Will Employees Need To Demonstrate "More Than A Feeling" Of A COVID-19- Unsafe Workplace To Get Unemployment Benefits?

Insights
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President Biden wants to "help ensure unemployed Americans no longer have to choose between paying the bills and keeping themselves and their families safe from COVID-19." Specifically, he has instructed the U.S. Department of Labor (DOL) to consider providing guidance to the state unemployment agencies to make clear that "workers have a federally guaranteed right to refuse employment that will jeopardize their health" and can still be eligible for unemployment insurance benefits. The DOL has now issued a Program Letter directing state unemployment compensation agencies to implement this provision. But how will the DOL determine what is an unsafe workplace when it comes to COVID-19? Will it require employees to demonstrate "More Than a Feeling"?

Current Backdrop

Of course, another federal law already provides a "federally guaranteed" right that employees may refuse unsafe work, and the DOL already can enforce that right through OSHA. The OSH Act, at Section 13(a), provides that an employee may refuse to work if they believe they are in imminent danger, defined as including "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act."

In order for an employee to gain these protections, the threat must be immediate or imminent, which means that they must believe that death or serious physical harm could occur within a short time – before OSHA could investigate the problem, for example. COVID-19 has changed this situation somewhat as it can oftentimes be difficult to determine if there is an imminent threat to employees from an invisible virus. As the pandemic has dragged on, we have seen workplaces outside of healthcare suffer outbreaks of positive cases. OSHA's guidance on imminent danger is general and was not written with COVID-19 in mind, obviously, so employers must evaluate the worksite to determine when this unusual state exists prior to determining whether it is permissible for employees to refuse to work.

How Do States Handle This Issue?

Currently, most state unemployment agencies generally consider an employee to remain eligible for

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benefits if they leave employment "with good cause connected to the work" or some similar standard. This could include quitting work when the workplace is unsafe. The employee would need to explain how the workplace is unsafe and the employer would have an opportunity to refute the claims.

Pre-pandemic, this was a rare claim and employees would need to point to some specific workplace hazard – such as a dangerous piece of equipment or chemical exposure – to meet this high standard. But, in the age of COVID-19, what would such a claim look like and how would a state agency determine a workplace was unsafe? Will it require "More Than a Feeling," on the part of the employee? Or will it be the "Same Ol' Situation" where employers will still have an opportunity to refute the allegations?

What Can Employers Expect?

While unemployment insurance is a federally directed program, states generally have some flexibility in how it applies the federal policies. For example, some states have already made changes during the pandemic to be less stringent and allow employees to remain eligible for benefits when the employee has an individualized circumstance that puts them at higher risk from COVID-19 such as being over age 65 or having an underlying health condition.

The DOL's new program letter will allow an applicant to be eligible for unemployment compensation benefits if they have refused to work or return to work because the employer has failed to follow orders or guidance to protect employees from COVID-19. This includes requirements or guidance for "facial mask wearing, physical distancing measures, or the provision of personal protective equipment consistent with public health guidelines."

Under the new program letter, an applicant will need to sign a form that includes multiple check box reasons for eligibility, including this new provision which reads:

I was denied continued unemployment benefits because I 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.

The applicant must attest to this checkbox reason under penalty of perjury.

Employers will then have an opportunity to rebut the allegation. Presumably, this will be done with evidence that the employer is in compliance with the applicable safety standards. At this point, those "standards" could include local or state health or executive orders, CDC and OSHA guidance, or other applicable safety laws.

Some states have also issued emergency temporary standards (ETS) addressing COVID-19 (Virginia, Michigan, Oregon and California). Further, President Biden has issued an executive order directing

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the DOL to determine if a federal ETS regarding COVID-19 is needed, and if so, to issue it by March 15. So it is possible that employers will have a federal OSHA ETS addressing COVID-19 or infectious diseases more broadly. That could certainly be used as the measuring stick of whether the employer is safe or unsafe.

What Should Employers Do?

If an employer has not already adopted and implemented local or state health or executive orders, now is the time. Likewise, if you are located in a state that has not issued any such orders, you should look to CDC guidance, recent OSHA guidance, and the anticipated federal OSHA ETS for what you should be doing to ensure you have a safe workplace. In addition to protecting employees and possibly keeping the business open, this will also be helpful for defending potential OSHA inspections/citations, as well as defending unemployment compensation claims based on a refusal to work due to safety concerns.

While the applicant's claim will require more than a feeling, the employer's response will have a familiar refrain – but a different tune – based on the COVID-19-related orders, regulations, and guidance. Fisher Phillips will continue to monitor these developments expected and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of our Workplace Safety and Catastrophe Management Practice Group.

This Legal Alert provides an overview of developing workplace issues. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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