EMPLOYMENT LAW NEWS
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NO-FAULT ATTENDANCE POLICIES - NOW A PROBLEM IN UNEMPLOYMENT CASES

On November 1, 2011, the Indiana Court of Appeals issued a decision that will have an impact on all Indiana employers that have No-Fault attendance policies. In particular, in the unemployment compensation setting, an employee will not be found to have been discharged for "*just cause*" (and therefore disqualified from receiving benefits) if the discharge was based on a No-Fault attendance policy that did not contain specific exceptions for "extended personal illness" and "verified emergencies."

This ruling is significant because most No-Fault policies are just that - "no-fault" - and the reasons for an absence are generally not relevant once the employee has been absent more than can be tolerated. Now, any Indiana employer with a No-Fault attendance policy will need to review it to ensure that it allows for the exceptions that the Indiana Court of Appeals now requires so that the attendance rule will be deemed "reasonable" and can then form the basis for a discharge for "*just cause.*"

Background – Discharge for "Just Cause" and Unemployment Compensation Benefits

By statute, unemployment compensation is paid to persons in Indiana who become unemployed through no fault of their own. However, a person is disqualified for unemployment benefits if he or she is discharged for "just cause." The phrase "just cause" is defined in the statute to mean, among other things:

- A knowing violation of a *reasonable* and uniformly enforced rule of an employer, *including a rule regarding attendance*; and
- If an employer does not have a rule regarding attendance, an individual's unsatisfactory attendance, if the individual cannot show good cause for absence or tardiness.

In the case that was decided by the Indiana Court of Appeals, the employer had a No-Fault attendance policy that provided for discharge if an employee had seven "occurrences" in a 12-month period. The policy contained an exception for consecutive days of absence supported by a doctor's statement that would count as only one occurrence. An employee was discharged for reaching seven occurrences under the No-Fault policy when her last two absences were for a severe rash due to psoriasis and her leaving work abruptly to care for her seriously ill husband who had been found unconscious at home by their son. She filed for unemployment benefits and argued that the No-Fault attendance rule was not reasonable and that she was therefore not discharged for "*just cause.*"

The Indiana Court of Appeals agreed and determined that because the No-Fault policy contained no exception for "extended personal illness" or "verified emergencies," the No-Fault rule was not reasonable, because it denied benefits to individuals who became unemployed through no fault of their own. Therefore, any discharge under that rule that didn't consider these exceptions was not for "just cause." The former employee was awarded unemployment benefits.

Observations and Tips for Indiana Employers

First of all, it is important to note that this decision does **not** prevent employers from terminating employees. It only affects whether the individual receives unemployment benefits. Indiana is still an at-will state (so long as there is no contract, statute or public policy that restricts the ability to terminate the employment relationship) so it is still okay to terminate someone even if the policy may be seen as "unreasonable" in the unemployment context.

Second, much of the Court of Appeals' decision relies on an Indiana Supreme court decision from June 2010 that looked at No-Fault attendance policies before the law was changed in July 2010 to allow for "just cause" discharges if the employer had "a rule regarding attendance." This was a phrase that the General Assembly added to clear up past confusion over the use of No-Fault attendance policies in unemployment context. Indeed, two of the Supreme Court Justices wrote separate opinions warning that the Supreme Court's opinion (that was relied on by the Court of Appeals in the current case) would be confusing because the Supreme Court decided its case under the old language that existed before the clarifying language was added. Unfortunately, that warning was not heeded and confusion has returned to the use of No-Fault attendance policies in the unemployment context.

Review and Modify No-Fault Attendance Policies

It is now a safe bet that any discharge based on a No-Fault attendance policy that doesn't consider the exceptions the Court of Appeals requires will result in an award of unemployment benefits. Perhaps the General Assembly will try again next year to settle the issue, but for now, it would be a very good idea for employers to review and modify their No-Fault attendance policies to cover these and other exceptions.

Given the recent focus of the EEOC in challenging absence and leave policies that fail to consider whether an absence caused by a disability could be accommodated by granting more leave or forgiving a particular absence (see the July 2011 $20 million Verizon class action settlement), it's a good idea in any event to review absence and leave policies to ensure that appropriate consideration is given to the reason for each absence.

P.M.T., Inc., v. Review Board (Ind. Ct. of Appeals, November 1, 2011); See also Giovanoni v. Review Board (Ind. Supreme Ct., June 1, 2010).

Should you have questions, please contact your regular Hall Render attorney or a member of our Employment and Labor Section.