

An Employer's Guide To Unemployment During Pandemic

By Marc Sloane and Kirsten Eriksson (May 12, 2020)

With the tens of millions of employees who have been laid off or furloughed as a result of the impact of COVID-19 on business operations, unemployment compensation has become a much-discussed subject.

In addition to many states adjusting their unemployment compensation laws to account for the impact of COVID-19 on employment, the federal Coronavirus Aid, Relief, and Economic Security Act, which was passed in March, provides both additional unemployment compensation and additional categories of individuals who may be entitled to unemployment compensation.

Employers had largely ignored unemployment in the past other than to contest an occasional claim. Now, however, as employers consider different options to address the impact of the COVID-19 pandemic on their operations, they find themselves struggling to understand the system and the impact it may have on their operations.

In particular, understanding when an employee may be entitled to benefits and how much they can receive can have a significant impact on decisions of whether to furlough, lay off or cut hours, or, on the flip side, whether to bring employees back to work on a full-time or part-time basis. In addition, employers need to understand the impact of unemployment rules on employees who have been off work and who may be reluctant to return to work because of safety concerns, child care issues, or generalized fear.

While unemployment rules and regulations will vary on a state-by-state basis, there are some general principles that employers should understand to help them develop the best business plan for their operations and their employees.

State Benefits

In a general sense, to determine benefit amounts, state unemployment statutes take into account an individual's past weekly earnings. The unemployment payment is generally a percentage (usually less than half) of those past weekly earnings up to a maximum weekly benefit amount, or WBA, set by each state. For example, Maryland's maximum WBA is currently \$430, maximum WBA in Washington, D.C., is currently \$444, and Virginia's maximum WBA is currently \$378. Each state also sets a minimum payment for eligible individuals.

State unemployment statutes provide for limits on the number of weeks an employee is able to obtain benefits (usually about 26 weeks) and generally require that an employee be able to work



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and actively seeking employment. In that case, employees who leave work for medical reasons are generally not entitled to unemployment because they are not "available" for work. States also require that an employee become unemployed through no fault of his or her own, and will disqualify employees who are terminated for misconduct or who resign without good cause.

During the COVID-19 pandemic, many states have lifted or loosened restrictions on employees who cannot work for medical reasons, particularly those who have an underlying health condition that may put them at higher risk of serious infection. States may also consider employees who leave work because of such risks, or who have a spouse or child at significant risk, to have resigned or refused work for "good cause." Finally, many states are temporarily suspending the requirement that employees certify that they are actively seeking work during the pandemic.

An employee need not actually terminate employment in order to be eligible for benefits — an employee on temporary layoff will qualify. In addition, an employee who is placed on leave and not working will not qualify for benefits during any time he/she is receiving pay from the employer — such as paid administrative leave or payment for PTO.

CARES Act

The CARES Act significantly increased the availability of unemployment for many employees and the amount of benefits available. Section 2104 of the CARES Act, Federal Pandemic Unemployment Compensation, or FPUC, generally provides for an additional payment of \$600 per week to individuals who are otherwise eligible for unemployment compensation under either state or federal law. This provision of the act remains in place through July 31.

The provision more than doubles the available maximum WBA available to employees — in Maryland, for example, an employee who would normally receive \$430 per week will now receive \$1,030 per week until July 31. It is not unusual now for employees to receive more money through the unemployment system than they made while employed.

Section 2107 of the CARES Act, Pandemic Emergency Unemployment Compensation, or PEUC, provides up to 13 weeks of unemployment compensation to individuals who would otherwise be entitled but have exhausted all rights to regular unemployment compensation under state or federal law and are "able to work, available for work, and actively seeking work." States, however, are able to offer flexibility in meeting these requirements as a result of the impact of COVID-19 as discussed above.

This additional 13-week period increases to 39 the total number of weeks generally available to employees under state unemployment compensation statutes. The amount of unemployment compensation received during the 13-week extension is equal to the normal state benefit plus, through July 31, the additional \$600 weekly benefit under the FPUC. This provision of the CARES Act expires on Dec. 31.

Section 2102 of the CARES Act, Pandemic Unemployment Assistance, or PUA, provides benefits to individuals who are not otherwise entitled to receive regular unemployment compensation or compensation under PEUC, such as self-employed individuals, independent contractors or "gig" workers. To receive PUA the individual must certify that he or she is unemployed, partially unemployed or unavailable to work because of one of 10 COVID-19-related reasons listed in Section 2102. An individual receiving PUA benefits may also be entitled to the \$600 weekly benefit amount under the FPUC until July 31. PUA provides up to 39 weeks of benefits but will end on Dec. 31.

Questions Being Raised

As employers prepare plans to address the operational difficulties caused by the pandemic, questions arise as to when employees may be entitled to benefits. For example, as employers plan for reopening and bringing employees back to work or making job offers to new employees, questions concerning unemployment compensation have arisen.

Employers that are initially planning to bring back employees on a part-time basis and then gradually increase the hours as business increases have wondered about the impact of the part-time earnings on the employee's entitlement to unemployment compensation. Similarly, employers wonder whether a reduction in the rate of pay will entitle employees to unemployment.

A reduction in pay that is not a result of a reduction in hours will generally not entitle an employee to unemployment, because the employee remains employed full-time, albeit at a lower rate of pay. However, if the lower pay is a result of a reduction in hours, the employee generally will be entitled to file for benefits.

Wages earned by an employee must be reported to the state unemployment compensation commission by the employee on a weekly basis. The wages earned will be offset against the employee's unemployment compensation amount.

Some states use a dollar-for-dollar offset while others use a more generous formula. For example, Maryland and Virginia both offset the wages on a dollar-for-dollar basis against the unemployment compensation otherwise due. In states that follow this formula, individuals earning weekly wages equal to or more than the state's maximum weekly benefit amount will not be eligible for unemployment compensation in that week. Washington, D.C., on the other hand, only offsets a percentage of the weekly wages earned.

It is important to note that, regardless of the state involved, as long as the employee is entitled to \$1 in unemployment compensation, she will also be entitled to the \$600 FPUC payment through July 31, 2020. As described above, the additional \$600 payment results in an unemployment compensation payment that often replaces 100% of an employee's earnings or even results in unemployment compensation payments that are higher than the employee's actual earnings while employed.

Needless to say, unemployment compensation payments that are equal to or greater than an employee's compensation for working can lead to a disincentive to return to work when an employer makes a job offer or attempts to recall an employee. As a result of the amount of unemployment compensation being paid and the health issues and generalized fear surrounding COVID-19, employers have been faced with some employees refusing job offers or refusing to return to work when recalled by an employer.

Generally, an employee must certify weekly to their state unemployment commission that the employee is able and available to work. Accordingly, an employee who refuses an offer to return to work will be disqualified from receiving benefits unless the unemployment commission determines the employee had "good cause" to refuse.

Some states (such as Maryland) mandate that an employer report an employee who refuses to return to work or refuses a job offer. Other states permit such a report, and many have forms or reports that an employer may file. As a last resort, states have mechanisms by which unemployment fraud may be reported — often a hotline or online report.

If an employee refuses work, the commission will review the reasons behind the employee's refusal and determine if the reason offered by the employee does or does not qualify as good cause under the state's unemployment statute. For example, an employee who refuses recall or turns down a job offer simply because she is receiving more money through unemployment than she would earn working will not be able to show good cause for turning down the job offer and should not be entitled to receive unemployment compensation.

On the other hand, an employee who refuses recall or turns down a job offer because he has been ordered to self-quarantine or has an underlying health condition that makes him more vulnerable to COVID-19 may be determined to have done so for good cause and be entitled to unemployment compensation.

The more difficult situation involves an employee who refuses recall or turns down a job offer because the employee has a general fear of returning to the workplace out of concern for becoming infected with COVID-19.

Although it is too soon for state unemployment commissions to have opined on this issue, the U.S. Department of Labor, in connection with advice provided concerning the CARES Act, has stated that a generalized fear of contracting COVID-19 is not a credible health concern that would allow an employee to turn down a job offer or refuse recall.[1] As such, it seems likely that state unemployment commissions, when ultimately faced with the issue, may make the same determination.

Communication With Employees

With all the changes to the laws, employees are often equally confused about the law, and may not understand their rights and obligations under unemployment regulations. Human resources departments should strongly consider providing resources to employees to help them understand not only their rights to unemployment compensation but also the limitations. Many states are creating FAQs for employees to help guide them through this difficult time, and employers should consider directing employees to those resources.

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[1] See question and answer here: <https://www.dol.gov/coronavirus/unemployment-insurance#faqs>.
