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Insights

Returning to the Workplace: Addressing Requests to Work from Home and Refusals to Return to Work

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As government restrictions and stay-at-home orders related to COVID-19 are gradually eased throughout the United States, employers are confronted with how to bring employees back into the workplace. If employees were working remotely during this time, they may request to continue doing so. On the other hand, these employees or employees who were laid off or furloughed may refuse to return to work entirely. Regardless of the scenario, employers must consider a number of issues including the validity of such requests or refusals, an employee's statutory rights, continuing governmental restrictions, unemployment benefits and the standards for loan forgiveness under the Paycheck Protection Program (PPP).

What Employment Issues are Implicated in Requests to Continue Working Remotely or Refusals to Return to the Workplace?

Whether it is a request to continue working from home or a refusal to return to work, employers should investigate an employee's request or refusal to determine the underlying reason. This is critical as there are employment law issues common to both scenarios: a few of these concern compliance with the Occupational Safety and Health Administration (OSHA), the Americans with Disabilities Act (ADA), and the Families First Coronavirus Response Act (FFCRA).

If an employee requests to work from home or refuses to return to the workplace, the employer should ask additional questions to determine the reason behind the employee's request or refusal. Is it due to safety concerns? Is it due to the employee's underlying health condition? Is it due to a need to care for a child whose school or daycare is closed due to COVID-19? Would the employee prefer to continue receiving unemployment instead of returning to work? These are just some of the many reasons employees are making these requests or refusing to return. Asking about the reason underlying the employee's request will reveal whether the explanation is one that is legally protected.

OSHA Issues

An employee's fear to return to the workplace may stem from the safety of the workplace. This triggers an employer's OSHA obligations under the general duty clause to provide a safe work environment to employees. Generally, as long as the employer is taking precautions in the workplace, this fear will not amount to a valid reason to continue working from home or refusal to return to work. However, for employers, this is an opportunity to improve employee morale, strengthen the COVID-19 precautions, and remedy potential issues before they escalate.

Consider asking the employee what the specific concern is. If employers are in Indiana or another state that requires a Return to Work or Safety Plan, remind the employee of that plan and ask them to identify areas where they believe the employer should be taking additional precautions. Be flexible and try to go above the minimum requirements imposed by federal, state, and local laws, regulations, or orders to create a safe and comfortable workplace for employees.

ADA Issues

An employee's desire to continue working from home or refusal to return to work may stem from concerns related to the employee's underlying health conditions and being a member of a vulnerable population at higher risk for severe illness due to COVID-19. This request or refusal triggers an employer's obligations under the ADA to engage in the interactive reasonable accommodation process. Generally, employers, not employees, determine the most effective reasonable accommodation after conducting the interactive process with the employee and determining the limitations of the employee's disability. While teleworking or leave may not be the most effective long-term reasonable accommodation, employers may consider providing either as a temporary accommodation until an effective accommodation in the workplace is identified.

FFCRA Issues

Employers should also keep in mind the leave they may be required to provide to employees under the FFCRA. For example, an employee may be eligible for up to 12 weeks of partially paid leave if they need to remain at home (and cannot work remotely) to care for a child whose school or daycare is closed due to COVID-19. In addition, if that employee is subject to a federal, state, or local quarantine or isolation order, has been advised by a health care provider to self-quarantine, is experiencing symptoms of coronavirus and seeking a medical diagnosis, or is caring for someone else in one of those situations, the employee may be entitled to two weeks of paid leave. Employers should also consider leave that may be available under the Family and Medical Leave Act if an employee or their covered family member becomes ill with COVID-19.

Invalid Requests or Refusals

Ultimately, however, if the request to work from home or the refusal to return to work is not grounded in legitimate safety issues or a need for an accommodation, the employer may take disciplinary action in accordance with company policy. As discussed in further detail below, this also triggers unemployment compensation and PPP loan considerations.

What Effect Does a Refusal to Return Work Have on Unemployment Compensation? Or, on an Employer's PPP Loan Forgiveness?

Unemployment Compensation

Some employees may refuse to return to work because they are receiving more in unemployment benefits than they would if they return. With the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), individuals on unemployment may receive an additional $600 per week through the Federal Pandemic Unemployment Compensation (FPUC) or the Pandemic Unemployment Assistance (PUA). These increased benefits are currently set to expire July 31, 2020; however, Congressional action may extend the benefits further. Regardless of the expiration date for the FPUC and PUA programs, the amount available through unemployment benefits may exceed the amount an employee earned in the workplace. Consequently, an employee may believe that returning to work is not economically prudent.

While unemployment varies state to state, in general, individuals are not eligible for unemployment if they received a valid offer for work and refuse to take it solely because they are earning more on unemployment. In that instance, employers usually have an obligation to report the refusal to the state agency handling

unemployment. Failure to do so may result in employer liability for overpayment or fraudulent payment to the individual.

With the CARES Act, however, an otherwise eligible individual may remain eligible for unemployment after a refusal to work through the PUA program. The PUA provides unemployment insurance benefits to individuals who would otherwise be ineligible for regular unemployment compensation. To be eligible for PUA, the individual's refusal to work must result from a valid COVID-19 reason.**1**

PPP Loan Forgiveness

Unless an employer takes proper precautions, an employee's refusal to return to the workplace can negatively affect the employer's prospects for PPP loan forgiveness. PPP loan forgiveness is available for an employer that has laid off employees if the employer offers to rehire the laid off employees. To ensure that an employee who refuses to return to the workplaces does not disrupt PPP loan forgiveness, an employer should thoroughly document its offers to rehire laid off employees as well as any rejections of those offers. Further, offers should include the same terms as the previous employment.

In the event that an employee rejects an offer, the employer should notify the Indiana Department of Workforce Development (DWD). The employee will then have the burden of demonstrating to DWD why the employee should not return to work and should continue to collect unemployment benefits. DWD makes its determinations on a case-by-case basis, and considerations may include availability of child care services and the health of family members. If DWD determines that the employee is no longer eligible for unemployment benefits, then the employee's refusal to return to work may not affect the PPP loan forgiveness.

Moving Forward

When confronted with employees who request to work from home or who refuse to return to work, an employer may take a variety of actions to assuage employee concerns. Flexibility and recognition of employees' fears and concerns is key for employee morale.

- *Flexibility*. Consider identifying the job tasks that require an employee's physical presence in the office and other tasks that an employee can accomplish remotely without a loss of efficiency. After determining this, an employer may adopt a level of flexibility that does not damage its business interests.
- *Safety Concerns*. If a Safety or Return to Work plan is in place, employers should continue communicating these protocols and the employers' expectations to all employees. Such communication will not only help employees understand all of the precautions put in place to create a safe workplace for their return to work but also, when coupled with uniform administration, help avoid employee assertions of discrimination.
- *Addressing Concerns Generally.* If employers do not have one already, consider implementing a specific process for employees to report COVID-19 related concerns. Employers should actively solicit employee feedback and then take time to respond to employees' requests, questions, and concerns. Times are tough for all and maintaining a strong employee morale is key to retention and productivity; going beyond the minimum requirements may reap greater benefits than the cost and time associated.

If you have any questions about addressing an employee's request to continue working from home or refusal to return to work, please contact **Amy J. Adolay**.

Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.

[1] See Q & A #59. https://www.in.gov/dwd/files/Indiana_Unemployment_FAQ.pdf#page=13