

As States Reopen, Can Employees Refuse to Return to Work Based on Fear of Exposure to COVID-19?

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by Aaron Goldstein

As many states progress through different phases of reopening, companies are preparing for their employees to return to work. Employers are also noting, however, that some states are seeing COVID-19 cases surge. This has generated some concerns from employees who do not want to return to the work place. **Can employers require employees to return to work if the employees are not comfortable returning based on fear of exposure to COVID-19 in the workplace?**

Often, the answer is yes. Employers *generally* can require a non-high risk employee to return to work where there hasn't been any cases in the employee's particular workplace. But as with many broad employment questions, there is no universal answer that covers all cases and employers must look to both federal and state law, and in some instances, local law, to determine whether a particular employee can be required to return to work.

For example, under federal law, employees can refuse to work under certain, narrow circumstances. In these situations, employers must proceed with caution or they risk retaliation claims. It is important to note, however, that a generalized fear of infection alone is usually not enough to permit an employee to refuse to return to work.

Employers must be aware of COVID-19 related protections existing for employees and understand what rights they have in the face of an employee's refusal to return to work. This post does not cover alternative avenues such as local, state, and federal law governing protected leave, including the Families First Coronavirus Response Act. These rights and protections vary with each state, so employers should review the most recent return-to-work orders.

Americans with Disabilities Act

Per EEOC guidance, the Americans with Disabilities Act ("ADA") requires an employer to work with employees at high risk of serious health complications related to COVID-19 (as determined by guidance from the Centers for Disease Control and Prevention ("CDC")) to provide reasonable accommodations like teleworking or taking leave. To avoid the risk

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of discrimination claims, employers should communicate alternative options to all employees, rather than directly reaching out to employees who have not yet requested an accommodation. As a general matter, employers should work with employees and offer alternative work arrangements where possible.

Occupational Safety and Health Act

Employers who are following current guidelines for safe workplaces – under the CDC or state health departments – would generally be able to require non-high risk employees to return to work without running afoul of safety standards, especially where there have not been any cases of COVID-19 in the employee’s workplace.

The Occupational Safety and Health Act (“OSHA”) creates a general duty for employers to maintain safe workplaces and mitigate any health or safety hazards but as of the date of this posting has not issued any regulations specifically covering COVID-19 safety requirements. Importantly, for “medium risk” employers (such as retailers and other workplaces open to the public) OSHA’s Interim Enforcement Response Plan for Coronavirus Disease 2019 focuses on incidences of actual exposure rather than the general risk that someone might catch COVID-19 in the workplace because the disease is spreading in the community. <https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>.

However, it is important for employers to understand that under certain narrow situations, OSHA also permits an employee to refuse to perform unsafe work. The employee may refuse to perform a specific task when all of the following conditions are met: (1) the employee “asked the employer to eliminate the danger, and the employer failed to do so”; (2) the employee “genuinely believe[s] that an imminent danger exists”; (3) “a reasonable person would agree that there is a real danger of death or serious injury”; and (4) the urgency of the hazard does not allow correction through “regular enforcement channels, such as requesting an OSHA inspection.”

National Labor Relations Act

Employers must also be on the lookout for employee conduct that constitutes protected concerted activity under the National Labor Relations Act (NLRA). Section 7 of the NLRA guarantees unionized and non-unionized employees the right to engage in concerted activities for the purpose of “mutual aid or protection.” In the context of COVID-19, protected concerted activity could occur when two or more employees (or one employee acting on behalf of others) address issues such as safe working conditions and the steps their employers are taking to prevent the spread of the virus.

State Guidance and Return-to-Work Orders

In Minnesota, all critical and non-critical sector employees who are able to work from home must continue to do so. ([Stay Safe Minnesota](#)). [Emergency Executive Order 20-54](#) protects employees for raising concerns about unsafe conditions related to COVID-19. The order extends existing state law protections to COVID-19: employers cannot

discriminate or retaliate against an employee for exercising any right under the Minnesota Occupational Safety and Health Act.

In contrast, California workers are protected by the state's Resilience Roadmap because the stay-at-home order is still in effect. If an employer does not provide essential services or is not in an industry allowed to reopen in Stage 2 (or the current stage of the plan), an employee would have good cause to refuse to return to the workplace. Employers should also consult local public health ordinances. Some localities, like the City of Los Angeles, require employers to provide face coverings for all employees.

Some states mandate additional protections for employees at high risk for severe COVID-19 complications. Washington Governor Jay Inslee issued Proclamation 20-46.1, in effect through August 1, amending Proclamation 20-05 to require employers to offer high-risk employees alternative accommodations. If alternative options are not feasible, the employee must be allowed to use accrued leave or seek unemployment relief while the employer maintains health insurance benefits. The order also prohibits employers from permanently replacing high-risk employees and requires employers to maintain high risk employees' health benefits.

Other states mandate employer responsibility for providing protective equipment to its employees. In New York, Executive Order 202.16 requires essential employers to provide face coverings to employees in direct contact with members of the public. Empire State Development also released guidance for determining whether a particular enterprise is subject to workforce reductions under relevant executive orders. If an employee works for a non-essential New York business that is not encompassed by its region's current phase of reopening, they cannot be forced to come into work.

Employers are encouraged to work with employees who have concerns about working safely under applicable state orders and federal guidance. Although an employee may bring safety or retaliation concerns directly to their local OSHA office or to the state department of labor, proactive efforts to discuss a safe workplace can help minimize this risk.

Finally, it may behoove employers to understand when an employee could secure unemployment benefits for refusing to return to work. Generally, a refusal to work disqualifies an individual from unemployment benefits. But in the current COVID-19 pandemic, many states have relaxed the criteria to allow for continued benefits when the refusal to work is because of a personal situation exacerbated by COVID-19.

Unemployment Insurance Benefits

Minnesota

The Minnesota Department of Employment and Economic Development ("DEED") says that employees offered a suitable opportunity to return to work, and who are not subject to an exemption under Executive Order 20-05 or state law, may not continue receiving unemployment benefits. If an employee refuses a suitable offer of employment, they can

be held overpaid for unemployment insurance benefits received. DEED clarified that if an employer cannot provide reasonable accommodations upon an employee's request, they might still be eligible for unemployment benefits. Additionally, Executive Order 20-54 provides that the failure of an employer to implement a COVID-19 Preparedness Plan constitutes an adverse work environment that could qualify a complaining employee to receive unemployment benefits.

Washington

The Employment Security Department ("ESD") released guidance stating that individuals receiving unemployment benefits must be available for "suitable work," including any offer to return to previous employment after a layoff caused by COVID-19. Individuals must have good cause to refuse an offer to return to work and continue receiving unemployment benefits. Good cause may apply to those considered high risk by the CDC and those living in a household with a person at high risk. School or daycare closures, providing care for a family member, employer noncompliance with worksite safety guidelines, or a substantial change to the job may also be accepted as good cause. Employees may not refuse work and retain unemployment benefits because they make more on unemployment or because of a fear of returning to work without having good cause to refuse.

California

The Employment Development Department ("EDD") released guidance emphasizing that employees that refuse to accept "suitable" employment when offered are ineligible for unemployment benefits. The EDD considers factors such as the degree of risk involved to the individual's health and safety when determining if particular work is "suitable." If an employer has complied with state requirements and safety regulations for reopening, an employee may not have good cause to refuse to return to work. If an employee indicates on their certification for continued benefits that they refused work, the EDD will investigate accordingly.

New York

If an employee refuses an offer to return to their previous position, they will likely lose eligibility for unemployment benefits unless they have good cause as defined by Section 593.2 of the Unemployment Insurance Law. Employees may not turn down offers of employment based on a general fear of exposure to COVID-19 and still receive unemployment benefits. (Returning to Work). However, in some circumstances an employee could continue receiving benefits if the employee's situation meets Pandemic Unemployment Assistance (PUA) eligibility criteria.

Employers that are following CDC and state and local guidelines regarding social distancing and other precautions in the workplace will often be allowed to require non-high risk employees to return to work when there are no cases of COVID-19 in the employer's workplace. However, like so many employment related legal issues, the devil is in the details and exceptions abound. When employees refuse to return to work and

challenge their employer's ability to compel them to do so employers should consult with knowledgeable counsel to make sure they are on solid ground.