



August 3, 2020

-- via mail and email --

Governor Andy Beshear
Office of the Governor
700 Capitol Avenue, Suite 100
Frankfort, KY 40601

Re: Next Steps to Protect Kentucky Workers: “Suitable Work” and “Good Cause” in Unemployment Insurance; Online Health and Safety Complaints and Enforcement

Dear Governor Beshear,

Thank you for your actions to keep Kentucky workers safe. We appreciate your orders to authorize flexibility in Unemployment Insurance (UI) on two elements of safety in the context of COVID-19: suitable work and good cause not to work in an unsafe workplace.¹ We also very much appreciate Secretary Roberts taking steps pre-pandemic to make an online workplace health and safety complaint form available on the Labor Cabinet’s website.

Kentucky Equal Justice Center is a nonprofit advocacy center for low income Kentuckians. We work closely with Kentucky’s federally funded civil legal aid programs across the state, offering training, litigation expertise and advocacy support for their programs and clients. We challenged in court your predecessor’s Medicaid plan and are thrilled with your initiatives so far on access to health coverage.

We and fellow advocates write today to urge you to build on your actions (a) on unemployment insurance by adding crucial COVID-19 and safety-related detail and (b) on workplace safety by making the online complaint form easier to find and use.

At the outset we note that the Centers for Disease Control (CDC) has issued guidance identifying people at higher risk of infection. These include people age 65 and older, people with underlying medical conditions including lung disease and severe asthma, and people who are immunocompromised due to other medical conditions.

¹ Executive Order 2020-235, issued March 16, 2020, and Education and Workforce Development Cabinet order of March 25, 2020, which temporarily allows for flexible interpretation or waiver of the good cause provisions in eligibility determination, “including but not limited to leaving work due to a reasonable risk of exposure to infection (i.e., self-quarantine) or to care for a family member affected by the virus.”

The CDC also has issued guidance on workplace protections to reduce risk of exposure, including social distancing, use of protective masks, shields and other personal protective equipment, access to frequent hand washing or hand sanitizer, and routine cleaning of frequently touched surfaces.

Your own Healthy at Work initiative draws on CDC guidance and incorporates standards, benchmarks and tools for healthy reopening. Indeed, Kentucky this past week made the “honor roll” of fourteen states identified by the National Employment Law Project (NELP) as having adopted comprehensive COVID worker safety protections so far.²

Among these leading states, Virginia provides an especially worthy touchstone, in the form of its Emergency Temporary Standard, adopted July 15.³

Standards must be upheld through enforcement. The email distributing the NELP report notes that Kentucky OSH has not yet been charged with enforcing the Kentucky standards. As you remind us frequently, only public health and safety from the pandemic will ensure economic recovery. Our recommendations follow.

1. Determination of Suitable Work Pursuant to KRS 341.100

Workplaces lacking proper safety precautions do not qualify as suitable work, and jobseekers should not be disqualified from UI benefits for refusing to return to a workplace that does not take reasonable precautions to protect workers from communicable disease.

Recommendation

Through Executive Order and implementing regulations as needed, the Kentucky Office of Unemployment Insurance (OUI) shall consider the risk to an individual’s health when making determinations on suitable work. Determination shall include but is not limited to consideration of:

1. the individual’s prior or current health conditions, age, or other risk factor(s) that may lead the individual to be immunocompromised;
2. whether the individual is at higher risk of contracting COVID-19 according to guidance issued by the Centers for Disease Control; and
3. whether the workplace provides proper facilities, equipment, training, supplies, and physical distancing necessary to permit the individual to take reasonable precautions to prevent the infection of the individual from communicable disease in the workplace consistent with guidance issued by the Centers for Disease Control.

This provision shall continue in effect at least until six months after the expiration of the Governor’s Declaration of State of Emergency, dated March 6, 2020.

² Berkowitz, Deborah, “Which States and Cities Have Adopted Comprehensive COVID Workers Safety Protections So Far.” National Employment Law Project. <https://www.nelp.org/blog/which-states-cities-have-adopted-comprehensive-covid-19-worker-protections/>

³ §16VAC25-220, Emergency Temporary Standard Infectious Disease Prevention: SAR CoV-2 Virus that Causes COVID-19. Virginia Department of Labor and Industry. Adopted July 15, 2020. <https://www.doli.virginia.gov/wp-content/uploads/2020/07/COVID-19-Emergency-Temporary-Standard-FOR-PUBLIC-DISTRIBUTION-FINAL-7.17.2020.pdf>

2. Good Cause for Voluntarily Leaving Work

Workers who voluntarily leave work due to COVID-19 related issues should not be denied UI. Protection should extend to workers who have left the job due to a lack of adequate safety precautions at their workplace and to those who have left to care for themselves or a family member.

Recommendation

Through Executive Order and implementing regulations as needed, the Kentucky Office of Unemployment Insurance (OUI) finding of good cause for voluntary leaving employment shall include:

1. claimants who left employment based on being diagnosed with COVID-19 or upon experiencing symptoms of COVID-19 and seeking a medical diagnosis;
2. claimants who left employment to care for quarantined or sick family or household members with COVID-19 or are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
3. claimants who have left employment in order to quarantine on a doctor's order;
4. claimants who have left employment because their employer did not make available to the individual the facilities, equipment, training, supplies, and physical distancing necessary to permit the individual to take reasonable precautions to prevent the infection of the individual with COVID-19 consistent with guidance issued by the Centers for Disease Control; or
5. claimants who are at a higher risk of contracting COVID-19 according to guidance issued by the Centers for Disease Control and who have a family member in their household who is immunocompromised.

This section shall continue in effect at least until six months after the expiration of the Governor's Declaration of State of Emergency, dated March 6, 2020.

3. Access to an online complaint form

In its [2018 Follow-up Federal Monitoring Evaluation Report](#),⁴ OSHA criticized Kentucky for not accepting reports of workplace safety concerns online. It said:

KY OSH has elected to not acknowledge complaints with electronic signatures as being valid signed complaints, even though State law KRS 369 – Information Technology allows agencies to recognize electronic signatures as being acceptable forms of signature. This policy is not at least as effective as OSHA's policy of accepting electronic signatures as valid signatures. Electronic complaints that are forwarded to KY OSH are not being properly addressed.

During a meeting with Secretary Roberts and staff on January 16, 2020, pre-pandemic, we asked that the Labor Cabinet implement an online form. We followed up with suggestions, including an approach suggested by NELP: a link to the federal form which upon submission automatically would be forwarded to Kentucky.

We were delighted when the link appeared shortly thereafter, in a drop-down menu on the Labor Cabinet's website, among other complaint forms. However, later we learned from Prof. Ariana Levinson

⁴ [2018 Follow-up Federal Monitoring Evaluation Report](https://www.osha.gov/sites/default/files/2019-06/kentucky_2018.pdf). https://www.osha.gov/sites/default/files/2019-06/kentucky_2018.pdf

at the Brandeis School of Law that students upon searching online did not find the form and instead found language suggesting online complaints were unacceptable.

Upon inquiry in May, we learned that Kentucky had received 287 complaints from federal OSHA since January 1. By contrast, Deborah Berkowitz at NELP points out that Oregon OSHA puts the complaint form “front and center”⁵ and has received thousands of complaints. We have asked that the Labor Cabinet take a similar “front and center” approach and are happy to provide suggestions and examples.

Recommendation

We ask that the Cabinet place a prominent, clearly labeled link to a submittable online complaint form on its home page, perhaps in the same format as the orange COVID-19 alert banner at governor.ky.gov. We further ask that through Executive Order, Kentucky OSH be charged with enforcement of the COVID 19 workplace standards.

Conclusion

These are unprecedented times. Today, UI is a lifeline for hundreds of thousands of workers and their families. Eligibility requirements should not adversely affect our efforts to contain the spread of COVID-19. Workers should have ready access to tools to point out unsafe conditions.

Thank you for the strong steps taken so far, and for your consideration of our recommendations. Please feel free to reach out to us with any questions you may have.

Sincerely,



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Cc: Secretary Larry Roberts, Labor Cabinet

⁵ <https://osha.oregon.gov/workers/Pages/index.aspx>