Dealing With Worker Recall Challenges Caused by the Coronavirus Unemployment Benefit Expansions

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In reaction to the Coronavirus crisis, states loosened unemployment benefits eligibility rules and the federal government significantly expanded benefits through The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), signed into law on March 27, 2020. While many viewed such measures as necessary, they have created incentives that are inconsistent with restarting factories and other businesses. The expansion of benefits has presented challenges for businesses across various industries that are trying to recall workers, as states begin to reopen, for at least three reasons:
1. Many eligibility criteria, have been eased or eliminated, making it much easier for workers to receive unemployment benefits

2. With the $600 increase to weekly unemployment benefits provided under the CARES Act, on top of state benefits, some workers make more money while unemployed than if they returned to work, and;

3. The generalized fear and anxiety of returning to the workplace and potentially increasing the risk of contracting the virus.

These factors raise the following question: “Can an employee refuse to return to work and continue collecting unemployment benefits because they have a generalized fear of contracting COVID-19?”

Typically a generalized fear of contracting COVID-19 alone is not a sufficient reason for an individual to refuse to return to work once you recall them. DOL Unemployment Insurance FAQs. Under the Department of Labor (“DOL”) guidance, voluntarily quitting, or in this case refusing to return to work, based on a general concern of exposure to COVID-19, does not make one eligible for unemployment benefits under the CARES Act. However, the individual is likely eligible for benefits if she has been advised by a healthcare provider to self-quarantine because the individual’s immune system is compromised due to a disability or serious health condition and exposure to COVID-19 would present a greater-than-average health risk to the individual.

Many states, such as Wisconsin, California, and Missouri, follow the DOL’s guidance. However, each state has its own unemployment agency that is responsible for interpreting and enforcing both federal and state laws regarding benefit eligibility, and therefore the answer may vary depending on the state in which your business is located.

For example, at least one state, Kentucky, has released guidance that indicates the analysis is more complex than first meets the eye. Kentucky apparently has taken a more lenient approach regarding refusals to return to work and benefit eligibility.

In its guidance, The Kentucky Career Center instructs that “individuals who have left their jobs because they have a reasonable fear that exposure to COVID-19 at their workplace will cause a negative impact on their health and they want to stay home” may be eligible for benefits. Kentucky Unemployment Insurance FAQs. In Kentucky, the individual may not be required to provide medical documentation indicating the individual is at higher risk of contracting COVID-19 than the general population, rather fear alone may be a sufficient reason for the employee to quit or refuse to return to work during the pandemic. While it will be interesting to see how Kentucky determines what constitutes a “reasonable” fear, this vague directive creates uncertainty and an economic buffer for those fearful about returning to work.

This approach creates challenges for employers who need a full complement of workers to restart and meet customer demands, but there are steps employers can take that will create a presumption the individual’s generalized fear of working is unreasonable, and ultimately decrease the likelihood of unemployment benefit eligibility. The Kentucky Career Center has indicated that if an employer provides
reasonable accommodations for employees at their workplace or offers an option to telecommute, the employee must work if it is offered by the employer. Further, the employer may contest any claim that an employee files for unemployment benefits if the employer and employee disagree about what constitutes a reasonable accommodation. Both the employer and individual can appeal the decision made by the unemployment agency.

While many states are following the DOL guidance, some states may mirror the Kentucky approach and place the burden on the employer to alleviate the individual’s fear by providing a reasonable accommodation. It is important to note that the threshold for whether or not you need to provide a reasonable accommodation to an employee for purposes related to unemployment benefits is distinct from whether or not you are required to provide a reasonable accommodation under the Americans with Disabilities Act (“ADA”).

Regardless of what state your business operates in, there are several steps you can take to increase the likelihood that your employees accept an offer to return to work, or risk the loss of unemployment benefits.

Top Five Ways to Make Sure Your Workforce Returns

1. Create and Document a Plan

The best way to increase workforce participation is to do everything reasonable to make the workplace safe. Designate a person or group at your company to be in charge of drafting a comprehensive plan to protect the health and safety of workers, and to deal with various COVID-19 related issues that are likely to arise in the coming months. You should consider both preventative steps such as proper PPE, temperature checks, and social distancing mechanisms, as well as systems focused on what to do if an employee tests positive for COVID-19, such as isolation steps, contact tracing, and quarantine requirements for workers who had close contact with the individual who tested positive. Further, your plan should comply with the guidance, and in some instances mandatory requirements, issued by the following agencies and government entities:

1. **OSHA Guidance** (and state equivalent)

2. **CDC Guidance**

3. State and Local Plans and Executive Orders – Some states have indicated that if your business reopens and does not adhere to state reopening health and safety requirements, an employee may have the right to refuse to return to work and continue collecting unemployment benefits.

2. Communicate the Plan

As you prepare to recall workers, send them a letter or email summarizing the policies your company has implemented to promote and protect the health and safety of all employees during the COVID-19 pandemic. Train managers and employees on these measures before they actively begin working. This should help to reduce some
of the fear and anxiety for individuals returning to work, making for a smoother transition.

3. Consider Accommodations

Be prepared to discuss and offer accommodations where an employee has a medical condition that makes them particularly vulnerable to Covid-19. You can demand medical documentation and the worker must cooperate in the interactive accommodation process. However, even when the employee is not entitled to an accommodation under the ADA, express empathy and work with the employee to try to alleviate the fear. Remember, that if you are willing to make accommodations this may reduce the likelihood that an individual refuses to return to work, or be eligible to receive unemployment benefits.


Consider communicating in the letter used to alert employees of the company policies regarding COVID-19, that if a recalled individual refuses to return to work while collecting unemployment benefits, you will contest the claim and report the refusal to the unemployment agency, which you expect will result in the termination of benefits.

5. Report

If you have reason to believe that an employee has refused to return to work because of a generalized fear or the desire to continue collecting unemployment benefits, you should report it to your state’s unemployment agency immediately. Not only will this trigger an investigation and discourage individuals from refusing work without good cause, but you have an obligation to notify the unemployment agency. The DOL recently released resources aimed to enhance the integrity of unemployment insurance programs. The DOL encourages reporting of unemployment insurance fraud and has made it easier to do so by compiling a directory of all state unemployment insurance fraud hotlines.

In summary, while enhanced unemployment benefits provide a safety net for workers displaced because of the Coronavirus crisis, they create a challenge for employers seeking to recall enough workers to restart operations. It is important for employers to take additional steps now in order to recognize and address these disincentives to return to work. For more information about recommended steps, please contact your Foley relationship partner. For additional web-based resources available to assist you in monitoring the spread of the coronavirus on a global basis, you may wish to visit the CDC and the World Health Organization.

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