

# Returning the Reluctant Employee to Work: How the Governor's Latest Executive Order May Allow Employees Who Refuse to Return to Work to Collect Unemployment Benefits

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## Working Together

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As more businesses begin to reopen, one of the most common issues facing employers is how to manage employees who refuse to return to work. Bringing employees back to work has proven challenging for employers who are struggling to balance the need to be receptive and understanding of employees' legitimate concerns against the need to ensure their businesses have adequate staffing to operate effectively.

While refusing suitable work generally renders an employee ineligible for unemployment benefits, the criteria for determining whether work is "suitable" during the COVID-19 pandemic have been unclear. Many employees are reluctant to return to work because they are afraid of contracting COVID-19, irrespective of the extensive safety measures and procedures employers have implemented to combat the spread of the virus. Although some employees have particularized concerns, such as their own vulnerability due to age or underlying health conditions, or the presence of vulnerable family members in their households, others merely express a general fear of getting sick. Until recently, there has been no formal guidance from the State about whether these types of fears will be considered a sufficient basis for employees to refuse to return to work and still collect unemployment benefits. The State Department of Labor (DOL) said only that each case would be considered on its individual merits.

The Governor's 48th executive order, signed on June 1, attempts to clarify this uncertainty. In determining if work is suitable, Executive Order No. 7UU *requires* the DOL to "consider the degree of risk to the individual's health or, due to the COVID-19 public health emergency, the health of a member of that individual's household." In evaluating the degree of risk, the Executive Order also *permits* the DOL to consider the "individual's or household member's health, his or her physical capabilities, the physical and mental requirements of the job, working conditions and the existence of any medical documentation concerning the

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individual's limitations." If the work is determined to create an "unreasonable risk to the individual's health or, due to COVID 19, the health of a member of that individual's household," the work will be deemed unsuitable. The order applies to claims for unemployment benefits filed between May 17 and July 25.

While protecting employees with bona fide health concerns is paramount, many employers fear that this guidance provides an invitation to fraud or misuse by employees seeking to stay on unemployment compensation because, with the \$600 per week Federal Pandemic Unemployment Compensation supplemental benefit, they are actually better off not working than working. It has been reported that the DOL will release more detailed guidance specifying what types of medical documentation will be required to substantiate a claim that work is unsuitable, how employers can contest claims, and penalties for fraudulent claims, but as of this writing, the DOL has posted nothing on its website. Employers may take some comfort from the fact that Executive Order 7W provides that employers' experience rating accounts will not be charged with respect to benefits attributable to COVID-19.

Employers should ensure that they have adequate policies and procedures in place to maintain a healthy and safe work environment, and should clearly communicate that information to employees as part of the return to work process. Pullman & Comley has policy templates and other useful resources available to aid employers in navigating the confusing web of laws, regulations, and guidance related to COVID-19. If your organization has questions about returning employees to work, please contact any of our Labor and Employment Law attorneys for assistance.

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