Savvy Separations

Proper hiring and firing can help you reduce your SUI tax rate

By Fran De Luca

Tax cuts, as any politician knows, are an excellent way to please voters. As a payroll and HR professional, you can use tax cuts to enhance your own standing with senior managers. That's because unlike other taxes, State Unemployment Insurance (SUI) premiums are based in part on *your company's HR behavior*. They represent your only controllable tax.

Let's start by making it clear that we're discussing significant amounts. In Hawaii, for example, your company's SUI premium can be as low as zero, or as high as $1,836 per year … *per employee.* Hawaii is a worst case scenario. But in California, the annual SUI premium still ranges from $112 to $434 per employee. In New York, it goes from $127.50 to $841.50. In Illinois, $132 to $1,078.

It is this *range* of tax rates that should attract your attention. Your company's actual rate will vary, depending on the number of former employees who have *successfully filed for unemployment benefits*.

Why is your claims experience so closely linked to your SUI tax rate? According to the Department of Labor, each worker who files for unemployment benefits collects an average of $3,945. Your state pays those benefits, but it must go back and raise that money from the companies most responsible for those terminations. The more employee terminations a company has, the more unemployment benefits it causes the state to pay out. So it's only fair that employers with higher turnover pay higher SUI premiums.

A single claim can tarnish your record for years

The rate increase after just one claim can raise the your SUI premiums for all employees. That means the benefits charged from one claim can raise your unemployment taxes by several thousand dollars.

Even worse, *the increases stay with your company for years.* Most states keep a three-year revolving record of your claims experience. So an unemployment claim from three years ago could still be increasing your SUI premium today. Other states look at a five-year period and some *never* phase out your poor experience. It simply accumulates and averages out over the life of your company.

In short, because each SUI payout has such long-term, company-wide consequences, you want to do everything you can to protect yourself against unwarranted claims.

Lay the groundwork for contesting claims

How do you keep your claims experience — and SUI tax rates — to a minimum? Whenever an employee files for unemployment benefits, you have the option of protesting that claim. If the claim is denied, your experience rating will be unaffected.

When you protest a claim, your state unemployment agency will schedule an appeal hearing, where you and the employee present your respective cases to a referee. To qualify for benefits, the employee must satisfy three basic requirements

1. Meet state-specific wage requirements
2. Be unemployed through no fault of their own
3. Be able to work, available for work and actively seeking new employment

Your HR management practices come into play in connection with the second requirement. If you hired an employee and laid him off because business got slow, that employee is unemployed through no fault of his own. You will not win your appeal. The same holds true if you terminated an employee because she proved unsuitable for the job. Employers are responsible for properly screening and training the people they hire.

If, however, you can prove that the employee was terminated for *just cause*, you will maximize your odds that the claim will be denied. To do that, you must be able to document four things:

1. That the employee knew your company's policies and procedures
2. That the employee knowingly and intentionally failed to follow those procedures
3. That the employee was given advance warning and ample opportunity to correct his or her behavior

4. That the employee knew that continuing his or her behavior would lead to termination

Have employees acknowledge in writing that they know the rules

Let's start with the first requirement - proving that the employee knew your company's policies and procedures. To do that, you must clearly establish your rules and guidelines in an employee manual or handbook. At the very least, post a list of rules in a prominent place, such as the lunch room. Have employees sign an acknowledgment that they have received and read these rules. By the same token, make sure that all new hires receive an orientation that covers expectations, policies and procedures. Have them sign a document confirming that they underwent orientation and what it covered.

Use progressive discipline to document that rules were broken

Your next steps are to prove that the employee knowingly and intentionally failed to follow company procedures and that he or she was given advance warning and ample opportunity to correct the problem behavior. When an employee commits an infraction, quickly begin a process of progressive discipline. A supervisor should meet with the employee and explain:

- The issue at hand
- The rules broken
- What the proper behavior should have been
- That the employee's job is in jeopardy because of this misconduct

Have the employee sign a document that acknowledges these points and affirms that the behavior in question will not be repeated. Include details of the problem behavior, but leave out opinions about the situation. Supportable facts count in an appeal hearing, opinions do not. If the employee refuses to sign, have a witness sign a confirmation that the employee received this notice.

Instruct your supervisors to maintain a dignified, professional tone during these disciplinary meetings. They should conduct disciplinary meetings in private and avoid emotional confrontations. Advise them to stick to the situation at hand, be specific on areas needing correction and not wander into areas unconnected to the infraction. Protect yourself from harassment charges by having both a male and female supervisor at these meetings.

Since the discipline is justified, there is no need to be apologetic or feel guilty. The purpose is to help the worker become a better employee. Give the employee plenty of opportunity to explain the behavior in question. Convey a feeling that, "We invested in recruiting and training you. We want this to work out."

Make it clear when you are giving the "final warning"

Your fourth requirement for successfully appealing a claim is to document that the employee was aware that continuing his or her behavior would lead to termination. If an employee fails to improve, conduct an additional disciplinary meeting during which you inform the employee that he or she faces termination if the problem behavior occurs again. Have the employee sign a written acknowledgment of this and offer him or her a copy.

Termination should preferably happen on the day of the final incident, or as soon as possible thereafter. Have the employee sign a document that recounts past performance problems and states the reason for discharge. Avoid using the term "layoff" to disguise a termination.

If you have documented each of these steps, you should stand an excellent chance of successfully appealing the employee's claim. Yes, it involves paperwork. It takes time away from work to attend the appeal hearings. But given the long-term cost of a rate increase, the effort is worth it.

Know which claims are worth contesting

That said, not every claim for unemployment benefits should be contested. Remember that the behavior warranting separation must be *within the employee's control*. If you terminate an employee because he or she couldn't get along with a supervisor, for example, that employee will probably qualify for unemployment benefits. Personality clashes are generally not disqualifying grounds. Similarly, employee carelessness or poor judgment are not considered intentional misconduct. Neither are repeated absences due to a genuine illness.

Most state unemployment agencies will only disqualify claims where the misconduct was shown to be willful and intentional. Since the burden of proving intentionality is on the employer, your best bet is to appeal claims where the employee clearly and demonstrably broke company policy. The most common grounds are employee theft, failure to call in on the day of an absence, consuming alcohol or abusing substances on the job, coming to work under the influence, fighting on the job, sleeping on the job, insubordination, excessive tardiness or absenteeism and, in some states, failing a random drug test.

Avoid firing by not *hiring* problem employees

Of course, the best alternative to terminating problem employees is not hiring them in the first place. Conduct testing and/or extensive interviews to make sure they are truly qualified for their positions. On the other hand, since over-qualification and underpayment increase the risk of separation, instruct your supervisors to watch for these warning signs in job applicants:

- Applicant experience that differs significantly from what the job requires
- A wide disparity in either direction between the pay offered and the pay desired

Verify the candidate's work history before making a job offer. Have them explain any gaps in their experience and independently confirm those explanations. Even though you may be anxious to fill a vacancy, give the applicant a realistic picture of the responsibilities and nature of job. There should be no surprises or disappointments when they start work.

Once employees are hired, pay attention to other factors that promote job satisfaction. Provide training and opportunities for advancement. Give employees regular, constructive feedback on their performance. Recognize and reward good behavior. Happy employees often mean fewer unemployment insurance claims.

Finally, monitor your unemployment insurance claims experience and watch for invalid claims or calculation errors by your state. There are third party vendors who can manage this process for you. Such simple mistakes are more common than you may think – and actually on the increase. Between 2003 and 2004, the rate of erroneous or fraudulent unemployment insurance payments rose from 9.2% to 9.9%.

These sensible precautions can help you reduce your company's SUI premiums – and receive credit from your management for a very welcome tax break.

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