Nation's Restaurant News


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The challenge of getting restaurant workers to come back

Fear of COVID-19 and the pull of enhanced unemployment benefits is keeping employees off the job, but that may not be enough to turn down work

Arif Virji | Sep 03, 2020

As restaurants gradually reopen for greater levels of dine-in service, employers are faced with the challenge of convincing their workers to come back.

Through the end of July, many of those workers were sustained by an extra $600 per week in additional emergency support created under the federal Coronavirus Aid, Relief, and Economic Security, or CARES, Act, a relief effort Democrats in Congress would like to see continued. Senate Republicans are reportedly considering a bill that would provide $300 per week in enhanced benefits.

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In the meantime, President Trump has issued an executive order granting a $400 weekly benefit and a number of states, including California, have negotiated accepting a modified version of that executive order, pending a final resolution of the standoff in Congress. As a result, most employees will be guaranteed at least some level of significant additional unemployment benefits through the end of the year.

Restaurants that are reopening will therefore continue to confront the problem of employees who may prefer to remain on those enhanced unemployment benefits — especially in states where COVID-19 cases are spiking.

Related: California restaurant owner says furloughed employees won't come back to work because they're making $1,000 a week in unemployment

This is a problem that can not only delay a reopening, but can, if not handled properly, result in health-and-safety problems at restaurants and can greatly increase liability exposure for restaurateurs.

Restaurant workers collecting unemployment benefits who are reluctant to return to work may be doing so for many reasons, some that are permitted under the CARES Act and others that are not.

As a starting point, the law is clear on one point — a generalized fear of contracting the virus by itself is not enough to permit an employee to refuse to return to work while continuing to collect unemployment benefits.

According to the U.S. Department of Labor, individuals receiving regular unemployment compensation must accept any offer of "suitable" employment. Except for unusual circumstances, an employer's request that a furloughed employee return to his or her job most likely constitutes an offer of suitable employment that the employee must accept.

Nevertheless, there are legitimate exceptions to this general rule , and employers must balance the their legitimate business needs with the rights of employees under state and federal law.

Employees at high risk of serious health complications from COVID-19 due to pre-existing medical conditions may be entitled to reasonable accommodations under the Americans with Disabilities Act, or ADA, to eliminate possible exposure. The same may be true for employees with certain pre-existing mental health conditions, who may have difficulty handling the stresses in daily life that created by the COVID-19 pandemic.

Per the Equal Employment Opportunities Commission , employers should be able to take some steps to accommodate an employee's needs without undue

hardship to the employer, such as leaves of absence or other on-the-job accommodations.

Although employees may not refuse to return to work while collecting unemployment benefits based on an *unreasonable* fear of contracting COVID-19, the failure of an employer to take reasonable steps to create a safe work environment may result in a *reasonable* fear that renders the offered job not "suitable."

Moreover, the Occupational Safety and Health Act, or OSHA. creates a general duty to maintain safe working places and mitigate any health or safety hazards. Employers therefore should establish and document a health-and-safety protocol aimed at decreasing the risk of exposure to COVID-19 in the workplace before asking employees to return to work.

Furthermore, restaurant employers should be aware of the possibility of retaliation complaints from employees who complain that the employer's reopening plans violate federal, state or local laws. Similarly, a complaint brought by a group of employees may qualify as a "protected concerted activity" under various labor-relation statutes.

Employees who refuse to return to work due to childcare issues may have a legitimate reason to not return to work. The CARES Act provides enhanced benefits to an individual who is the "primary caregiver " of a child whose school is closed due to COVID-19 concerns. This issue is particularly important now as many schools offer only on-line classes in the fall.

Restaurants faced with an employee who refuses to return to work and who wishes to continue receiving extra benefits must carefully consider the reasons why provided by the employee.

The CARES Act does not permit an employee to refuse work and to continue to collect extra unemployment benefits based solely on a generalized fear of contracting COVID-19. However, special consideration should be given to employees who have legitimate physical or mental health issues that may require the offer of a reasonable accommodation or who have COVID-19-related family care issues.

Above all, restaurants must ensure that they have instituted all necessary health-and-safety protocols in the workplace before requiring employees to return to work.

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