

## Information for Employers

# Employee misconduct affects decisions about workplace safety violations and unemployment benefits

*This fact sheet is intended to help employers understand how the Department of Labor & Industries (L&I) and Employment Security Department (ESD) take employee misconduct into account when making decisions about workplace safety and health violations or unemployment benefits.*

## L&I: Unpreventable employee misconduct

During L&I enforcement action (or during appeal) related to unsafe workplace conditions or practices, if the employer claims the violation was caused by unpreventable employee misconduct, the department will examine all facts about the current enforcement activity and the employer's overall history of workplace safety and health efforts. L&I will consider the following criteria in determining whether the employer made workplace safety a priority and whether unpreventable employee misconduct caused the violation(s). (See state law, RCW 49.17.120.)

- 1. Program review** — Did the employer establish and implement a written accident-prevention program tailored to the business' operations and the hazards involved, as required in state regulation (WAC 296-800-140)?
- 2. Hazard analysis** — Are there procedures established and implemented for identifying and evaluating workplace hazards?
- 3. Equipment and personal protective equipment (PPE)** — Does the employer provide or ensure that employees have the proper safety-related equipment and necessary PPE prior to the work being performed? Also, have employees received the training necessary to use the PPE and/or related equipment?

- 4. Communication** — Is there a reliable system for communicating safety and health matters to staff in a form that's readily accessible and understandable by all affected employees, including other languages if needed?
- 5. Training and instruction** — Has the employer designed and implemented a reliable training program to provide employees with specific instruction on the practices necessary for the employee to perform assigned duties in a safe manner?
- 6. Hazard reporting and correction** — Has the employer established a procedure for employees to report unsafe conditions and hazards, and are they corrected in a timely manner?
- 7. Compliance and enforcement** — Has the employer established a reliable system for verifying compliance with the safety rules? Does the employer consistently and adequately discipline all employees for using unsafe work practices and/or not using safe work practices?

Under workplace safety laws, employers are responsible for maintaining safe working conditions and for ensuring all employees know and follow the rules. If an employer cannot meet the criteria listed above (further detailed in L&I staff directive 5.10, [www.Lni.wa.gov/Safety/Rules/Policies/pdfs/wrd510.pdf](http://www.Lni.wa.gov/Safety/Rules/Policies/pdfs/wrd510.pdf)), what's known as an "affirmative defense," it would be difficult to prove unpreventable worker misconduct during a L&I investigation.

## ESD: Unemployment benefits not allowed for misconduct

If ESD decides a worker was fired or suspended for misconduct or gross misconduct, he or she will not qualify for unemployment benefits. The action must be connected to the individual's work and must harm or create the potential for harm to the employer. The harm can be tangible, such as property damage, or intangible, such as a negative effect on the employer's reputation or staff morale. (Keep in mind: Lacking the skills to do the job is not misconduct.)

### Misconduct examples

- Deliberate or wanton disregard for the employer or a fellow employee, such as:
  - Insubordination.
  - Repeated, inexcusable tardiness following warnings.
  - Dishonesty related to employment.
  - Repeated and inexcusable absences.
  - Violating a reasonable company rule.
  - Deliberately violating or disregarding standards of behavior that the employer has a right to expect.
- Carelessness or negligence that causes, or will likely cause, serious bodily harm to the employer or fellow employees.
- Carelessness or negligence that is so bad or happens so often that it shows an intentional or substantial disregard for the employer.

### Gross misconduct

- A criminal act connected with the work for which the worker has been convicted in court or has admitted committing to a competent authority (law enforcement or court official).
- Conduct connected with the work that demonstrates a flagrant and wanton disregard for the employer or a fellow employee.

If ESD determines the employee was fired or suspended for misconduct or gross misconduct connected with the work, benefits will be denied for at least 10 weeks and until the worker earns at least 10 times his or her weekly benefit amount in a job covered by unemployment insurance. If benefits are denied based on gross misconduct, wages and hours will be removed from the worker's unemployment-insurance records, which may make him or her ineligible for unemployment benefits.

### Documentation

Employers are responsible for proving misconduct occurred. Whenever possible, employers should keep records indicating what led to the discharge. Examples include:

- Attendance records.
- A copy of any rule(s) the claimant has violated and how the claimant was informed of the rule.
- Copies of warning letters, emails and other documents that relate to the separation.
- Statements or documents initialed or signed by the claimant.
- Witness statements.
- Other documents that will establish misconduct by a preponderance of evidence.
- During an appeal hearing, it is best to have direct testimony rather than hearsay testimony. In addition to having your human-resources staff testify, include supervisors or co-workers who have firsthand knowledge about the discharge.

### Contacts

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ESD: Unemployment Benefits Employer Hotline  
1-877-504-5607

*Upon request, foreign language support and formats for persons with disabilities are available. Call 1-800-547-8367. TDD users, call 360-902-5797. L&I is an equal opportunity employer.*