

April 20, 2020

COVID-19 Daily Briefing Recap

When Employees Refuse to Work Due to Safety Concerns

Please note that the following is a recap of our COVID-19 Daily Briefing from April 20, 2020. Due to the rapidly evolving nature of the pandemic, we recommend that you consult the most up to date materials possible. Visit Jackson Lewis P.C.'s [COVID-19 resource page](#) for updates on workplace impacts and [sign up here](#) to receive invitations to future daily COVID-19 webinar briefings and email updates on ongoing legal and workplace health challenges.

Labor Management Relations Act (LMRA) Section 502

Overview

- Section 502 excludes work stoppages taken in response to “abnormally dangerous conditions” from the definition of a “strike:”
 - In union workplaces, even those with no-strike clauses, Section 502 protects safety walkouts.
 - Section 502 protects *all* employees, including those in non-union workplaces.
- Section 502 overlaps with, but is distinct from, claims involving alleged “protected concerted activity” or OSHA “whistleblowing” cases:
 - PCA: concerted activity engaged in for mutual aid or protection.
 - OSH Act: general duty to maintain safe workplace.

Burdens of Proof

- To be protected, employees must be able to demonstrate, by a “preponderance of the evidence,” that:
 - The employees believed, in good-faith, that their working conditions were abnormally dangerous;

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- That belief was a contributing cause of the work stoppage;
- The employees' belief is supported by ascertainable, objective evidence; **and**
- The perceived danger posed an immediate threat of harm to employee health or safety.
- The danger need not be a “grave” danger that requires an immediate departure from work.
- Cumulative exposure may give rise to a protected work stoppage where there is a “reasonable possibility of serious incipient or future illness or injury:”
 - However, a “purely subjective” perception of danger will not suffice.
 - Nor will a “speculative doubt” about safety in general.

Relevant Factors

- In determining whether conditions are “abnormally dangerous,” the National Labor Relations Board may consider:
 - Whether conditions appeared to be deviating from the norm or from a reasonable level of risk;
 - Whether equipment intended to protect employees from exposure to toxic substances appeared to be operating in a manner sufficient to afford such protection;
 - Whether employees had received sufficient instruction in the use of safety equipment;
 - Whether policies mandated and supported the proper use of safety equipment and standards; and
 - Any failures to correct infractions / negative evaluations from regulatory agencies.

Best Practices

- Refer to, and follow, CDC guidelines.
- Follow industry standards.
- Continue to take all safety-related complaints seriously.
- Investigate, document, and follow-up.
- Consult with HR and legal counsel when faced with good-faith employee complaints.

What if I have more questions?

As issues and concerns around COVID-19 unfold daily, employers must prepare to address the threat as it relates to the health and safety of their workforce. Keep up to date with [Jackson Lewis' latest available information and resources](#).

If you have any questions, please contact the Jackson Lewis attorneys with whom you regularly work.