

# Mitigating Unemployment Insurance Risk

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*HR's Risky Business*

2017 Dulles SHRM Fall Seminar

Andrew Jennings

Ekdesk LLC

# Presentation Goal

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To help HR professionals *and* business line leaders

- **Identify**
  - common legal *and* business risks
  - associated with
    - administering and complying with an employer's unemployment insurance obligations, and
- **Mitigate** those risks.

# Introduction/Unemployment Insurance Programs

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- A federal-state partnership designed to protect eligible workers from the risks associated with becoming involuntarily unemployed through no fault of their own.
- Administered by states, funded through a mix of federal and state taxes on *employers*. Unemployment taxes *cannot* be deducted from payroll. VAC § 60.2-107.
- An employer's claims history can have a large impact on the taxes it owes, leading to disputes over benefits eligibility.
- State laws on benefits eligibility, tax rates, experience ratings, compliance and reporting requirements, etc., vary.
- This presentation uses the Virginia Unemployment Compensation Act, VAC § 60.2-100, *et seq.*, as a baseline. But it's not legal advice. As always, consult with an attorney if you have questions about how state law, Virginia's or another's, applies to your circumstances.

# Legal, Financial, and Strategic Risks

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- **Legal**

- Violations of unemployment insurance laws/regulations can result in civil and regulatory fines and penalties.
- Certain violations can give rise to criminal liability, both for employers and for individuals responsible for the violations.

- **Financial**

- Claims can lead to thousands, or tens of thousands, of dollars in higher taxes, depending on workforce size and employer claims history.

- **Strategic/Operational**

- Layoffs not only increase unemployment claims, but have a negative effect on the morale of those still employed.
- Layoffs are disruptive to the business.
  - Management time and disruption
  - Team disruption
  - Project disruption

# Topics Covered

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- Reporting and Compliance
- Employees versus Independent Contractors
- Documenting Resignations and Discharges
- Active-Duty Military Spouses
- Severance Agreements and Waivers of Claims
- Business Combinations
- Partnering with the Business Line

# Please turn your cell phones . . . on.

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## Audience Participation

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On your mobile device, open your web browser and go to:

**[Pollev.com/ekdeskllc633](https://Pollev.com/ekdeskllc633)**

You can also text **EKDESKLLC633** to **22333** to participate via text message.

# Poll 1

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**Which of the following best describes your experience with disputed unemployment claims at your current, or a former, employer?**

- A. I've never dealt with one.
- B. I've dealt with one, and the employer won.
- C. I've dealt with one, and the employee won.
- D. I've dealt with more than one, regardless which party won.



## Poll 2

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**(If you've dealt with a disputed unemployment claim) which of the following is most similar to your experience?**

- A.** Relaxing on the beach with an adult beverage.
- B.** Attending a risk management seminar.
- C.** Sitting in rush-hour gridlock on I-66/I-95.
- D.** Getting a root canal.

## Poll 3

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**Marla's finally done it—she went out on her own to start her own architecture firm and has engaged Harry's HR Consulting to handle payroll for the two full-time employees she's hired. Harry tells Marla that she must report the hires to the state unemployment agency and pay unemployment taxes based on their wages. Marla scoffs. Stuff like that doesn't apply to small startups, she says. Who's right?**

- A. Marla, because she has fewer than five employees.
- B. Marla, because she's in her first year of business.
- C. Harry

# Reporting and Compliance

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- In general, any person who has
  - paid \$1,500 a year in this (or the prior) year, or
  - employed at least one person at least one day a week for twenty different weeks this (or the prior) year
- Is an “employer” for unemployment insurance purposes. VAC § 60.2-210.
- Quarterly reporting on payroll and taxes, including for individual employees. VAC § 60.2-512.
- In lieu of taxes, state, local, and tribal governments, and 501(c)(3)s, may opt to be responsible for benefits. VAC § 60.2-501, VAC § 60.2-506–507.1.
- There are exceptions for which employees count—e.g., commission-only real estate salespeople don’t—for unemployment purposes. But in general, assume that they do.
- Unemployment insurance poster (Va. Employment Commission provides) must be hung in a place readily accessible to employees. VAC § 60.2-106.

# A few words about experience ratings

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- **Taxable Wages**

- Employers pay unemployment taxes on each wage dollar, capped at \$8,000/employee/year. VAC § 60.2-229(B)(1).
- “Wages” includes commissions, bonuses, tips, back pay, dismissal pay, severance pay, and any other payments. *Id.* at § 60.2-229(A).

- **Unemployment Insurance Tax Rates**

- The total tax an employer owes in a given year is the tax rate multiplied by the total wages (subject to the \$8,000 per-employee cap).
- Example: 5% tax rate, ten highly-paid employees (i.e., more than \$8,000/yr)  
total tax owed  $\rightarrow (10 \times \$8,000) \times 5\% = \$4,000$

- **Experience Ratings**

- An employer’s benefits ratio—the yearly benefits charges applicable to it, divided by its total wages (up to the per-employee cap) rounded to the nearest tenth—helps determine the employer’s tax rate.
- Example: A \$9,828.00 benefits charge  $\rightarrow \frac{\$9,828}{10 \times \$800} \approx 0.1\%$ .
- The higher the ratio, the higher the tax rate.

## Poll 4

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**Wowza is a branding company that frequently engages Jeff, a graphic designer, to help with design work. Rik, Wowza's financial manager, looks at Jeff's invoices for the year and notices that in the last few months Jeff has worked 25-40 hours weeks on Wowza projects. Rik suggests that Wowza might need to classify Jeff as an employee. Is this necessary?**

- A.** Yes, Jeff's hours will likely qualify him as an employee for unemployment purposes.
- B.** No, Jeff is an independent contractor—it makes no difference how many hours he bills to Wowza.
- C.** We need more information before making that call.

# Employee versus Independent Contractor

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- In general, a person who provides services for pay is an “employee” for unemployment insurance purposes unless he or she is an “independent contractor” for federal tax purposes. VAC § 60.2-212(C).

- The IRS has identified 20 factors to help guide classification. Rev. Ruling 87-41.

Instructions	Continuing	Reporting	Profit/loss
Training	Set Hours	Payments	Multiple firms
Integration	Full-time	Expenses	Public
Personal	On premises	Tools	Discharge
Assistants	Sequence set	Investment	Termination

- Employee/contractor classification comes up in many areas of employment and labor law—not just unemployment insurance—and is often challenged by government authorities or litigated by employees. There are also state-specific rules for who’s an “employee” for unemployment insurance purposes.
- When in doubt, consult counsel.

## Poll 5

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**Kerry and her supervisor Meva have been clashing for months and Kerry is ready to call it quits. She turns in her resignation, effective immediately. Kerry files a claim for unemployment benefits, which her former employer disputes. What will the employment commission find when it hears the dispute?**

- A.** Kerry is not entitled to benefits because she resigned voluntarily.
- B.** Kerry is not entitled to benefits because her resignation was caused by her insubordination toward Meva, which is misconduct.
- C.** Kerry is not entitled to benefits because she failed to give two weeks' notice.
- D.** We need more information before making that call.

# Documenting Resignations and Discharges

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- In general, to show “good cause” for resigning, an employee must show
  - that he or she took reasonable steps to protect his or her employment,
  - but was compelled by necessity, law, or some other factor to resign.
  - “Good cause” can be work-related or personal.
- “Misconduct” includes, but is not limited to, failing a test for controlled substances, making a false or misleading statement about criminal convictions on a job application, intentional violations of state regulations that endanger the employer's licensing, and chronic absenteeism or tardiness. VAC § 60.2-618. Other examples include disloyalty, dishonesty, and insubordination.
- The Virginia Employment Commission and courts have developed an extensive case law of what counts as “good cause” and what counts as “misconduct.”
- Often these questions will interact with other labor and employment issues, especially in the non-discrimination context.
- Although an employer may be represented by a non-lawyer before the commission, close cases may require legal consultation. VAC § 60.2-123.



## Documenting Resignations and Discharges, cont'd.

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- Document everything.
- If employees resign, ask them to state their reasons in their own words, such as by sending you an email or printing and signing a resignation letter.
- If they are unwilling to do that, or if it doesn't make sense under the circumstances to request it, ask them about their reasons for resigning and their life/career plans for afterward. Write down your own dated notes for what you were told. Do this as soon as possible, preferably the day of the conversation.
- Get documentation and grounds from managers before employees are discharged. Collect any documentation that supports these grounds. Document these reasons contemporaneously.
- Satisfy yourself whether the stated reasons for discharges are the actual reasons.
- If appropriate, ask employees to confirm whether the reasons for discharges are true. Again, create notes of these responses. You probably won't get a written statement.

## Poll 6

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**Marvin and his wife, a career Army officer, live in northern Virginia. Marvin gives notice to his employer, explaining that his wife is being re-stationed. Will Marvin be eligible for unemployment benefits?**

- A.** Yes, and his benefits will count against the employer's experience rating.
- B.** No, because he is resigning voluntarily.
- C.** Yes, but his benefits will not count against the employer's experience rating.
- D.** We need more information before making that call.

# Active-Duty Military Spouses

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- Through 2020, an employee has “good cause” to resign if his or her spouse
  - is an active-duty service member
  - who receives a new, permanent change of station order for a location that
  - is not readily accessible to the current place of employment and
  - the state of the new duty assignment does not treat such resignations as being without “good cause.” VAC § 60.2-618(1).
- Also through 2020, benefits paid to military spouses do not count toward the employer’s experience rating. They thus will not cause the employer’s unemployment tax rate to increase. VAC § 60.2-528(C)(9).

## Poll 7

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**Thoma is a technical writer at Acme who is being let go because his writing is technically not very good. Acme's CEO wants Thoma to land softly and recommends four months' severance in exchange for waiving his right to seek unemployment benefits or to press any other employment-related claims. She asks you and Legal to draw up an agreement. Is this okay?**

- A.** Yes, the terms of severance agreements are up to employers and employees to negotiate.
- B.** Yes, with amendments to the CEO's proposal.
- C.** Yes, but only if four months' severance is standard in the industry.
- D.** Yes, but only if the four months' severance is worth more than Thoma's potential unemployment benefits.
- E.** No, because severance agreements cannot include waivers of employment-related claims.

# Severance Agreements and Waivers of Claims

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- An agreement that involves an employee waiving, releasing, or reducing his or her right to unemployment benefits is void. VAC § 60.2-107
- It is a criminal offense for an employer, its officers, or its agents to make an agreement that involves an unemployment benefits waiver provision. *Id.*
- This rule applies to pre-employment and post-employment (i.e., severance) agreements.
- If a discharged/resigned employee will be ineligible for unemployment benefits, it is acceptable to memorialize in a severance agreement, or another document, what the facts are that lead to that ineligibility.
- Severance agreements sometimes include a stipulation that the employee is not eligible for unemployment benefits. These stipulations should state their factual basis. Proceed with caution with these types of stipulations.
- Carefully review any severance agreements or written employer policies for these provisions, and seek legal advice when necessary.

## Poll 8

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**A hotelier owns a hotel with a low unemployment tax rate. On her consultant's advice, she acquires a seven-hotel group that has a much higher unemployment tax rate. The combined business will keep the acquiring hotel's unemployment tax rate until the next annual rate calculation, the consultant explains, creating a windfall in the form of lower unemployment taxes attributable to the acquired hotels. Should the consultant get a big bonus this year for his strategic thinking?**

- A.** Yes, he saved the hotelier an enormous amount of money.
- B.** No, he was only doing his job.
- C.** No, and the hotelier and the consultant might need to hire lawyers.
- D.** No, he should be fired.

# Business Combinations

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- In general, when an employer acquires another unrelated employer, the acquirer will retain its unemployment tax rate for up to a year (until tax rates are recalculated for all employers). VAC § 60.2-535(A).
- Thus, if a small employer with a low unemployment tax rate acquires a larger one with a high rate, the low rate would apply to the entire combined business for up to a year. The combined company would pay less in unemployment taxes than would the two companies if they were separate concerns.

<u>Pre-Combination</u>	<u>Post-Combination</u>
A. $\$100,000 \times 2\% = \$2,000$	A. $\$100,000 \times 2\% = \$2,000$
B. $\$1,000,000 \times 5\% = \$50,000$	B. $\$1,000,000 \times 2\% = \$20,000$
Total Taxes: \$52,000	Total Taxes: \$22,000 (\$30,000 savings)

## Business Combinations, cont'd.

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- This practice is ripe for abuse. As a result, Virginia law prohibits business combinations whose “sole or primary” purpose is reducing unemployment taxes. VAC §§ 18.2-204.3, 60.2-536.3.
- Violations of this prohibition subject the employer to punitive tax rates and civil penalties, as well as criminal liability. *Id.*
- Persons who knowingly advise others to engage in these types of transactions are also subject to civil penalties and criminal liability. *Id.*
- Raise a red flag if you learn of a potential business combination where lowering unemployment tax rates might be a motivation, or could be alleged to be a motivation by the government. Legal counsel advising the transaction should be made aware of this concern so that they can ensure compliance with the law.



## Partnering with the Business Line

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- Educate business leaders about the employer's unemployment obligations.
- That includes educating the business about keeping records that might be relevant in a discharge/resignation context.
- Work with the business to assess staffing needs and levels. One way to avoid layoffs is to avoid overhiring. Ask whether existing teams, outside vendors, or software or other tools can be used to fill a current need.
- If a former employee claims unemployment benefits and you dispute his or her eligibility, make a decision with the business line whether to dispute the claim.
  - Is it a close call?
  - Do you have documentation supporting your view?
  - Will you hire an attorney or represent the employer yourself?
  - What will the impact on your experience rating be?

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Questions? Feedback?

**Andrew Jennings**

andrew@ekdesk.com