

## Publications

### Refusing to Return to Work May Not Make Ohio Employees Ineligible for Unemployment Compensation

#### Related Professionals

Robert A. Harris

Daniel J. Clark

Charles F. Billington III

#### Related Services

Employment Counseling

Labor and Employment

Workplace Safety and Workers' Compensation

**CLIENT ALERT** | 6.24.2020

Although businesses across the country are reopening, the threat of contracting COVID-19 remains. Accordingly, for many employees the choice to return to work is not an automatic “Yes.” For example, employees who are considered to be at “high risk” for serious illness if they contract COVID-19 – employees over the age of 65, employees who have underlying conditions that make them more susceptible to severe effects of COVID-19 – are facing a choice: return to work and resume receiving their paychecks or refuse to return due of health and safety concerns. Employees who live with someone who is in a high risk category or who have COVID-related childcare issues face a similar dilemma.

At the same time, refusing to return when work is available, could endanger employees’ ability to receive unemployment benefits. The unemployment compensation laws of most states, including in Ohio, contain a presumption that when employers call employees back to work in the same position they held before any COVID-19-related shutdown, the position is considered “suitable work.” In fact, under Ohio law, “suitable work” means working any shift of any occupation consistent with the employee’s prior training and experience. Thus, an employer need not offer an employee the *same* position in order to be offering the employee “suitable work.” Employees who decline an offer for “suitable work” are generally disqualified from receiving unemployment benefits.

However, the COVID-19 pandemic has made this presumption less clear. Recently, Ohio re-examined this presumption and the treatment of employees who do not return to work for what the state considers to be legitimate reasons. On June 16, 2020, Governor Mike DeWine signed [Executive Order 2020-24D](#), which provides several circumstances that will now constitute “good cause” for refusing suitable work during the pandemic. In essence, this means that employees who refuse to return to work in Ohio for one of the following reasons should not see an impact on their eligibility for unemployment benefit:

1. A medical professional's recommendation that an individual not return to work because the individual falls into a category that is considered "high risk" for contracting COVID-19 by the Centers for Disease Control and Prevention AND the employer cannot offer teleworking options;
2. The employee is 65 years old or older;
3. Tangible evidence of a health and safety violation by the employer that does not allow the employee to practice social distancing, hygiene, and wearing protective equipment;
4. The employee has potentially been exposed to COVID-19 and is subject to a prescribed quarantine period by a medical or health professional; or
5. The employee is staying home to care for a family member who is suffering from COVID-19 or is subject to a prescribed quarantine period by a medical or health professional.

This list is noteworthy for several reasons. First, Executive Order 2020-24D does not provide a definition of what constitutes "tangible evidence of a health and safety violation." This could mean photographs, written policies, or other forms of proof, but would seemingly preclude mere uncorroborated statements from unemployment claimants that their employer was violating its health and safety obligations. Second, the list does not include refusing to return to work because *an employee's household member* is considered "high risk." Third, it does not make the unavailability of child care, even if due to coronavirus-related reasons, "good cause" for not returning to work.

It is worth noting that an employee's eligibility for unemployment compensation is not the same as whether the employee is or should be protected from termination. For example, an employee who refuses to return to work may be protected from adverse employment action under the Family and Medical Leave Act or similar law, or the employee may be entitled to a reasonable accommodation under the Americans with Disabilities Act or Ohio law. An employer should consider these, and other potential issues, in making its determinations and should also ensure that it is treating similarly situated employees in a consistent manner.

Executive Order 2020-24D is effective immediately. The order provides that it will remain in effect throughout the duration of Ohio's state of emergency.

## **Will Your Employees Who Refuse to Return to Work Retain Their Unemployment Benefits Eligibility?**

In addition to Ohio, varying unemployment compensation structures and the unique dilemmas employees face in this COVID-19 world regarding return-to-work issues have caused other states to re-examine this presumption as well. There is no one-size-fits-all answer here; it will depend upon the jurisdiction and the employee's rationale.

Contact your Vorys attorney if you are concerned about employees' refusal to return to work in Ohio or other jurisdictions in which you operate, including what that could mean for their unemployment benefit eligibility.

--

## Vorys COVID-19 Task Force

Outside of this new law, employers continue to face myriad issues as COVID-19 continues to spread and impact communities and workplaces (some of these issues are addressed in our prior alerts [located here](#)). We will continue to keep you posted on any important developments. In the meantime, if you have any questions regarding this new law or any other aspect of COVID-19, please contact your Vorys lawyer.

We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at [vorys.com/coronavirus](http://vorys.com/coronavirus).