RETURNING TO WORK FROM THE COVID QUARANTINE
QUESTIONS AND ANSWERS FOR WORKERS AND EMPLOYERS

As Georgia businesses begin to answer the Governor's call to re-open to save the State's economy, employees are contacting us with their concerns about returning to work while the COVID virus continues to plague us. Here we answer four of the most common ones.

If My Employer Recalls Me, Can I Refuse to Report?

Employment is "at will" in Georgia and by default in the vast majority of U.S. states. This means that workers can quit their jobs, and employers can fire workers for pretty much any reason at any time unless the worker has a contract saying otherwise, or unless the employer's reason for firing the employee is one that federal or state laws prohibit. So employers are generally free to fire workers who refuse to work because of virus concerns. However, there are some exceptions to this rule.

The National Labor Relations Act gives workers — both unionized and union-free— a job-protected right to engage in "concerted activity for the purpose of mutual aid or protection." This right covers a range of activity from spontaneous walk-outs to coordinated strikes. If workers are fired for protesting unsafe conditions, they can complain to the National Labor Relations Board. But there are some limits to this shield. The NLRA protects group-based activity, so it would not cover workers who individually refuse to work solely to protect themselves. Not only that, but while an employer can't fire striking workers, it can *permanently replace* them. And, to be protected from termination, workers who strike or refuse to work because of fear for their own health or safety must be able to prove their fear is reasonable.

To the extent that an employee has a reasonable good-faith concern that the working conditions aren't safe, the Board is likely to find their refusal to work as protected. That is a heavy burden, but it can be met.

Under the Americans with Disabilities Act, persons with genuine disabilities (i.e. substantial impairments of major life functions such as workers with co-morbid health conditions, compromised immune systems, diabetes, heart-rhythm malfunctions like a-fib, or morbid obesity) may also be able to avoid returning to the workplace (but not to refuse to work altogether. The law requires employers to provide disabled workers "reasonable accommodations" to a disability that will allow them to continue or resume performing their jobs so long as the accommodations don't pose "undue hardships" for the business. If a worker has a condition that puts them at high risk for COVID-19 complications, their employer may have to let them take leave or work remotely, even if their office has reopened. Of course if they don't work, they aren't entitled to pay.

Do I Lose Unemployment If I Refuse to Go Back to Work?

Unemployment insurance has been a lifeline to tens of millions of workers who have lost their jobs during the pandemic, especially after the federal government boosted workers' weekly benefits by $600 in the Coronavirus Aid, Relief and Economic Security Act. In most

cases, workers will lose these benefits if they refuse to return to their jobs after being called back by their employers.

But some may not. While some state unemployment offices have told employers to report workers who refuse requests to return, others have been more lenient. For example, North Carolina has said workers can refuse to work and continue to collect benefits if they're at high risk for severe complications from COVID-19 or live with someone who is. The Georgia Department of Labor may also consider high risk for severe Covid-19 complications as a valid excuse for refusing to return to work and continuing unemployment benefits; but this will be decided on a case-by-case basis.

And workers may be able to keep collecting unemployment benefits if they refuse to report to an unsafe workplace. The federal government has said workers can't collect if they refuse "suitable work," which gives workers some leeway to refuse unsuitable work. What makes work unsuitable is not clear. However, a workplace in which medically-vulnerable workers will be exposed to unreasonably heightened risk of Covid-19 exposure without sufficient personal protective equipment would be one in which a medical worker could refuse an assignment to treat COVID patients. Once again, these issues will be determined on a case-by-case basis.

The Social Security Act, which controls regular unemployment benefits, looks to the "prevailing conditions of work" to determine suitability. Under this standard, work would not be suitable if safety conditions are worse than at other comparable places of work. The Stafford Act's Disaster Unemployment Assistance program, on the other hand, says work isn't suitable if it presents an "unusual risk to the health, safety or morals of the individual."

But which standard applies and how they relate to the risks posed by the pandemic is unclear because the administration has not released clear guidance on this.

Even if workers have a right to continue collecting unemployment, it may not be easy to assert it. If workers lose benefits because of a refusal to work, they would have to appeal to state unemployment offices strained by millions of sudden filings. That changes the calculus for the worker also.

Does My Employer Have to Protect Me?

Federal and state laws require employers to provide their workers a safe workplace, but they set few hard-and-fast rules for work during a pandemic.

The Occupational Safety and Health Act requires employers to follow certain safety standards put out by Occupational Safety and Health Administration, some of which may apply to COVID-19. For example, OSHA requires employers to provide workers respirators or other personal protective equipment if job hazards demand it, though the agency has given most non-health care employers leeway not to provide masks during the crisis. Another rule requires employers to provide hand-washing facilities to nonmobile workers. And some employers may be subject to stricter rules set by state safety offices, such as a Cal/OSHA rule requiring employers to protect workers from airborne diseases.

The Occupational Safety and Health Act also imposes a "general duty" to keep the workplace "free from recognized hazards" that could cause workers serious harm.

In theory, these rules require employers to protect their workers from COVID-19. And Labor Secretary Eugene Scalia has **pledged to wield them** against employers that don't implement reasonable protections. But so far, this pledge has been hollow. As of May 26, 2020 OSHA hasn't taken any enforcement action. The agency has reported fielding more than 4,200 complaints to date and closing more than 3,000 investigations, but has not announced any citations, she said.

Still, to the extent they feel their employers aren't providing a safe workplace, workers can file complaints with OSHA or their state's safety enforcer. This triggers a probe that can lead to a citation, and blocks employers from retaliating against workers who blow the whistle.

If workers feel they've been retaliated against, they have 30 days to complain to OSHA. The agency then investigates, and if it finds merit to the worker's claim, attempts to settle the dispute before filing suit if it can't. But the OSH Act's whistleblower provisions are weaker than those of other laws because workers must rely on the DOL to press their case, and they can't get their jobs back or other interim relief while disputes play out. When it works, it's good protection. But there are a lot of hoops you have to jump through before you get there.

What Happens if I Get Sick?

Workers who get coronavirus or can't work because they have to take care of family members may be able to take paid time off, even if their employer doesn't ordinarily offer paid sick time.

The Families First Coronavirus Response Act requires employers with fewer than 500 workers to provide short- and long-term leave to workers who come down with COVID-19 or can't work for certain reasons tied to the virus.

Though some states (but not Georgia) have laws making employers provide paid sick and family leave, FFCRA is the first-ever federal mandate. However, it leaves out a large portion of the workforce — the law doesn't cover about 6.8 million workers at large firms who don't get paid leave, according to an Economic Policy Institute analysis of DOL data.

Under the law, workers can take two weeks off at full salary — up to $511 per day — if they're subject to a government isolation order, their doctor has told them to self-quarantine or they have COVID-19 symptoms. They can also take off at two-thirds pay — capped at $200 a day — to care for family members who are subject to quarantine orders or children whose schools have closed. Workers whose school-age kids are now at home can also take off up to 12 weeks at partial pay to care for them.

The law also makes it illegal for employers to retaliate against workers who request paid sick days or leave under FFCRA and lets workers sue if they've been underpaid or illegally denied time off. These protections are robust because they're built on existing law. The two-week benefit is built on the Fair Labor Standards Act, which sets pay standards, and the

leave benefit is based on the Family and Medical Leave Act, which provides workers unpaid, job-protected time off to deal with medical issues. Practitioners who are skilled and comfortable with the FLSA and the FMLA should be able to pretty quickly and appropriately get into court and correct these violations. Workers who get sick on the job may also be able to collect workers' compensation, a state-administered payment for injuries or illnesses that stem from work; but workers would need to show some sort of proof or evidence that they likely caught [COVID-19] at work (which may be difficult).