct.
- **Terminate when the misconduct occurs.** Avoid post-discovery delay in investigation or termination that would cause the administrative agency (or plaintiff’s counsel) to question the true motivation behind the termination.
- **Protect the workforce.** Do not let fear of an employee receiving benefits prevent you from correctly terminating to protect the rest of the workforce. Similarly, do not allow anger to lead you to protest benefits that are properly allowed.
- **Apply policies equally.** Consistency avoids questions regarding favoritism, discrimination, and retaliation.
- **Seek the advice of counsel.** Formulating a simple plan of action and reviewing the basis of termination can lead to more successful unemployment protests and avoid headaches associated with discrimination and/or retaliation claims.