National Association of Unemployment Insurance Appeals Professionals

Navigator

Fall 2016

NAUIAP 2016 Conference:

Learning, Meeting, and Innovating in Hartford, Connecticut

Appeals professionals from more than 30 states participated in the annual NAUIAP Conference June 19, 2016, through June 23, 2016, in Hartford, Connecticut. Hartford was a gracious, welcoming host city offering good food and better company. Presenters and participants gave tips and best practices on serving our customers efficiently and effectively, because, as speaker Scott Jackson, Commissioner of the Connecticut Department of Labor so poignantly reminded us, we are the "only game in town," and so it is crucial that we do it right!

A night on the town

Taking it all in at the Wadsworth Museum

The event kicked off with a welcome reception that allowed guests from across the country to meet and reconnect before embarking on a series of classes and discussion of pressing unemployment insurance appeals issues. Over the next four days, attendees engaged in meaningful classes and breakout sessions covering a range of commonly shared concerns about how to ensure that we are not only the only game in town, but the best game in town.

Indiana, Ohio, Michigan, and DOL proudly representing Region 5 at the Wadsworth Museum outing

Monday, Tuesday, and Wednesday of the conference featured breakout sessions that focused on ethical considerations at the lower and higher authority, working through conflict between lower and higher authority, as well as trends in quit and discharge cases. Sessions also included discussion of the changing scope of our workload and how we handle cases in the new age of technology, social media, and online services. Attendees were also able to share information and get guidance during the regional breakout sessions on Wednesday.

The conference also included opportunities to build relationships among individuals from the many state programs that were represented. This is important, because each of our state's successes or failures can impact our program as a whole. Through educational and relationship building opportunities like the NAUIAP conference, we can improve our service and continue to meet and exceed our performance goals.

After a full day of class Tuesday, attendees enjoyed a dinner event at the Wadsworth Atheneum Museum of Art, surrounded by beautiful works of art. While we were "on our own" for

lunch and dinner the remainder of the conference, no one was truly left alone. Oftentimes, our lively back-and-forths on due process, legal interpretations, scoring, and best practices spilled over into group discussions around dining tables (and turned to debates on what restaurant served the best garlic bread). A big help in coordinating meet-ups and keeping tabs on the conference agenda was the addition of the NAUIAP social media application ("app") that Amanda Hunter, Florida Deputy General Counsel, helped implement this year—kudos to Amanda for a fabulous app.

The conference concluded Thursday with a general membership meeting and the announcement of the site for the 2017 conference: Seattle, Washington. A big thank you to our host city, Hartford, and all those who worked hard to put together another successful NAUIAP conference!

A big Thank You to the crew in CT who helped us at the conference!

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President's Column

By Tim Dangerfield, South Carolina

Now that the 2016 Annual NAUIAP Convention in Hartford, Connecticut, has come to a close, I want to thank Lynne Knox, her committee and state of Connecticut for all of their hard work. From their choices of delicious food to the Wadsworth Atheneum, every aspect of the time spent in Hartford showed careful planning and lots of hard work. Lynn and her committee even provided weather a lot cooler than the heat waves we experience in South Carolina. Thanks for a job well done!!

I would like to thank Kathryn Todd for serving as president of NAUIAP this year. I am happy to say that she brings experience from her time in the leadership position as she remains on the Board of Directors in the past president seat. She's probably relieved her duties have ended! Thank You Kay!!!

With more than 100 attendees at the NAUIAP, we networked with peers from many others states, heard a lot of speakers, and I hope some new friends.

As the 2016-2017 NAUIAP president, my goal for this year is to double the state membership. Currently, California, Florida, Maryland, Ohio, and Oklahoma have joined as state members.

With your help, I believe this is an achievable goal. Talk to your peers in other states and share the benefits you have discovered and received as a member.

I also need your help to volunteer to serve on committees such as membership, newsletter, technology and numerous others. Contact me if you're interested!

I look forward to working with my new board and to seeing everyone at the 2016-2017 NAUIAP Annual Convention in Seattle, Washington, June 18-22, 2017.

Have a good year!

Third Party Medical Evidence in UI Hearings

By Chairman Frank E. Brown, Florida

Medical evidence, in the form of testimony or documentation, is commonly offered in UI cases. Most of the time, the evidence relates to the health status of the claimant or perhaps a family member for whom s/he is responsible. On occasion, however, medical evidence regarding third parties may be offered, perhaps most commonly when the employer alleges the claimant violated medical confidentiality laws or policies and the employer offers testimony or documentation regarding the third party's medical information that the claimant allegedly misused.

The Legal Standards

A number of federal and state laws require medical institutions and practitioners to maintain the confidentiality of medical information and records. The most important of these are the Privacy and Security Rules implemented under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). These rules limit the use of "protected health information" or "PHI." PHI is medical information generated or received by a covered entity which identifies (or can be used to identify) the patient and relates to the patient's health condition, treatment, or payment for health services, provided the information is transmitted or maintained by the covered entity. Most cases in which an employee is discharged for an alleged privacy or confidentiality violation concerning health information will involve HIPAA standards. In some of these, the employer may feel it necessary to introduce testimony or documentation that contains information that would be considered protected under these regulations. These regulations do not just prohibit employees from misusing PHI; they also regulate the circumstances under which such information can be used for any purpose, including legal proceedings.

The HIPAA regulations are very complex and technical. The good news for the hearing officer, however, is twofold. First, these HIPAA rules apply only to medical evidence that is being offered by a "covered entity" such as a medical practice, health plan, or health clearinghouse, and only when the covered entity is offering information that it generated or received in that capacity. Medical information provided by an employee to an employer for employment purposes is not covered by HIPAA,

and so cases in which medical information is being offered about the claimant will generally not implicate the Privacy Rule. Second, and even more important, the responsibility for complying with the Privacy Rule is not the hearing officer's; these duties are placed on the covered entities. If any employer wishes to use such evidence, it is the employer's responsibility to ensure compliance.

The Privacy Rule provisions regarding use of PHI for legal proceedings will typically come up in one of two ways. First, an employer may request issuance of a protective order permitting it to use the PHI and providing for protection of the confidentiality of the information. Second, a claimant may wish to subpoena information from the employer to establish a defense to such an allegation. In either case, the hearing officer may need to issue an order addressing the admissibility of the evidence, limiting its use, and determining how it will be submitted.

The Privacy Rule provisions regarding use of PHI in legal proceedings include a specific standard for use in judicial and administrative proceedings, and a general standard for use in "health care operations." The specific standard has two parts. The first authorizes a party to provide PHI in response to an order of a tribunal. The more complicated second standard allows a covered entity to produce PHI "in response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal" if either of the following is true: (1) the party serving the subpoena provides the covered entity with "satisfactory assurance" that "reasonable efforts" have been made to notify the individual whose PHI is being sought; or (2) the party serving the subpoena provides the covered entity with "satisfactory assurance" that "reasonable efforts" have been made to obtain a "qualified protective order." A qualified protective order is a judicial or administrative order or a stipulation by the parties that "[p]rohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and [r]equires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding." This last restriction, although common for courts, may be problematic for agency tribunals subject to record retention laws. Likewise, the extent to which the hearing exhibits or recordings may be maintained as confidential, and the conditions on which they may be released, vary under state law.

It may be unnecessary to go to this effort when the employer wishes to offer its own records to prove misconduct. The U.S. Department of Health and Human Services Office of Civil Rights has opined that a covered entity that is a party in litigation may use PHI from its records when necessary under the "health care operations" provisions if the litigation involves a "covered function." While the agency guidance includes litigation over treatment or payment as examples, where the employer has discharged a claimant for an alleged violation of confidentiality policies implemented pursuant to the Privacy or Security Rules, it could be argued that the use of the PHI would be for covered purposes.

Lower authorities must also give consideration to any state laws that govern disclosure of medical information in litigation. These laws may provide a higher standard of protection than the HIPAA rules. However, state laws may not validly authorize a covered entity to act in a way that would infringe HIPAA protections.

The Practical Issues

Because the responsibility to comply with the HIPAA Privacy and Security Rules lies on the covered entities, a tribunal need only be prepared to address a request for a subpoena or protective order in a manner consistent with the Privacy Rules and state law. Where these issues arise, the lower authority tribunal must decide under its own state's laws and procedures the best method for handling such requests. However, some steps can be taken to minimize the disclosure of confidential information whether or not a confidentiality law is applicable.

One of the most common steps to protect patient confidentiality is de-identification, particularly in cases where the identity of the patient is not a crucial fact or a significant piece of evidence. Where feasible, a covered entity may provide documentary PHI in a redacted form or by using a patient number or code that does not readily identify the patient. This method may require the parties to agree on the identity of the individual(s) involved to ensure that the claimant is not denied a chance to respond to a specific allegation. For in-person hearings, it may be possible for the parties and hearing officer to conduct an examination of documentary evidence without taking it into the record, or doing so in a redacted form.

Deciding the appropriate steps to maximize protection of third party PHI while ensuring both parties to the UI case have a full opportunity to present and defend their positions will not always be easy, but finding creative solutions that are permissible under a state's UI procedures will minimize the potential for controversy in the use of such evidence.

The "Merit" Staff Requirement

By Referee Cheri Ruch, Idaho Industrial Commission

Once upon a time, political patronage dictated who worked for the government and who received government services. Along came the reformers to slay the patronage dragon with the replacement known as "civil service." Under civil service, government workers were free to do their jobs without fear of political interference. Others combated the patronage dragon through unionization and collective bargaining agreements. The reforms became particularly applicable to Unemployment Compensation administration through the "merit" staff requirement.

The "merit" staff requirement comes from Section 303(a)(1) of the Social Security Act. To receive an Unemployment Compensation administrative grant after January 1, 1940, the state's law must provide methods for administration including establishment and maintenance of personnel standards on a merit basis. Although the Social Security Act does not define "merit" staffing, the U.S. Department of Labor interprets the provision as requiring that states operate their merit personnel system consistent with Federal standards. Unemployment Insurance Program Letter No. 12-01, "Outsourcing of Unemployment Compensation Administrative Functions," December 28, 2000. ("UIPL 12-01") The merit standards administered by the U.S. Office of Personnel Management are, by extension through provisions of the Social Security Act, applied to the administration of the Federal-State Unemployment Compensation Program. Those standards include: 1) the recruitment, selection, and advancement of employees on the basis of their ability, knowledge and skills, including the open consideration of qualified applications for the initial appointment; 2) providing equitable and adequate compensation; 3) training employees, as needed, to assure high quality of performance; 4) retaining employees on the basis of the adequacy of their performance; 5) assuring fair treatment of applicants and employees in all aspects of personnel administration; and 6) assuring that employees are protected against coercion for partisan political purpose. 5 C.F.R. §§ 900.603 and 900.604. Providing interested parties with a fair hearing by an unbiased adjudicator is the underlying principle. More importantly, a merit system ensures that the adjudicator is free from political interference.

In recent years, the reform winds started blowing again, prompting many states to abandon their civil service systems in favor of "at will" personnel systems. Proponents of "at will" personnel systems tout them as promoting a "lean" government that is more responsive, and functions like private industry. Hiring, firing, and promotion decisions are supposedly based on objective criteria and raises are awarded on merit rather than longevity.

Whether a state has a civil service, "at will" or another personnel administration system, that system as it exists comports with the "merit" staff requirement in the Social Security Act. Otherwise, the state would be out of conformity and would jeopardize receipt of the grant. In recent years, only two states have been the subject of investigations by USDOL regarding personnel practices. Both cases started with complaints that administrative law judges were being subjected to political pressure in the adjudication of appeals. In one case, the state went a step further and changed the supervisory position for the hearing officers to one that served at the pleasure of the executive. For USDOL, this was a step too far. The state redid the position and specified that it was "merit based."

Other than the odd politician or political appointee who asserts what is perceived as undue political influence over an ALJ, it appears the merit staff issue need not worry most adjudication managers. That is, until the next recession and agencies search for ways to bring on temporary staff for the crises.

Using independent contractors is often appealing in a crisis. Independent contractors are quick to hire, cost effective, and quick to cut loose. However, using independent contractors is also a quick way to run afoul of the merit staff requirement.

Temporary staff subject to lay off when the workload declines is acceptable; genuine independent contractors are not. Hiring an independent contractor to hear and decide unemployment appeals is outsourcing of a government function and therefore is prohibited. USDOL clearly states in UIPL 12-01 that adjudication cannot be outsourced. This is to ensure that those adjudicating Unemployment Insurance appeals are disinterested hearing officers providing fair hearings. A hearing officer who is an independent contractor will be more interested in keeping the work coming than furthering the interests of the parties. Deciding cases consistent with the whims of those who signed the employment contract is one way of ensuring that the work keeps coming. Beware, too, the "de facto" employment relationship created when a contractor is under the direction, supervision, and evaluation by government employees, but without the merit protection of a permanent employee. This is another form of outsourcing USDOL prohibits.

Different states will have different means for utilizing temporary workers to keep the cases moving. To ensure continued compliance with the merit staffing requirement, temporary adjudicators should be selected on the same competitive basis as permanent staff. They should be trained and provided the same working conditions as a new permanent hire. And, they should be supervised and evaluated the same as the permanent hearing officers.

The Great Recession is behind us. Workloads are decreasing to the point that some agencies have cut their workforces, either by layoff or by attrition. Others are struggling to keep existing staff busy. Therefore, now is a good time to think about how to re-staff when the next economic downturn happens. If your state has implemented recent changes in its personnel system, find out how those changes will affect your needs to bring on temporary help. Pour a cup of strong coffee, dust off your copy of UIPL 12-01 and review it, taking into consideration your current personnel administration rules. Planning now will save the additional angst in the next crises.

State Spotlight

NEW JERSEY

Information provided by Michael Marich

In New Jersey, the lower authority (Appeal Tribunal) and higher authority (Board of Review) fall under the jurisdiction of the Director of the Office of Benefit Appeals (OBA). The OBA decides disputed benefit cases involving Unemployment and Temporary Disability Insurance only.

The Appeal Tribunal has five hearing locations throughout the state which consist of 43 Appeals Examiners, 4 Supervising Appeals Examiners and 1 Supervisor of Quality and Training. New Jersey does not require their Appeal Examiners to be licensed attorneys and averages 40,000 hearings per year. Although there are numerous hearing sites, NJ has pushed to predominantly telephone hearings in an effort to increase customer service and to consistently meet federal time lapse standards.

The Board of Review is a three person panel headed by the Chairperson. Each case appealed to the Board is reviewed by one of seven Appellate Specialists employed at the Higher Authority. The Appellate specialists review, research and make recommendations to the Board members regarding the contested benefit cases. Two out of the three Board members must agree before rendering a final decision. All Board personnel are of civil service status and are not required to be licensed attorneys. On average the Board decides 2,500 cases a year and has the authority to affirm, reverse, modify, or remand contested cases decided at the lower authority.

NEW MEXICO

Information provided by Reba Blackwell

In New Mexico, the lower authority (Appeal Tribunal) and higher authority (Office of the Secretary and Board of Review) fall under the jurisdiction of the Office of General Counsel (OGC). The OGC represents the Department in cases appealed to District, Appellate, and Supreme Courts of New Mexico.

In New Mexico, the Appeal Tribunal has one location in our state which consists of 11 Administrative Law Judges and one Chief of Appeals. New Mexico does not require the Administrative Law Judges to be licensed attorneys. In an effort to promote career ladder, we typically promote qualified adjudicators to fill vacant Administrative Law Judge positions. The lower authority appeals decides approximately 12,000 hearings per year. In New Mexico we hold all of our scheduled hearings over the phone. We do however provide in person hearings for persons with disabilities who may not be able to participate in a telephonic hearing.

In New Mexico, lower authority decisions are appealed directly to higher authority. The Office of the Secretary disposes of approximately 85% of the appeals. Should the Office of the Secretary decide that a case needs further review, the cases are directed to the Board of Review. The Board of Review consists of a three members headed by a Chairperson. Each case on appeal before the Board is reviewed by all of the Board members. The Board members make the decision to reverse, affirm or remand the lower authority appeals decision. The Board of Review members meet on a bi-monthly basis. Two out of the three Board members must agree before rendering a final decision. All Board personnel are required to be licensed attorneys. The Board decides approximately 1400 cases a year and has the authority to affirm, reverse, or remand contested cases decided at the lower authority.

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