



BUSINESS AND EMPLOYMENT NEWSLETTER

DEFENDING AN UNEMPLOYMENT BENEFITS CLAIM

SECOND QUARTER, 2007

By Bethany Allen

When Would I Appeal an Unemployment Benefits Claim?

The first opportunity to appeal an unemployment benefits claim arises when the Employment Security Department (ESD) makes its initial determination of whether an applicant is eligible for unemployment benefits. You would appeal an unemployment benefits claim if you want to challenge the ESD's decision to award unemployment benefits to a former employee after they quit or were discharged.

Why would I want to Appeal an Unemployment Benefits Claim?

It is important to consider whether to appeal a former employee's unemployment benefits determination be-

cause your unemployment insurance taxes are based on your experience as an employer with unemployment. An increase in the number of your former employees that receive unemployment benefits may increase the amount of unemployment insurance taxes you pay. However, you may not want to appeal if the employee was dismissed for a non-misconduct reason (see below for description of statutory misconduct).

How do I appeal?

You can appeal the ESD's determination by faxing or mailing a letter to the Office of Administrative Hearings (OAH). This is an example of a request for an appeal: "I disagree with the decision made by the Employment Security Department regard-

ing John Doe, Social Security ###-##-#### and I wish to appeal that decision." You must also include your name, business name, and signature. You have 30 days from the date of the determination to appeal.

What Will Happen if I Appeal?

If you appeal, a hearing will be held before an Administrative Law Judge (ALJ).

What is a Hearing?

A hearing is a fact-finding process which enables the ALJ to make his/her decision. Generally, the purpose of the hearing is to determine whether unemployment benefits should be paid to former employee. The ALJ will determine the facts of the

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DEFENDING AN UNEMPLOYMENT BENEFITS CLAIM - CONTINUED

case and issue a written decision. Although either party can appeal the ALJ's decision if they disagree, the hearing is the only chance the parties will have to present their evidence and explain their side of the story. It is important to present all evidence that is important to your case at the hearing.

How is a Hearing Held by Telephone?

Most hearings are held by telephone via conference call, but may be held in person when requested. However, most ALJ's favor telephonic hearings rather than in person hearings. Telephonic hearings are also more convenient if you have multiple witnesses. If a hearing is scheduled to be heard by telephone, the OAH will mail you numbered copies of documents that involve the claim. These documents are called exhibits. The ALJ will make his/her decision based on the testimony presented during the hearing and the exhibits that are admitted into the record. You should carefully review these documents prior to the hearing and have them with you to reference during the hearing.

The ALJ will take an audio recording of the hearing. The recording of the hearing is considered a public record and subject to disclosure under the Public Records Act. Therefore, it is important to monitor what type of information you choose to disclose during the hearing. You do not want information that may be damaging to your company to be part of a public record that could be used to bolster any potential legal claims against you or your company by this or any other employee.

Who Will be Present at the Hearing?

The people involved in the claim will usually be present in the hearing. This will usually include the claimant or former employee, witnesses for either side, and sometimes a representative or witness from the employment security department. If you have witnesses, they do not have to be physically with you at the time of hearing. The ALJ can call them at the telephone number most convenient for them. It is your responsibility to make arrangements for your witnesses' participation. Before you ask witnesses to appear at the hearing, talk to them first. Generally, you should choose witnesses who have firsthand knowledge.

Both parties are allowed but not required to have a representative such as an attorney or employment service. However, legal representation is not necessary unless there are compounding issues that make the claim more difficult or complex.

What Will Happen at the Hearing?

At the start of the hearing, the ALJ will explain the issues and describe what will happen during the hearing. The ALJ will swear in all witnesses, identify and admit or exclude exhibits, and rule on any objections raised. You may object to exhibits that you believe contain inappropriate or unnecessary evidence.

To prove your case, you may testify and present testimony from other witnesses. You may also offer other documents and other physical evidence. You must pro-

vide copies of documents you plan to use during the hearing to the ALJ and opposing party prior to the hearing. The documents must be sent in advance of the hearing in order to give the parties a chance to review them in preparation for the hearing. This can be done by faxing or mailing the documents to all parties.

Each party will have an opportunity to present testimony, ask questions of witness, including witnesses for the opposing party, and respond to witness testimony given. Typically a hearing will last one hour, but can be longer or shorter depending on the complexity of the issues involved and the number of witnesses and documents presented.

After all evidence has been presented, the ALJ will adjourn the hearing. You may not call the ALJ to discuss the hearing any further. The ALJ will issue a written decision that will be mailed to the parties within two weeks of the hearing. This decision is called an Initial Order.

What Evidence Should I Present?

You can present evidence in the form of testimony, documents, and recordings. Evidence that is relevant and reliable will generally be considered, whereas evidence that is irrelevant or unreliable will generally be excluded.

The ALJ will give more weight to testimony of witnesses who have firsthand knowledge rather than written statements or witnesses with second-hand knowledge. Firsthand knowledge is the type of knowledge gained by actually seeing or hearing events when they

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WASHINGTON HOMESTEAD EXEMPTION INCREASES TO \$125,000

By Sallye Quinn

On May 11, 2007, Governor Gregoire signed into law legislation raising Washington's homestead exemption from \$40,000 to \$125,000. The homestead exempts an amount of home equity from foreclosure on judgment liens. According to an article published on the website for one of the bill's sponsors, Rep. Dawn Morrell, (hereinafter the "Morrell Article") witnesses told lawmakers at the public hearings for the bill that Washington's current homestead exemption of \$40,000 is less than half the amount of neighboring states such as Idaho, Montana and Alaska.

The purpose of the homestead exemption, according to Washington lawmakers and Washington Courts, is to protect families from eviction from their homes, to allow debtors to achieve a fresh start from debts, and to encourage long-term investment in homes¹. Given those policies, it is no surprise that Washington lawmakers increased the homestead exemption to keep up with rising home prices. According to the Morrell Article, Morrell stated that "a recent AARP bulletin reports that a medical bankruptcy will hit another American family every 30 seconds . . . Nearly half of all bankruptcies are caused by medical problems, and I just don't think it's fair for peo-

ple to lose their homes because of injury or illness." With the new homestead exemption amount, debtors that previously avoided relief from debt through bankruptcy filing because of a fear of losing equity in their homes will now have much more flexibility in evaluating debt relief options.

The new homestead exemption is clearly good for debtors, but what does it do to creditors? Previously, a creditor that was not secured by a deed of trust or mortgage on an individual's home² could enforce a judgment lien against the debtor's home and was only required to pay the debtor his \$40,000 homestead amount at a sheriff's sale of the home, either as an out of pocket cost or from the proceeds of the sale. Rising home prices in Washington State and the resulting automatic equity homeowner's received from the increase meant that a judgment lien on an individual's house was often worth the cost of execution. However, with the homestead increase, judgment creditors will have to be absolutely sure that sufficient equity exists in the property before execution because the cost for homestead amounts due to the debtor triples on July 22, 2007.

The new homestead exemption amount should encourage credi-

tors to obtain greater consensual security for debt, such as deeds of trust or UCC filings on personal property, in order to avoid a judgment that can't be collected. That being said, even with the increase in homestead, a judgment lien on an individual's home is still a powerful tool for a patient creditor who waits for the debtor to either sell his home or refinance, in which case the lien will need to be removed, and the creditor paid, in order to give clear title or first priority to a lender. As a final procedural note, it is important to remember that judgment liens do expire and must be renewed every ten years and even more important to remember that only *recorded* judgment liens attach to homestead.³ If you need assistance with recording or extending your lien, we appreciate the opportunity to assist you.

**If you would
prefer to
receive this
Newsletter by
email, please
call us at
360-733-0212.**

¹ Frederick P. Corbit, *Should Washington Raise the Homestead?* (Dec. 2005), <<http://www.wsba.org/media/publications.barnews/dec05corbit.htm>>.

² The homestead is subject to execution of forced sale in satisfaction of judgments obtained on debts secured by mortgage or deed or trust. R.C.W. § 6.13.080(2).

³ R.C.W. § 6.13.090.

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occurred.

You may submit additional written evidence to be admitted as exhibits. As previously mentioned, you must provide copies of those documents to the opposing party and judge prior to the hearing. Additional written evidence may include correspondence, time cards, medical reports, cell phone records, maps, charts, photos, etc. It is important that you are able to explain who prepared the written evidence, its purpose, and how it helps your case.

You may also submit audio or video recordings to support your case. You must provide a copy of the recording to the opposing party and the ALJ prior to the hearing.

How do I Present My Case if the Employee was Discharged for Misconduct?

A claimant who is discharged or suspended for misconduct or gross misconduct is ineligible for unemployment benefits. The employer has the burden of proving, by a preponderance of the evidence, that the claimant was discharged or suspended for work-connected misconduct or gross misconduct.

Misconduct is defined as conduct that harms or potentially harms the employer's interest. This includes: (1) willful or wanton disregard of the interests of the employer or a coworker; (2) deliberate violations or disregard of standards of behavior the employer has a right to expect of an employee; (3) carelessness or negligence that causes or would likely cause serious bodily harm to

the employer or a coworker; (4) carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest. See [RCW 50.04.294](#) and [RCW 50.20.066](#).

Examples of willful or wanton disregard of the interest of the employer or co-worked include: (1) insubordination; (2) repeated and inexcusable tardiness after warnings; (3) dishonesty related to employment; (4) repeated and inexcusable absences; (5) deliberate and illegal acts that provoke violence or a violation of the law or a collective bargaining agreement; (6) violation of reasonable company rules; (7) violations of the law while acting within the scope of employment

At the hearing, you should present a witness or witnesses with firsthand knowledge to explain how and when the claimant engaged in misconduct and how the employer's interests were harmed or potentially harmed by the claimant's actions. It is important that you keep clear and well-documented records of employee discipline in order to be able to provide ample evidence of employee misconduct. Having written records of progressive employee discipline that include a detailed report of the employee's misconduct, disciplinary steps taken, and the employee's signature will be helpful to bolster your case.

Gross misconduct is defined as a criminal act for which the claimant has been convicted in criminal court, or has admitted, or conduct that demonstrates a flagrant and wanton disregard of the inter-

est of the employer or fellow employee.

How do I Present My Case if the Employee Voluntarily Quit?

A claimant who establishes good cause (a legally recognized reason) for quitting is eligible for unemployment benefits. The claimant has the burden of proving he or she had good cause to quit. The claimant must establish that the job separation was for good cause. Good cause includes the following reasons: (1) the acceptance of other work (employee left your business for a bona fide job elsewhere but that job fell through); (2) the illness or disability of the claimant, or the illness, disability, or death of someone in the claimant's immediate family; (3) the relocation of the claimant's spouse due to a mandatory military transfer; (4) the protection of the claimant, or a member of their immediate family, from domestic violence or stalking; (5) a reduction in the claimant's usual income of 25 percent or more; (6) a reduction in the claimant's usual hours of 25 percent or more; (7) a change in the worksite that caused a problem with commuting; (8) a deterioration of worksite safety which the employer failed to correct within a reasonable period of time after being notified; (9) the existence of illegal activities in the worksite which the employer failed to correct within a reasonable period of time after being notified; and (10) change in the claimant's usual work which violated their religious convictions or sincere moral beliefs.

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KEEPING THINGS MOVING—USING ROBERT’S RULES OF ORDER IN MEETINGS

By Sallye Quinn

You may or may not remember the first time you attended a meeting run according to Robert’s Rules of Order. I have a clear memory of my first introduction -- a high school student council meeting where a straight-laced student body president clutched his handbook on Robert’s Rules of Order throughout the meeting and delighted in formally calling the meeting to order, making sure all motions were seconded and generally relished in dutifully enforcing the minutia of Robert’s Rules of Order. Robert’s Rules of Order are widely used, however, and are essential knowledge for any group or any member of a group who wants to take care of business via a meeting. Many of you will have formal meetings in your businesses, while some of you will only participate in formal meetings at your own homeowner’s association or a non-profit where you volunteer your time. Regardless, whether the issue is taking out a loan to expand into a new market, dealing with a noisy neighbor or applying for a new grant, meetings need to have flow, structure and give participants a way to let their voices be heard. Robert’s Rules of Order can make that happen. This article sets out some of the Robert’s Rules of Order basics and provides tips for some of the trickier issues, such as disruptive meeting attendees and strategies for either getting to a vote on an issue or avoiding the vote all together.

*Webster’s New Word, Robert’s Rules of Order Simplified and Applied*¹

(hereinafter “Webster’s New World”) breaks the basics down into the following four principals:

Taking Up Business One Thing at a Time. In an age of multi-tasking, formal meetings are one place where it is still best to do only one thing at a time. *Webster’s New World* states that the best way to do that in a meeting is to: 1) Set an agenda and make sure items are disposed of before moving on to the next item on the agenda; 2) Allow only one main motion to be pending at a time. Secondary motions, such as motions to amend or postpone, can be made while the main motion is pending and they must be resolved or temporarily disposed of before returning to the main motion; 3) Allow only one member to have the floor at a time; 4) Require members to take turns speaking; and last, 5) Prohibit any member from speaking twice until all have had the opportunity to speak.

Promoting Courtesy. It’s something I tell my four year old all the time: Be Nice! Some of the basic Robert’s Rules of Order *Webster’s New World* puts in this category are: 1) The presiding officer or chair calls the meeting on time; 2) During debate, members don’t speak directly to each other, but instead make remarks through and to the chair; 4) Members keep discussion to the issues, not the personalities or motives of other members; and 5) Members speak clearly and loudly so that all can hear and listen when others are speaking.

Justice, Impartiality and Equality. Nothing breeds frustration like having members feel as though they haven’t been given a chance to be heard. In order to promote the third principal, *Webster’s New World* encourages these elements of Robert’s Rules of Order: 1) The presiding officer should not take sides and allow all to be heard equally in debate. If the presiding officer wishes to voice an opinion he should relinquish the chair to another officer so that he can speak; 2) Officers and members should apply the rules, but only raise a point of order for major infractions. If someone’s rights aren’t being taken away, raising a point of order isn’t necessary; and 3) Allow ballot vote on a controversial issue to allow privacy.

The Rule of the Majority and Protection of the Minority. The rule that the majority wins brings finality to an issue, but the minority should not be silenced. On this issue, *Webster’s New World* categorizes the following: 1) Members get notices of all meetings and have the right to know by prior notice when there is a proposal to rescind or amend an action; 2) On issues where member’s rights can be taken away, majority usually means more than 50%. Each group’s governing documents, such as its bylaws and in cases of corporate matters, the relevant statutory provisions, will set out the situations where a super majority (i.e. a vote of greater than 50%) is needed. The most

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¹ Pgs. 9-13 (2d Ed. 2001).

ROBERTS RULES - CONTINUED

common situation requiring a supermajority is a proposed amendment to Articles of Incorporation, Bylaws or an Operating Agreement; and 3) Keep members advised of the work of the organization by reading minutes of prior meetings and reports of board and committee work.

With those basics in hand, here are some tips for dealing with disruptive meeting attendees and both getting to a vote on an issue and avoiding the vote all together. If you've grown weary of a difficult member who hijacks meetings with unnecessary rants and issues (or even funny anecdotes), simply reminding all present that Robert's Rules of Order apply can go a long way, along with some simple suggestions for keeping things on task. This can be easy to do if you're the presiding officer because you will have the floor and an opportunity to provide a reminder. If you're a member without automatic floor time, the best time to bring it up is under the common agenda item of New Business. A suggested approach is to begin with the basic submission of a motion to the aboard such as

"I move that we consistently apply Robert's Rules of Order in our meetings." Once discussion begins, the following Robert's Rules are especially helpful in curbing a disruptive member: 1) Each member has the opportunity to speak before anyone speaks twice and 2) Limit comments for any member to ten minutes, a customary time limitation. Of course, if there are a number of members, the standard limitation can be shortened and only extended to ten minute in cases of especially involved or contentious issues. Simply reminding the group that the meeting is a formal process with guidelines can be enough to keep that one member from, in effect, controlling the show.

If you have an issue that you want action on, *Webster's New World* suggests working to have the proposed motion come from a committee². A committee will typically give a report explaining the background and possible objections can be dealt with in the report, which is usually provided in advance with copies of the agenda. During the motion, if you feel you are losing your position, consider

making a motion to recess or table the motion to give others more time to evaluate the issue and give yourself more time to lobby others to your side.³

On the opposite side, if you want to avoid or delay action on a motion, *Webster's New World* presents a number of suggestions, all of which focus on delay, delay, delay. Delay can be obtained by a motion to postpone to the next meeting, referring the motion to committee or moving to lay the pending motion on the table. With enough delay, you may have enough time to sway others to your side of things so that when the motion comes up again, the vote goes in your favor.⁴

If you wish to learn more about Robert's Rules of Order, there are a number of books on the subject and a number of websites devoted to the issue, including some with quick guides on things like obtaining the floor, submitting a motion and voting on the motion at hand. I found the following website to be especially helpful for getting a quick and easy answer to parliamentary questions: <http://www.robertsrules.org>.

² Webster's New World, pgs. 239-40.

³ *Id.* at 240-241

⁴ *Id.*

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www.barronsmithlaw.com (click on Links and Resources)**

LEGISLATIVE UPDATE: FAMILY AND MEDICAL LEAVE INSURANCE (E2SSB5659)

By Kirsten Barron

The last bill to pass the House before the April 13 cutoff was a scaled-down version of the family & medical leave insurance bill, E2SSB 5659. The House version was substantially different than the version that passed the Senate, and the Senate refused to concur in the House amendments.

The bill was then sent to a conference committee of three senators and three representatives to work out the differences. Listed below are the major components of the conference committee's revised bill, which passed the House on Saturday and the Senate the last day of the session.

- The bill outlines a basic framework for a family leave insurance program,

which would go into effect on October 1, 2009. It would provide \$250 per week for a maximum of five weeks of leave taken by a parent following birth or adoption of a child, and would mandate job protection for employees taking leave if they work for an employer with more than 25 employees.

- It establishes a 13-member joint legislative task force to study the establishment of a family and medical leave program and report its findings and recommendations, including proposed legislation, to the Legislature by January 1, 2008.
- It does not specify the state agency responsible for ad-

ministering the family leave insurance program, nor does it establish premiums to finance the benefits, instead directing the task force to make recommendations on both issues.

It states that leave under the bill must be taken concurrently with leave taken under the federal Family and Medical Leave Act or the state Family Leave Law, and permits employers to require that leave under the bill be taken concurrently or otherwise coordinated with leave allowed under collective bargaining agreements or employer policies.

DEFENDING AN UNEMPLOYMENT BENEFITS CLAIM—CONTINUED

If the claimant quit for medical reasons, safety hazards, or illegal activities, the claimant must also prove the he or she took reasonable steps to preserve his or her employment, unless it would have been futile to do so. See [RCW 50.20.050\(2\)](#).

At the hearing, you should be prepared to respond to the claimant's evidence with information and witness(es) with firsthand knowledge to explain why the claimant did not have good cause for quitting and/or how the claimant failed to take reasonable steps to preserve his or her em-

ployment prior to quitting.

How do I present my case when job search/availability for work is an issue?

Claimants who are required by the Department to register for work must prove that they are able to work, available for work, and actively seeking suitable work during all weeks claimed. You can produce evidence or question the claimant about the claimant's employer contacts, job search activities, and availability for work to show that the claimant was not available for or actively seeking

employment.

You may read the full text of the unemployment compensation statute at www.legalwa.org. Direct your attention to [RCW Title 50](#) and [RCW 34.05](#).

A former employee is not eligible where he/she has engaged in misconduct that harms or potentially harms an employer's interest. See RCW 50.04.294 and

SERIES - BOILER-PLATE CONTRACT PROVISIONS

By Kirsten Barron

Governing Law, Venue and Jurisdiction

The next in the series of articles on “boiler-plate” provisions of contracts is governing law, venue and jurisdiction. This is the part of the contract that sets forth the state and local laws that the parties will agree to be bound by, the court having authority to hear disputes arising out of the contract and the place the parties agree to resolve any disputes.

Governing law means the law of a particular state that will govern disputes.

Jurisdiction means the court that has the authority to hear a dispute.

Venue is the place the parties agree to have the dispute heard.

The following is a typically governing law, jurisdiction and venue clause:

THIS AGREEMENT SHALL IN ALL RESPECTS, INCLUDING ALL MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE, BE GOVERNED BY, AND CONSTRUED AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF WASHINGTON WITHOUT REGARD TO ANY RULES GOVERNING CONFLICTS OF LAWS. THE PARTIES AGREE THAT VENUE AND JURISDICTION OVER DISPUTES ARISING OUT OF THIS AGREEMENT SHALL BE IN THE COURTS OF THE

STATE OF WASHINGTON, U.S.A., KING COUNTY, WASHINGTON, FOR STATE MATTERS OR THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SEATTLE, FOR FEDERAL MATTERS.

If two Whatcom County residents enter into an agreement in Washington for the sale of a product that is made and stored and shipped only in Whatcom County, then the question of which state law governs and where jurisdiction and venue are appropriate is simple. This issue gets more complicated if the parties are in different states or even in different parts of the state. I should note here that if the parties do not provide for or choose the governing law, jurisdiction or venue, the courts will interpret the facts of a case and apply existing case law to reach its own conclusions about what is appropriate.

I advise clients to attempt to negotiate Washington as the governing law with jurisdiction and venue in Whatcom County for state matters and Seattle for federal matters. Governing law, jurisdiction and venue can be different. I have seen contracts that have Washington as the governing law with jurisdiction in Illinois and venue in Chicago. Jurisdiction and venue often go hand in hand. It would not be

appropriate to give jurisdictional authority to a Washington judge, but venue, where the case is heard, to be in New York. Washington will not allow its judge to hear cases in New York.

Here are some key points to consider in negotiating these terms:

Governing Law: Are you familiar with the laws of that state? Do the laws of the state favor you? Is your counsel familiar or will you have to engage counsel in that state for advice?

Jurisdiction and Venue: What is the convenient forum for you? If you are entering into a contract with a company in Virginia, is there somewhere in the middle for the parties to meet for disputes? Where are your contacts for legal representation?

This is another area of “boiler-plate” that is deceptively complicated, and in the case of a dispute, very important.

I advise clients to attempt to negotiate Washington as the governing law with jurisdiction and venue in Whatcom county for state matters and Seattle for federal matters.

A PERSONAL NOTE FROM THE DEPARTMENT:

By Kirsten Barron

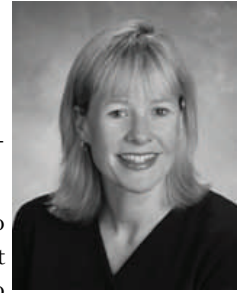
I am very pleased with this issue of our newsletter. I think it offers a good blend of practical information and updates on the status of the law.

The article on defending an unemployment claim is the result of my experiences with clients who have had difficulty with the process. Sometimes folks do not understand the process and are not really prepared for the hearing. I want to provide two caveats or warnings for those who decide to contest an unemployment claim. First, it is difficult for the employer to win an unemployment hearing, which means that you should chose carefully the cases you contest. Employers are most likely to win where there is an egregious event, a history of discipline or a voluntary quit. Second, if you have other compounding issues, such as harassment, discrimination or safety complaints, you may want to consider engaging a lawyer to assist you.

The family and medical leave insurance is an interesting development. I have read a lot of articles and commentary on this issue. The new law seems to have passed without much fanfare or notice, but since adoption there has been quite a bit of discussion on implementation. We will keep you abreast of developments on this issue.

I would like to take this opportunity to welcome Bethany Allen to the firm. She is working as an intern for the summer. She comes to us from Gonzaga Law School and she has her sights set on returning to Bellingham after graduation. She is a smart one!! And, we are grateful to have her gifts and talents for the summer.

I hope you all have a wonderful summer in this glorious corner of the world in which we live.

CONTRIBUTORS AND EDITORS TO THIS PUBLICATION

Sallye Quinn is a senior associate in the firm's business department and focuses her practice on business and real estate transactions as well as commercial litigation



Bethany Allen is a Rule 9 Intern who comes to us after finishing her second year at Gonzaga University School of Law. She plans to practice in Bellingham after law school.

Amy Robinson brings employment and human resource experience to the firm and has been invaluable to our department and the Litigation team in solving a myriad of complex legal issues. Her practice is focused on employment and civil litigation.



Debbie Nelson is a paralegal in the firm's business department and has extensive experience in corporate legal services.