



WHAT IF GUIDE:

What if an employee refuses to return to work after a COVID-19 Furlough or Lay-off?

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As we start reopening our business, how do we handle the employee that refuses to come back to the workplace? There could be several reasons and how can we be compassionate to their concerns but keep the business open.

Reasons an employee might refuse to return:

- Fear of being infected with COVID-19
 - Be compassionate, listen, and effectively communicate procedures that have been put in place.
- OSHA Rights?
 - An employee generally does not have the right to refuse work merely because of a potentially unsafe condition in the workplace. However, the employer may not discriminate against an employee who exercises "any right afforded" by the OSHA Act. The employer needs to show that they have taken the appropriate steps to mitigate the risk of COVID-19 infection in the workplace.

So what are some steps an employer should take to stave off OSHA to COVID-19 hazards?

- Assess the level of risk of COVID-19 exposure
- Train employees about and enforce rules/policies pretraining to proper workplace sanitation and hygiene.
- Assess and provide employees with appropriate PPE and train on its proper use
- Implement appropriate administrative controls (e.g. staggered shifts, social distancing, encouragement of sick workers to stay at home).

Employers must demonstrate their good faith efforts to reduce or eliminate COVID-19 hazards in the workplace. Simultaneous documentation and implementation of these efforts is the key to demonstrating why it is unreasonable for an employee to refuse to return to work.

- Is the ADA implicated?
 - As part of the interaction process, the employer should discuss all workplace protocols that are in place to reduce the risk of COVID-19 (e.g. PPE, social distancing, staggered shifts, limited customer access, hand sanitizer, physical partitions or barrier, etc). If the employee still refuses to work, the employer may require medical certification of the employee's alleged restrictions. Employers should be flexible in allowing an appropriate telehealth note or certification, as medical staff across the country are overburdened right now.

- If a leave of absence or a remote working arrangement is appropriate and would not constitute an undue hardship to the employer, the ADA may require the employer to provide such accommodation. But the employers should attempt to put timeframe limits on that accommodation, or at least set a future time for a reassessment of the accommodation through further interactive dialogue. In this way, the employer can balance the employee's ADA rights, if any, with the business disruption of accommodations based on COVID-19 issues.
- Is the Leave Act implicated? Federal, State and Local Laws
 - Multiple layers of leave laws exist and are in play regarding COVID-19. Would an employee be entitled to leave under the federal (FFRCA) or other state or local laws simply because of concerns over COVID-19? Maybe, depending on the reason for the leave and particular law at issue.
 - As we've reported previously, the FFCRA provides employees with leave if, among other things, "the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19". This ties into the ADA consideration above because the United States DOL has explained that "concerns related to COVID-19" means, for example, that the employee is "particularly vulnerable" to COVID-19.
 - If not a reasonable fear and none the foregoing apply, may administer attendance policy and treat as an unexcused absence. Consulting with Resourcing Edge before terminating will help you navigate potential risks during these unprecedented times.
 - No Call No Show policy
 - Progressive Disciplinary process

An employee's refusal to return to work upon the reopening of the economy is likely to create a myriad of considerations for employers. That employer must consider whether the employee's refusal is reasonable in light of the measures taken to mitigate the risk of COVID-19 in the workplace, whether the employee has a covered disability that must be accommodated, and whether the employee is entitled to leave under the layers of leave laws. If you have any questions or would like additional information, please contact your HR Services team at hrservices@resourcingedge.com.

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