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## Employment Question of the Day: April 22, 2020 - Part 2

**Legal Update**

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By Pamela Abbate-Dattilo and Bryan J. Morben

**Question****Can a furloughed employee refuse to come back to work when recalled?****Answer**

Many states have greatly expanded the availability of unemployment compensation benefits to furloughed employees as a result of the economic downturn caused by COVID-19. On top of that, the CARES Act generally entitles these employees to \$600 per week in benefits *in addition* to their normal state unemployment compensation benefits. See our March 30 Employment QOD for more detail on how the CARES Act impacted unemployment benefits.

As a result, many employees have been able to earn *more* in unemployment compensation than they were previously earning while working. Employers are wondering how they will get employees to return to work when they are ready for them.

The first thing an employer should do when it is ready to bring furloughed employees back to work is send a written recall notice advising that the employee should return to work. The employer should also follow up with a phone call. Hopefully that is the end of the story, and the happy employee returns to work as directed.

If, however, the employee pushes back about returning to work, the employer needs to discuss the reasons why with the employee. If the employee is sick, is taking care of an eligible family member who is sick or otherwise cannot return to work because their childcare is still closed or not available, then you should consider whether the employee may be eligible for leave under the FMLA or FFCRA, or whether some other reasonable accommodation should be evaluated.

Alternatively, if the employee indicates that she is afraid to return to work because of concerns about contracting the coronavirus, the employer should ask for more details about where those fears are coming from (e.g., is the employee at a higher

risk of complications if infected, is there a household family member with a higher risk of complications, etc.), and advise the employee what precautions the employer has taken to prevent the spread at the workplace. See our April 6 Employment QOD for more advice on these issues.

On the other hand, if becomes clear that the employee has only a general fear of contracting COVID-19 or is declining to return to work because the employee would prefer to continue collecting the enhanced unemployment payments, a different discussion should result. Employees in most states must be available for suitable employment and actively seeking work in order to remain eligible for unemployment compensation benefits. Although states have relaxed these requirements to some extent because of the COVID-19 pandemic, a furloughed employee typically cannot refuse to return to work because they prefer the unemployment benefits and remain eligible.

Various state agencies are advising employers to inform them if employees are refusing to return to work. If this occurs, an employer should log into its online account and report this as an issue.

In fact, Iowa Workforce Development has posted the following notice to its website:

“ATTENTION EMPLOYERS: If you have offered work to employees and your employee refuses to return to work, you must notify Iowa Workforce Development here: <https://www.iowaworkforcedevelopment.gov/job-offer-decline-form-employers>.”

Therefore, when faced with this situation, the employer may:

- Explain to the employee that returning to work is not optional. They are still employed by the company and, in many cases, have remained on the employer's health insurance plans at a cost to the employer.
- Explain that refusing to return to work without a legitimate justification will likely cause the employee to become ineligible for continued unemployment benefits, and that the employer will need to report this refusal to the appropriate state agency.
- Explain that refusing to return to work may result in the employee's termination of employment, which will trigger the COBRA-election period. In other words, the employer will no longer subsidize any portion of the insurance premiums, and the employee will have to pay the entire cost to continue her health insurance.
- If the request is for a full-time employee to return to only part-time work, the employer should explain that a partial return-to-work may not render the employee ineligible for all unemployment compensation. The employee should still be eligible for the \$600 CARES Act payment. However, it is important not to make any promises about eligibility because ultimately the state makes these decisions. That should also be explained to the employee.
- If the employer is still having difficulty gaining the employee's cooperation, the employer probably has grounds for terminating the employee if her employment

is at will.

Some employers prefer the “carrot” vs. “stick” approach. In that case, you could try one or more of the following:

- A voluntary recall offered to a group of employees.
- Offer additional PTO to be used during a 12-month period (but not in the first three months).
- Offer a retention or “return to work” bonus, paid incrementally over the next six weeks.
- Offer flexible hours or more opportunities to work remote.
- Offer some other perk or benefit not typically available to the recalled employees through the end of the calendar year.

### Takeaway

The significant state and federal expansions to the unemployment compensation system has provided much needed relief to the millions of American workers that have been laid off, furloughed or had their hours cut. But let’s not ignore the obvious. In some circumstances (hopefully the exception, not the norm) it has created an incentive for some employees to turn down going back to work because of the ability to earn more (or close to full pay) without having to work at all.

Employers in this situation should have detailed conversations with any employees resisting the recall to work to determine the driving reasons behind that decision. If the reasons do not qualify the employee for protected leave or a reasonable accommodation, then employers should decide what works best for them: the carrot or stick approach (or a combination of the two) and act accordingly.

For more information, please contact your Fredrikson & Byron attorney.

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