

Big Change Under Unemployment Compensation Act: Additions to the Definition of “Misconduct.”

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John Gilbert, an attorney with Sandberg Phoenix & von Oertzen, LLP, writes that employers should be aware that effective January 3, 2016, the Illinois Unemployment Compensation Act, while retaining the previous definition of misconduct for which former employees can be disqualified from benefits, adds eight new grounds for misconduct in work-related circumstances.

Those eight generally involve falsification of an employment application or any other document provided to the employer to obtain employment through subterfuge; failure to maintain licenses, registrations, and certifications reasonably required by the employer or required by law; knowing, repeated violations of attendance policies that are in compliance with federal and state law following a written warning for a violation unless the employee can demonstrate that the employee has made reasonable effort to remedy the reasons for the violations or that the reasons were out of the employee's control -- the statute further provides that attendance policies of the employer shall be reasonable and provided to the individual in writing, electronically, or via posting in the workplace; damaging employer's property through conduct that is grossly negligent; refusal to obey an employer's reasonable and lawful instruction unless due to lack of ability, skills, or training or the instruction would result in an unsafe act; consuming alcohol or illegal or non-prescribed prescription drugs or using an impairing substance in an off-label manner on the employer's premises during working hours in violation of policies; reporting to work under the influence of alcohol, illegal or non-prescribed prescription drugs unless compelled to report by the employer outside of scheduled and on-call working hours and informs the employer that he or she is under the influence in violation of employer policy; and, grossly negligent conduct endangering the safety of the individual or coworkers.

In addition, the amendment defines “grossly negligent” as when the individual is or reasonably should be aware of a substantial risk that the conduct will result in the harm sought to be prevented, and the conduct constitutes a substantial deviation from the standard of care a reasonable person would exercise in the situation.

Finally, the amendment suggests that the prohibitions on alcohol, illegal or non-prescribed prescription drugs does not prohibit the lawful use of over-the-counter drugs provided the medication does not affect the safe performance of work duties.

Not only does this amendment make the definition of misconduct more specific which may or may not make challenges to unemployment benefits on the basis of misconduct easier (that remains to be seen since all of these are ripe for litigation), but perhaps an unintended consequence is that employers who want to take advantage of these amendments to the Act need to have in place attendance policies (including warnings) which are reasonable and provided to the employee. The Act also suggests that employers should have policies regarding consumption of alcohol or illegal or non-prescribed prescription drugs or using impairing substances in an off-label manner.

Further study of these amendments is in order, and employers need to seek guidance from their labor and employment counsel in order to prepare for the effective date of the amendments which is only a few weeks away.