

# Can a Worker Who Was Fired for Refusing a Vaccine Collect Unemployment?

Now that the Pfizer-BioNTech vaccine has been fully approved—and as the COVID-19 delta variant continues to spread—more employers may decide to require workers to get vaccinated. Employees who are fired for refusing to get vaccinated may be violating a company policy and ineligible for unemployment benefits.

"Unemployment is available to employees who lose their jobs through no fault of their own," explained Lindsey Self, an attorney with Eastman & Smith in Toledo, Ohio.

In most states, employees are not eligible for unemployment benefits if they are fired for violating a company policy, because it is considered misconduct. So if a company has a vaccination policy and the consequences for violating that policy are clear, Self said, the employee may be ineligible for such benefits unless the worker was exempt from the policy for medical or religious reasons.

Jason Habinsky, an attorney with Haynes and Boone in New York City, said refusing to get vaccinated may be akin to failing to adhere to another company safety protocol, such as a training requirement or refusing to take an employer-mandated drug test. However, the unemployment insurance agency likely will consider a totality of factors, he noted, such as whether the employee had a reasonable basis for refusing the vaccination.

The agency may also look at whether the company policy was applied uniformly to similarly situated employees, as well as other extenuating factors, Habinsky said.

"A critical factor is that the employer had a clear policy in place that the employee violated," noted Chase Hattaway, an attorney with RumbergerKirk in Orlando, Fla. The key is to tell employees in writing what is required and when they will be eligible for an exemption, he said.

## **Review State Law**

"The standard for denying unemployment benefits varies from state to state," explained Elizabeth Liner, an attorney with Baker Donelson in Baton Rouge, La. "Be sure to evaluate the impact on a state-by-state basis and understand that the situation remains fluid as the laws are continuing to change with regard to these types of policies."

Liner recommended that employers check with the relevant state agency regarding the position it will take on applications for unemployment benefits, as well as the reasonableness of vaccination mandates.

States generally bar employees who are fired for misconduct from collecting unemployment benefits, but some states apply a higher "gross misconduct" standard.

Whether the refusal to get vaccinated constitutes misconduct may depend on how a particular state law defines its exclusions and how the state's rules have been interpreted in the past, noted Robert Duston, an attorney with Saul Ewing Arnstein & Lehr in Washington, D.C.

"Some states may define 'cause' as any refusal to follow employer rules and policies, in which case a refusal to get vaccinated or to provide proof would likely be sufficient cause," he said. "In a state with higher standards, such as gross misconduct, a refusal to comply with such a mandated safety rule may or may not rise to that level."

The burden of proof is typically on the employer to show that the employee should be denied unemployment benefits.

Lawmakers in several states have proposed legislation that would prohibit state agencies from denying unemployment benefits for employees who refuse to comply with a vaccine mandate. "Employers with employees in these states should follow the progress of the legislation to ensure compliance," Self recommended.

Notably, Montana has prohibited all discrimination based on vaccination status.

### **Consider Why the Employee Refused**

Under most circumstances, an employer may require employees to be vaccinated against the coronavirus and provide documentation of such, Self noted. "Further, employees may be terminated for failing to comply with a company policy requiring vaccination, and unemployment benefits may be denied for misconduct."

But employers need to consider medical and religious objections that are protected under the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964. Employers should [explore reasonable accommodations](#) for employees who refuse to get vaccinated for these reasons.

"A similar analysis would apply to an employee who voluntarily leaves employment in response to a vaccination mandate," Habinsky said. "While most states would ordinarily disqualify an employee who leaves voluntarily, an agency would likely consider whether the employee had a reasonable basis for leaving, such as a disability or religious belief, and other relevant circumstances."

Employers should be able to show that they had a clear policy, the employee received the policy and the employee refused to comply, Hattaway said. "Have documentation of the reason for the employee's termination."

## Contesting a Claim

Employers have the right to contest unemployment claims that they feel are unwarranted. "Effective claims control may keep the employment insurance rate low for employers," Self noted. "However, contesting claims may promote future litigation."

Ultimately, she said, it is up to the employer to decide whether to contest an unemployment claim, and the decision should be based on the specific circumstances with the employee.

When deciding whether to contest a claim, Duston said employers should:

- Know and comply with applicable state laws, which are changing.
- Understand how the state has interpreted its exclusions when employees have refused to follow other safety rules.
- Be able to demonstrate that they attempted to provide accurate information, and address any concerns regarding vaccine hesitancy before firing the employee. Employees who are still vaccine-hesitant may be viewed differently than employees who just refuse the vaccine.

Habinsky said employers should watch for more guidance. "Given that we are at the forefront of what may become a wave of unemployment insurance claims on this basis, we do expect some states to either provide guidance or implement modifications to applicable laws in order to provide more clarity."

**Source:** SHRM at <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/can-a-worker-who-was-fired-for-refusing-a-vaccine-collect-unemployment.aspx>