

AN EMPLOYER'S GUIDE TO HANDLING VIRUS-RELATED PROTESTS

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In the current environment of heightened COVID-19 fears, there have been multiple reports of employee walkouts and related actions, particularly in food production, warehousing, distribution, fast food, food delivery and health care businesses deemed to be essential services. Some actions appear to be spontaneous in nature, while others appear to be aided by labor unions that want to leverage the COVID-19 crisis to further organizing objectives.

While some businesses have received advance notice of such activities, others are experiencing unplanned, spontaneous actions in response to specific events. These activities have ranged from refusals to work by small groups of employees protesting lack of sufficient face masks in nonunion health care settings, to planned mass-walkouts by employees protesting employers' failure to provide basic up-to-date information regarding COVID-19 cases.

Most managers and supervisors responsible for day-to-day operations of essential, or any, businesses have rarely — if ever — been tested by the types of concerted activities seen in some reported scenarios.

In situations where management suddenly faces such immediate and unexpected employee protests, their reactions can lead to more serious legal and employee relations challenges. Especially if managements' immediate responses are seen as punitive or tone-deaf to employees' complaints, escalation of protest activities may follow.

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To minimize the risk of operational disruption or other business impact, and resolve legal or longer-term employee relations problems, managers and labor counsel are strongly encouraged to review these guidelines to gain a better understanding of their rights and obligations if faced with employee protests.

WHAT LEGAL ISSUES COULD WE BE FACING?

The answer may depend on whether the work stoppage takes place in a union or nonunion setting.

Nonunion Settings

Many of the reported walkouts have occurred in nonunion settings that are not accustomed to dealing with work stoppages. In general, if two or more nonunion employees withhold services in protest over alleged working conditions (wages, COVID-19-related health issues, etc.), their activities are likely to be deemed protected concerted activity under the National Labor Relations Act.

The NLRA gives all employees the right to engage in protected concerted activities for their mutual aid and protection. Such protections may, in limited circumstances, even extend to a single employee who is clearly acting on behalf of himself and other co-workers. The details of each situation will generally dictate the extent of protection.

Union Settings

Where employees are represented by a labor union, there will almost always be an existing no-strike provision in the collective bargaining agreement. Consequently, the concerted activities of such employees generally do not enjoy the same degree of protection as their nonunion counterparts.

In general, unionized employees are prohibited from engaging in strikes, walkouts or other job actions and are, instead, required to continue working while raising their complaints through any available contractual grievance mechanisms.

PREPARING FOR POTENTIAL PROTECTED CONCERTED ACTIVITY

You should take several steps in response to threats or reports of group protests, strikes, walkouts or related employee activities.

Maintain open lines of communication.

Well before the onset of protected concerted activity and related activities, establish and always maintain open communications with employees. Open communications channels are even more important in the current tense environment.

Many of the concerted activities occurring in the midst of the COVID-19 outbreak appear to be spontaneous reactions to real or perceived workplace health concerns. If multiple employees threaten to walk off or refuse to return, work in conjunction with human resources to offer assurances that appropriate preventive measures have been undertaken in conjunction with applicable CDC guidelines and workplace safety policies.

Such concerns should never be taken lightly or summarily dismissed. The investment you make in communication lines now can pay big dividends when employees are contemplating such action.

Be alert to early warning signs.

Although some concerted activities are preceded by extensive planning and coordination with third-party support, most are spontaneous efforts prompted by festering discontent over workplace safety and related employment terms (wages, work schedules, job assignments, etc.). Employees often raise these concerns before deciding on coordinated actions. Remaining attentive and responsive to day-to-day concerns may reveal emerging employee anxiety before the onset of group activity.

Get the facts.

Ask employees about their intentions before things reach the boiling point, such as:

- Where are you going?
- Do you understand that you are scheduled to be at your workstation?

- Why are you walking off the job?
- Are you open to discussing this first?
- Are you willing to return to your workstation until I can schedule a meeting with HR?

Continue monitoring employee actions.

Instead of threatening discipline, try to diffuse the situation with assistance from senior management and HR as the case may be. If employees abandon their workstations regardless, do not order them to clock out, but instead advise them that they will not be permitted to remain on-premises unless and until they return to their assigned duties. If they refuse to comply, consult with HR for purposes of evaluating alternative measures.

Employees who leave the premises to join in organized picketing or other protest activities should be instructed to relocate to adjacent sidewalks or easements off-premises. Those who engage in acts of vandalism, theft, physical threats or related misconduct may forfeit legal protection under the NLRA. Any such infractions should be investigated and documented under oversight from HR.

Above all, keep your cool.

No matter what happens, always be a professional. Don't let your emotions get the best of you.

Offer to answer those questions that you can, and to get assistance with those you can't. It may not seem like it now, but at some point the COVID-19 crisis will be behind us, and you will still need to work effectively with your employees thereafter.

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