



VSBIT Guide to Defending Unemployment Claims

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VSBIT offers this *Guide to Defending Unemployment Claims* to support its members through the process of responding to unemployment claims filed by former employees. VSBIT's experience for over thirty five years shows that thorough, timely and well prepared responses to unemployment claims greatly improve our members' chances of prevailing in disputed claims, resulting in a cost savings of millions of dollars. We hope that this *Guide* will assist member districts in gathering the information needed to respond to claims and to present evidence with confidence at hearings when claims are contested.

It is important for all member districts to participate fully in unemployment claims. In many situations, your account may be relieved of charges if you effectively present your case. But if you do not participate in the process, or if you do not prepare a response thoroughly, the Department of Labor might decide to grant the claim and charge your account, resulting in increased (and unbudgeted) costs to your district. VSBIT therefore encourages all of its members to participate fully in the process, and this *Guide* is one resource we offer to assist you.

Another resource is the claims handling assistance provided by VSBIT's unemployment claims partner, Equifax (formerly TALX). A Claims Handler from Equifax will coordinate the claims process with you and the Vermont Department of Labor, and will help you administer claims, respond to agency requests, and obtain information about appeal hearings. While Equifax will provide administrative assistance to help you defend a claim, your active – and proactive – participation in the process will greatly increase your chances of success in disputed claims. We hope that this *Guide* will help you participate fully.

I. General Overview of the Unemployment Claim Process in Vermont

An unemployment proceeding begins when a former employee (called the "Claimant") files a claim for benefits with the Vermont Department of Labor. The Department of Labor will assign a claim adjudicator to review the claim to determine whether the Claimant is eligible for benefits. As part of this review, the claim adjudicator will contact the employer (in writing, with follow-up questions by telephone) to obtain information needed to make a final determination on the Claimant's eligibility. After reviewing the information submitted by the Claimant and the employer, the claim adjudicator will make a decision either granting or denying the claim.

¹ This *Guide* has been prepared for VSBIT and its members by the employment lawyers at WrightJones PLC, a Vermont law firm that devotes its practice to representing employers (public and private sector) in all aspects of employment law, including the defense of unemployment claims before the Vermont Department of Labor. Although this *Guide* was prepared by lawyers, nothing in this guide is legal advice and this *Guide* does not create an attorney-client relationship with VSBIT's members; rather, the information in this *Guide* is intended only to provide general information about the process of unemployment claims proceedings in Vermont. If any VSBIT member requires legal advice in a particular matter or claim, it should engage legal counsel.

If either party disagrees with the determination, that party may request an appeal to an Administrative Law Judge (known as an “ALJ”). Upon receiving a notice of appeal from either side, the Department of Labor will schedule a hearing with an ALJ. At the hearing (which is often conducted by telephone) each side will present evidence through documents and witnesses. After considering the evidence and any arguments presented by the Claimant and the employer, the ALJ will issue a written decision.

Further appeals are possible, but the ALJ hearing is the last opportunity to present factual evidence. All additional review is limited to legal questions based upon evidence presented to the ALJ. The first round of appeal from an ALJ decision is to the Department of Labor Employment Security Board. The second – and final – opportunity for appeal is to the Vermont Supreme Court.

Most claims are resolved at the initial determination or ALJ stage.

II. Employer Response To A Written Claim (The First Step In Defending A Claim)

When a former employee files a claim, the Department of Labor will gather information from all parties to explore the reasons for termination and other facts to assess whether the former employee is eligible for benefits. The DOL will first send the employer a form (titled “Separation and Payment Information”); this form seeks information about the Claimant’s most recent wage payment history, the reason(s) for termination of employment, and the existence of any additional payments made to the Claimant upon termination (such as severance pay, payment in lieu of notice, accrued vacation etc.). After you submit the completed form, a claim adjudicator will usually contact you by phone or email to seek further information and request further details.

For VSBIT members, these communications will be processed through an Equifax Claim Handler. To help the Equifax Claim Handler respond in a timely, complete, and effective manner, it is important that you provide as much information as you have to the Claim Handler as quickly as possible. Time frames for communicating with the DOL are quite short; in order to ensure a timely and comprehensive response, you should begin gathering information as soon as you learn that a claim has been filed.

Before completing the forms and responding to additional requests for information, it is important to first thoroughly research the facts of the Claimant’s employment history and the complete reasons for separation from employment. All information provided to Equifax and the Department of Labor should be as accurate and complete as possible (often, a complete explanation requires providing even more information than specifically requested). This research usually requires compiling all potentially relevant documents (wage payment summaries, written warnings, investigation reports and memos, emails about the events in question, relevant personnel policies or employment contract provisions, etc.) and speaking with people who may have knowledge of important facts (such as a supervisor, a human resources manager, or others who may have witnessed events in dispute). Gathering all of the available information and

documents before completing forms and answering questions will ensure that your responses are accurate and complete.

A timely, thorough and careful response to an unemployment claim is very important (particularly with regard to questions about the reasons for termination). First, experience shows that well-prepared and complete responses supported by good documentation result in more proper denials of claims and less appeals (thus reducing your cost and time considerably). A strong written response to a claim may well avoid appeals and may put a Claimant in a defensive position if an appeal is pursued. Second, in the event a case proceeds to an appeal hearing before an ALJ, the best preparation for the hearing is a well-prepared response to the DOL's initial requests for information. If you consider your response to the DOL's preliminary inquiries as the start of your hearing preparation, you will be well positioned to present a strong case if a hearing is needed. This is particularly true if you start your preparation early (i.e., as soon as you learn of a claim). Third, your responses to the DOL may potentially be used in other proceedings. For example, if the Claimant is represented by a union and files a grievance over the termination of employment, or if the Claimant files a claim of discrimination with another state agency, information provided in unemployment claim proceedings may be requested and considered as part of any investigations and hearings. Thus, taking the time to prepare a timely, complete, well-considered response to the DOL at the outset will have many benefits.

III. Appeal Hearing Before An ALJ

A. *The Procedure of an ALJ Hearing*

If either the Claimant or the employer appeals an initial determination, the DOL will schedule a hearing with an ALJ. In Vermont, most ALJ hearings are conducted by telephone. The ALJ records the hearing so that a transcript will be available if further appeals are pursued.

The ALJ starts the hearing by addressing preliminary issues. This usually includes identifying all parties on the call (representatives and witnesses), identifying the issues that are in dispute, and explaining the process of the hearing. The ALJ will then discuss documents that have been submitted by the parties, and the ALJ will make decisions about which documents will be accepted as official evidence. Next, the ALJ will administer an oath to the witnesses. The ALJ will then ask the party with the burden of proof to proceed with the presentation of its case. Once that party completes its presentation, the other party will present its case. As witnesses provide testimony, the ALJ may ask questions to make sure all factual matters are covered. In addition, the other party will have an opportunity to ask questions of (or "cross examine") the witnesses. After all witnesses have testified, the ALJ will usually ask a representative from each side to present a summation, or closing argument. The ALJ will then close the hearing. The ALJ will issue a written decision within 30 days of the hearing.

When compared to a proceeding in court, the ALJ hearing process is quite informal. But it is important that you not let the informality of the process lull you into taking a casual approach. The hearing involves sworn testimony from witnesses and the submission of documents as official evidence. Also, sworn statements made by witnesses may potentially be used in later proceedings (such as arbitrations, court cases and other hearings). So, although the process is informal, you should approach the hearing with the same sense of solemnity and decorum of a more formal proceeding.

When presenting your case, be sure to address all facts and documents that are important to proving your positions. An ALJ hearing is the only opportunity you have to offer official evidence. Even if you already provided certain documents to the DOL as part of a response to questions from the DOL claim handler, and even if you already explained factual matters in a phone interview during the initial investigation, you should make sure that all key documents are accepted in evidence and that all important facts are addressed as part of the hearing. Information that is not presented to the ALJ at the hearing will not be considered. Also, even though further appeals may be possible, those appeals will be limited to legal arguments based on facts established at the ALJ hearing; you will not have the chance to offer new factual information. In deciding what evidence you need to present, remember that you can only rely on information that you can prove; consider all evidence you need to prove the facts you need to rely upon.

Before preparing for the hearing, you need to determine whether you have the burden of proof. If you have the burden of proof, then you need to present your case first. Also, with the burden of proof, you must be sure to present enough evidence that the ALJ can conclude that your position is correct, and the evidence must be credible enough and solid enough that the ALJ can decide that your position is more likely correct than any other conclusion when confronted with contrary evidence. In most unemployment hearings, the party with the burden of proof is the party who initiated the end of employment (or the continued unemployment). Thus, if you fired an employee due to misconduct, then you will have the burden of proof and you will need to present evidence to prove that the employee engaged in misconduct. On the other hand, if the employee quit, then the employee will have the burden of proof and the employee will need to prove that the reason for resignation was for good cause attributable to the employer. Similarly, if the issue on appeal is the employee's failure to accept suitable work after termination, the employee will have the burden of proof and will need to justify the refusal by showing that the potential work was not "suitable."

B. How to Prepare for an ALJ Hearing

When preparing for a hearing, the first step is to review carefully the notice of hearing from the DOL. The notice will have instructions for participating in the hearing, deadlines for pre-hearing tasks, and other information about the process. Be sure to follow the instructions closely and meet all deadlines. Be particularly mindful of your obligation to submit any documents to the DOL – and to provide copies to the Claimant – before the hearing and within any timeframes stated in the notice. If you do not properly

submit documents and deliver copies to the Claimant, the ALJ will likely refuse to consider them as evidence at the hearing.

The second step is to identify and copy all of the documents you want to submit as evidence. Once you have a complete set of documents, send a copy of a complete set to the DOL and another copy to the Claimant (and consider obtaining proof of delivery to the Claimant).

The third step is to identify who you need to attend the hearing as witnesses. Particularly if you have the burden of proof, you will need witnesses who have first-hand knowledge of the facts (because they personally observed something, personally participated in a conversation or a decision, or otherwise have direct knowledge). Otherwise, testimony may be considered hearsay. While an ALJ might decide to accept hearsay, such testimony carries far less weight. If there is a dispute over an important fact, and if the Claimant provides contrary testimony from first-hand knowledge, hearsay testimony is unlikely to prevail when the ALJ resolves the dispute. Similarly, a written statement signed by a witness (even under oath) has even less weight and might not be accepted at all. Once you have identified the witnesses, be sure to tell the witnesses when the hearing will occur and ask them to calendar the date and time. If a key witness has a conflict that cannot be changed, consider asking the DOL for a continuance of the hearing. If a witness refuses to participate and you cannot control their attendance, you may need to ask the ALJ to issue a subpoena.²

The fourth step is to prepare the witnesses for the hearing. You should meet with each witness before the hearing to make sure that they understand the process and what to expect. You should explain that their testimony will be under oath and needs to be truthful. To help provide witnesses with guidance, you can offer the following tips:

- Listen carefully to the question, and answer only what is asked (do not volunteer information).
- Keep answers as simple and direct as possible.
- Do not guess (if you do not have specific knowledge of something, or if you do not have a clear recollection, simply say “I don’t know” or “I don’t recall”).
- Avoid absolutes or extremes (such as “never”, “always,” “the worst,” etc.).
- Focus your answers on facts, not conclusions (i.e., “she signed an acknowledgment that she received a warning”, not “she was aware of the warning”).
- Seek clarification if you do not completely understand a question.

² If you need to request a subpoena, be sure to submit the request well in advance of the hearing so that the ALJ can consider the request in time to issue a subpoena before the hearing.

- Maintain a professional demeanor (stay calm and focused, do not interrupt others or argue with questioner, and do not become aggressive or rude).

Next, you should prepare yourself (or whoever the representative for the employer will be) for cross-examining the Claimant and other witnesses for the Claimant. Usually the ALJ will only allow one person to cross-examine witnesses on behalf of the employer. Try to limit your cross-examination to the most important issues and the issues that are disputed. Resist the temptation to ask about every detail and avoid asking questions that have already been answered or that are about facts that are not disputed. Use leading questions that can be answered “yes” or “no” (i.e., “Isn’t it true that _____”). If a witness is evasive or rambles, consider following up with “is that a yes or a no” or some other question that shows the witness did not answer the question. But be careful to maintain a calm and professional demeanor (and do not become argumentative or aggressive with a witness).

Finally, you should outline a brief Summation that highlights the key points that support your positions (and refers to the evidence that supports your main points). After the witnesses have testified, the ALJ will usually ask the parties if they want to provide a closing summation. You should take this opportunity to wrap all of your positions up in a final argument. A thoughtful outline of key positions (even if they are just a series of bullet points) will help keep you focused and clear when delivering your summation.

IV. Further Appeals

After the ALJ issues a written decision, either party can request an appeal to the DOL Employment Security Board. Unlike an ALJ hearing, the Employment Security Board appeal will not include testimony or the introduction of evidence. The Board will consider only those facts that were established by evidence submitted to the ALJ. The Board’s review of the ALJ decision will be limited to questions of law (i.e., did the ALJ reach the wrong legal conclusion based on the evidence) and questions of evidence based on the record (i.e., was the ALJ’s factual conclusion supported by adequate evidence in the record). If an appeal is made to the Employment Security Board, the parties will have the opportunity to submit written arguments (usually in the form of a legal brief). In addition, the Board will schedule a hearing to permit parties the chance to make arguments in person. After considering the record, the parties’ written submissions, and oral arguments, the Board will issue a written decision.

Any party that wants the Board’s decision reviewed may then seek another appeal to the Vermont Supreme Court. This appeal is the last step in the process and the Court’s decision becomes the final resolution of the dispute. Like an appeal to the Employment Security Board, an appeal to the Vermont Supreme Court is limited to legal arguments based on evidence submitted to the ALJ. The parties will submit briefs to the Court in support of their positions, and the Court may schedule the appeal for oral argument (which usually occurs before a panel of three Justices). The Court will issue a written opinion resolving the case.

V. Role of Legal Counsel

The unemployment claim process is designed to permit parties to participate without the need for legal counsel. Thus, you are able to handle your case on your own. But if you want legal representation, you have the right to be represented by an attorney.

The choice about hiring counsel belongs to each member district (and will require an assessment of cost and budgets). Many cases are relatively straightforward and can be handled without counsel (particularly if you have experience with unemployment hearings and are comfortable with the process). But in some cases, you might want to consider engaging a lawyer to either handle the case on your behalf or to provide you with advice and counsel.

For example, if the Claimant has filed a claim under a collective-bargaining agreement challenging a discharge decision, or has otherwise pursued (or threatened) legal action for wrongful termination, you should at least consult with counsel to ensure that your response is coordinated. Because information provided and testimony given during an unemployment claim can potentially be used in collateral legal proceedings, it is important to coordinate your responses. In addition, if you have any reason to believe that the Claimant will be represented by an attorney at an ALJ hearing, you should consider engaging counsel as well to ensure a level playing field. Finally, if a case proceeds to an appeal before the DOL Employment Security Board or the Vermont Supreme Court, you may want to hire counsel (since the issues will be limited to legal questions and will require the submission of technical briefs).

VI. Additional Resources

For more information about Vermont's Unemployment Insurance program, including guides and forms to assist employers with unemployment claims, consult the website for the Vermont Department of Labor. The DOL's website has many useful resources, including the following:

1. "Employer Information Manual: A Guide to Vermont's Unemployment Insurance Program": <http://labor.vermont.gov/wordpress/wp-content/uploads/Employer-Information-Manual.pdf>
2. "Dismissing an Employee For Misconduct": <http://labor.vermont.gov/unemployment-insurance/employers/dismissing-an-employee-for-misconduct>
3. Definitions of Employee Misconduct: <http://labor.vermont.gov/wordpress/wp-content/uploads//misconduct.pdf>
4. Instructions for Completing Requests For Separation Information Forms: <http://labor.vermont.gov/unemployment-insurance/employers/how-to-complete-request-for-separation-forms>

The chapter on Unemployment Claims Adjudication in the Employer Information Manual is particularly helpful, as it contains a comprehensive list of grounds for challenging unemployment claims and a chart identifying which party has the burden of proof for issues arising under each of these grounds.

Appendix A –Checklist for
Preparing for a Hearing Before an Administrative Law Judge

- Review Notice of Hearing and note all deadlines and instructions.
- Calendar important dates (prehearing deadlines, hearing date, etc.).
- Identify all key documents.
- Deliver copies of key documents to the DOL and Claimant within deadlines (with proof of delivery).
- Identify witnesses.
- Notify witnesses of the hearing date and make sure they calendar it.
- Meet with witnesses a day or two before hearing to prepare them for the hearing.
- Prepare a summary of key points and an outline for a summation.
- On the day of the hearing, have all witnesses available in a single location, and make sure the phone line remains open at the time of the hearing.

Appendix B - Grounds to Challenge Claims

According to Vermont's statute, the purposes of the unemployment compensation law are (1) to remove economic distress from involuntary unemployment, and (2) to assist workers who become jobless for reasons beyond their control. Thus, voluntary resignation and misconduct (or gross misconduct) are the most common reasons that people are disqualified from receiving benefits. In addition, grounds to challenge claims include the Claimant's refusal to accept suitable, alternate work, or the Claimants' loss of ability or availability to work. These grounds are listed and discussed below:

1. Discharge from employment for "misconduct". Under Vermont's statute, "misconduct" is defined as a substantial disregard of the employer's interests. The conduct must be either intentional or the result of extreme carelessness, indifference or lack of effort. The conduct must also be work-related. Poor performance alone is not misconduct. Examples that the DOL and courts have recognized as misconduct include: repeated unexcused absences and tardiness, rudeness to customers and co-workers, insubordination, and intentional misrepresentation. Prior warnings are the best way to prove that the employee was aware of the employer's interests and expectations and continued in disregard of the employer's interests.
2. Discharge for "gross misconduct". Gross misconduct is more severe than simple misconduct, and requires a showing that the Claimant engaged in a "flagrant, wanton, and intentional disregard of the employer's interests," and the conduct has a direct and significant impact on the employer's interests. Examples include theft, fraud, intoxication, intentional and serious damage to property, intentional infliction of personal injury, and repeated incidents (after written warnings) of either unprovoked insubordination or public use of profanity. As with simple misconduct, prior written warnings are often the best evidence to support a showing of gross misconduct where appropriate.
3. Voluntary quit. If a Claimant voluntarily leaves a job without "good cause" attributable to the employer, the Claimant will not be eligible.
4. Refusal of "suitable work." A Claimant may lose eligibility if alternate, "suitable" work is available but the Claimant declines the work.
5. Claimant not able to work, or not available for work. To remain eligible to receive benefits, the Claimant must be able to work and available to work. Thus, grounds to challenge continued benefits are that the Claimant is no longer able or available to work.