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AN UNEXPECTED HURDLE: HOW TO HANDLE EMPLOYEES WHO REFUSE TO RETURN TO WORK

by Gray Reed's Labor & Employment Department

May 1, 2020



On Monday, Governor Abbott announced plans for safely reopening some businesses as the state and local governments continue to work to minimize the impact of COVID-19 on Texas communities and the businesses that serve them. But many employers looking to get back to (near) normal are encountering an unexpected hurdle: employees who refuse to return to work. This alert provides employers with guidance on what to do when employers are ready to get back to business but some employees are not.

There are two common reasons provided by employees for their refusal to return to work: (1) fear of exposure to COVID-19; and (2) satisfaction with continuing to collect unemployment benefits.

EMPLOYEES CONCERNED WITH POTENTIAL INFECTION

Employees may express a fear of contracting COVID-19 if they return to work. Although employers should be understanding of their employees' health-related concerns, employees do not have a right to refuse to work simply because they have generalized anxiety about potential exposure to COVID-19. Rather, Occupational Health and Safety Administration (OSHA) regulations require an "imminent danger" to the employee's health or safety to justify a refusal to work. OSHA has interpreted the "imminent danger" standard to require a "reasonable expectation that toxic substances or other health hazards are present and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency." Given this narrow definition, few, if any, non-healthcare workplaces will meet the "imminent danger" standard in relation to COVID-19. Employers confronted by employees apprehensive about the risk of infection should express their understanding of the employees' concerns, identify the precise measures the business is taking to ensure that the risk of transmission is minimized, and encourage employees to report any concerns that those measures are not being followed.

EMPLOYEES SATISFIED WITH COLLECTING UNEMPLOYMENT BENEFITS

Employees may also refuse to return to work because they are satisfied—at least for the time being—with continuing to receive state and federal unemployment assistance. This problem is unique to this particular economic crisis because the federal CARES Act provided an additional \$600 per week for unemployed workers and significantly extended the period for collection of unemployment benefits by an additional 13 weeks. However, there are a number of strategies employers can use to deal with employees who are content to remain on unemployment rolls rather than return to work.

- Employers should ensure that these employees understand that the additional \$600 provided by the federal government is only available through the end of July 2020. Beginning the first week of August 2020, workers collecting unemployment compensation will only receive what they are entitled to under Texas law, which is approximately half of their ordinary wages (up to a maximum of \$521 per week). Employers may also want to make it clear to these employees that they will not be inclined to rehire them in August when the employees' unemployment compensation is cut by more than half.
- Although unemployed workers may receive a weekly check from the Texas Workforce Commission (TWC), it does not come with several of the fringe benefits often available to employees. To the extent applicable, employers should remind employees of any benefits the business offers its employees, including health insurance, retirement benefits, and life/disability insurance.
- As a means of enticing reluctant employees to return to work, employers may consider making employees who return to work eligible for a modest year-end bonus. It would incentivize employees to return to work, and it would not be payable until after the business has hopefully recovered from any downturn in business due to the COVID-19 pandemic.

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- Finally, the TWC has made it clear that an employee who refuses to return to work is ineligible for unemployment benefits unless the refusal is because the employee: (1) is 65 or older or has a household member who is 65 or older; (2) has been diagnosed with COVID-19 or has a household member who has been diagnosed; or (3) has a child whose school or daycare is closed and there is no alternative care provider. Thus, unless one of those exceptions applies, employers may consider sending a letter to the TWC indicating that an offer of employment has been made to an employee and proactively challenging the payment of any future unemployment benefits.

For further guidance concerning the decision to reopen businesses, what measures to consider in reopening, and what issues may arise after reopening, please [contact us](#) or register for Gray Reed's webinar titled "[Employment Law Q&A as Texans Go Back To Work!](#)" scheduled for on Monday, May 4th at noon (CST).

ABOUT GRAY REED'S LABOR AND EMPLOYMENT PRACTICE GROUP

Gray Reed's labor and employment practice group recognizes that proper management of the workforce is essential for our clients' success. Our proactive employment attorneys counsel employers on all employment laws and regulations, as well as help clients draft employment contracts, executive compensation agreements, policies and handbooks. When litigation cannot be avoided, our employment attorneys are skilled trial lawyers, and they defend our clients in a cost-effective manner. They craft an aggressive strategy to defend each lawsuit and develop cost and risk determinations at each step of the litigation so that our clients can make the best decision for their business. To learn more about the practice group or Gray Reed, visit grayreed.com.