

Governor Jim Justice
c/o Brian Abraham, General Counsel
State Capitol, 1900 Kanawha Blvd. E
Charleston, WV 25305
sent via email to Brian.R.Abraham@wv.gov

Ed Gaunch
Secretary of Commerce
1900 Kanawha Boulevard East
Building 3, Suite 600
Charleston, WV 25305
sent via email to ed.gaunch@wv.gov

Russell Fry, Acting Executive Director
Scott Adkins, Acting Commissioner
WorkForce WV
1900 Kanawha Boulevard East
Building 3, Suite 300
Charleston, WV 25305
sent via email to russell.l.fry@wv.gov
sent via email to scott.a.adkins@wv.gov

May 11, 2020

Dear Governor Justice, Secretary Gaunch, Acting Director Fry, and Acting Commissioner Adkins:

The undersigned organizations and individuals are calling on you to take immediate action to protect workers with health conditions that put them at risk for complications from COVID-19, and those who live with people who have health complications that put them at risk for complications from COVID-19. As our economy begins to reopen, these individuals should take additional precautions to protect themselves and their loved ones. This may include turning down work opportunities where there is a significant risk of exposure to COVID-19. These individuals should not be denied unemployment benefits for making this decision.

Governor Justice has repeatedly upheld that the health and safety of our workforce must be a top priority. He has urged West Virginians who are at elevated risk of serious illness from COVID-19 to continue to remain at home. West Virginia has the population most at-risk in the country of serious illness if they contract COVID-19, due to our high prevalence of underlying medical conditions including asthma, respiratory conditions, diabetes, obesity, and other conditions.¹ Further, many of the workers in industries that are reopening first face elevated health risks and disparities, while also often lacking health coverage and paid leave for illnesses.² Failing to take steps to protect these individuals will only further hurt our disability and elderly communities. Even before the

¹ Wyatt Koma et al., How Many Adults Are at Risk of Serious Illness If Infected with Coronavirus? Updated Data The Henry J. Kaiser Family Foundation (2020), <https://www.kff.org/global-health-policy/issue-brief/how-many-adults-are-at-risk-of-serious-illness-if-infected-with-coronavirus/> (last visited May 5, 2020).

² Kelly Allen & Sean O'Leary, Low-income Earners, Women and Workers of Color First Back to Work under Governor's Plan - West Virginia Center on Budget & Policy West Virginia Center on Budget & Policy (2020), <https://wvpolicy.org/low-income-earners-women-and-workers-of-color-first-back-to-work-under-governors-plan/> (last visited May 5, 2020).

COVID-19 crisis, West Virginia had the highest rate of disability in the nation, and the lowest rate of employment for people with disabilities.³

As businesses reopen, these at-risk workers must have the option to continue sheltering at home for their safety, in order to minimize their potential exposure to COVID-19. Specifically, we request you:

- 1. Confirm that individuals with health conditions that put them at risk for complications due to COVID-19 are entitled to unemployment benefits if they leave or turn down work that risks exposure.**

Code and caselaw in West Virginia make it clear that a person is not ineligible for unemployment if they decline work for health concerns. The code describes someone as eligible for unemployment if they are doing what a “reasonably prudent person” in their situation would do.⁴ The code goes on to state that a person is not disqualified if they leave their employment for health reasons, including a condition that could be worsened or aggravated by work.⁵ The West Virginia Supreme Court of Appeals has ruled that people leaving the workplace for health reasons do not leave voluntarily.⁶

Allowing people with disabilities and underlying health conditions to collect unemployment even if they have turned down certain job opportunities is also a prudent public policy. Substantial measures were undertaken and continue to be utilized to minimize the death toll of the COVID-19 outbreak. Forcing the people most at risk of succumbing to this disease into the workplace would undermine those measures. Currently employers are being given the option of choosing to reopen or remain closed for safety considerations. An employee should be able to make the same determination for themselves.

We call on you to issue a clear statement based on existing law and sound public policy ensuring that individuals with health concerns know that those concerns can be a valid excuse to turn down work that would create a significant risk of exposure.

- 2. Allow individuals who live with at-risk individuals to continue to collect unemployment if they turn down or leave work that risks exposure.**

It is just as important that employees can keep their families safe and healthy during the COVID-19 crisis as it is that they can protect themselves. An individual is making a rational decision to protect family if someone they live with is at risk for health complications, and they choose to limit exposure. The same governmental interest in protecting life exists regardless of whether it is the employee or someone who lives with them.

Factors that the Commissioner must consider in suitability for work include the health, safety, and *morals* of the individual.⁷ Although in standard practice, morals would refer to personally-held beliefs that might prevent certain job duties, during a declared state of emergency we believe you have the ability to broaden this definition to cover people who are protecting family members. The authority of the Commissioner to consider other circumstances when making a decision about eligibility for unemployment has been found in caselaw too. “Although the statutory factors must be considered in analyzing the issue of the suitability of available employment, other salient factors may also be considered in light of the attendant circumstances presented in a particular case.”⁸

³ Brett Ziegler, *Clocked Out For Good*, U.S. News and World Reports, 2016, <https://www.usnews.com/news/best-countries/articles/2016-09-16/worldwide-people-with-disabilities-struggle-to-find-jobs> (last visited May 5, 2020).

⁴ W. Va. Code §21A-6-1

⁵ W. Va. Code §21A-6-3(1)

⁶ *Gibson v. Rutledge*, 171 W. Va. 164, 168 (1982)

⁷ W. Va. Code §21A-6-5

⁸ *Perfin v. Cole*, 174 W. Va. 417, 420 n.3 (1985)

Giving workers the option to decline work to protect family does mean that every person living with someone with a health condition will decline work. Nor does it mean that a person who might turn down one opportunity would turn down all offers. Instead, making it clear that people *may* consider the wellbeing of their family will give people the flexibility to find work where they can minimize the risk to their family members and others who share their household.

We call on you to issue a rule allowing the Commissioner to consider the health of those in a household in considering whether or not a particular employment opportunity is suitable.

3. Publicly release the conditions being used by WorkForce WV to determine suitable work during the COVID-19 crisis.

Throughout the crisis transparency and communication has been essential in keeping people informed amid a rapidly changing situation. The same level of transparency must persist as the economy begins to reopen. Ensuring that there are clear guidelines about how WorkForce WV is assessing unemployment applications – particularly for those who are at-risk for complications or live with people who are at-risk for complication from COVID-19 – is a critical element of this transparency.

With clear guidelines people are more likely to have reasonable expectations about whether their specific claim for unemployment will be accepted. Advocates will be able to effectively and efficiently assist applicants without burdening the system with repeated inquiries or legal actions. Clear guidelines will also help WorkForce WV to ensure that there is uniformity and predictability in decisions regarding eligibility for unemployment.

For all of these reasons we call on you to release the conditions being used to the public.

4. Ensure that the Commissioner is engaged in individualized assessments of suitability, taking into account the individual's health, safety, and morals.

The COVID-19 crisis has created an unprecedented spike in unemployment claims.⁹ Despite the backlog and urgency with which claims need to be processed, it is still important that the state meet its legal obligation to make full, individualized assessments. A full assessment must include consideration of: (1) the degree of risk involved to the individual's health, safety, and morals; (2) the individual's physical fitness and prior training; (3) their experience and prior earnings; (4) their length of unemployment; (5) their prospects of securing local work in their customary occupation; (6) the distance of the available work from their residence.¹⁰ As noted above, the Commission may also consider additional factors, and we urge the Commissioner to take into consideration the policy prerogatives to mitigate the risks caused by the COVID-19 outbreak.

A thorough review ensures that applicants get the full consideration and due process due when applying for unemployment protection. Accounting for health and safety is always important, but deference for safety considerations must be heightened in the midst of a deadly pandemic. We call on you to ensure that all applicants will be granted a thorough review which takes into account all relevant factors, including the health and safety of the individual and those living with them.

5. Issue a statement declaring it a public policy of West Virginia for employers to provide employees with safe workplaces in accordance with OSHA/HHS guidelines.

⁹ Chris Lawrence, WorkForce WV sorts through massive claims WV MetroNews (2020), <http://wvmetronews.com/2020/04/11/workforce-wv-sorts-through-massive-claims/> (last visited May 5, 2020).

¹⁰ W. Va. Code §21-A-6-5; Perfin, 174 W. Va. at 420 (1985).

The Occupational Health and Safety Administration (OSHA) has put out guidelines in response to the COVID-19 crisis.¹¹ While these guidelines are not legal obligations, they provide descriptions that help to classify the risk of exposure based on type of work, and also best practices for protecting employees. West Virginia could give additional force to these guidelines with a declaration that the policy of the state is that employers should follow these guidelines.

Making a declaration adopting these guidelines as policy would have several benefits. It would help to clarify what types of jobs do create moderate and high risks of exposure, which would help in making suitability decisions. It would provide guidance on what steps an employer can take to reduce risks for individuals with health concerns. It would help to reinforce best practices, developed by leaders in workplace safety to reduce the spread of COVID-19. Declaring these guidelines to be state policy would also help to protect whistleblowers in private employment who raise concerns about employers that are not taking adequate steps to protect their staff and customers. However, the declaration does not carry the force of law, ensuring that it is not mandatory for employers to comply. For these reasons we ask that you formally declare OSHA guidelines to be consistent with state policy.

6. Take proactive steps to educate employees and employers about unemployment options during this crisis.

Confusion is to be expected in any crisis. The State can, and should, take affirmative steps to minimize confusion. Unemployment has been extended, and expanded to contractors. The Coronavirus Aid, Relief, and Economic Security (CARES Act), Paycheck Protection Program (PPP), Family Medical Leave Act (FMLA) and Emergency Family Medical Leave Expansion Act (EFMLEA) have left employers and employees trying to navigate a maze of information.

Allowing confusion to persist will have significant negative effects. Most importantly, those in need of relief may not be aware of all the options that are available, and this is particularly true of those who are already coping with disabilities. Employers may not be aware of their obligations to employees. Much of this will ultimately drain government resources to sort out conflicts and to process claims for assistance that are not appropriate. An aggressive public education campaign will mean these resources are used more effectively to get people connected with the right information before mistakes are made.

As you adopt the other recommendations made in this letter, effective communication is also important to ensure that people do not feel compelled to put themselves in a dangerous situation just to keep a roof over their heads or food on their tables.

No person should have to choose between life and livelihood. As the West Virginia Supreme Court once noted:

Experience teaches that joy does not reign supreme when the ‘pink slip’ is received; that people do not revel in being out of work, and do not need to be coaxed to take a job; that the mental and emotional pressures upon a worker brought about by the need to clothe, feed and house his or her family, to make payments upon debts, to maintain an economic and social position oftentimes hardwon, are great... We are certain our Legislature did not, when it enacted the unemployment compensation law, contemplate that those affected by it were thieves and nere-do-wells... The Legislature intended that registration with the state employment office would attest to and establish Prima facie proof of availability; and that until a claimant refuses a referral to work or otherwise demonstrates that he or she is not available, his registration is proof enough.¹²

¹¹ Occupational Safety and Health Administration, Guidance on Preparing Workplaces for Covid-19 (2020), <https://www.osha.gov/Publications/OSHA3990.pdf> (last visited May 5, 2020).

¹² London v. Bd. of Review, 161 W. Va. 575, 585-587 (1978)(citations omitted)(in relation to § 21A-6-5).

As we move towards restarting the economic engines, we must be cognizant that we do so in the midst of an ongoing pandemic. We must be aware that many in our population are vulnerable health-wise and economically, and that often they are both. And we must take active steps to protect life and economic stability in this new reality. Therefore, we urge you to take the steps outlined above.

Sincerely,

- American Civil Liberties Union of West Virginia
- American Friends Service Committee
- Call to Action for Racial Equality
- Disability Rights WV
- Fair Shake Network
- Mountain State Justice
- Mark Federici, President, United Food and Commercial Workers, Local 400, International Vice President
- NAACP WV
- NAACP Charleston
- National Association of Social Workers West Virginia
- Our Future West Virginia
- Rise Up WV
- West Virginia Center on Budget & Policy
- West Virginia Citizen Action Group
- West Virginians for Affordable Health Care
- West Virginia Working Families Party
- WV Developmental Disabilities Council
- WV FREE
- WV NOW

