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FEBRUARY 2005

## Pennsylvania Employment Law

### A Fundamental Change For Employers In Unemployment Compensation Hearings

On February 3, 2005, the Pennsylvania Commonwealth Court ordered an end to a long-standing practice among many employers by declaring that employers no longer will be permitted to have any person who is not an attorney represent them at unemployment compensation hearings. The decision will force many employers to make a fundamental change in the manner in which they have handled unemployment compensation claims for many years.

#### THE DECISION

In *Harkness v. Unemployment Compensation Board of Review*, No. 150 C.D. 2004 (Pa. Commw. Feb. 3, 2005), the Commonwealth Court ruled that any non-attorney advisor, consultant, advocate, manager, administrator, facilitator, and every other non-lawyer, whether employed by the respondent-employer or by a third party, engages in the unauthorized practice of law when he or she represents an employer at an unemployment compensation hearing. That practice, according to the Court, must stop.

The Commonwealth Court's ruling will have immediate and far-reaching consequences. Because of the relatively low stakes of unemployment compensation hearings and the relative simplicity of the issues involved, the practice among employers of having non-lawyers conduct unemployment compensation hearings on their behalf has been widespread for years. Employers often sent their own human resources managers to the hearings as their representatives. Another common approach was for employers to outsource the representation to

non-attorney consultants (such as tax consultants, as in the *Harkness* case), who had effectively developed a cottage industry focused on the representation of employers at unemployment compensation hearings. The non-attorney representatives would serve as the focal point for communications between the Referee and the employer; they would speak on behalf of the employer when questions were posed; they would coordinate, direct, and oversee the order of witnesses for the employer, sometimes facilitating the testimony of those witnesses with questions in the nature of direct examination; they would pose questions to the claimant in the nature of cross-examination; they would make decisions regarding the evidence presented at the hearing, making objections when they thought appropriate; and they frequently would make a closing statement or "argument" at the conclusion of the hearing.

Despite the fact that those efforts were of great service to employers and were often done with a high level of ability and success, the Commonwealth Court held that there was "no doubt" that those efforts must be characterized as the practice of law, even calling them "the paradigmatic functions of an attorney-at-law." The Commonwealth Court rejected a suggestion that the relative informality of unemployment compensation hearings should play a role in the Court's analysis, ruling instead that the character of the activities performed by the representative is determinative. So long as those activities are legal in nature, they must be performed only by persons admitted to the practice of law.

One irony of the Court's decision is that the Referees before whom unemployment compensation hearings are held often are not lawyers. Based on the Court's

decision, it would appear that the Referees themselves, who routinely examine and cross-examine witnesses, handle evidentiary matters, and make numerous legal rulings, also would be engaged in the unauthorized practice of law. The Court's decision in *Harkness* did not address, let alone resolve, that difficulty.

There appear to be other difficulties with the decision in *Harkness*, as well. For example, the decision does not apply equally at all times and to all parties. Despite concluding that there was "no doubt" that the activities at unemployment compensation hearings fell within the scope of the practice of law, the Commonwealth Court also ruled that those very same "legal" activities can be performed by non-lawyer representatives who are acting on behalf of individual claimants. The dissent in *Harkness* highlighted the seeming inequity in the treatment afforded by the Commonwealth Court to employers as opposed to claimants, going so far as to characterize it as a constitutional equal protection problem. The Court, however, dismissed that suggestion of inequity by stating that "[w]hether employers and claimants should be treated 'equally' is not the proper inquiry before this Court." Although a full legal analysis of that issue is beyond the scope of this article, it must be observed that the seeming inequity in the Court's decision is a serious issue deserving of a thoughtful response, and one which can be resolved only after a rigorous examination of a wealth of statutory, regulatory, and even constitutional provisions. The Commonwealth Court's perfunctory dismissal of the issue seems to fall short of giving the issue its due.

Although the decision may seem to be unwelcome news to many employers and although it is marked by several notable difficulties, it would be a mistake to conclude that the decision in *Harkness* was arbitrarily reached or involves a clear misapplication of law. In its favor, the Commonwealth Court's decision in *Harkness* is supported to one extent or another by authorities both from within Pennsylvania and from other jurisdictions. For example, the Commonwealth Court has an established history of banning non-lawyers from participating in hearings before various state administrative agencies on the grounds that they were engaged in the unauthorized practice of law. *Harkness*, then, reasonably may be seen as the most recent step along that same consistent path. The decisions from other jurisdictions cited by the Court further confirm that the decision in *Harkness* is not so unusual as to be unique among the states. Rather, it appears that the trend among courts that have

addressed the issue supports the Commonwealth Court's decision in *Harkness*. Additionally, the Commonwealth Court seems to have correctly characterized the activities at issue. Anyone who has participated in an unemployment compensation hearing will recognize that what the employer's representative does during the hearing has the look, the feel, and, most pertinently, the substance of the practice of law.

### WHAT DOES THE FUTURE HOLD FOR EMPLOYERS?

Obtaining a reversal of the decision in *Harkness* on appeal may be a long and difficult process, and perhaps an impossible one. Given the historical decisions of the Commonwealth Court tending in the direction of preserving similar activities in judicial and quasi-judicial settings for attorneys only, there is a strong likelihood that the decision in *Harkness* will be upheld upon its inevitable appeal.

Perhaps the most effective indictment of the decision in *Harkness* is the one leveled at it in the concluding remark of the dissent: "In short, I would not meddle in a system that seems to be working." The long-standing practice of allowing non-lawyers to represent employers at unemployment compensation hearings seemed to benefit all parties concerned. It helped employers minimize the costs of defending such claims. As a result, it facilitated the participation of employers in those hearings, when otherwise they may have chosen not to attend. It also served to keep claimants and respondents on a relatively even playing field – when neither side was represented by a lawyer, there could be no claim that a lawyer took unfair advantage of an unrepresented claimant.

All of that will change as a result of the *Harkness* decision. Whether one agrees with the decision or does not agree with it, the Commonwealth Court's decision in *Harkness*, at least for now, is the law in Pennsylvania. Barring a reversal on appeal or a legislative change, the decision in *Harkness* is one with which employers will have to live. As a result, for all unemployment compensation claims filed after February 3, 2005 (the decision explicitly states that it does not apply retroactively), employers are prohibited from being represented at unemployment compensation hearings by any advisor, consultant, employee, or any other person – whether employed by the respondent-employer or by a third-party contractor – who is not admitted to practice law as an attorney.

Only the future will tell how *Harkness* will play out in practice. There may be a chilling effect on the participation of employers in unemployment compensation hearings; employers could decide that they would rather forego participation than retain legal counsel for that purpose. The same effect may be magnified for small or new employers who simply may not have the means or resources to retain legal counsel for such an endeavor. On the other hand, employers may benefit from the requirement that legal counsel represent them at unemployment compensation hearings. As noted by the dissent in *Harkness*, individual claimants most likely will suffer and employers consequently will benefit if, at every hearing in which an employer participates, there is always a lawyer in the room – and always on the side of the employer.

#### **AN UNANSWERED QUESTION**

The Commonwealth Court in *Harkness* left one important question unanswered. Clearly, the Court held that a non-lawyer who conducts cross-examination, makes evidentiary decisions and objections, and makes legal arguments engages in the unauthorized practice of law. The Commonwealth Court did not address, however, whether an employer may send to an unemployment compensation hearing solely a fact witness or witnesses who possess relevant information concerning the claim and who do nothing but sit in the hearing room and answer questions when asked of them. Certainly such persons do not engage in the practice of law, even under the Court's analysis in *Harkness*. However, such a scenario may run afoul of the Court's unequivocal admonition that "corporations must be represented by legal counsel." The question is not answerable based upon the *Harkness* decision and, indeed, presents an issue requiring further judicial or statutory clarification. The reaction of Referees, the Board, and the courts to those employers who first attempt such an approach is much-anticipated and will be closely analyzed.

#### **CONCLUSION**

The Commonwealth Court's decision in *Harkness* works a fundamental change in the way in which many employers have handled unemployment compensation hearings for many years. Following *Harkness*, employers are essentially left with two choices: either to participate in unemployment compensation hearings through the representation of an attorney, or to forego participation in those hearings altogether. *Harkness*, therefore, marks a significant turning point in unemployment compensation law in Pennsylvania and one whose consequences will be experienced for years to come.

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**David J. Kolesar**

412.355.6252

dkolesar@klnl.com

**Elizabeth S. Windsor**

412.355.8922

ewindsor@klnl.com

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If you have questions or would like more information about K&LNG's Employment Law Practice, please contact one of our lawyers listed below:

<b>Boston</b>	Henry T. Goldman	617.951.9156	hgoldman@kIng.com
<b>Dallas</b>	Jaime Ramón	214.939.4902	jramon@kIng.com
<b>Harrisburg</b>	Carleton O. Strouss	717.231.4503	cstrouss@kIng.com
<b>Los Angeles</b>	Thomas H. Petrides Paul W. Sweeney, Jr.	310.552.5077 310.552.5055	tpetrides@kIng.com psweeney@kIng.com
<b>Miami</b>	Carol C. Lumpkin Michael C. Marsh	305.539.3323 305.539.3321	clumpkin@kIng.com mmarsh@kIng.com
<b>Newark</b>	Rosemary Alito Vincent N. Avallone Marilyn Sneirson	973.848.4022 973.848.4027 973.848.4028	ralito@kIng.com vavallone@kIng.com msneirson@kIng.com
<b>New York</b>	Eva Ciko	212.536.3905	eciko@kIng.com
<b>Pittsburgh</b>	Stephen M. Olson Michael A. Pavlick Hayes C. Stover	412.355.6496 412.355.6275 412.355.6476	solson@kIng.com mpavlick@kIng.com hstover@kIng.com
<b>San Francisco</b>	Jonathan M. Cohen	415.249.1029	jcohen@kIng.com
<b>Washington</b>	Lawrence C. Lanpher Hayes C. Stover	202.778.9011 412.355.6476	llanpher@kIng.com hstover@kIng.com
<b>San Francisco</b>	Jonathan M. Cohen	415.249.1029	jcohen@kIng.com
<b>Washington</b>	Lawrence C. Lanpher	202.778.9011	llanpher@kIng.com



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