

SOME EMPLOYER CONSIDERATIONS WHEN RECALLING WORKERS FROM COVID FURLough

Why would an employee not want to come back to work?

Some recalled employees will not want to return to work, most commonly because:

1. The combined benefits they receive may be the maximum of \$962 weekly, which is higher than their regular pay, at least until July 31, 2020;
2. They have health and safety concerns and are fearful that they will be exposed to the virus;
3. They have COVID or are quarantined with the symptoms;
4. They are caring for someone with COVID who is in their family;
5. They are involved in their child's care because the caregiver/school is unavailable or closed.

Regarding #1

This is not a legally acceptable reason not to return. They can be separated, and their benefits ended.

Some background, which you probably have memorized already: the Coronavirus Aid, Relief, and Economic Security (CARES) Act was enacted on March 27th, 2020. It contains the Pandemic Unemployment Compensation ("PUC") program that enlarged weekly unemployment benefits by adding an additional \$600 supplement to the employee's maximum weekly rate. And note, the Pandemic Emergency Unemployment Compensation ("PEUC") extends the duration of weekly unemployment benefits by adding 13 weeks to the maximum recovery period.

Thus, unemployed workers in Michigan may now collect unemployment benefits at the State's rate for which they qualify for up to 39 weeks from the date of their layoff, furlough, or not for cause termination.

However, unlike the 39 weeks of regular State unemployment benefits, **the supplemental \$600 per week only applies to benefits received between March 29, 2020 and July 31, 2020**. The supplemental benefit ends July 31, 2020, even if an employee is still collecting regular unemployment benefits under the extended 39 week period.

WILL AN EMPLOYEE RISK STAYING HOME WITHOUT A QUALIFYING REASON TO COLLECT THE BUCKS? It is a risk for them for sure.

Q: How to prevent scammers?

A: All employees must be put on notice of the legitimate criteria for extended leave. DO THAT NOW!

Regarding #2

If an employee's fears and concerns about COVID exposure are "reasonable," legally they do not need to return to work. If the concern is "unreasonable," and they do not return, they will be deemed to have voluntarily terminated their employment. Voluntary termination status will end their extended special FMLA leave eligibility and unemployment benefits. Each case is unique to the individual and must be assessed by you to determine if the employee's fears and concerns are "reasonable".

Q. How to test if employee's fears about their health and safety are reasonable, qualifying them to stay home on leave?

A: Employees have the burden of proof to show they are eligible for extended leave; however, the reality is that for the employer it is likely a total conundrum.

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“Reasonable employment” is defined in Section 301(11) of the Act as “work that is within the employee’s capacity to perform that *poses no clear and proximate threat to that employee’s health and safety*, and that is within a reasonable distance from that employee’s residence.”

Is it possible for an employer to argue that a return to favored work during a pandemic poses *no clear and proximate threat to the employee’s health and safety*? At this time, there are over 55,000 confirmed cases of COVID-19 in Michigan and over 5,200 deaths. Across the United States, over 1.7 million people have tested positive for the virus and over 103,000 people have died.

This issue will ultimately come down to a factual determination – whether a specific employee’s refusal to return to work in a specific job is “reasonable”. Individuals who suffer from multiple comorbidities (such as advanced age, obesity, cardiovascular diseases, or other autoimmune deficiencies) will likely have a stronger argument that a return to work in a position exposing them to significant risk of contracting COVID-19 is unreasonable.

Regarding # 3, 4 and 5

Employees can be required to prove their eligibility for all Extended FMLA leaves. They should complete eligibility forms to confirm their legitimate medical/safety fears, family caregiving situations and childcare responsibilities. We can provide an Eligibility Questionnaire Form for you upon request. Just call.

Note that **intermittent leave** is permissible, ONLY WITH YOUR PERMISSION and unlike traditional FMLA leaves, the leave under the extended FMLA provided by the Emergency Family Medical Leave Extension Act is only allowed if the leave request is to care an employee’s own **children** who have lost their caregivers or schools to COVID closings

Employees who are denied Extended FMLA leave because they are not eligible can be separated as voluntary terminations. If an employee’s fears are unreasonable, or they cannot document illness or their caregiving roles, or that there are no alternatives to their caregiving roles, then you can separate them if they do not come to work. Employees’ eligibility for continuing unemployment benefits should be denied. However, you might be in for a fight. If you are suspicious of a request for expanded FMLA, give us a call.

What will the extended leaves mandated by FFCRA cost the employer?

In the event expanded FMLA leave is required, the two weeks of paid Emergency Sick Leave run concurrent with the first two weeks of unpaid FMLA. Throughout the remaining 10 weeks, the subject employee is compensated at 2/3 their usual rate of pay, capped at \$200 per day and \$12,000 total. Please note that this \$12,000 cap is **inclusive** of payments made during the initial emergency sick leave coverage.

Bear in mind that any payments made under this Act are reimbursable to the company on a dollar-for-dollar basis and may be retained from the quarterly employment tax otherwise due. The IRS advises that if the company’s quarterly employment tax deposits are less than the amount of credit for which the employer is eligible, the employer may receive the remaining credit in advance using IRS Form 7200. We can provide a copy of the form and instructions on request.

Have more Questions?

We will be ready to assist you if you are confronted by the requests for leave or refusal of employees to return to work. Also another wrinkle with our adjustments to the COVID pandemic is that as so many of your folks may be working from home, you may have workers compensation considerations if they suffer physical or psychological injuries when working at home.

We stand ready to provide you support. We wish you all good health and renewed prosperity.

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A note of caution: As these COVID laws & regulations have changed over time, please know that this summary is general advice only. Call us if you need specific legal advice. Thanks! [\(313\) 967-0700](mailto:ksk@ksklaw.com) 06.01.2020