

MEMORANDUM

TO: Union Clients DATE: April 18, 2020

FROM: Willig, Williams & Davidson

RE: Workers Compensation & Unemployment Insurance During the COVID-19 Pandemic

INTRODUCTION

On March 18, 2020, and on March 27, 2020, the U.S. Congress passed the Families First Coronavirus Response Act (the "FFCRA") and the Coronavirus, Aid, Relief, and Economic Security ("CARES") Act, respectively. These laws include numerous emergency measures to combat the ongoing COVID-19 pandemic, including additional funding for states to help manage their unemployment insurance programs, expanded unemployment insurance benefits and eligibility, as well as incentives for states to temporarily relax or modify certain eligibility standards.

Since unemployment insurance programs are operated and administered at the state level, states that enter into conformity agreements with the U. S. Secretary of Labor may access the federal assistance detailed in the above legislation. Many states, including Pennsylvania, New Jersey, Illinois, and West Virginia have already done so or are in the process of doing so. The significant unemployment insurance highlights of the federal legislation include:

- Financial incentives for states that waive the "waiting week" – the first week of eligibility for unemployment insurance for which an individual otherwise may not receive unemployment insurance benefits. Unemployment insurance recipients may now receive benefits for the first week of eligibility.
- Flexibility for states applying the *able and available for suitable work* and *active search for work* eligibility requirements for individuals impacted by COVID-19.
- A flat \$600 per week supplement for unemployment insurance claimants between April 4, 2020, and July 31, 2020, that includes all eligible unemployment insurance claimants whether eligible for a total or a partial unemployment insurance weekly benefit.
- Up to 13 weeks of additional, supplemental benefits through December 31, 2020, for those who exhaust or have already exhausted their state unemployment insurance eligibility.

- Providing comparable benefits, including the flat \$600 per week and the up to 13 weeks of supplemental benefits, to individuals impacted by COVID-19, as specified in the law, who do not otherwise qualify for state unemployment insurance (*i.e.* gig economy workers, freelance workers, the self-employed, and workers who are not otherwise eligible for state unemployment insurance).

In addition, State Workers' Compensation laws, such as Pennsylvania's, have requirements that mandate that all employers have workers' compensation insurance, or are qualified for self-insurance. These laws provide financial compensation to workers who are injured or become ill by reason of their work and are critically important for workers exposed to COVID-19 on the job.

This memorandum focuses on Pennsylvania's Workers' Compensation laws, and while many of the general principles are present in other State Workers' Compensation laws as well, workers in other states should confer with their Union or counsel as to the law in their state. This is particularly important since some states are amending their laws in response to COVID-19. For example, Illinois has enacted an emergency rule modifying workers' compensation in that state which provides for a rebuttable presumption that exposure to COVID-19 arose out of and was connected to employment for certain first responders and other frontline workers.

The guidance below highlights what the new federal legislation has changed regarding both eligibility and economic benefits for union members experiencing economic losses from unemployment as a result of the COVID-19 pandemic and discusses eligibility for workers' compensation benefits for workers exposed or infected by COVID-19 while on the job.

Eligibility for State Unemployment Insurance

While these new federal laws provide much-needed financial assistance to workers who suffer wage losses, as well as financial assistance to states operating strained unemployment insurance systems, eligibility for unemployment insurance from the state remains largely unchanged and is still administered under state law, regulations, and applicable case law.

How do I know whether I am eligible for unemployment insurance?

The general eligibility criteria for unemployment insurance consists of being unemployed (that may include a reduction in work hours) through no fault of the employee's, financial eligibility (adequate earnings in the *base year*), and otherwise being able and available for suitable work. In addition, an employee receiving

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unemployment insurance must generally certify that s/he is actively searching for suitable work during each week for which s/he is receiving benefits.

The state (not the employer) administers and makes eligibility determinations for the unemployment insurance system. Employers do not determine whether an individual seeking unemployment insurance is eligible for weekly benefits – they can neither deny the individual benefits, nor can they ensure or guarantee that an individual will be determined to be eligible for benefits by the state.

When am I considered unemployed through no fault of my own?

The classic example for unemployment insurance eligibility is when an employer lays off an employee because it has ceased or reduced its operations. Generally, if the employee has lost work and, as a result, lost wages, s/he may be eligible for unemployment insurance. For example, an individual may be eligible for unemployment insurance regardless of whether s/he was laid off, is still employed in an unpaid leave status, was temporarily furloughed without pay or at reduced pay, or has had his or her hours of work reduced involuntarily.

As is becoming common during the current COVID-19 pandemic, if an employer shuts down, permanently or temporarily, and an employee is not paid their normal earnings during the shutdown, they have become unemployed through no fault of their own and should apply for unemployment insurance benefits.

In some states, including Pennsylvania, an employee whose work hours are involuntarily reduced but who remains employed on a shortened work schedule, may still be eligible for a reduced or *partial* unemployment insurance benefit, depending upon her or his average wages and the amount by which his/her work hours are reduced. Employees who would otherwise meet the eligibility requirements for unemployment insurance should check to see if their state provides *partial* unemployment insurance benefits.

In addition, an employee who quits, resigns, or otherwise voluntarily accepts reduced work hours is not automatically ineligible for unemployment compensation, although such a worker may find obtaining benefits more challenging. In Pennsylvania, workers who quit or voluntarily reduce their hours have the burden of establishing they did so for a *necessitous and compelling* reason.

By way of example, and as it relates to the current COVID-19 pandemic, some of the United States Department of Labor's ("DOL") guidance envisions a scenario in which an employee applies for unemployment insurance benefits after resigning or taking a leave of absence due to risk of exposure or infection from the virus. See *UIPL 10-20*. The DOL does not determine individual cases of unemployment insurance

eligibility for states, but the guidance does note that one criterion for states to consider, as they apply their own laws to cases involving a *voluntary quit*, is whether the employee is particularly at risk of succumbing to the virus.

What has the federal legislation changed regarding eligibility for state unemployment insurance benefits?

While unemployment insurance is not intended to serve as paid sick time for individuals infected with or exposed to the virus, participating states have been encouraged to be flexible in determining the standards for ability, availability and suitability of work during the current COVID-19 pandemic. In addition, states have modified or relaxed *active search for work* requirements to which recipients of unemployment insurance benefits must usually adhere.

By way of example, the Pennsylvania Department of Labor & Industry's *Frequently Asked Questions* guidance for unemployment insurance advises workers to apply if, "you cannot work because a medical or public official has directed you to quarantine or self-isolate because of COVID-19 exposure, symptoms, or a positive diagnosis; or you are caring for someone who is suspected of having or has tested positive for COVID-19."

When I file for unemployment insurance benefits, what must I disclose?

It is important to be as accurate and forthright as possible when applying for unemployment insurance. An individual who obtains unemployment insurance benefits through fraud will have to pay back the amount received and may be subject to criminal charges. In order to avoid even the appearance of fraud and protect themselves from such claims, applicants should be truthful and provide complete answers to any questions when applying for unemployment insurance benefits.

Eligibility for Pandemic Unemployment Assistance

If I do not qualify for regular unemployment insurance benefits, does the new federal legislation provide any other financial assistance?

The CARES Act also created the Pandemic Unemployment Assistance ("PUA") program, that provides relief for individuals who are unable to work, become unemployed, or who have lost income or revenue for specified reasons related to the current pandemic and who are not otherwise eligible for state unemployment insurance. While PUA is a federal program, it will be administered by states that choose to participate. PUA is available through the end of 2020 only, unless it is extended by the Congress.

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Although generally characterized as unemployment insurance for individuals who are usually ineligible, such as freelancers, gig economy workers, self-employed individuals, and other independent contractors, the PUA may provide benefits to union members who otherwise do not qualify for state unemployment insurance benefits. For example, employees who were eligible for unemployment insurance prior to the pandemic and who have exhausted their state and federal benefits, or workers new to the labor force who do not meet the minimum state financial eligibility requirements, may qualify for PUA. If a worker does not qualify for state unemployment insurance, s/he should check on whether s/he is eligible for PUA.

To be eligible for PUA, the worker must have experienced unemployment, be unable to work, or have experienced a reduction in work, for one of the COVID-19 related reasons provided by the law, including:

- Diagnosed with COVID-19;
- Experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- Household member diagnosed with COVID-19;
- Caring for a family or household member diagnosed with COVID-19;
- Caring for child or household member unable to attend school or another facility closed because of COVID-19;
- Cannot reach place of work because of a quarantine or a medical provider has advised to self-quarantine due to COVID-19;
- Cannot commence new employment or reach a new job because of COVID-19;
- Head of household died of COVID-19 rendering the individual the major support for the household;
- Necessary to quit a job as a direct result of COVID-19; and,
- Place of work closed as a direct result of COVID-19.

Any person receiving paid leave or teleworking for pay is not eligible for PUA. In addition, any person receiving paid leave pursuant to the FFCRA's paid sick leave provisions is not eligible for PUA.

If a worker is found eligible, PUA provides a benefit comparable to what s/he would receive under state unemployment insurance laws, and s/he is also eligible for the \$600 additional, weekly benefit and the 13 extended weeks of eligibility, subject to the same limitations as individuals receiving state unemployment insurance and with no *waiting week*. However, the nature of eligibility for PUA may mean that individuals only qualify for it for short periods of time. For example, an individual receiving PUA because they are caring for a child whose school is closed may not receive PUA for weeks after the school year would have ended. See *UIPL 16-20, 1-7*.

Eligibility for **Workers'** Compensation Coverage

The COVID-19 crisis has created many critical issues for Unions and the workers that they represent. As individual cases unfold, it is very important that members have clear guidance on how to access Workers' Compensation benefits. Employees have a clear right to Workers' Compensation coverage for medical and limited wage loss benefits when the COVID-19 virus is contracted as a result of their employment.

Unions should strongly encourage their members to protect themselves by preserving their rights to Workers' Compensation following a diagnosis of COVID-19. The long-term effects of the virus are unknown. Medical experts have already indicated findings of long-term damage to the lungs as well as cognitive issues due to infection with and/or treatment for the virus. These conditions may require very costly future medical care and may disable employees for prolonged periods of time. When the virus is contracted through exposures that occurred within the course and scope of employment, members have a clear right to Workers' Compensation.

The process for making a Worker's Compensation claim for COVID-19 is the same as for making a claim for any other type of work injury in Pennsylvania. Initially, an employee must provide notice that: 1) s/he has been diagnosed with COVID-19; and 2) the virus was contracted due to work-related exposure. A sample letter providing proper notice is attached.

After a member provides notice of the diagnosis of COVID-19 due to exposure at work, the employer is legally required to respond within 21 days. The employer must file either: 1) a Notice of Compensation Payable (NCP), fully accepting the virus as work-related; 2) a Temporary Notice of Compensation Payable (TNCP) that allows the employer to investigate the claim for an additional 90 days; or 3) a Notice of Compensation Denial (NCD). The employee must receive a copy of the form when it is filed with the Pennsylvania Bureau of Worker's Compensation.

If the claim is accepted, all medical and limited wage loss related to the virus must be paid by the employer or its Workers' Compensation insurance carrier. If, however, the claim is denied, the member should engage counsel and file a Worker's Compensation claim so that s/he is properly covered under the law. There is no downside to providing notice or claiming coverage. By contrast, if the employee fails to provide notice in a timely fashion, or fails to claim benefits, s/he will be excluded from getting benefits for what could be a lifelong illness. Such an outcome must be avoided at all costs.

CONCLUSION

After reviewing the above guidance, Unions should have a better understanding of members' rights to workers' compensation and to unemployment insurance, as modified by the new federal legislation outlined above.

Of course, a member with a specific question about her or his own eligibility should consult with their union representative or a qualified attorney. The Attorneys at Willig Williams and Davidson have been counseling union leadership and members regarding the COVID-19 crisis. If you, or any of your members, have questions or need assistance please feel free to contact us at 215-656-3600.

SAMPLE NOTICE LETTER

The letter should be addressed to the Head of Human Resources or the worker's supervisor. Please note that it is important to date the letter.

[Date]

[Head of Human Resources/Supervisor]

Re: Notice of Workers' Compensation Claim for COVID-19

Dear [insert name]:

I am writing to formally notify my employer of 1) my recent diagnosis with the COVID-19 virus and 2) my belief that I contracted the virus in the course and scope of my employment at [insert employer's name].

Please advise me of the next step in the process of receiving Workers' Compensation benefits due to this diagnosis.

Very truly yours,

[Members name]

cc: Plant Manager and/or Supervisor and/or HR