



# What Schools Should Do If An Employee Refuses To Return To Work Because Of COVID-19

Insights

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Given the uncertainty surrounding the spread of COVID-19, efforts to contain it, and ever-changing health and safety guidelines, schools need to act quickly to address not only the current situation but also the new challenges which are to come once schools are permitted to re-open their classrooms. When responding to these new challenges, schools need to be careful with both their unionized or non-union workforces to not run afoul of the National Labor Relations Act (NLRA) and other laws prohibiting retaliation for an employee's "protected activity." Below we provide some practical guidance for schools on how to avoid labor law violations when confronting employees who refuse to return to work during the COVID-19 pandemic.

## Is Refusing To Return To Work "Concerted Protected Activity?"

During the COVID-19 pandemic, employees may refuse to come back to work because they are fearful or for other reasons potentially related to the pandemic. Schools need to be cautious about disciplining and terminating employees who refuse to return to work due to claimed safety concerns and potential exposure to COVID-19. Employees who raise these concerns, even if they are mistaken about the risk, may be engaging in "concerted protected activity" under the NLRA and therefore protected against any adverse action, including termination.

By way of background, Section 7 of the Act generally applies to all employers, whether unionized or not. Section 7 extends sweeping statutory protections to employees and guarantees them the right to engage in concerted activities for the purpose of mutual aid and protection.

To be protected, such activity must involve group activity (i.e., two or more employees), a single employee seeking to incite group action, or an individual employee "bringing truly group complaints to the attention of management" to improve the "terms and conditions" of their employment. Actions taken by an individual, *without* the actual or inferred support of other employees, and actions that relate only to an individual's *personal* interests, are generally not concerted and therefore are not protected.

An employee's right to engage in protected concerted activity under Section 7 has been interpreted broadly. However, even concerted employee actions may not be protected where they relate to an issue over which the employer lacks control. Disciplining or discharging an employee for engaging in protected concerted activity constitutes an unfair labor practice, for which the National Labor

Relations Board can bring an action on behalf of the employee and seek remedies, including reinstatement and backpay.

As for workplace issues relating to COVID-19, for an employee to refuse to return to work and be protected under the Act, the employee must have a “reasonable, good-faith belief” that the working conditions are unsafe. However, the Act protects employees if they are “honestly mistaken” in their belief that the conditions are unsafe. The circumstances surrounding COVID-19 are unique because schools may be unable to fully remediate the exposure of risk. Thus, an employee’s refusal to work as a result of the fear of exposure to COVID-19, or safety issues related to COVID-19, may constitute protected activity, as long as it is made on behalf of more than one employee and there is at least a reasonable, good-faith belief that the working conditions are unsafe.

For example, if a group of employees cited a school’s failure to implement safety protocols recognized by the Centers for Disease Control and Prevention (CDC) or other public health authority as the reason they refused to return, this could be concerted protected activity. They are citing a presumably reasonable belief that the “working conditions” are unsafe. On the other hand, if they relied on the general risk of exposure from being in public, the refusal may not be protected because they are not raising concerns about working conditions at the school.

### **How Should Schools Respond To Employees Who Refuse To Return To Work?**

First and foremost, schools have a duty to maintain safe and healthy conditions for employees and students. The circumstances surrounding COVID-19 are unique and schools will likely be unable to fully rebut employees’ health concerns related to COVID-19. However, schools can help manage fears about COVID-19 by educating employees that the schools are closely monitoring the situation and taking steps that are in proportion to current, known risks and in line with up-to-date, official guidance to protect them from COVID-19 exposure.

When employees trust that schools are being honest and transparent in their communications, and that they are taking every step possible to ensure their safety, employees may be more likely to return to work and perform their jobs as required. Frequent and strategic communications are a necessity until the fear of COVID-19 is behind us.

To do this, schools should adopt and strictly adhere to the latest recommendations and guidance issued by state and local health departments, the CDC, Occupational Safety and Health Administration (OSHA) and other reliable resources. Preparation and communication are of the utmost importance and having a thorough plan in place to establish a safe and healthy workplace and sharing that plan with employees will provide peace of mind the school’s employees. The plan should be sure to address communication, education, training, safe workplace protocols, personal protective equipment (PPE), and cleaning and disinfecting protocols. This will establish credibility that the school will be organized, competent and prepared, which will reassure employees’ safety concerns.

Second, the best approach for schools to take when handling employees expressing fears of returning to work is to actively listen to the employees and have a conversation to identify potential legal issues. While speaking to employees, schools need to identify if the employee is acting alone or with others to recognize if the employee is engaging in concerted protected activity.

Moreover, schools also need to identify and permit their employees to take any protected leave for which they may be eligible. A school that fails to recognize a request for protected leave could unwittingly create the basis for a retaliation claim under the array of laws providing for leave and protecting against retaliation generally.

For instance, employees may have a right to take leave under applicable paid sick leave laws or local ordinances, the Family Medical Leave Act (FMLA) and the Families First Coronavirus Response Act (FFRCA), among others. Schools that do not allow employees to exercise their rights to take protected leave may risk interference and/or retaliation lawsuits.

Additionally, employees who are considered part of a “vulnerable” population due to their age or underlying health conditions may be entitled to leave as a reasonable accommodation under the Americans with Disability Act (ADA) or state disability laws. Schools must be sure to engage in the interactive process with vulnerable employees or risk potential lawsuits for disability discrimination, failure to engage in the interactive process, and/or failure to accommodate.

## **Conclusion**

Given each situation is different, employers should carefully review the facts before disciplining or terminating an employee who refuses to return to work due to COVID-19 concerns. Schools must carefully evaluate the reasons for which an employee is refusing to return to eliminate the possibility that it is based on concerted protected activity under the NLRA or another protected right.

Assuming that is the case, schools should then document, preferably in a writing to the employee, the unprotected reason for which the employee is refusing to return. This will mitigate the risks of retaliation claims based on a refusal to return.

Because of the complexity issues when handling employees who refuse return to work during COVID-19, if you have any questions about how to respond to an employee or wish to discuss an appropriate response, please contact your Fisher Phillips attorney or any member of our [Education Practice Group](#).

*For more information, contact the authors [here](#) or [here](#).*

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