Reopening the Economy in the Midst of COVID-19: What Happens If an Employee Refuses to Return to Work?

Article By

Taylor Eric White
Foley & Lardner LLP
Coronavirus Resource Center

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With initial rumblings about “reopening the economy,” employers are understandably concerned about what exactly that might look like. Frankly, everyone—including the U.S. workforce—is concerned. For that reason, one of the biggest challenges confronting employers is the inevitable refusal of one or more employees to return to work when shelter-in-place orders are lifted or eased.

Is an employee allowed to refuse to work? Probably not (with certain exceptions, of course), but there may be federal, state, or local leave requirements in play. Thus, an employee’s refusal to return to work under these circumstances can lead to a lot of consideration and analysis for his/her employer, both in the short- and long-term. This post will discuss some exceptions to the “probably not,” and address a few
ways employers can manage the business disruption and associated legal risks when an employee refuses to come back.

**Balance Employee OSHA Rights in Light of What is Reasonable**

An employee generally does not have the right to refuse work merely because of a potentially unsafe condition in the workplace. That said, an employer may not discriminate against an employee who exercises “any right afforded” by the OSH Act. According to the Occupational Safety and Health Administration (OSHA), this dichotomy means that an employee may only refuse to come to work if:

1. He/she asked the employer to eliminate a hazard in the workplace but the employer has failed or refused to do so;
2. He/she has a “good faith” belief that an imminent danger exists;
3. A “reasonable” person would agree there is a “real danger” of death or serious injury; AND
4. There is no time to get the hazard corrected through appropriate channels (i.e., OSHA inspections, etc.).

Certainly, the “reasonable” element of the test makes this a fact-intensive inquiry. What is “reasonable” in this crazy COVID-19 world? An employer can help OSHA answer this question with the right information and documentation.

Specifically, as we reported previously, OSHA has indicated that for employees in the low and medium exposure risk categories (as opposed to high risk categories, like healthcare delivery and support, medical transport, and mortuary workers), it will likely engage in “non-formal” investigation of complaints of workplace COVID-19 hazards through notices of alleged hazard to which employers must respond.

For OSHA to consider an employer’s response to a notice of alleged hazard adequate (and thus forego a disruptive onsite inspection), the employer should demonstrate that it has taken appropriate steps to mitigate the risk of COVID-19 infection in the workplace.

So what are some appropriate steps for employers to take to stave off OSHA actions related specifically to COVID-19 hazards? Employers should undertake and, most importantly, document the following steps, as suggested by OSHA:

- Assess the level of risk of COVID-19 exposure for each of their employees based on OSHA’s employee exposure chart;
- Train employees about and enforce rules/policies pertaining to proper workplace sanitation and hygiene (e.g., wash hands for 20 seconds, use hand sanitizer regularly, etc.);
- Assess and provide employees with appropriate PPE (e.g., face coverings, gloves, gowns, respirators, etc.) and train on its proper use, maintenance, and cleaning;
If normal PPE is unobtainable due to shortages, assess and provide employees with comparable alternatives;

Note, in most instances for employees in the low and medium exposure risk categories, N95 respirators are not necessary or recommended;

- Assess and implement appropriate administrative controls (e.g., temporary shutdown of nonessential activities, staggered shifts, limited customer access, one-way aisles, encouragement of sick workers to stay home, social distancing where feasible, etc.);

- Assess and implement appropriate engineering controls (e.g., exhaust or ventilation systems, physical barriers or partitions, installation of drive-thru windows for customers, etc.); and,

- Investigate and address, if necessary, internal complaints from employees about alleged workplace hazards.

Simply put, it is imperative that employers demonstrate their good faith efforts to reduce or eliminate COVID-19 hazards in the workplace. Contemporaneous documentation and implementation of these efforts is the key to demonstrating why it is unreasonable for an employee to refuse to return to work.

Keep in mind that the above list of efforts is in addition to all other required PPE and safety measures and assessments that must take place in the workplace due to hazards associated with employees’ normal job duties (e.g., N95 respirators or comparable, NIOSH-approved, alternatives; process hazard analyses; etc.). For that matter, employers with employees in the high and very high exposure categories (e.g., healthcare and morgue workers performing job duties bringing them in contact with known or suspected cases of COVID-19) will have other, more substantial requirements and are much more likely to face an onsite inspection upon employee COVID-19-related complaints. So it is of the utmost importance for an employer to assess and plan for hazards associated with particular job duties.

Balance Employee Americans with Disabilities Act Rights, If Any, Through an Interactive Process

What if an employee refuses to return to work because he/she believes he/she is at a higher risk of COVID-19 illness due to a pre-existing medical condition? Would that employee be entitled to refuse to return to work under those circumstances? Again, probably not (with certain exceptions and considerations).

The Americans with Disabilities Act (ADA) does not grant an employee a general right to refuse work due to a disability, as such would be a total refusal to complete the essential functions of the job. And, in any event, a generalized fear of COVID-19 is not, in and of itself, a covered disability under the ADA. (Keep in mind, however, that some state or local laws (e.g., New York, California, etc.) may define “disability” differently than the ADA, so an employer should be sure to vet those
accordingly with its employment attorney.)

On the other hand, if the employee does have a known, covered disability under the ADA, such as Generalized Anxiety Disorder or the like, it behooves employers to recognize that fear of COVID-19 in the workplace might simply be a symptom of that sort of covered disability. Under those circumstances, the employer must engage in the interactive process with the employee and provide a reasonable accommodation, if any, that does not constitute an undue hardship to the employer.

As part of the interactive process, the employer should discuss all workplace protocols that are in place to reduce the risk of COVID-19 (e.g., PPE, social distancing, staggered shifts, limited customer access, hand sanitizer, physical partitions or barriers, etc.). If the employee still refuses to return to work, the employer may require a medical certification of the employee’s alleged restrictions. As a practical matter, medical staff across the country may be overburdened right now, so an employer should be flexible in allowing an appropriate telehealth note or certification.

If a leave of absence or a remote working arrangement is appropriate and would not constitute an undue hardship to the employer, the ADA may require the employer to provide such an accommodation. But employers should attempt to put timeframe limits on that accommodation, or at least set a future time for reassessment of the accommodation through further interactive dialogue. In this way, the employer can balance the employee’s ADA rights, if any, with the business disruption of accommodations based on COVID-19 issues.

Consider Employee Leave Rights Under Federal, State, and Local Laws

As if OSHA and the ADA are not enough for employers to consider, multiple layers of leave laws exist and are in play in the COVID-19 world. So, would an employee be entitled to leave under the federal Families First Coronavirus Response Act (FFCRA) or other state or local leave laws simply because of concerns over COVID-19? Maybe, depending on the reason for the leave and the particular law at issue.

As we’ve reported previously, the FFCRA provides employees with leave if, among other things, “[t]he employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.” (emphasis added). This ties into the ADA consideration above because the United States Department of Labor has explained that “concerns related to COVID-19” means, for example, that the employee is “particularly vulnerable” to COVID-19.

An employer therefore must consider whether the employee has provided appropriate documentation under the FFCRA and whether the employee is able to telework. If teleworking is possible, then the employee would not be entitled to FFCRA paid sick leave, but may be entitled to a remote working arrangement as a reasonable accommodation. On the other hand, if the employee cannot telework, then he/she would be entitled to FFCRA paid sick leave and then, possibly, a further leave of absence under the ADA, if it does not impose an undue hardship for the employer.
But the analysis doesn't end there. Some states and municipalities have their own paid leave laws to consider. Take Nevada, for example. As of January 1, 2020—impeccable timing, right?—most employers with 50 or more employees in the state must provide certain amounts of accrued paid leave to an employee and the employee does not even have to provide a reason for the leave. The employee need only provide notice as soon as practicable of the need for leave that has accrued and is available for use by that employee. Because Nevada’s law specifically states that it does not “limit or abridge” or “negate any other rights, remedies or procedures available,” employers may be required to provide this leave in addition to FFCRA leave. Nevada is just one example, though. Other states or municipalities may have similar requirements that employers must consider.

Conclusion

An employee’s refusal to return to work upon the reopening of the economy is likely to create a myriad of considerations for his/her employer. That employer must consider whether the employee’s refusal is reasonable in light of the measures taken to mitigate the risk of COVID-19 in the workplace, whether the employee has a covered disability that must be accommodated, and whether the employee is entitled to leave under multiple layers of leave laws. This is a complicated analysis, and employers are well-advised to involve employment counsel to assist them at the outset.

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