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Expert Q&A: COVID-19 and Employee Return to Work Issues

by Practical Law Labor & Employment

Status: **Law stated as of 10 Aug 2020** | Jurisdiction: **United States**

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An Expert Q&A with Thomas H. Wilson of Vinson & Elkins LLP on what employers need to know in dealing with employees who refuse or are hesitant to return to work during the 2019 novel coronavirus disease (COVID-19) pandemic. The Q&A includes a discussion of frequently asked questions (FAQs) employers may face in reopening their workplaces, primarily under federal law.

While the US continues to contend with the 2019 novel coronavirus disease (COVID-19) pandemic, states and local jurisdictions have been easing stay-at-home restrictions and business closure orders in an effort to reopen the economy. While employers may want to reopen their workplaces, they may encounter employee refusal or reluctance to return to work, especially in person at the worksite.

To help employers with their reopening efforts, Practical Law reached out to Thomas H. Wilson, a partner of Vinson & Elkins LLP, for his insights on how employers should navigate employee refusal or reluctance to return to work. Tom has more than 30 years of experience counseling clients on labor and employment matters impacting their business processes and objectives and has been actively advising clients on COVID-19 during the recent outbreak.

For more information on business reopening considerations, see Business Reopening and Return to Work Checklist and Mitigating Employer Reopening Liability Checklist. For more on COVID-19 and employment generally, see Employment Global Coronavirus Toolkit.

For work that must be done in person, what are employers' options if an employee refuses to report back to work because they are afraid of COVID-19?

In response to an employee's refusal to return to work, employers should first ask for all reasons behind the employee's refusal. Employee statements of generalized fear of COVID-19 do not, by themselves, create legal obligations that employers must accommodate. However, the employer's response may vary depending on the employee's reasons for refusal. Even where the employee's underlying reasons do not create independent legal obligations, employers should keep in mind that employees may still have compelling reasons to refuse to return to work.

For example, specific reasons underlying an employee's refusal may include:

- Fear arising from an employee's underlying medical condition or disability that places the employee at high risk of complications should they contract COVID-19.
- Fear arising from an employee's age, which places the employee at high risk of complications should they contract COVID-19.
- Concerns that an employer has not implemented appropriate safety measures to reduce risk of COVID-19 exposures in the workplace.
- Concerns due to an employee residing with a family member or other individual who is at high risk of COVID-19 complications.
- Objections of conscience.

If the employee reports a health condition or disability (for example, diabetes, chronic lung disease, severe asthma, severe obesity, or some condition that might cause them to be immunocompromised), the employer may have an obligation under the Americans with Disabilities Act (ADA) to consider potential reasonable accommodations, including teleworking to the extent that the employee could perform their essential job

functions from home. In this situation, the employer should engage with the employee in the ADA-required interactive process when the issue of accommodation arises. Even if the employer cannot reasonably accommodate the employee, they should document the steps they have taken to consider the alternatives. Keeping an employee temporarily on an unpaid leave with health benefits may be the safest course of action in these instances, as opposed to terminating the employee.

Unlike the ADA, the Age Discrimination in Employment Act (ADEA) does not create any obligation for employers to provide reasonable accommodations. If an employee reports that their age is the reason behind their refusal to return to work, employers have more discretion in how they choose to respond (though some jurisdictions have passed laws protecting certain high-risk categories of individuals). Similarly, a report that an employee shares a residence with an individual considered to be at high risk of COVID-19 complications due to age or medical conditions does not create an independent legal obligation to provide reasonable accommodations.

In these cases, it is best for an employer to treat the employee's concerns with empathy and understanding. The employer should explain the steps that it has taken to reduce COVID-19 exposure risks in the workplace and ask the employee whether there might be additional reasonable precautions available that would make them feel more comfortable returning to work.

In response, some employees may take an employer up on this request and offer suggestions for additional safety measures. It is important in these circumstances that employers avoid taking any actions that may later appear to be retaliatory in nature. The best safety programs encourage employees to be involved in the safety process. If an employee expresses concerns and offers reasonable suggestions for improvement, employers should incorporate the suggestions. If the employee is making unreasonable requests that far exceed the most current guidance of the Occupational Safety and Health Administration (OSHA), the Centers for Disease Control and Prevention (CDC), and local government, and the standard of care followed by companies in the employer's industry, the employer may instead have to diplomatically tell the employee that it will not be implementing the requested changes, given the safety precautions already in place and that it expects the employee to return to work.

Should the employee continue to refuse to work for whatever reason, employers may take a number of actions. An employer may:

- Terminate the employee (though where an employee has raised safety concerns, an employer must be prepared to show that it evaluated the employee's concerns and that those concerns were not a factor in its decision to terminate).
- Consider offering unpaid leave for a limited period.
- Inform the employee that it will not be able to guarantee that their position will be available if they ask to return at a later date.

How an employer handles particular refusals to work can vary based on each employee's particular circumstances and reasons for refusing to return to work, but decisions regarding how employers will handle refusals to return to work should be made carefully and in coordination with return to work teams or other company decision-makers. It is important that employers implement a uniform system allowing for essential work to get done while also being mindful of employment discrimination laws.

What about employees who were sick with COVID-19 and have been out for extended periods of time? What are best practices to ensure their safe return and minimize the risk that they are remaining home when they should report back after their recovery?

Following a confirmed COVID-19 infection, an employer may require that the employee provide a doctor's note certifying that they are fit to work before being permitted to return to the employer's premises. The employer may alternatively require that the employee undergo virus testing, conditioning their return to work on its receipt of a "negative" virus test result. Before requiring virus testing, employers should review applicable government guidance to confirm that the tests they plan to use are both accurate and reliable.

Employers should be aware that medical information provided by their employees in response to employer requests, including the results of any COVID-19 testing, must be treated as confidential medical records under the ADA. This medical information must be stored separately from employees' personnel files.

Employers should also keep in mind that requiring documentation or testing from health care providers

will likely delay employees' return to work. Notably, current CDC guidance recommends against requiring documentation or testing because the health care system is likely to be overburdened during the pandemic and may not be in a position to provide certifications or reliable tests in a timely manner (see EEOC: Pandemic Preparedness in the Workplace and the Americans with Disabilities Act). This guidance does not bar employers from requiring medical documentation as a return to work condition.

However, the CDC has endorsed certain alternative symptom- and time-based return to work criteria for employees who have tested positive for COVID-19. Employers may consider relying on these guidelines if they prefer not to demand documentation or testing from a health care provider. The CDC's most current guidance indicates that individuals who suffered from mild to moderate COVID-19 symptoms remain infectious for no more than ten days after their symptoms began. Individuals with more serious symptoms or who are severely immunocompromised can remain infectious for no more than 20 days after their symptoms began. The CDC currently recommends that an infected individual may discontinue self-isolation after satisfying all the following conditions:

- At least ten days have passed since their symptoms began.
- At least 24 hours have passed since individuals last had a fever (without the assistance of fever-reducing medications).
- Other COVID-19 symptoms have improved.

For those employees who suffered from severe symptoms, the ten-day period may be extended to 20 days. (See CDC: Discontinuation of Isolation for Persons with COVID-19 Not in Healthcare Settings.)

Before setting symptom- or time-based criteria under which a specific employee will be permitted to return to work, an employer should confirm that the CDC's most recent guidance on the criteria has not changed. Such guidance is frequently updated as medical knowledge about the virus improves.

Under current CDC and Equal Employment Opportunity Commission (EEOC) guidance, employers should not use antibody tests to make decisions about returning employees to work (see CDC: Interim Guidelines for COVID-19 Antibody Testing and EEOC: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (ADA Guidance)). If an employer wishes to provide antibody testing, it may consider offering antibody tests on a voluntary basis, while making it clear that such tests are not mandatory and will not be used to determine whether an employee will be permitted to return to work.

If an employer suspects that the employee is taking advantage of a positive COVID-19 test in order to take Family and Medical Leave Act (FMLA) or Families First Coronavirus Response Act (FFCRA) leave past the actual duration of their illness, or during periods in which they are otherwise able to return to work, it may require that the employee provide:

- Periodic reports during the leave regarding the employee's status and intent to return to work.
- Second or third medical opinions at the employer's expense.
- Fitness for duty certifications.

An employer may treat confirmed instances of fraud or misrepresentation as it would treat misrepresentations in other FMLA contexts and discipline the employee accordingly.

What if an employee refuses to wear a face mask or comply with other safety measures implemented in response to the COVID-19 pandemic?

An employer may require that its employees wear face masks and observe other infection control practices. Generally speaking, unless an employee raises a valid medical or religious reason for refusing to wear a mask or observe other safety practices, an employer may send the employee home or deny the employee entry into its premises. An employer may treat the employee's corresponding absence as a refusal to return to work and may discipline the employee accordingly, with discipline up to and including termination.

If an employee does raise a valid medical or religious reason for their refusal, the employer is required to treat the refusal in the same manner as it would other requests for reasonable accommodations under the ADA or Title VII of the Civil Rights Act of 1964 (Title VII). The employer should discuss the request with the employee and provide feasible modifications or alternatives to the face mask or safety requirement if such modifications or alternatives do not pose an undue hardship. An employer is not required

to accommodate suggested modifications or alternatives that would pose a direct threat to the health of individuals in the workplace (for more information, see Practice Note, Pandemic Preparation and Response: Disabled Employee Who Poses Direct Threat Not Entitled to Accommodation).

Apart from conversations related to reasonable accommodations, an employer should not make exceptions to its face mask and other infection control practice requirements, as defined by its safety policies. An employer's established safety policies should be uniformly implemented and consistently enforced. For a sample face mask policy, see Standard Document, Employee Face Mask Policy.

What if schools remain closed and offices require in-person work? What can employers do about employees who will not or cannot return to work because of ongoing childcare issues?

The FFCRA provides employees with an entitlement to two weeks of paid sick leave under the Emergency Paid Sick Leave Act (EPSLA) plus an additional ten weeks of paid family leave under the Emergency Family and Medical Leave Expansion Act (EFMLEA) to care for a son or daughter whose school or care facility has been closed due to the COVID-19 pandemic. In each case, the FFCRA provides for paid leave at the rate of two-thirds the employee's regular pay, up to $200 per day. For more on the FFCRA, see Practice Note, COVID-19: Paid Sick and Family Leave Under the FFCRA.

Once an employee exhausts these weeks of paid leave, which is possible given the extended duration of the COVID-19 pandemic, there are several options available to the employer in how to proceed. Just as is the case under the FMLA, if an employee confirms that they are unable to return to work once their leave entitlements are exhausted, the employer may then terminate the employee. As an alternative, the employer could explore the possibility of the employee working on a reduced schedule or teleworking. The employer may also choose to furlough the employee or offer them unpaid leave.

During the time employees are unable to work either in person or remotely due to childcare responsibilities, an employer should inform its employees that they may qualify for Pandemic Unemployment Assistance (PUA) under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Pub. L. 116-136, 134 Stat. 281 (2020)) that was signed by President Trump on March 27, 2020. The CARES Act provides PUA to individuals who are the "primary caregivers" of children who are at home due to forced school closures that directly result from the COVID-19 public health emergency. To qualify as a primary caregiver, an employee's provision of care to their son or daughter must require ongoing and constant attention such that it is not possible for the employee to perform their customary work at home. Many states have also expanded their unemployment programs to offer regular unemployment benefits to individuals who are unable to return to work due to childcare obligations resulting from the COVID-19 pandemic. For more on federal unemployment benefit programs, including the PUA, see Practice Note, COVID-19: Unemployment Benefit Provisions of the CARES Act and FFCRA.

In accepting either FFCRA paid leave or state or federal unemployment compensation benefits, employees should be aware that paid leave and unemployment compensation for childcare are generally only available during periods in which schools and care facilities are closed as a direct result of the COVID-19 pandemic. This will not include periods during which schools are normally closed due to scheduled summer or winter breaks, unless the summer care facility that the employee usually relies on is also closed as a direct result of COVID-19. Employees should rely on their normal childcare arrangements for these periods, rather than exhausting their paid leave or unemployment compensation benefits.

What if an employee says they do not want to come back because they are making more on unemployment than in their job or simply want to continue collecting unemployment benefits?

The CARES Act temporarily expanded unemployment benefits for employees who lose their job or the ability to work due to the COVID-19 pandemic through the newly created Federal Pandemic Unemployment Compensation program (FPUC). The FPUC provided an additional $600 per week through July 31, 2020 to any employee receiving either regular unemployment compensation or Pandemic Unemployment Assistance (PUA). Congress may extend such benefits in future economic stimulus or other legislation. Should it do so, this may result in some lower paid workers earning more than 100% of their usual

paychecks for a temporary period. For more on the FPUC, see Practice Note, COVID-19: Unemployment Benefit Provisions of the CARES Act and FFCRA.

Unlike some other reasons that an employee may have for refusing to return to work, an employer should not consider an employee's desire to continue collecting regular or enhanced unemployment benefits to be a valid reason to refuse to return to work. An employer should inform the employee that their refusal to return to work once the work becomes available will be considered a resignation.

The employer may also inform the employee that a state unemployment agency may likely require the employee to accept the employer's return to work offer to avoid becoming ineligible for future unemployment benefits. This is because most states' regular unemployment compensation generally requires individuals to act on any offers of "suitable employment." Similarly, the PUA requires that an individual be unemployed, partially employed, or unable to work due to certain circumstances that are a direct result of the COVID-19 health emergency, and these conditions are not met if an employee's refusal to return to work is solely based on a desire to continue collecting regular or enhanced unemployment benefits.

Should an employee continue to refuse to return to work without any valid justification, the employer should document the employee's refusal. The employer should then report the refusal to the employer's state unemployment benefits agency, which will have a process for reporting potential refusals of suitable employment.

It is possible that the state unemployment agency will determine that the employer's offer for the employee to return to work was not an offer of "suitable employment" for the purpose of terminating unemployment benefits. This determination can be based on the unique risk factors or personal circumstances facing the individual during the COVID-19 pandemic. The factors that state agencies consider when determining whether an offer to return to work is "suitable" vary from state to state. For more information on unemployment eligibility, see Practice Notes, COVID-19: Unemployment Benefit Provisions of the CARES Act and FFCRA: Work Search and Employee Eligibility for Unemployment Insurance Benefits.