
ALERT

COVID-19 – Can My Employees Refuse to Come Back to Work?

There has been a lot of speculation regarding employees who are refusing to come back to work because, in some instances, they are receiving compensation in excess of their salaries or wages in the form of state and unemployment benefits. Recently, we received an interim rule from the SBA regarding employees that refuse to return to work and the impact that it may have on Paycheck Protection Program loan (“PPP loan”) forgiveness. In that case, and in most cases, documenting the good faith offer and the rejection of the offer is going to be paramount. Here, the California Employment Development Department (“EDD”) has issued its guidance on when an employee may refuse to come back to work without eliminating his/her ability to continue to receive unemployment benefits. Importantly, the EDD’s guidance for when a refusal is justified, and thus does not impact unemployment benefits, is likely to create the groundwork for the determination of whether or not an employee is justified in refusing to return to work for purposes of later claims for retaliation or wrongful termination.

Generally, if an individual receives and rejects a job offer while collecting unemployment benefits, further unemployment benefits will be denied. This is the case unless the position offered is “unsuitable”. In the advent of COVID-19, the EDD has now said that a job could be deemed unsuitable if the workplace is not essential or has not met state or county guidelines for reopening. A job may also be unsuitable if the employee is older than 65, has a weakened immune system or has a chronic health condition that puts him/her at higher risk for coronavirus. Additionally, a job offer could be unsuitable if it pays significantly less.

In addressing whether an employee that is asked to return to work would be denied unemployment benefits, the EDD has stated “you would have good cause to refuse to return to work if the business does not provide an essential service and is not in one of the industries reopening now under the state’s Resilience Roadmap for reopening^[1]. This is because the stay-at-home order is still in effect outside of essential or reopened industries.” The focus, of course, is the fact that only business included in the state wide order for reopening should be recalling employees. Thus, employers wishing to bring employees back to work must ensure that their businesses are firmly within those “essential or reopened industries” before taking any negative action against any employees that refuse to return to work.

The EDD has also stated that it will be considering the degree of risk involved to an individual’s health and safety when determining whether the particular work offered is “suitable”. With this, the EDD’s guidance provides that an employee “would have good cause to refuse to return to work if you are at greater personal risk due to higher risk factors as identified by the California Department of Public Health (“CDPH”).” The CDPH has issued public health guidance urging individuals who are over 65, immunocompromised or have certain serious chronic health conditions (such as heart disease, lung disease or diabetes) to stay at home due to “higher risk” factors. Thus, employees with these higher risk factors could refuse to return to work without impacting their ability to collect unemployment. In turn, it is likely that terminating an employee with higher risk factors for

refusing to return to work could expose an employer to liability.

Note, however, that if an employer was to offer remote work to an employee with higher risk factors and he/she refused, the analysis would change and a determination that suitable work was offered is likely. This would also alter favorably the potential liability exposure that the employer could have for terminating the higher risk employee for refusing to return to work.

Another issue that has arisen occurs when an employee refuses to return to work due to fear of contracting COVID-19. The EDD has said that where an “employer has complied with the state’s requirements for reopening, and any and all government safety regulations, you may not have good cause to refuse to return to work and could be disqualified from continuing to receive regular UI benefits for a designated period of time.” Importantly, the responsibility is first placed on the employer to make sure that it is properly reopening and then that it is following the necessary safety protocol. Only after that does the employee’s fear lack good cause for refusing to return to work.

As stated above, employers are grappling with bringing employees back to work, in some instances even where there isn’t a business need, in order to fulfill headcount requirements necessary for PPP loan forgiveness. First, this is not recommended. Determinations regarding when and if to bring back employees, should be made based on the business need. Next, the EDD has said that an employee can refuse to return to work if the work offer is “substantially less favorable” than that of similar work in the same area. This analysis takes into consideration wages, hours and working conditions. Importantly, however, it is not sufficient to refuse work merely because the wages offered are less than the amount that the individual is receiving in unemployment benefits.

As stated above, for employers, the issue isn’t so much whether an employee will or will not receive unemployment benefits if he/she refuses to return to work. The questions that arise in the context of the EDD’s guidance involve whether an employer may be liable for terminating an employee who refuses to return to work under one of the reasons that the EDD has identified as establishing “good cause” for rejecting an employment offer. Thus, employers that are faced with an employee that is refusing to return to work should consider whether the refusal is based on the belief that the employer is not an essential business or properly reopening, whether the employee does not believe that safety protocols have been met, if the employee is over 65 years old, has a weakened immune system or has chronic health condition, before the employer proceeds to declare a job abandonment or terminate the employee.

Additionally, as mentioned in a prior Alert, this may be a good time to consider speaking to your insurance provider about Employer’s Liability Insurance (“EPLI”). EPLI generally provides coverage for claims of wrongful termination, harassment, discrimination and retaliation. Given the uncertainty of what’s to come, having EPLI insurance may be one more avenue of assistance if a claim is filed.

If you need assistance or have any questions, please feel free to contact us.

[\[1\]](#) The Resilience Roadmap for reopening outlines the four stage approach to lifting the state wide shelter in place order in California. (See, <https://covid19.ca.gov/roadmap/>.) Currently, Stage 2 allows for the gradual reopening of retail (curbside only), manufacturing & logistics and later, relaxing retail restrictions, adaptation to allow schools to reopen, child care reopening, offices, limited hospitality and certain personal services.

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