Surging Unemployment Claims Pose New Challenges to Employers – Are You Ready?

Legal Alert
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Employers: Brace for unemployment benefit inquiries, watch for legal pitfalls, and consider federal relief programs in managing payroll and position reductions

Hordes of distressed applicants have crashed the systems and clogged the phone lines of state unemployment offices across the country as employers are forced to shed jobs and federal relief enhances jobless benefits during the COVID-19 pandemic.

Washington state's Employment Security Department opened applications for new federally financed unemployment benefits at 8 p.m. on Saturday, April 18, and was soon overwhelmed. More applicants filed for unemployment in those first *24 hours* than during its busiest *week* in recent history – the last week of March 2020, when 182,000 applicants filed.

Employers should prepare for their own surge of inquiries as states process unemployment claims and take care to avoid legal pitfalls. Employers should also factor the federal COVID-19 relief into their plans to pare down payroll, maintain essential operations and keep their business and workforce afloat through this perilous time.

And be aware: State and federal agencies are still building the system as it launches – so their guidance, rules, programs and eligibility requirements are shifting daily.

Federal support for those losing work to COVID-19. The federal government's $2 trillion CARES Act:

- Provides unemployment benefits to part-time workers who lose their jobs, to the self-employed, to gig workers and independent contractors, and to others usually ineligible for

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unemployment benefits;

- Encourages states to waive the "waiting week" that delays benefits for the jobless (Washington, Oregon and New York are waiving the wait);
- Extends unemployment benefits for an additional 13 weeks;
- Requires states to provide flexibility to unemployed individuals in meeting job search requirements if their ability to look for work is affected by COVID-19 ; and
- Offers an additional $600 a week through late July to almost all out-of-work employees, no matter how much they had earned while working. That $600 goes even to those on "short-time compensation" programs (known in Washington as the SharedWork Program) that provide unemployment benefits for those still at work but with significantly reduced hours.

These changes – implemented faster than government, workers or businesses can keep pace – pose serious challenges for employers on a number of fronts.

Notification to affected employees. States may require employers to notify individuals affected by schedule reductions, layoffs and furloughs that unemployment benefits are available. Those notices should refer generally to benefits available in response to COVID-19 – ideally sharing links to any guidance the state has developed to explain its policies and how to apply. As explained below, best practice is also to notify your independent contractors if they might qualify for unemployment under the new extension of benefits. It is *not* the employer's job to determine eligibility – that's up to the states – but it may be required, and helpful, to the workers to point them in the right direction.

Verifying employee information. Employers are seeing the first wave of a flood of unemployment confirmation forms heading their way – forms designed well before the federal CARES Act sent states scrambling to pass emergency rules. Washington's form, for example, asks these yes/no questions about employees claiming partial unemployment due to reduced hours:

- Is the claimant guaranteed to work at least 16 hours every week?
- Will the claimant return to full-time work within the next four months?

For many employers, the honest answer right now might be "I have no idea." Employers must make a good-faith effort to fill out these outdated forms as completely and accurately as possible so workers can get the benefits they deserve, without running into trouble themselves. Provide explanations when they are requested – and in the margins when not. And get the information back to the state promptly.

Future unemployment insurance costs. The Labor Department's guidance reinforces the notion that the federal government, not employers, will pay for the extra unemployment insurance benefits during this crisis. The guidance indicates that "non-charging" of benefits is permitted. States can decide not to charge the current costs against the employer experience rating, or against "reimbursing" employers, including government entities, hospitals and nonprofit organizations, that self-finance the costs of their employees' claims.

Beware of employee classification traps. In the past, having an independent contractor file for unemployment often led to a review of whether the worker should have been classified as an employee – with all the attendant payroll taxes, benefits and protections of employment. Now, gig workers, the self-employed and 1099-contractors may for the first time apply for unemployment – but they have to apply as self-employed workers, not as your employees.

States have taken various steps to gear up for this seismic shift. Washington instructs gig workers and the self-employed to apply for "regular" benefits, and then when those are denied, they can apply for the new benefits. Oregon simply says the application process for those workers is "coming soon." And New York has posted guidance that those workers should fill out the form listing themselves as the "Employer" and providing their own phone number for the "employer contact."

Any employer who has stopped assigning work to freelancers or contractors because of COVID-19 orders restricting business should take a proactive approach: Inform the workers that they may qualify for unemployment benefits, remind them that they must apply as self-employed and share a link to the application process in your state.

Federal relief and your plan to stay in business. The COVID-19 shutdown has forced droves of layoffs already this year. As employers decide which positions to eliminate, or whose hours to reduce, they must be sure they have sound business reasons for their choices, guarding against any claims of retaliation or discrimination. The federal relief also brings new factors into play. The additional $600 a week means that employees whose hours are reduced, or more modestly paid employees who are laid off or furloughed, might actually earn *more* money while drawing unemployment benefits than they would have if working full time.

On the other hand, if the employer has secured a Paycheck Protection Plan loan from the U.S. Small Business Administration ("SBA"), they will want to maximize the amount of that loan that is forgiven – and minimize the amount they will have to repay. Employers must pay close attention to PPP loan forgiveness factors such as their payroll expenses, staffing and pay levels, and to guidance from the SBA. Several of our colleagues are following these issues and have shared their insights about the SBA loan programs under the CARES Act in the following articles:

- Paycheck Protection Program: SBA Guidance and Application Available (Legal Alert)
- Congress Passes CARES Act: Stimulus Package Includes $349 Billion for SBA Guarantees of Forgivable Loans for Small and Medium Sized Businesses (Legal Alert)
- The Cavalry Has Arrived – Congress Passed and President Trump Signed Into Law the CARES Act (Blog Post, Larry's Tax Law)

For additional resources on how to navigate the business disruptions caused by COVID-19, please visit our COVID-19 Resource Center and reach out to the Foster Garvey team with any questions.