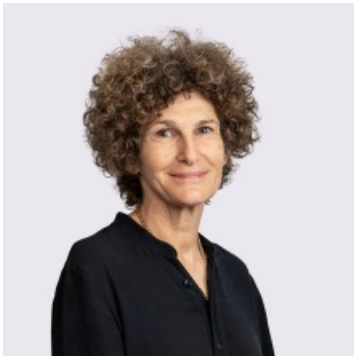


Options for Enticing Workers to Return from Unemployment after COVID-19 Shutdowns

By Felice B. Ekelman, Adam G. Guttell & Stephanie E. Satterfield

May 4, 2020

Meet the Authors



Felice B. Ekelman

Principal
212-545-4005
Felice.Ekelman@jacksonlewis.com



Adam G. Guttell

Principal
631-247-4675
Adam.Guttell@jacksonlewis.com



Stephanie E. Satterfield

(She/Her)

Being able to compete with the dramatically expanded unemployment benefits some workers are receiving from the Coronavirus Aid, Relief, and Economic Security Act (**CARES Act**) may be a hurdle for many employers when states begin relaxing their stay-at-home orders. Reportedly, workers who are receiving more through unemployment, and even workers who are receiving less, are reluctant to return to work.

CARES Act

The CARES Act significantly increased the unemployment benefits available to furloughed workers. An individual who qualifies for any state unemployment benefits will receive those benefits, plus an additional \$600 per week in federal Pandemic Unemployment Compensation (PUC). The additional \$600 weekly PUC is available through July 31, 2020.

States, DOL on Consequence of Refusing Offer

Unemployment officials in Iowa, Oklahoma, Tennessee, and other states reportedly **have announced** that refusing an offer to return to work “potentially disqualifies claimants from receiving unemployment benefits.” State officials have instructed employers to notify them if an employee refuses to return to work. In South Carolina, for example, its unemployment agency requires employers to make an “Offer of Work” to individuals receiving unemployment compensation. This Offer of Work can be made either orally or in writing; however, the law requires that the offer identify specific perimeters of the job (*i.e.*, probable wages, hours per week, expected duration of employment, nature of the work offered, and so on). In addition, the employer is required to submit a copy of the offer to the agency certifying that the offer was received and refused. If the employer fails to abide by these requirements, an employee can refuse the offer and continue to collect unemployment compensation.

The U.S. Department of Labor confirmed this position in its guidance, stating “[B]arring unusual circumstances, a request that a furloughed employee return to his or her job very likely constitutes an offer of suitable employment that the employee must accept.”

Further complicating this issue, employers that need employees to return to work may not be able to offer them their previous schedules. Employers may be forced to reduce hours because of ongoing restrictions on their businesses or because they need to limit payroll costs. Employees who are “partially unemployed” may be eligible for unemployment benefits, but they become ineligible if they earn more than a certain amount from their employer. In many states, these amounts are low. In Florida, for example, an individual who earns more than their weekly benefit under

Related Services

COVID-19
Wage and Hour

the state's formula is ineligible for benefits. The maximum weekly benefit in Florida is \$275.

Workshare

Where available, workshare programs offer employers an important way to deal with these issues. Currently, 26 states and the District of Columbia have operational workshare programs. See our article, [How State Workshare Programs Can Help Employers Reduce Costs, Avoid Layoffs, Furloughs](#). [Virginia](#) recently enacted a new workshare program.

Workshare programs were set up by state labor departments to encourage employers to use reductions in hours and pay as an alternative to layoffs. Generally, the employer is required to maintain benefits and must reduce hours within a specific range, often between 10% and 60%. The employer can reduce hours across its entire workforce, or a segment of its workforce. The employer must submit a plan for approval by the state unemployment authority. Importantly, the state's maximum earning threshold does not apply to workshare participants.

As an example, take a group of employees in New York that earned \$1,000 per week, for five days of work, before they were furloughed. Assuming the individuals are eligible for the maximum benefit, they would receive \$1,104 per week in unemployment benefits through July 31, if they continue to remain out of work. Requiring these individuals to return to work, five days a week, would essentially result in a pay cut.

As an alternative, the employer could use a workshare program that returns each employee to work for three days a week, at 60% of their prior compensation (\$600). Their partial unemployment benefit from New York State would be \$126, but they also would be eligible for \$600 in PUC. Considering the amounts these employees would receive for working three days a week (\$1,326), the workshare program allows the employer to create an incentive to return to work that is cost effective and likely to result in better employee relations. This outcome would not be possible if the employer simply reduced hours outside of a workshare program, because earning \$600 per week would exceed New York's maximum earning threshold (\$504 per week).

Week On/Week Off Furloughs

In states in which workshare is not available, intermittent furloughs of a week or longer may be a better option than continuous work at reduced hours and pay.

If an employer were to require its entire workforce to return to work at 50% of their prior hours or pay, the employees will be ineligible for unemployment benefits if they earn more than the state's maximum earning threshold.

Week on/week off furloughs allow employers to reduce payroll while maintaining a connection with employees. The employees earn their normal compensation for the weeks they work and should be eligible for unemployment benefits during weeks they are furloughed. Previously, this approach would not have been possible because state unemployment laws imposed a one-week waiting period. But the CARES Act incentivized states to temporarily waive these waiting periods. Every state that had a one-week waiting period (except Alaska, Oregon, and Utah) has

now temporarily waived their waiting periods.

As an example, assume an employer in New York employed a group of exempt employees at salaries of \$62,400 per year, or \$1,200 per week. If the employer needed to achieve a 33% cost saving, it might consider temporarily reducing each individual's salary by \$400 per week. (The employer also would have to reclassify these employees as non-exempt to avoid violating New York's minimum salary requirements.) Earning \$800 per week, the employees would not be eligible for any unemployment benefits because their earnings would exceed the maximum earning threshold in New York. But if the employer were to furlough one-third of the employees for a week at a time, it could achieve the same cost savings. The furloughed employees should be eligible for \$1,104 per week in benefits for the weeks they are furloughed. Assuming the employer's benefit plan permits furloughed employees to remain eligible for benefits, the employer can maintain benefit coverage.

Jackson Lewis attorneys are committed to helping employers make the best business decisions. For additional guidance on this issue, please contact a Jackson Lewis attorney.

©2020 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 1000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.