Alert

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COZEN O'CONNOR

Dealing with Employee Protests and Strikes due to COVID-19 Concerns

The COVID-19 outbreak has rendered many workplaces dormant, but frontline workers in the grocery, delivery, and medical fields are feeling the effects of the massive influx in demand for their services caused by the pandemic. In recent weeks, the situation has come to a head with some employees protesting and/or threatening to strike or sick-out unless employers agree to provide hazard pay and enhance workplace safety measures.

Employers of both unionized and non-unionized workforces are making decisions on employee treatment that will have longstanding implications. The aftermath of COVID-19 may lead to a shift in bargaining power to employees and a rise in union organizing like nothing we have seen in this generation. Employers need to be wary of the legal pitfalls that come with these types of demands from workers. The following are some of the common questions and hands-on guidance to help employers deal with these issues.

Are employees who complain about working conditions protected from discipline?

NLRA Protected Concerted Activity

All employers should be aware that employees don't need to be represented by a union to enjoy the right to engage in protected "concerted activity … for mutual aid or protection" provided for by Section 7 of the National Labor Relations Act. Concerted activity can come in the form of two or more employees discussing issues like pay or working conditions, or an individual employee speaking to the employer on behalf of a group of employees on issues like pay or working conditions. Employees, whether unionized or not, may also engage in strikes or walkouts as a means of engaging in protected activity. Generally, as long as the topic of discussion or reason behind the activity is "work related," and involves more than one employee, it is likely to be considered protected activity.

Under Section 8 of the NLRA, employers are prohibited from taking adverse action against employees for engaging in concerted activity that is protected under Section 7.

These are some examples provided by the National Labor Relations Board of protected concerted activity:

- Two or more employees addressing their employer about improving their pay (**which may include asking for hazard pay**).
- Two or more employees discussing work-related issues beyond pay, such as safety concerns, with each other (**e.g. personal protective equipment (PPE), sanitation, work demands**).
- An employee speaking to an employer on behalf of one or more coworkers about improving workplace conditions.

However, not all concerted activity is protected. To enjoy protection, the means by which employees engage in concerted activity must not be illegal or involve violence. There are also restrictions on the timing and duration of strikes or walkouts that employees must heed, or risk losing protection (i.e. intermittent or "quickie" strikes that unfairly disrupt an employer's business).

Can employees who strike or engage in "sickouts" be fired?

As a starting point, strikes are a form of protected activity under the NLRA. Generally, employers are prohibited from terminating striking employees and can only lawfully replace them with other

David L. Barron

Member

dbarron@cozen.com
Phone: (713) 750-3132
Fax: (832) 214-3905

Robert S. Hawkins

Member

rhawkins@cozen.com
Phone: (215) 665-2015
Fax: (215) 701-2098

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workers. Under federal law, employees striking over better working conditions (like increases in pay or better treatment) can be permanently replaced, while strikers over unlawful conduct can only be temporarily replaced and must be reinstated immediately upon request.

In the context of an already unionized workforce, many collective bargaining agreements have no-strike clauses whereby the union has waived the right for employees to strike during the term of the contract. In this context, employees who violate the contract can be disciplined, and an employer can ask a court to enjoin an illegal strike.

In a non-union setting (which is where most of the recent activity has been centered), there is usually not a formal declaration of a strike. During the COVID-19 crisis, employees have chosen "sickouts" as a preferred method of economic pressure. The touchstone in responding to such actions is to remember that employees who have engaged in protected concerted activity (i.e. advocating for higher pay or better working conditions) cannot be treated differently than other employees. To the extent employers are not aggressively enforcing attendance policies during the COVID-19 crisis, it may be unlawful to discriminate against certain employees who call-in sick without adequate supporting documentation. In sum, if an employer would normally engage in progressive discipline for such violations, it will be difficult to treat an employee who engages in a sickout more harshly than other similarly situated employees who miss work for other illegitimate reasons.

Can employees who perceive a danger of contracting coronavirus refuse to work?

OSHA Refusal to Perform Unsafe Work/Section 502 of Taft Hartley Act

Section 11(c) of the Occupational Health and Safety Act (the Act) makes it illegal for an employer to discharge or discriminate against any employee because the employee has:

1. Filed any complaint under or related to the Act;
2. Instituted or caused to be instituted any proceeding under or related to the Act;
3. Testified or is about to testify in any proceeding under the Act or related to the Act; or
4. Exercised on his own behalf or on behalf of others any right afforded by the Act.

Although some employees assume they have the right to walk off the job if they feel it is unsafe, according to Occupational Safety and Health Administration (OSHA) regulations, "as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace." Section 12(b)(1). An employee's right to refuse to do a task is protected only if **all** of the following conditions are met:

- Where possible, the employee has asked the employer to eliminate the danger, and the employer failed to do so; and
- The employee refused to work in "good faith." (**employee must genuinely believe that an imminent danger exists**); and
- A reasonable person would agree that there is a real danger of death or serious injury; and
- There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

Under Section 13(a) of the Act, an "imminent danger" is defined as:

> ... any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.

In addition to OSHA's protections, Section 502 of the Taft Hartley Act also contains specific protections on employee rights to strike or refuse to work over "abnormally dangerous conditions." Similar to the OSHA standard, courts interpreting this provision have required a "good faith belief" that the working conditions were abnormally dangerous and for the belief to be supported by ascertainable, objective evidence (among other factors).

The general consensus among employers and practitioners is that the coronavirus is not an

imminent danger or “abnormally dangerous” condition in most workplaces, and most employees will not be able to refuse to work simply for fear of contracting the virus. However, employers should make reference to OSHA’s Guidance on Preparing Workplaces for COVID-19 to assess where they fall in the spectrum of COVID-19 occupational risk (from low to very high exposure risk), and follow OSHA’s guidance on implementing appropriate controls to protect workers. Employers should also consider the broader business impact (both internally and externally) that may arise out of discipline of employees in these situations

Can requests for PPE or to stay home raise issues under the ADA?

ADA Reasonable Accommodation Request

There may also be employees who invoke the Americans with Disabilities Act (ADA) as a means of seeking an alteration to their normal working conditions. Generally, under the ADA, an individual is considered “disabled” if an impairment substantially limits one or more “major life activities,” which includes the functions of the immune system — i.e., an impairment that limits the immune system will qualify as a disability under the ADA. These disabilities can be the result of certain cancer treatments, persistent viral infections, or genetic disorders that suppress the immune system. Moreover, because of the low bar for qualifying as disabled and the long list of risk factors associated with COVID-19, like asthma and diabetes, large portions of the population may have the right to request a disability related accommodation in this context.

Employees who qualify as disabled may claim to be particularly susceptible to infection and thus require a modification of their workplace or working conditions as an accommodation. Once an employee makes a request for an accommodation, it is incumbent on the employer to engage in an interactive process with the employee to assess their particular limitations, and whether an accommodation can be provided. The important things to remember here are that a request for an accommodation may be subtle or implied, and the process used to decide whether an accommodation can be made is just as important as the ultimate decision.

Although each situation will likely call for a particularized analysis, some steps that employers have taken to accommodate employee requests in this area are:

- Providing enhanced PPE;
- Increased social distancing and sanitation measures;
- Modification of schedules (i.e. rolling or staggered shifts);or
- Working from home.

Of course, the accommodation has to be reasonable and cannot impose an undue burden on the employer. An employer is not required to create a new position to accommodate a disabled employee and cannot be forced to supplant other employees from their positions. Also, an employee must be qualified for the position to which they seek to be reassigned. If the employee is qualified for a number of suitable alternative positions, then the employer can choose among those options, so long as it is reasonable.

In most circumstances, an employee cannot simply refuse to work because of a disability, but it might be reasonable to grant a temporary leave of absence. If they are unable to work because their disability puts them at too great a risk to physically appear at the jobsite, the employee may also be entitled to Emergency Sick Pay under the Families First Coronavirus Response Act and job protection under the FMLA and ADA.