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Title 22@ Social Security

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Division 1@ Employment Development Department

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Subdivision 1@ Director of Employment Development

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Division 1@ Unemployment and Disability Compensation

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Part 1@ Unemployment Compensation

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Chapter 5@ UNEMPLOYMENT COMPENSATION BENEFITS

1256-31 Discharge for Misconduct -Absence from Work

Article 1@ ELIGIBILITY AND DISQUALIFICATIONS

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Section 1256-31@ Discharge for Misconduct -Absence from Work

(a)

Scope. This section relates to discharges for misconduct due to absence from work. Section 1256-30 of these regulations set forth general principles also applicable under this section.

(b)

Excused Absences. If an employer has given an employee prior approval for an absence from work, or grants approval when notified by the employee of an absence, a discharge of that employee for that absence from work is not for misconduct unless unusual circumstances are presented. Employer rules or collective bargaining agreement terms may provide procedures governing requests for extension of a leave of absence. Reasonable steps to substantially comply with such procedures is a duty of the employee, and a discharge for failure to so comply is for misconduct. An employee who has been granted an indefinite leave of absence for a specific purpose which is accomplished and who thereafter engages in other unauthorized activities for the balance of his or her absence without notice to the employer, may be discharged for this reason. This employee is discharged for misconduct unless there are compelling reasons for the continued absence and the failure to give notice. If an employee deliberately gives false reasons to the employer to obtain a leave of absence from work and the employee knew or should have known that the leave of absence would not have been

approved by the employer had the true reasons for the absence been known, a discharge of the employee for dishonesty in these circumstances is for misconduct.

(c)

Unexcused Absences. Except for an isolated instance of a short period of unexcused absence for the first time due to an employee's good faith error in judgment, and except as provided in subdivision (d) of this section, an employee who is discharged by the employer due to the employee's absence from work without prior approval of the employer is discharged for misconduct if any of the following conditions exists: (1) The employee did not have a real, substantial, and compelling reason for, and continuing during the period of, the absence from work of such nature that a reasonable person genuinely desirous of retaining employment would have been absent from work, and the employer has not condoned the employee's absence by failing to warn or reprimand the employee if prior similar unexcused absences from work have occurred. (2) The employee has not, personally if reasonably possible or by a reliable agent and with reasonable promptness under the circumstances, notified the employer of the employee's absence from work and the reasons for the absence, where notice to the employer is reasonably feasible, and there is no real, substantial, and compelling reason to excuse the failure to give such notice. COMMENTS. An employee who is absent from work without prior approval of the employer under circumstances which reasonably justify an inference that the employee intends never to return to work has voluntarily left his or her work, even if the employer later purports to discharge the employee (see Sections 1256-1 to 1256-23, inclusive, of these regulations for interpretations as to whether particular reasons for voluntarily leaving work are good cause for the leaving). In determining whether a discharge is for misconduct

where an unexcused absence is involved, the primary elements are whether the absence was due to compelling reasons, and whether the employee notified the employer in order to protect his or her job or, if not, had compelling reasons for the failure to give notice. A first-time short period of absence generally is not misconduct warranting discharge, unless aggravated by facts imposing an unusual duty in a particular case. Compelling reasons for absence combined with adequate and prompt notice to the employer mean that any discharge based on the absence is not for misconduct. Compelling reasons for absence but an inexcusable failure to give notice to the employer mean that a discharge for the failure to give notice is for misconduct, even though the absence itself is justified by the compelling reasons. Noncompelling reasons for absence justify discharge for misconduct even if prompt notice to the employer is given, unless condoned by lack of prior warnings or reprimands as discussed below. If compelling reasons for an employee's absence from work exist, as interpreted under subdivision (c) above, prior warnings or reprimands by the employer do not negate the compelling reasons. Prior warnings or reprimands are pertinent, however, if the employee does not have compelling reasons. In that case, since the lack of prior warnings or reprimands by the employer condones a pattern of unexcused absences, the employee's lack of willfulness in violating any duty to the employer is apparent; there is no misconduct. On the other hand, an employer's prior warnings or reprimands for unexcused absences due to noncompelling reasons followed by a repeated similar absence justifies a discharge for misconduct even if the employee notifies the employer of his or her unwarranted absence for noncompelling reasons. Prior notice does not convert noncompelling reasons to compelling reasons, and the employer has not condoned unexcused absences. A compelling reason for an unexcused absence may also justify failure to give notice to the

employer. For example, a death of a member of the employee's family, as defined by Section 1256-9 of these regulations, excuses the absence and also excuses failure to give notice, and there is no misconduct to warrant a discharge. The employee's obligation to give notice to the employer of the reasons for an unexcused absence include the duty to give continuing notice and the probable date of return to work. For example, an ill employee should tell the employer when the employee expects to recover and return to work, or advise that the employee can return to work only when released by a doctor if such is the case and promptly inform the employer of any change in the circumstances as to return to work.

(1)

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(2)

The employee has not, personally if reasonably possible or by a reliable agent and with reasonable promptness under the circumstances, notified the employer of the employee's absence from work and the reasons for the absence, where notice to the employer is reasonably feasible, and there is no real, substantial, and compelling reason to excuse the failure to give such notice. COMMENTS. An employee who is absent from work without prior approval of the employer under circumstances which reasonably justify an inference that the employee intends never to return to work has voluntarily left his or her work, even if the employer later purports to discharge the employee (see Sections 1256-1 to 1256-23, inclusive, of these regulations for

interpretations as to whether particular reasons for voluntarily leaving work are good cause for the leaving). In determining whether a discharge is for misconduct where an unexcused absence is involved, the primary elements are whether the absence was due to compelling reasons, and whether the employee notified the employer in order to protect his or her job or, if not, had compelling reasons for the failure to give notice. A first-time short period of absence generally is not misconduct warranting discharge, unless aggravated by facts imposing an unusual duty in a particular case. Compelling reasons for absence combined with adequate and prompt notice to the employer mean that any discharge based on the absence is not for misconduct. Compelling reasons for absence but an inexcusable failure to give notice to the employer mean that a discharge for the failure to give notice is for misconduct, even though the absence itself is justified by the compelling reasons. Noncompelling reasons for absence justify discharge for misconduct even if prompt notice to the employer is given, unless condoned by lack of prior warnings or reprimands as discussed below. If compelling reasons for an employee's absence from work exist, as interpreted under subdivision (c) above, prior warnings or reprimands by the employer do not negate the compelling reasons. Prior warnings or reprimands are pertinent, however, if the employee does not have compelling reasons. In that case, since the lack of prior warnings or reprimands by the employer condones a pattern of unexcused absences, the employee's lack of willfulness in violating any duty to the employer is apparent; there is no misconduct. On the other hand, an employer's prior warnings or reprimands for unexcused absences due to noncompelling reasons followed by a repeated similar absence justifies a discharge for misconduct even if the employee notifies the employer of his or her unwarranted absence for noncompelling reasons. Prior notice does not convert noncompelling reasons to compelling reasons, and the employer has not condoned unexcused absences. A compelling reason for an unexcused absence may also justify

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(d)

Incarceration. (1) A voluntary leaving without good cause exists, and not a discharge, where an individual's employment is terminated due to his or her absence from work for a period in excess of 24 hours because of incarceration and the individual is convicted of the offense or any lesser offense or pleads guilty or nolo contendere. In the following three situations where incarceration and absence from work are involved, however, an individual terminated from his or her work for such absence from work is discharged: (A) Incarceration for 24 hours or less, including such incarceration where an individual in a narcotics or drug abuse case is diverted to a program of education, treatment, or rehabilitation pursuant to Chapter 2.5 (commencing with Section 1000) of Title 6 of Part 2 of the Penal Code. (B) Incarceration following conviction for any period in lieu of a fine which the individual is unable to pay due to indigency. (C) A verdict of not guilty of the offense or any lesser included offense for which the individual was incarcerated. (2) If any of the circumstances proposed in subparagraphs (A) to (C) of paragraph (1) of this subdivision exists, any failure by the individual to give notice to the employer of absence from work, as required by paragraph (2) of

subdivision (c) of this section, is ordinarily excusable since the dominant motivation of an incarcerated person is to obtain release from incarceration as soon as possible. COMMENTS. The basis for disqualification under Section 1256 of the code requires a distinction between voluntary leaving of work and a discharge. An individual who voluntarily commits and is convicted of a crime for which a fine is imposed but who is indigent and unable to pay the fine and is thereupon incarcerated in essence loses his or her job when discharged for absence due to incarceration because of indigency and not due to the voluntary criminal act. The act is voluntary, but the failure to pay is involuntary. But for the individual's involuntary indigency, there would have been no incarceration and no absence from work despite the commission of a crime. Similarly, the individual who has been found not guilty of the offense or any lesser included offense charged has been incarcerated involuntarily through no fault or action on his or her part and has not voluntarily left the work. In these situations then, the termination from employment due to involuntary incarceration and absence from work is a discharge, the reasons for discharge do not constitute misconduct, and the individual is not disqualified unless there has been an inexcusable failure to notify the employer where it was reasonably feasible to give such notice and a reasonable person would have given notice of absence from work. This section does not deal with situations in which an employee is discharged due to the commission of an illegal act itself, rather than for absence from work caused by incarceration due to the illegal act. For discussion of discharge due to an illegal act itself, see Section 1256-43 of these regulations.

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Incarceration following conviction for any period in lieu of a fine which the individual is unable to pay due to indigency.

(C)

A verdict of not guilty of the offense or any lesser included offense for which the individual was incarcerated.

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