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Labor Laws Could Protect Employees' Refusal to Work During COVID-19 Pandemic

The sudden rise of COVID-19 within the United States has caused significant upheaval for employers and employees alike, and both parties have questions about their rights and responsibilities in these uncertain times. An issue that many employers are now facing is how to manage employees who refuse to report to work due to concerns about exposure to coronavirus. Before responding, employers must consider whether the refusal is protected activity under the National Labor Relations Act (NLRA) and the Occupational Health and Safety Act (OSH Act).

Refusal to Work May be an Action Protected by Labor Laws

Under the NLRA, all employees—regardless of whether they are in a union—have a right to engage in "concerted activities … for the purpose of collective bargaining or other mutual aid or protection." Protected activities include employees' refusal to work in unsafe conditions if done as part of group action or by a single employee on the authority of others. Employers that discipline employees who engage in such activities may be subject to liability for an unfair labor practice.

The Labor Management Relations Act (LMRA) contains a similar provision that applies only to unionized employees. Intended to harmonize labor relations between employers and unions, the LMRA provides that employees who, "in good faith because of abnormally dangerous conditions," refuse to report to their jobs are not deemed to have engaged in a strike for purposes of the LMRA. Such work stoppages do not violate a no-strike provision of the collective bargaining agreement and the employer, therefore, may not permanently replace those employees.

As of the time of this article's publication, the relevant government agencies have not offered guidance for employers that are now beginning to encounter employees who are opting to shelter at home instead of going to work. Although the COVID-19 pandemic has not, at this time, altered the way in which employers are permitted to enforce attendance policies (absent extenuating medical or other circumstances), employers should be mindful that they may face liability in disciplining or terminating employees who choose to stay home due to fear of exposure to the coronavirus in the workplace.

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Employees Have a Right to Refuse to Perform Dangerous Work under the OSH Act

An employee's refusal to report to work in these circumstances may also be protected by the OSH Act, which prohibits employers from retaliating against employees (*i.e.*, disciplining or terminating) for declining to perform dangerous work. The OSH Act is more specific than the NLRA or LMRA about the types of dangers that may justify such refusal and specifies that the danger—here, being physically present at the employer's workplace—must "reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated" through an OSHA inspection or other procedure under the OSH Act.

Employees who decline to work in light of the pandemic are protected by the OSH Act only if all of the following conditions are met:

1. The employee has asked the employer to eliminate the danger and the employer failed to do so;
2. The employee refused to work in "good faith," meaning that the employee genuinely believed that an imminent danger existed;
3. A reasonable person would agree that there is a real danger of death or serious injury; and
4. There is not enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

While we are getting more guidance about addressing COVID-19 every day, there is no indication that simply being present at work—while adhering to (among other precautions encouraged by the CDC and OSHA) social distancing standards, proper hand-washing techniques and sanitizing procedures—presents the type of imminent danger of death or serious harm contemplated by the OSH Act to warrant a refusal to work. With the information currently available, employees will have a significant hurdle in establishing that refusing to work for fear of exposure to the coronavirus is protected under the OSH Act.

Best Practices for Employers

Regardless of the ultimate viability of claims that could be brought by employees

who are disciplined or terminated for refusing to come to work, employers should take seriously employees' concerns about working in close proximity to colleagues or the general cleanliness of the workplace. Employers are encouraged to have a discussion with employees about the ways in which they are helping to prevent the spread of the coronavirus in their workplace, such as following Centers for Disease Control and Prevention (CDC) guidelines. Transparency can help ease fears and may further diminish the employee's ability to show that they reasonably believed the workplace was dangerous.

If they have not done so already, employers should ensure that common areas and surfaces touched by employees throughout the day are regularly and thoroughly cleaned and should have supplies on hand that employees can use to clean their own workspaces. Employees should be separated by at least six feet while performing their work, and, when this is not feasible, employers could consider providing employees with masks, gloves or other personal protective equipment.

If you have any questions about how to manage employees who are concerned about working during the pandemic, please contact Robert S. Driscoll, Brittany Lopez Naleid or your Reinhart attorney.

Please visit Reinhart's Coronavirus Resource Center for additional up-to-date information.