

What to Do When Scared Workers Don't Report to Work Due to COVID-19

By Allen Smith, J.D.

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Some essential workers are refusing to come to work out of fear of contracting the coronavirus. Their employers must weigh the employees' legal rights and understandable health concerns with the organizations' business needs. It can be a tough balancing act.

"A good first step for an employer to respond to an essential worker who's expressing fears of returning to work is to actively listen to the employee and have a conversation," said Brian McGinnis, an attorney with Fox Rothschild in Philadelphia. "What are their specific concerns? Are they reasonable?"

McGinnis said that employers should consider whether it already has addressed those concerns or if additional steps are needed. Often, having a conversation with the employee "will avoid an unneeded escalation," he said.

Employees' Legal Rights

What if that doesn't work? Tread cautiously, as employees have many legal protections.

An employer usually can discipline workers for violating its attendance policy. But there are exceptions to that rule, noted Robin Samuel, an attorney with Baker McKenzie in Los Angeles. Putting hesitant employees on leave may be a better choice than firing them.

Christine Snyder, an attorney with Tucker Ellis in Cleveland, cautioned, "If an employer permits employees to use vacation or PTO [paid time off] for leave, it may soon find itself without a workforce sufficient to maintain operations. Therefore, an employer may want to rely upon the terms of its existing time-off policy, which typically requires approval to use vacation or PTO, to require that leave for this reason be unpaid."

OSH Act

Employees can refuse to work if they reasonably believe they are in imminent danger, according to the Occupational Safety and Health (OSH) Act. They must have a reasonable belief that there is a threat of death or serious physical harm likely to occur immediately or within a short period for this protection to apply.

Samuel explained that an employee can refuse to come to work if:

- The employee has a specific fear of infection that is based on fact—not just a generalized fear of contracting COVID-19 infection in the workplace.
- The employer cannot address the employee's specific fear in a manner designed to ensure a safe working environment.

NLRA

The National Labor Relations Act (NLRA) grants employees at unionized and nonunionized employers the right to join together to engage in protected concerted activity (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/coronavirus-protected-concerted-activity-unions.aspx). Employees who assert such rights, including by joining together to refuse to work in unsafe conditions, are generally protected from discipline, Samuel noted.

"That said, the refusal must be reasonable and based on a good-faith belief that working conditions are unsafe," said Bret Cohen, an attorney with Nelson Mullins in Boston.

ADA

Employers should accommodate employees who request altered worksite arrangements, remote work or time off from work due to underlying medical conditions that may put them at greater risk from COVID-19, Samuel said.

The EEOC's guidance on COVID-19 and the Americans with Disabilities Act (https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm) (ADA) notes that accommodations may include changes to the work environment to reduce contact with others, such as using Plexiglas separators or other barriers between workstations.

The Age Discrimination in Employment Act, unlike the ADA, does not have a reasonable-accommodation requirement, pointed out Isaac Mamaysky, an attorney with Potomac Law Group in New York City. Nonetheless, he "would encourage employers to be flexible in response to leave requests from vulnerable employees," such as older essential workers, as the right thing to do and to bolster employee relations.

FFCRA

If a health care provider advises an employee to self-quarantine because the employee is particularly vulnerable to COVID-19, the employee may be eligible for paid sick leave under the Families First Coronavirus Response Act (FFCRA), Cohen noted. The FFCRA applies to employers with fewer than 500 employees, and the quarantine must prevent the employee from working or teleworking.

FFCRA regulations (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/dol-releases-ffcra-regulations-coronavirus.aspx) permit employers to require documentation for paid sick leave, noted John Hargrove, an attorney with Bradley in Birmingham, Ala.

Employers may relax documentation requirements due to the difficulty some employees could have obtaining access to medical providers during the pandemic and to encourage ill employees to stay away from work, said Pankit Doshi, an attorney with McDermott Will & Emery in San Francisco.

SHRM RESOURCE SPOTLIGHT

Coronavirus and COVID-19 (www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx)

Hazard Pay

Although not currently mandated by federal law, hazard pay—extra pay for doing dangerous work—might be appropriate for an employer to offer to essential workers, McGinnis said.

If hazard pay is offered, similarly situated employees should be treated the same, he said. Otherwise, the employer risks facing a discrimination claim.

Andrew Turnbull, an attorney with Morrison & Foerster in McLean, Va., noted that companies with multistate operations may have legitimate reasons for offering hazard pay to employees working at locations with a high risk of exposure and not where the risk is minimal.

Hazard pay might be a good choice for public-facing jobs, where employees may not be able to observe social distancing, said Román Hernández, an attorney with Troutman Sanders in Portland, Ore.

Some localities require hazard pay in some circumstances, Doshi noted. These localities include Augusta, Ga., Birmingham, Ala., and Kanawha County, W.Va.

Inform and Protect Workers

Lindsay Ryan, an attorney with Polsinelli in Los Angeles, said that employers should keep employees apprised of all measures the employer is taking to maintain a safe workplace, consistent with guidance from the U.S. Centers for Disease Control and Prevention (CDC), the Occupational Safety and Health Administration, and local health authorities.

If employers have the means to do so, they should screen employees each day by taking their temperatures (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/eeoc-coronavirus-temperature.aspx) and send workers who have fevers home, Snyder said. Alternatively, employers can require employees to take their own temperatures before reporting to work, she added.

"Finally, in light of recent CDC guidance regarding the use of cloth masks to prevent infection, employers should allow employees to wear masks in the workplace and consider providing employees with cloth masks if they are able to acquire them," she said.

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