



# Returning Employees To Work Following Unemployment Requires A Tailored 10-Step Plan Of Action

Insights

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As businesses gradually begin to ramp up and bring employees back to work, you may soon need to figure out what to do when employees who are receiving unemployment benefits refuse to return to work. After all, they may be reluctant or disincentivized to return to the job, especially if they can turn down your offer and still collect robust unemployment benefits.

As with all unemployment issues, the solution may differ from state to state – and employee to employee. But while the answers will vary depending on your workplace and individual employee circumstances, you can take steps now to put yourself in the best position to respond to such situations. We recommend an individualized 10-step plan of action to minimize your return-to-work headaches.

## The \$600 Dilemma

With the enactment of the CARES Act, employees qualifying for unemployment benefits are in line to receive an additional \$600 benefit payment over and above the regular unemployment payment. This benefit is courtesy of the federal government program and continues through July 31, 2020. In many situations, however, the additional \$600 benefit has created a disincentive for employees to return to work. This phenomenon has caused a dilemma for many employers (and employees) as businesses start to reopen.

At the lower end of the economic scale, many workers are receiving more from unemployment than they would earn from their regular wages. However, to remain eligible for unemployment benefits in all but a few circumstances, individuals who have been placed on a temporary layoff related to the COVID-19 pandemic must return to work if called back. And since most state unemployment agencies require or request that you notify them when you call an employee receiving unemployment back to work, the agency will likely deny ongoing benefits unless the employee can demonstrate *good cause* for refusing the offer.

## “Good Cause” And High-Risk Employees

The determination as to what constitutes good cause for the job refusal, however, will be viewed in light of the COVID-19 pandemic and will be subject to agency review. The U.S. Department of Labor and many states have emphasized that an unreasonable fear over the risk of contracting the virus in the workplace is not enough to constitute good cause, and state agencies will likely deny unemployment claims if this is the only reason offered.

Several states, however, including Washington, Colorado, Alaska, and Texas, have already adopted rules outlining when an employee's refusal to return to work may rise to the level of good cause. These rules generally protect unemployment benefits for "high risk" or "vulnerable" employees, such as workers over 65 or with underlying medical conditions.

For example, Texas Governor Abbott has directed the Texas Workforce Commission to continue providing benefits even when the employee refuses an offer of suitable employment where (1) the employee is 65 or older or at higher risk for getting very sick from COVID-19; (2) the employee has a household member at high risk; (3) the employee or a household member has been diagnosed with COVID-19 (and not recovered); (4) the employee is under quarantine due to close contact or exposure to COVID-19; or (5) the employee has child care responsibilities and the school or daycare is closed (and employee has no available alternatives).

Similarly, Washington has issued a proclamation that not only protects an employee's rights to unemployment benefits, but also provides broader employment protections for such workers. The proclamation directs that employers with vulnerable workers provide a choice of alternative work assignments, telework, the ability to use accrued leave, or unemployment if alternative work is not feasible.

### **10-Step Return-To-Work Plan To Minimize Unemployment Concerns**

Given the complicated issues created by the COVID-19 pandemic, you should be careful to consider the best approach for your workplace and employees. A thoughtful and transparent return-to-work process will help ensure employee safety and boost morale. Here is a 10-point plan you should implement to ensure a smooth return-to-work for your organization.

1. In all cases, the first step is to develop a plan of action to reopen the workplace that provides a safe work environment for the returning employees. The plan should be consistent with guidelines for return to work developed by the Occupational Safety and Health Administration (OSHA) and the Centers for Disease Control (CDC). OSHA requires employers to provide a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." The plan should include an assessment of risk based upon employee exposure levels to COVID-19 in the workplace, which will vary based upon the workplace and job. For example, a risk assessment will be different for an employee returning to an office setting (low risk) versus the risk to a worker on an assembly line (high risk). The risk assessment should also consider federal, state, and local laws to address high-risk or vulnerable employees.
2. Create and disseminate a return-to-work communication that outlines all the steps you are taking to comply with the recommended safety protocols, including policies to address high-risk and vulnerable employees.
3. As noted above, each state is approaching return-to-work situations differently. You should carefully assess the guidelines that apply to your operation before making any decisions regarding an employee's refusal to return to work or continued employment.

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4. Continue to permit alternative work, including telework or work at an alternative location where feasible, and providing partial employment and work share opportunities.
5. Clearly communicate the details of any return-to-work offer in writing (start date, hours to be worked, wages, job duties and location).
6. If a return-to-work offer is rejected, develop a plan to address for-cause job refusals, including consideration of high-risk and vulnerable employees.
7. If required, report any refusal to return to work to your state unemployment agency.
8. Be sure to document an individual's refusal of an offer to return to work. This is particularly important if you have taken out loans under the Paycheck Protection Program. The Treasury Department recently indicated that an employer's loan forgiveness amount will not be reduced if the employer's written offer to rehire is refused.
9. If an employee expresses concern about returning to work, keep the lines of communication open and try to determine and address any concerns, if possible. If applicable, engage in the interactive process to determine whether a reasonable accommodation can be made before requiring the employee to return to work.
10. Consider implementing a short-time compensation (STC) program, often called a shared work or workshare program, which allows employers to retain employees on a reduced schedule, while unemployment benefits make up some of the difference in income.

### **What Else Should Employers Do?**

As you begin the process of reopening, you should familiarize yourself with our alert: [5 Steps To Reopen Your Workplace, According To CDC's Latest Guidance](#). You should also keep handy our [4-Step Plan For Handling Confirmed COVID-19 Cases When Your Business Reopens](#) in the event you learn of a positive case at your workplace. For a more thorough analysis of the many issues you may encounter from a labor and employment perspective, we recommend you review our [FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers](#) and our [FP Resource Center For Employers](#).

### **Conclusion**

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. For questions about unemployment matters, contact [Bob Robenalt](#), [Margaret Scheele](#), [Meghan Delaney](#), or [Jerry Cline](#). For further information, contact your Fisher Phillips attorney, or any member of [our Post-Pandemic Strategy Group Roster](#).

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

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