

Important Ruling on Kentucky Unemployment Hearings: What Employers Need to Know

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Any employer that uses a non-lawyer corporate representative at unemployment hearings will risk having favorable decisions reversed if it is determined that the representative has engaged in the unauthorized practice of law. That is thanks to a 2019 Kentucky Court of Appeals ruling. The Court issued the decision upending the well-established practice allowing employers to be represented at unemployment hearings by a non-lawyer employee. Subject to reversal in the Kentucky Supreme Court, this opinion rewrites longstanding procedures applicable to unemployment hearings. If the decision stands, employers may no longer be able to use corporate representatives to represent them as advocates at unemployment hearings in place of lawyers.

A non-lawyer typically cannot represent another party in an adversarial legal proceeding. Doing so would constitute practicing law without a license, a Class B misdemeanor in Kentucky. Under an exception to this rule created by the Legislature, however, an employer in an unemployment hearing can either represent itself, hire an attorney, ***or appoint a corporate representative or another agent to represent it***. This exception recognizes the informal nature of unemployment hearings, which are generally conducted over short telephone conferences and often involve *pro se* employees.

The Court concluded that it is for the Kentucky Supreme Court — not the Legislature — to establish rules relating to the practice of law and to create exceptions to those rules. According to the Court, the exception for unemployment hearings was unconstitutional because it was created by the Legislature. Despite the Legislature's "laudable goal" of trying to simplify unemployment proceedings, the Court held that this goal could not overcome the constitutional separation of powers problem created by a legislative-created exception.

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While certain commentators believe this ruling means that employers must always have a licensed attorney present at an unemployment hearing, the conclusion reached by these commentators is premature.

First, the Kentucky Unemployment Insurance Commission has formally announced that it will be seeking review of the decision by the Kentucky Supreme Court. In the meantime, the agency will continue to allow employers to be represented by non-lawyer employees and agents.

Second, the scope of the decision has not been fully litigated. While a non-attorney representative may be precluded under this decision from examining or cross-examining the claimant or witnesses and making legal arguments, that does not necessarily mean the representative or other company witnesses could not supply factual information in response to questions posed by the referee.

Of course, having the ability to examine and cross-examine witnesses and making legal arguments could be the key to winning an unemployment hearing, but even if this decision stands, such a result does not necessarily mean that a licensed attorney will need to be present at all hearings — though the employer would be relying upon a referee to ask the right questions.

There will be more to come on this topic, including that possible review by the Kentucky Supreme Court and how employers who choose not to retain attorneys for unemployment hearings should proceed in light of the ruling from the Court of Appeals.

The decision will be published by the Kentucky Court of Appeals as *Nichols v. Kentucky Unemployment Ins. Comm'n*, No. 2017-CA-001156-MR (Ky. Ct. App. Apr. 26, 2019).

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