

Focus | Labor & Employment/Employee Benefits & Executive Compensation

Quit or Fired?

BY LINDSAY HEDRICK AND
ENRIQUE LEMUS

It is a common scenario: An employee gives their employer the conventional two weeks' notice that they intend to resign. The employer—perhaps concerned that the departing employee may take confidential information, be unproductive, or disrupt the workplace—decides to end the employment relationship immediately. Has the employee resigned or been fired?

Before delving into the issue of whether the employee jumped or was pushed, why does it matter how the separation is construed? For one thing, employees terminated without cause may be eligible for unemployment insurance benefits, whereas an employee who voluntarily resigned is generally ineligible. Further, the employee may have an employment contract providing for a bonus, severance, or other benefits that are triggered by a termination without cause.

Whether the separation is deemed a voluntary resignation or involuntary termination depends on the jurisdiction. In Arkansas, courts have adopted an "acceleration doctrine," which allows an employer to accept an employee's resignation immediately—to accelerate the employee's resignation—regardless of the employee's intended effective date, and the resignation matures when it is offered. On the other hand, the Vermont Supreme Court affirmed an Employment Security Board order finding that a separation initiated by the employer after the employee gave notice, but before the employee's desired end date, was an involuntary termination. Courts in Utah, Connecticut, Florida, Louisiana, Mississippi, and Nebraska have reached similar conclusions.

While Texas state court opinions offer little guidance on the issue, the Fifth Circuit and Southern District of Texas have rejected claims that immediate acceptance of a resignation prior to the notice's effective date constitutes involuntary termination. According to the Texas Workforce Commission (TWC), the state agency charged with providing unemployment insurance benefits, the determination hinges on timing:

- If the employee's resignation notice provides an effective date two weeks or less in the future, the employer's immediate acceptance of the resignation will be deemed a resignation.
- If the employee's resignation notice provides an effective date more than two weeks in the future and the employer accepts it more than two weeks before the effective date, but the employer pays wages through the notice period, the early acceptance of the resignation will be deemed a resignation.
- If the employee's resignation notice provides an effective date more than two weeks in the future, but the employer does not accept the resignation until two weeks or less before the effective date, the TWC says there is "a good chance of having TWC regard the work separation as a resignation, although not all claim examiners and hearing officers agree."
- If the employee's resignation notice provides an effective date more than two weeks in the future and the employer accepts it more than two weeks before the effective date without paying wages, the situation is likely to be considered a discharge, with the burden of proof on the employer to prove misconduct.

There is no bright line rule for all jurisdictions and all circumstances. Nonetheless, with some diligence, employees and

employers can protect themselves from unintended outcomes after notice is given.

For Employers:

- Before resigning from a job, determine whether notice is required. Generally, resigning employees are not required to give notice under state or federal law, but the employer may require notice. Check the employee handbook and any applicable employee contracts. For example, some employers have policies that only pay out accrued vacation to the departing employee if the employee provides some notice before resigning.
- Even if the employer does not have a policy requiring notice, the employee should weigh professional courtesy factors of prior notice (*e.g.*, preserving positive relationships with colleagues and ensuring a seamless transition of work) against the risk that the employer may accept the resignation immediately.

For Employers:

- Consider applicable state law before taking any action with a resigning employee. Remember the timing of any action may matter.
- Review any decisions and guidance issued by unemployment agencies with the relevant decision-making authority in the applicable jurisdiction.
- Also review any applicable employee contracts and handbooks for provisions about separation.
- Ultimately, weigh the benefits of immediately separating with the resigning employee against the risk of unintentionally converting the employee's voluntary resignation into an involuntary discharge.

HN

Lindsay Hedrick and Enrique Lemus are attorneys at Jones Day. They can be reached at lhedrick@jonesday.com and elemus@jonesday.com, respectively.

BECOME INVOLVED IN HIGH SCHOOL MOCK TRIAL

• HELP WITH COMPETITIONS

Work behind the scenes—man check-in, coordinate students, help Tabulate scores, etc.

• JUDGE MOCK TRIAL

Be a competition judge. No litigation experience necessary! Earn CLE credit! Multiple dates available.

• ATTORNEY ADVISOR

Help a team prepare for competition.



Mock Trial Competition Dates: January 21-28, February 4 and March 3-4, 2017

See website for details: www.texashighschoolmocktrial.com

To volunteer, or for more information: mgarcia@dallasbar.org | (214) 220-7484.