VOLUME 74 ◆ NUMBER 5

Employee Benefit Plan Review

Employment Law Implications of a Refusal to Work Due to Fear of COVID-19

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During the height of the COVID-19 pandemic in America, one healthcare worker told the press: "Every day when I go to work, I feel like a sheep going to slaughter." As states continue to reopen and businesses bring employees back to work, it is likely that some employees will feel this same way and refuse to return to work due to a fear of contracting COVID-19. When this occurs, employers need to know their obligations under various federal, state, and local laws – some of which have just recently been enacted. Failure to properly account for this patchwork of laws when faced with an employee refusing to work could expose a company to legal liability.

As an initial matter, before bringing the full workforce back, employers should analyze their workspace and determine which guidelines from the Centers for Disease Control and Prevention ("CDC") and similar agencies they should implement. Employers should also communicate the new safety measures and procedures to the workforce prior to reopening. This will help alleviate concerns employees have about contracting COVID-19 while at work. Still, there will likely be employees who refuse to return to work. Discussed below are the laws employers must keep in mind when such a scenario presents itself.

Families First Coronavirus Response Act

The first law to be aware of is the recently enacted Families First Coronavirus Response Act ("FFCRA"). Under the FFCRA, employers with less than 500 employees are required to provide employees with paid sick leave and Emergency Family and Medical Leave Act ("EFMLA") leave.

Being afraid of contracting COVID-19, by itself, does not meet any of the qualifying reasons for paid sick leave. Under the FFCRA, paid sick leave is available if an employee is unable to work or telework because:

1) The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2) The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;
3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4) The employee is caring for an individual who is subject to an order or self-quarantine as described above;
5) The employee is caring for a son or daughter if school or child care is closed/unavailable due to COVID-19; or

6) The employee is experiencing "any other substantially similar condition" specified by Health and Human Services.

Although simply being scared of contracting the coronavirus does not meet any of these qualifying reasons, employers should evaluate the situation to assess whether the employee meets the requirements for receiving paid sick leave. For example, an employee may live with and may be needed to care for an at-risk parent who has been advised to quarantine. In such cases, paid sick leave may be warranted.

A generalized fear of COVID-19 is also not a qualifying reason for EFMLA leave. Leave under the EFMLA is only available if an employee is unable to work, or telework, because the employee is caring for a son or daughter when school or childcare is closed/unavailable due to the COVID-19 pandemic. But once an employee realizes this limitation, they may submit a new request that would qualify.

The FFCRA provides private rights of action for discrimination, retaliation, interfering with or denying FFCRA leave, or failure to properly pay wages in accordance with the FFCRA, including the ability to assert a collective action. Moreover, the FFCRA incorporates the Fair Labor Standard Act's provisions that provide for individual liability for managers and supervisors. It is therefore important to ensure that employees refusing to work due to COVID-19 fears do not qualify for leave under the FFCRA before taking any adverse action against them.

Employer's obligations under the FFCRA expire on December 31, 2020. The coronavirus, however, may still be around at that time and it is possible that Congress could extend the FFCRA's protections. Both now and after the FFCRA expires, employers need to be aware of other laws that potentially protect an employee's right to refuse to return to work as outlined below.

Occupational Safety and Health Act

It is possible that a refusal to work is protected under the Occupational Safety and Health Act ("OSH Act"). The statute's general duty clause requires employers to provide employees with a workplace that is free from recognized hazards that are causing, or likely to cause, death or serious physical harm. Further, the OSH Act allows an employee to refuse to work if certain requirements are met because the employee working would expose the employee to certain hazards. Moreover, if an employer takes a discriminatory action against an employee for exercising their rights under the law, the Secretary of Labor can sue the employer to require reinstatement, back pay, and "all appropriate relief."

For this right to exist, all of the following conditions must be met:

1) If possible, the employee asked the employer to eliminate the danger, and the employer failed to do so;
2) The employee refused to work in "good faith" – meaning the employee genuinely believes that an imminent danger exists;
3) There is no reasonable alternative to refusing to work;
4) A reasonable person would agree that there is a real danger of death or serious injury; and
5) There is not enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an Occupational Safety and Health Administration ("OSHA") inspection.

It is unlikely that a general fear of contracting COVID-19 at the workplace meets the conditions for a refusal to work to be protected under the OSH Act – even for employees at higher risk of having a more serious case of COVID-19. That is because the danger in such a situation is not likely imminent as contemplated under the law. Generally, imminent danger means the conditions in the workplace could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the procedures outlined by OSHA.

Further, OSHA has noted that "most employers" can protect their employees just by implementing "basic infection prevention measures." Thus, if an employee asks their employer to remedy the danger – as is required for protection – the employer can explain that it has taken the measures outlined by the agency.

Regardless, if any employee refuses to work, an employer should realize that such a complaint may be protected under the OSH Act. Before proceeding, employers should ensure they have fully analyzed whether the employee's refusal is protected in order to prevent a possible retaliation claim.

Family and Medical Leave Act

Employers with 50 or more employees within a 75 miles radius of the worksite should also determine whether an employee who refuses to work due to fear of COVID-19 is eligible for regular Family and Medical Leave Act ("FMLA") leave. To be eligible for FMLA leave, the employee must have worked for their employer for at least 12 months and have worked at least 1,250 hours for the employer during the 12-month period immediately preceding the leave.

A refusal to work because of the coronavirus may be a request for FMLA leave if the employee has an underlying medical condition that puts the employee at greater risk for COVID-19. Examples of such

conditions include high blood pressure, chronic lung disease, diabetes, obesity, asthma, and employees whose immune system is compromised (examples of such conditions include chemotherapy for cancer and other conditions requiring such therapy).

If such an employee refuses to work or asks to stay home due to fear of COVID-19, employers should initiate their normal FMLA process. Typically, this process includes providing the employee with the Notice of Eligibility and Rights & Responsibilities (Form WH-381) and a medical certification form.

If the employee qualifies for and is placed on FMLA leave, then their benefits continue, and they are also entitled to job restoration at the same or an "equivalent" job at the end of their 12 weeks of FMLA leave. It is also important to remember that if the employee took leave under the EFMLA, this reduced the amount of leave available to the employee under traditional FMLA. Unlike EFMLA, regular FMLA is not required to be paid, but in certain instances employees may use available paid leave.

Americans With Disabilities Act

The Equal Employment Opportunity Commission ("EEOC") has issued guidance stating that employees with underlying medical conditions who refuse to return work because of the COVID-19 pandemic would be considered as having made a request for a reasonable accommodation under the Americans with Disabilities Act ("ADA"). Such a refusal would, therefore, trigger what is known as the interactive process.

The underlying physical illnesses mentioned in Section III the FMLA Section above are not the only conditions that the COVID-19 pandemic might exacerbate. EEOC guidance mentions that individuals with certain pre-existing mental health conditions – for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder – may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic. According to the EEOC, these conditions could also qualify as a disability triggering the interactive process.

Once an employer determines that an employee with an underlying health condition is requesting a reasonable accommodation, the employer should begin its normal practice in connection with the interactive process. This includes determining the essential functions of the job and discussing how a reasonable accommodation can help the employee perform those functions. Just as with any reasonable accommodation request, employers can ask questions to determine whether the condition is a disability under the ADA to include asking for medical documentation of the employee's limitations and restrictions, if needed. Employers may also suggest alternative accommodations to those requested by the employee to determine if they effectively meet the employee's needs.

Many companies have likely implemented new work rules for all employees that may in and of itself be sufficient to accommodate an employee. The EEOC has issued guidance noting that possible accommodations "may include changes to the work environment, such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and co-workers whenever feasible per CDC guidance or other accommodations that reduce chances of exposure."

EEOC guidance also notes that "temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job, while reducing exposure to others in the workplace or while commuting."

While a temporary job restructuring of marginal duties is a possible reasonable accommodation, an employer does not have to eliminate a fundamental job duty to accommodate an employee. Further, a transfer to another, open position for which the employee is qualified is a possible reasonable accommodation. Employers, however, are not required to create a new position as a reasonable accommodation. Courts have also found temporary leave of a finite duration to be a possible reasonable accommodation.

An employer is not required to provide a reasonable accommodation to an employee if doing so would cause an undue hardship. The EEOC recognizes that "an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now." However, before claiming that the COVID-19 pandemic has altered an employer's circumstances enough that a requested accommodation now poses an undue hardship, employers should ensure they have actually analyzed their situation and have documentation to support their position. Denials of accommodation requests based on claims of undue hardship will likely be tested in litigation – especially if the employee is terminated.

National Labor Relations Act

The National Labor Relations Act ("NLRA") protects non-supervisory employees' rights to engage in protected, concerted activity, i.e., to collectively raise concerns regarding the terms and conditions of their employment. It is possible that an employee's actions related to a refusal to work due to a fear of contracting COVID-19 could be protected, concerted activity. Employers cannot take an adverse action against an employee for engaging in protected, concerted activity.

For such a refusal to receive protection under the NLRA, an employee's actions must be taken in concert

with one or more other employees (meaning at least two employees act together) or on the authority of other employees, and not solely by, and on behalf of, the refusing employee. This means an employee holding themselves out as the spokesperson for a group of employees can be protected. To be protected, an employee or employees must seek to initiate or to induce or to prepare for group action or bring a truly group complaint to the attention of management. A single employee openly protesting in a group setting about personal or individual matters is generally not sufficient to be considered protected concerted activity.

Thus, it is unlikely that a single employee refusing to work due to fear of the COVID-19 virus is protected, concerted activity. To be protected, concerted activity, a single employee's refusal to work because of COVID-19 concerns would have to be presented as a refusal to work because the employer is not doing enough for a group of employees. Significantly, the NLRA can also shield employees from discipline and/or discharge for simply discussing issues and concerns related to COVID-19. Having a good faith belief or a reasonable basis in a COVID-19 issue – or any issue – is not necessary to evoke legal protections. An employer cannot defend against a claim that employees were unlawfully disciplined for engaging in protected, concerted activity by showing that the employees had no valid basis for their complaints.

It is also important for unionized employers to determine if a group refusal to work due to fear of COVID-19 possibly causes them to lose the protection of the NLRA. If a unionized facility has a collective bargaining agreement with a no-strike clause, and a group of employees covered by the agreement goes outside the established grievance procedure to engage in an unauthorized work stoppage, such a refusal to work would not be protected by the NLRA.

Employees Who Are Afraid of COVID-19 But Have No Legal Protections for the Refusal

If an employee does not have an underlying health condition refuses to work due to fear of contracting COVID-19, they will not qualify for FMLA or protection under the ADA. If their refusal is not otherwise protected by the other laws analyzed in this article, employers will generally have two options. Before deciding on which option to pursue, the employer should once again explain the safety measures implemented by the employer to make returning to work safe in an effort to convince the employee to return to work.

If the employee still refuses due to a fear of COVID-19, the employer's first option is to provide an unpaid leave of absence for such employees. This has the benefit of maintaining employee morale and loyalty. There are, however, potential issues with the employee's benefits while they are on unpaid leave. For example, some benefits, such as health insurance, require employees to be actively employed to be eligible for coverage. Before placing employees on an unpaid leave of absence, employers should review their benefits plans for these and other issues.

The second option for employers is to count the days missed when the employee refuses to return to work as absences under their absence policy and terminate the employee once the employee accrues enough absences. Employers should be aware that taking such an approach will likely have a negative effect on morale and could lead to litigation.

Unemployment Benefits

While employees who refuse to work when work is available are generally not eligible for unemployment benefits, state agencies have been overwhelmed with filings for those benefits. Thus, an employee who is terminated for refusing to work due to fear of COVID-19 should not receive unemployment benefits. However, it is possible such an employee will receive benefits due to the number of claims state agencies must process or that the company will need to take more action than normal to prevent such an employee from receiving unemployment.

Practical Guidance

Employers should implement new safety procedures recommended by the CDC that are feasible and communicate these efforts to employees. Employers should also educate managers and supervisors that an employee refusing to work due to a fear of COVID-19 may be protected by various laws and the company must determine its obligations before the company takes any action concerning the employee – especially if the employee has an underlying health issue. Managers should know to bring such issues to HR and companies should designate a member of HR the "expert" internally on this issue. Employers should document every step of the process related to decisions over whether to grant leave, possible accommodations, etc., to ensure that the company is in a position to defend its actions. If an employer has any questions about whether one of the above laws protects the employee, the employer should contact their labor and employment counsel before making a decision regarding the employee. ✪

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