

URGENT: Workers Can Refuse Work and Receive Unemployment Benefits Due to COVID-19

Labor & Employment Law Update

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On February 25, 2021, the U.S. Department of Labor (DOL) announced three new categories of individuals eligible to collect federally-funded unemployment benefits as the COVID-19 Pandemic continues. They are:

- Individuals who refuse to return to work that is unsafe or to accept an offer of new work that is unsafe;
- Certain individuals providing services to educational institutions or educational services agencies; and
- Individuals experiencing a reduction of hours or a temporary or permanent lay-off.

These changes are expected to take effect in late March, but could take longer to take hold as each state must adopt and administer to this new guidance in order to receive the additional federal COVID-19 specific funding.

Focusing on the first category, it essentially creates an additional “good cause” reason for an employee to refuse work, but remain eligible for unemployment benefits in situations in which “[t]he individual has been denied continued unemployment benefits because the individual refused to return to work or accept an offer of work at a worksite that, in either instance, is not in compliance with local, state, or national health and safety standards directly related to COVID-19. This includes, but is not limited to, those related to facial mask wearing, physical distancing measures, or the provision of personal protective equipment consistent with public health guidelines.”

In order to obtain benefits under this provision, the DOL requires individuals to attest, under penalty of perjury, that they have been denied continued unemployment because they “refused to return to work or accept an offer of work at a worksite that, in either instance, is not in compliance with local, state, or national health and safety standards directly related to COVID-19. This includes but is not limited to, those related to facial mask wearing, physical distancing measures, or the provision of personal protective equipment consistent with public health guidelines.”

It is unclear exactly how it would be possible for, e.g., an applicant who never set foot on a worksite or an employee who had not been in the workplace since pandemic-related changes were implemented to credibly complete the attestation.

Beyond the attestation under perjury, specific standards and requirements will largely be left to the states. Many states previously made clear that a generalized fear of COVID-19 in the workplace was an insufficient basis to refuse work and still receive unemployment benefits, and we anticipate many states will continue to require more than generalized fears when determining eligibility under this new DOL category.

The task for employers in light of this expansion is to demonstrate the safety and security of the workplace from a COVID-19 prevention and mitigation perspective. Step one in that regard is, of course, to ensure that the business has enacted policies and procedures in-line with the most up-to-date guidance from the CDC and other federal, state, and local agencies. Step two is to make clear to employees (1) what steps have been taken to improve health security in the workplace; (2) the fact that the business is vigilantly monitoring CDC and public health guidance and is ready to implement further protections in accordance with that guidance; and (3) that employees should feel free to express their questions and concerns to management regarding COVID-19 safety in the workplace without fear of adverse consequences or retaliation. This can take the form of e-mailed announcements and bulletin board postings for current employees.

But for employees away from work because of pandemic-related concerns, more formal, written correspondence aimed at communicating how the business has directly resolved the employee’s concerns may be appropriate. As always, we recommend drafting such correspondence with an eye toward an interactive process between the business and employee—and with guidance from experienced counsel.

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