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Environmental and Workplace Health & Safety

Does the OSH Act Give an Employee the Right to Refuse to Work Due to Fear of Workplace COVID-19 Exposure?

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Responding to COVID-19, many state and local governments are issuing orders encouraging or requiring workers to stay at home (Stay-At-Home Order) unless their employment is deemed to be in an "essential business" or "critical infrastructure industry." Whether working in an essential business or where no Stay-At-Home Order has been issued, employees may express concerns about, or refuse, coming to work due to fear of contracting COVID-19 at work. The federal Occupational Safety and Health Act (OSH Act or the Act) prohibits an employer from retaliating against an employee for exercising rights under the Act. If an employer fires or takes other action against an employee who walks off the job due to COVID-19 fears, is the employee exercising a right under the Act, such that the employer could face a government lawsuit for retaliating against the employee? Although this discussion is limited to refusal to work rights and responsibilities under the OSH Act, as with many issues raised by the novel coronavirus, the answer will be fact-specific and may be unique to this public health crisis. After analyzing the applicable law below, we provide practical suggestions for how employers and their counsel can analyze the issue if raised at their workplace.

I. The OSHA Anti-Retaliation Provisions

Since the OSH Act's enactment in 1970, Section 5(a)(1) of the Act states that "[e]ach employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654 (the General Duty Clause). From its beginning, the OSH Act also has provided that an employer cannot "discharge or in any manner discriminate against any employee" because the employee complains about a safety issue to management or OSHA or "because of the exercise by [an] employee on behalf of himself or others of any right afforded by this Act." 29 U.S.C. § 660(c) ("Section 11 of the OSH Act"); *see also* 29 CFR Part 1977. If an employer takes discriminatory action in retaliation, the Secretary of Labor (the Secretary) can sue the employer, under Section 11 of the OSH Act, in federal district, to require reinstatement, back pay, and "all appropriate relief." 29 U.S.C. § 660(c)(2). However, the OSH Act does not expressly address how employees can exercise their rights when there is an imminent risk of death or serious bodily injury and a reasonable belief that there is not sufficient time or opportunity to seek redress from OSHA or the employer.

Interpreting Section 11 in 1973, OSHA issued its anti-retaliation regulation at 29 CFR § 1977 (the "OSHA anti-retaliation regulation"), addressing whether, under what circumstances, and how an employee could refuse to perform work under the Act. Section 1977.12(b)(1) (emphasis added) states:

> [A]s 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. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would *not*

> ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

29 CFR § 1977.12(b)(1) (emphasis added).

Despite this initial statement that employees do not have the right to walk off the job, in the next paragraph the regulation acknowledges that exigent circumstances may exist that would trigger employee protections for refusing to work. Section 1977.12(b)(2) 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," and, on those occasions, an employer cannot take action against the employee. 29 CFR § 1977.12(b)(2). Specifically, if: (1) "the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition;" (2) "a reasonable person… would conclude that there is a real danger of death or serious injury;" (3) due to the urgency of the situation, there is insufficient time "to eliminate the danger through resort to regular statutory enforcement channels;" and (4) the employee "sought from his employer, and was unable to obtain, a correction of the dangerous condition," an employer taking action against the employee refusing to work could be subject to a Section 11 lawsuit brought by the secretary. *Id.*; *see also* 29 U.S.C. § 660(c).

OSHA has published guidance on the issue, *Workers' Right to Refuse Dangerous Work*, cautioning that "OSHA cannot enforce union contracts that give employees the right to refuse to work," but explaining the steps that workers should take if they believe working conditions are dangerous, the employer fails to eliminate the imminent danger, and there is not enough time to address the condition through regular enforcement channels:

1. Ask your employer to correct the hazard or to be assigned other work;

2. Tell your employer that you won't perform the work unless and until the hazard is corrected; and

3. Remain at the worksite until ordered to leave by your employer.

Notably, this OSHA guidance does not answer the question presented by COVID-19: an employer's obligations and an employee's rights when OSHA's direction to "remain at the worksite" is at the root of an employee's claim of a dangerous condition.

II. Caselaw and OSHA Guidance Interpreting Section 11 and the OSHA Anti-Retaliation Regulation

Not surprisingly, there are no reported court cases interpreting the OSHA anti-retaliation provisions in the context of potential exposure at the workplace to a contagious illness, much less a pandemic. However, court decisions interpreting the OSHA anti-retaliation regulation in the context of other workplace risks are instructive as to how those provisions may be applied to the workplace risk of exposure to the novel coronavirus.

The foundational case upholding a worker's OSH Act right to refuse to work is the US Supreme Court's decision in *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980). In *Whirlpool*, two employees refused to conduct maintenance tasks that previously had led to the death of a fellow employee, claiming that the risk had not been eliminated despite repeated employee complaints to management. When the employees refused to conduct the task the day after their call to OSHA, the employer sent them home without pay and put reprimands in their files. The secretary filed suit against the employer, alleging unlawful discrimination against the employees in violation of Section 11 of the Act, as interpreted by the OSHA anti-retaliation regulation. On appeal to the US Supreme Court, the issue was whether the OSHA regulation "authorizing employee 'self-help' in some circumstances . . . is permissible under the Act." 445 U.S. at 8. The Supreme Court first found that the OSHA regulation allowing workers to "avoid workplace conditions that they believe pose grave dangers to their own safety" "conforms to the

fundamental objective of the Act—to prevent occupational deaths and serious injuries" and that the regulation rationally complemented the Act's remedial scheme. *Id.* at 11-12, 21.

The Court then conducted an analysis of the Act's legislative history. The Court noted that the provisions in the OSH Act were different from those in other acts protecting workers, such as the National Labor Relations Act (NLRA) and the Labor Management Relations Act. *Id*. at 17, n. 29. The Court also found that

> Congress very clearly meant to reject a law unconditionally imposing upon employers an obligation to continue to pay their employees their regular paychecks when they absented themselves from work for reasons of safety. But the regulation at issue here *does not require employers to pay workers who refuse to perform their assigned tasks in the face of imminent danger*. It simply provides that in such cases the employer may not "discriminate" against the employees involved. An employer "discriminates" against an employee only when he treats that employee less favorably than he treats others similarly situated.

Id. at 18-19 (emphasis added). The Court concluded that the OSHA regulation explaining that it is an employee's right to refuse to perform an assigned task because of a reasonable apprehension of death or serious injury, coupled with a reasonable belief that no less drastic alternative is available, was a "valid exercise of [the Secretary's] authority under the Act." *Id*. at 22.

In *Whirlpool*, the Court found that the employees "were clearly subjected to 'discrimination' when [their employer] placed reprimands in their respective employment files," but the Court left to the lower court on remand to determine if the denial of pay for time they did not work was discrimination. *Id*. at 19, n. 31.

Since the Supreme Court's decision in *Whirlpool*, the secretary has successfully obtained awards of back pay, reinstatement, and other relief under Section 11 of the Act and the anti-retaliation regulation. *See*, *e.g*., *Perez v. Clearwater Paper Corp.*, 184 F. Supp. 3d 831 (D. Idaho 2016) (employer who retaliated against its employee for complaining about health hazards was required to pay back pay, severance pay, emotional distress and punitive damages); *Perez v. U.S. Postal Service*, 76 F. Supp. 3d 1168 (W. D. Wash. 2015) (employer who retaliated against its employee when he helped another employee file a complaint with OSHA was required to pay lost wages from denial of promotion, travel, housing, and medical expenses, and emotional distress damages, and expunge the employee's personnel record); *see also Secy. v. Lear Corp. Eeds and Interiors*, 822 F.3d 556, 561-62 (11th Cir. 2016) (the secretary has power under Section 11 to enjoin an employer's state court lawsuit alleging tortious defamation by employees who raised health and safety concerns if secretary finds that the employer's tort claims are baseless and retaliatory or preempted by federal law); *Reich v. Hoy Shoe Co.*, 32 F.3d 361, 368 (8th Cir. 1994) ("an employer that retaliates against an employee because of the employer's *suspicion* or *belief* that the employee filed an OSHA complaint has as surely committed a violation of § 11(c) as an employer that fires an employee because the employer *knows* that the employee filed an OSHA complaint").

The secretary's prosecution of Section 11 lawsuits typically uses a burden-shifting framework, consistent with other lawsuits for discrimination, in which the burden shifts to the employer if the Secretary has established a prima facie case. *See Solis v. Blue Bird Corp.*, 404 Fed. Appx. 412, 413 (11th Cir. 2010) (the district court properly used "the burden-shifting framework laid out in *McDonnell Douglas Corp. v. Green*," 411 U.S. 792 (1973), in a Section 11 retaliatory discharge case). For example, in *Chao v. Blue Bird Corp.*, 2009 WL 485471 (M.D. Ga., Feb. 26, 2009), the secretary brought suit under Section 11 of the OSH Act when an employer discharged an employee after he raised safety concerns about a work assignment and demanded further training. *Id*. *Blue Bird*, 2009 WL 485471 at *2-4; *see* 29 CFR § 1977.9. Applying *McDonnell Douglas*, the court found: "Claims alleging wrongful discharge in retaliation for exercising rights afforded under the Act are analyzed under the burden-shifting framework" under which the Secretary "must present sufficient evidence to satisfy the elements of her prima facie case." *Blue Bird* at *3 (citation omitted). To establish a prima facie case, "the Secretary must show by a preponderance of the evidence that (1) [the employee] engaged in protected activity; (2) [the employer] took adverse action against [the employee]; and (3) a causal connection exists between the protected activity and the adverse action." *Id*. (citation omitted). "If a prima facie case is established, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employment action. *Id*. If articulated [by the employer], the [Secretary] must show that the [employer's] reason was

pretextual in order to prevail." *Id*. (citation omitted). *In Blue Bird*, the court found that the employees' actions were proper and protected under the Act, that the employer's discharge and other actions violated the Act, and that the employer's justification for its action was pretextual, and ordered the employee's reinstatement with all prior benefits and back pay.

On January 1, 2016, OSHA's Directorate of Whistleblower Programs, which investigates potential Section 11 claims before they are filed in court, issued an agency-wide memo; "Clarification of the Work Refusal Standard Under 29 CFR 1977.12(b)(2)" (the Work-Refusal Memo). OSHA noted that there were "five requirements for a protected work refusal:"

1. a reasonable apprehension of death or serious injury,

2. a good faith refusal,

3. no reasonable alternative,

4. insufficient time to eliminate the condition through regular statutory channels, and

5. where possible, the employee sought and was unable to obtain a correction of the dangerous condition.

Work-Refusal Memo, p. 2. The last page of the Work-Refusal Memo has a flowchart showing how OSHA analyzes whether an employee's work refusal is protected under the Act. Among other points, OSHA clarifies that "[i]t is not an absolute requirement that a complainant [employee] call federal or state OSHA after being instructed to perform a dangerous task." *Id*., p. 3. However, "OSHA should determine whether (1) the called federal or state OSHA and, if not; (2) whether there was a period of time during which the complainant reasonably could have contacted Federal or state OSHA but did not do so." OSHA also takes the position that an "employee voluntary quit" after "protectable refusal to work" may be considered a constructive discharge that can trigger Section 11 liability. *Id*., pp. 5-6.

III. Minimizing Risk of an OSH Act Retaliation Claim During the COVID-19 Crisis

In sum, under the OSH Act, employees are not given an unfettered right to walk off the job or refuse to work, even in response to a dangerous condition. Moreover, employees are not necessarily entitled to pay if they refuse to work. However, employees generally are protected from discriminatory action by an employer if they stop work when they reasonably believe that they will be forced to work under dangerous conditions, risking death or serious injury, and they have no other recourse. Discriminatory actions are those treating an employee "less favorably" than others similarly situated. *Whirlpool*, 445 U.S. at 19. OSH Act protections are separate from those under labor contract laws. *See*, *e.g.*, *Whirlpool*, 445 U.S. at 17, n. 29; *N.L.R.B. v. Tamara Foods, Inc.*, 692 F.2d 1171 (8th Cir. 1982) (non-unionized employees have a protected right under the NLRA to walk off worksite after repeated exposures to ammonia fumes); *see also*, *Hatzel & Buehler, Inc. v. Orange & Rockland Utilities*, Inc., 1992 WL 391154, *5, n.10, 10-13 (D. Del. Dec. 14, 1992) (contractor cannot rely on its employees' rights under OSHA anti-relation regulation to claim impossibility of performance of work involving asbestos exposure).

The medical science regarding COVID-19 and the virus' transmission is still growing. To bring an action against an employer, the secretary would first need to demonstrate that exposure to COVID-19 (or the virus) in a particular workplace presents a "real danger of death or serious injury." *See* 29 CFR § 1977.12(b)(2). Still, an employer will want to take precautions to avoid being sued by the secretary for retaliatory conduct if employees raise COVID-19 concerns or refuse to come to work out of fear of the disease. To protect against an OSH Act Section 11 claim, employers and their counsel will want to consider the following:

First, an employer should not take any potentially retaliatory actions merely because an employee raises a COVID-19 safety concern or if the employee contacts OSHA about that concern. *See* 29 CFR

§ 1977.9 (employee's rights to raise safety concerns and/or contact OSHA protects employee from any retaliation in response).

Second, in response to an OSHA inquiry, complaint, or inspection, the employer would be well advised to demonstrate its compliance with potentially applicable OSHA regulations, such as PPE standards, *e.g.*, 29 CFR § 1910.132.

Third, although OSHA recognizes that "[t]here is no specific OSHA standard covering COVID-19," the employer should consider its workplace conditions in light of OSHA's "Guidance on Preparing Workplaces for COVID-19" (the OSHA Guidance), issued on March 11, 2020 (and any updates thereto). As discussed in a previous article on the COVID-19 OSHA Guidance, OSHA recommends steps that employers should take to protect workers at different levels of risk, using OSHA's "hierarchy of controls" framework for addressing workplace risks (*i.e.*, engineering controls, followed by administrative controls, safe work practices, and PPE). Notably, OSHA recognizes that for "most employers," they can protect their employees just by implementing "basic infection prevention measures." OSHA Guidance at 8, 20-22.

Fourth, if a fellow worker contracted COVID-19 and had been at the worksite within at least 14 days prior, the employer should consider the adequacy of its cleaning of the affected work area. *See* CDC's "Environmental Cleaning and Disinfection Recommendations"; OSHA Guidance at 9-10.

Fifth, the employer should evaluate whether the employer has control over the worksite conditions that are the subject of the complaint and whether a change in operations or additional precautions are possible and appropriate, especially given that the business may be deemed "essential." *See* OSHA Guidance at 11-12. This evaluation, and potential implementation of additional hazard controls, can demonstrate that the employer took appropriate steps to address the hazard, as explained in 29 CFR § 1977.12(b)(1).

Sixth, the employer should consider the action it should take in response to an employee's refusal to come to work or to work as instructed, given that it may be the employer's obligation to show that its action was not discriminatory, *i.e*., no different than taken with respect to others working in the same circumstances. The employer will want to show that the reasons for its actions, including, for example, discharge, were non-discriminatory, including whether those measures are equally applied, consistent with existing company policies and procedures, and otherwise not a pretext for retaliating against an employee taking allegedly lawful action.

As with many employment law issues, dealing with employees' concerns is both delicate and crucial to a business's success, particularly in these fraught and novel times. Careful consideration of Section 11 OSH Act responsibilities should be a key part of the employer's COVID-19 legal compliance analysis.

See Jenner & Block's COVID-19 Coronavirus Resource Center for further articles regarding legal issues facing our community in the wake of the public health emergency.

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.

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