Legal Sidebar

COVID-19 and Federal Employment Protections for Work Refusals

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The easing of stay-at-home orders in most states has prompted both the reopening of businesses and concern among employees who fear exposure to Coronavirus Disease 2019 (COVID-19) in the workplace. Fifty-one percent of the respondents in a recent survey of employees forced to stop working or work remotely because of the virus said that fear of getting sick at work would prevent their return. While federal labor and employment laws do not generally require an employer to retain an employee who fears returning to work, the Occupational Safety and Health Act (OSH Act) and the National Labor Relations Act (NLRA) may provide some protections for employees who are reluctant to return to work because of possible exposure to COVID-19.

Occupational Safety and Health Act

The OSH Act requires employers to provide a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm to their employees. The statute authorizes the Secretary of Labor to issue occupational safety or health standards, and provides for workplace inspections and investigations to ensure compliance with the standards. Any employee who believes there is an imminent danger or that a safety or health standard violation threatens physical harm may request an inspection.

Section 11(c) of the OSH Act prohibits employers from discharging or discriminating against employees because they have requested an inspection, instituted a proceeding under the statute, or will testify in any such proceeding. In a regulation promulgated, in part, under Section 11(c), the Occupational Safety and Health Administration (OSHA) has recognized that the OSH Act guarantees employees both explicit rights, such as the right to participate in enforcement proceedings, and rights that exist "by necessary implication." Among these implied rights is the right to refuse to work because of exposure to serious injury or death arising from a hazardous workplace condition. Section 1977.12(b)(2) of Title 29, Code of Federal Regulations, states:

> [O]ccasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination.

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Section 1977.12(b)(2) requires that the hazardous condition "be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels."

The U.S. Supreme Court upheld Section 1977.12(b)(2) in a case involving two manufacturing plant employees reprimanded after refusing to perform maintenance on a mesh screen used to protect employees from objects falling from an overhead conveyer. The employees in *Whirlpool Corp. v. Marshall* considered the guard screen unsafe. They previously voiced concerns about the screen to plant management and OSHA after their colleagues fell through the screen. One of these colleagues fell to his death. Although the district court determined that the two employees had a genuine fear of death or serious bodily harm and no reasonable alternative to refusing work, it denied relief, concluding that the regulation was inconsistent with the OSH Act. The U.S. Court of Appeals for the Sixth Circuit reversed the district court's judgment, and the Supreme Court affirmed the appellate court's decision.

In *Whirlpool*, the High Court held that Section 1977.12(b)(2) was a reasonable exercise of OSHA's authority. The Court maintained that the regulation furthered the OSH Act's overriding purpose and addressed a situation not explicitly addressed by the statute; that is, an employee being ordered to work under conditions that he reasonably believes poses an imminent risk of death or serious bodily injury, and a lack of time or opportunity to seek redress from the employer or OSHA. The Court explained: "[a]gainst this background of legislative silence, the Secretary has exercised his rulemaking power . . . and has determined that, when an employee in good faith finds himself in such a predicament, he may refuse to expose himself to the dangerous condition, without being subjected to 'subsequent discrimination' by the employer."

Whether an employee may refuse to perform his duties and be protected by Section 1977.12(b)(2) from an adverse employment action likely depends on the facts of a particular case. For example, a refusal to return to work in the context of COVID-19 raises the question of whether an employee's duties expose him to a real danger of death or serious injury. The health of other employees in the workplace and an employer's enhanced safety measures could affect a court's evaluation of a case.

National Labor Relations Act

The NLRA may also protect employees who refuse to work because of possible exposure to COVID-19 in the workplace. The NLRA provides employees in the private sector with a right to organize and bargain collectively through union representatives. Section 7 of the NLRA also guarantees these employees a right "to engage in other concerted activities for the purpose of . . . other mutual aid or protection[.]" The National Labor Relations Board (NLRB) has construed the right to engage in concerted activities to encompass a variety of activities, including some that do not necessarily involve collective bargaining or union organizing. For example, in *NLRB v. Mike Yurosek & Son*, the NLRB concluded that a group of employees who individually refused to perform overtime work were engaged in protected concerted activity because they initially protested a change in their work schedules as a group. Courts and the NLRB have found similar employee efforts to improve workers' terms and conditions of employment to be concerted activity protected by the NLRA.

The Supreme Court has determined that Section 7 protects employees who leave their positions because they oppose working in unsafe conditions. In *NLRB v. Washington Aluminum Co.*, an aluminum manufacturer terminated a group of employees after they refused to work in an aluminum plant machine shop they described as "bitterly cold." Unusually harsh winter weather and a broken oil furnace created the uncomfortable conditions in the machine shop. The employees complained to their foreman and decided to return home, believing they "could get some heat brought into the plant that way." The NLRB ordered the employees' reinstatement, concluding that their conduct was concerted activity protected by

Section 7. However, the U.S. Court of Appeals for the Fourth Circuit disagreed with the agency and declined to enforce the order. The appellate court maintained that the employees' walkout was not protected concerted activity because they did not give the employer an opportunity to respond to their complaint and avoid the work stoppage.

In *Washington Aluminum Co*., the Supreme Court reversed the Fourth Circuit's decision, maintaining that Section 7 protects employees' concerted activity even if the activity occurs before the employees specifically demand relief from their employer. The Court viewed Section 7 as broad enough to protect concerted activity that occurs before, after, or at the same time the employees demand relief. The Court also concluded that the employer's ongoing effort to restore heat in the shop did not prevent the walkout from being protected.

In finding the employees' walkout protected by Section 7, the Court in *Washington Aluminum Co*. observed:

> [C]oncerted activities by employees for the purpose of trying to protect themselves from working conditions as uncomfortable as the testimony and Board findings showed them to be in this case are unquestionably activities to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours.

Whether Section 7 of the NLRA would similarly protect a walkout in response to COVID-19 in the workplace could depend on the facts of a particular case, including how prevalent the virus is in the workplace. The employees in *Washington Aluminum Co*. refused to work because of the machine room's lack of heat. If employees could occupy a workplace with minimal exposure to COVID-19, it may be possible to distinguish that setting from the machine room. That said, Section 7 may still protect employees' concerted activity even if the employees' belief that COVID-19 is prevalent in the workplace turns out to be overstated. The NLRB has previously determined that employees' concerted activity for mutual aid or protection remains protected even if a protested working condition was actually not as objectionable as the employees believed.

Congressional Interest

Although Congress has responded to COVID-19 by passing legislation that includes employment-related provisions, measures like the Families First Coronavirus Response Act and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) did not amend the NLRA or the OSH Act. However, legislation that would direct OSHA to promulgate a new temporary standard to protect certain health care and other employees from workplace exposure to COVID-19 has been introduced. Under H.R. 6559, the COVID-19 Every Worker Protection Act of 2020, the temporary standard would require employers to develop and implement a comprehensive infectious disease exposure control plan. The standard would also require employers to adopt a policy prohibiting discrimination or retaliation against any employee who reports violations of the control plan or good-faith concerns over a workplace infectious disease hazard to any federal, state, or local government agency, the media, or a social media platform. S. 3677, a bill that would similarly require OSHA to promulgate an emergency temporary standard to prevent occupational exposure to COVID-19 has also been introduced.

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