Insights, News & Events

PROTECTED CONCERTED ACTIVITY: THE NEXT COVID-19 CHALLENGE FOR UNION AND NON-UNION EMPLOYERS ALIKE

Insights
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As businesses face daily new challenges in the wake of the COVID-19 pandemic, many are now confronting a new challenge: demands from their own employees for more pay and a safer work environment. The ability to manage these competing challenges may ultimately dictate the economic and operational fate of many companies.

It is well established that employees who act to raise common issues concerning wages, hours, or other working conditions are engaged in protected concerted activities (or "PCA") for mutual aid or protection – regardless of whether they are unionized. Against the backdrop of the COVID-19 pandemic, emerging forms of PCA include **work stoppages, demands for premium pay or improved working conditions, and public protests and other appeals to the public via news and social media.** Whether unionized or not, all businesses operating during this unprecedented time should understand your legal rights and obligations when confronted with these pressure tactics.

WORK STOPPAGES

From warehouse and distribution operations to healthcare institutions, employees across the nation are staging walk-outs, sickouts, and other forms of refusals to perform their assigned duties in response to alleged COVID-19 exposure concerns. According to news reports, employees at Amazon, Instacart, Perdue, and elsewhere have recently staged walkouts.

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Generally, employees who concertedly protest or refuse to work under these circumstances are deemed to be protected by the National Labor Relations Act (NLRA). But essential businesses must also continue to operate, which raises an important question: must employees establish a reasonable concern for their health to claim legal protection, or is a generalized fear of contracting COVID-19 sufficient?

GUIDANCE

The answer to these questions depends in large part on whether the employees are subject to a collective-bargaining agreement (CBA) with a no-strike clause. For non-union employees, and union employees without a no-strike clause in their CBA, the "reasonableness" of their decision to collectively refuse to work is irrelevant, according to the National Labor Relations Board (NLRB). Thus, such workers can lawfully engage in a collective work stoppage by simply articulating a generalized fear of contracting COVID-19.

On the other hand, unionized employees subject to a no-strike clause in their CBA must demonstrate through "ascertainable, objective evidence" that "abnormally dangerous conditions" existed at the time of their work stoppage in order for their conduct not to violate the applicable no-strike clause. This includes individual employees subject to a no-strike clause who act alone in their refusal to work. If an individual employee cannot prove this, then their conduct in refusing to perform work may not be protected by the NLRA (depending on the facts), although it may be protected by other statutes, such as the Occupational Health and Safety Act (OSH Act).

In examining whether "ascertainable, objective evidence" exists, the NLRB takes a case-by-case approach. Whether a generalized fear of contracting a potentially deadly virus would satisfy this standard has yet to be decided. In the absence of a valid no-strike clause, however, employees who withhold services as a group will most certainly be protected, regardless of whether their workplace exposure concerns are "reasonable."

While it may not be lawful for employers to interfere with protected work stoppages in response to COVID-19 concerns, you can certainly take steps to mitigate the associated risks. The first step to reducing the risk of PCA

under these circumstances is to consider and respond to workplace safety concerns raised by employees and their bargaining representatives alike. Coordinated work stoppages are more likely to occur when workers perceive (reasonably or not) that you are ignoring them.

You should establish clear lines of communication with employees and union representatives as the case may be. You should document their concerns and, where feasible, address and resolve them in a timely manner. Make sure to regularly update stakeholders on status and progress to ensure that the lines flow both ways.

In the meantime, you should take proactive measures to ensure that human resources personnel, supervisors, and managers are properly trained to recognize PCA. You should also ensure they know how to implement a lawful action plan for addressing it to minimize business disruption and adverse media relations exposure, while reinforcing a culture of positive employee relations. You should develop written communications strategies and identify experienced spokespersons. Finally, you should consider working with legal counsel to develop contingency plans for responding to variations on PCA, ranging from coordinated strikes to sporadic sick-outs.

PETITIONS FOR PREMIUM PAY OR IMPROVED WORKING CONDITIONS

On the heels of the COVID-19 crisis, employers are also experiencing an uptick in petitions for pay premiums (sometimes referred to as “hazard pay”), Personal Protective Equipment (PPE), and other worker enhancements. Increasingly, labor unions are demanding midterm modifications to existing collective-bargaining agreements. These demands are generally protected by the NLRA, but to what extent are employers legally obligated to agree to them?

GUIDANCE

First, all employers should make sure they are adhering to federal and state mandates related to COVID-19, including CDC guidance concerning the use of PPE, social distancing, and quarantines. The Fisher Phillips COVID-19 Legal Alerts and Guidance page represents a helpful starting point.

Second, you should refrain from summarily dismissing such requests. As an alternative, you may wish to consider meeting with employees or their authorized union representatives to hear them out – again subject to appropriate oversite from human resources, labor relations personnel, and outside counsel. It may be helpful to offer specific examples demonstrating adherence to state and federal mandates, as well as CDC guidance. When addressing pay concerns, it is best to adopt a well thought out, rational, and honest response that includes general information about any significant losses experienced as a result of the COVID-19 pandemic.

Acknowledging such demands will help you demonstrate that you understand the underlying concerns and recognize their importance. Even if the demands themselves ultimately prove unreasonable, there is generally value in keeping the lines of communication open, even if only to identify smaller adjustments that can lead to broader issue resolution.

Similarly, while a unionized employer need not accede to every demand for midterm contract modification, it may be worthwhile to consider one-off, non-precedential departures (generally memorialized in separate letters of understanding) – particularly in light of changed circumstances. For additional information concerning employer rights and obligations as it relates to a union contract, see the Fisher Phillips COVID-19 Guidance and FAQs for Unionized Employers.

MEDIA AND SOCIAL MEDIA

Workers and unions alike are increasingly taking their concerns to news and social media outlets to exert pressure and garner public support. Generally, such conduct has been deemed protected by the NLRA, but what are the limitations? Does this law extend protection to false or malicious statements? What if the employee is raising complaints based on unsupported information or exaggerations?

GUIDANCE

Generally, employees who take their group-related concerns over wages, hours, or working conditions to the news or social media are engaged in protected concerted activity. The NLRB has stated that such comments are protected

even if they are intemperate, abusive, insulting, or turn out to be blatantly untrue. There are times, however, when such communications are "so disloyal, reckless, or maliciously false" that employees forfeit legal protection.

In making this determination, the NLRB evaluates whether the attitude of the employees is "flagrantly disloyal, wholly incommensurate with any grievances which they might have, and manifested by public disparagement of the employer's product or undermining of its reputation." There is a wealth of case law defining the scope of this protection, and most of it falls in favor of the employee in light of the First Amendment.

It is likely the NLRB would find most public complaints about an employer's conduct during the COVID-19 crisis protected. Thus, before taking any adverse action in connection with a social media post or news story, you should refer back to your communications plan and consult with legal counsel.

WE ARE HERE TO HELP

The uncertainty swirling around this pandemic and its anticipated duration is stressful enough for businesses large and small. Many will soon be grappling with the additional economic and operational challenges posed by walkouts, public protests, and threats to impede uninterrupted service if concerted demands go unmet. It is important to stay one step ahead of these challenges and to develop a proactive labor relations plan and rapid response strategy well before the first signs of PCA.

The Fisher Phillips Labor Relations Practice Group is committed to assisting you in developing preventative measures and a customized contingency plan that fits the unique needs of your business. We will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. For further information, contact your Fisher Phillips attorney or any attorney in our Labor Relations Practice Group.

Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. You can also review our nationwide Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus, our Fisher Phillips COVID-19 Guidance and FAQs for Unionized

Employers, and our FP Resource Center For Employers maintained by our Taskforce.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.