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Back to Basics: Managing Through COVID-19 with Traditional Labor Law | Part 4

This alert is part four of our five-part series: "Back to Basics: Managing Through COVID-19 with Traditional Labor Law." The finale of the series will be posted tomorrow.

Part 4: Work Stoppages

In a non-union setting, employees have the right to strike or otherwise refuse to work for almost any reason and they cannot normally be retaliated against for doing so. Although they can be "replaced," either permanently or temporarily depending on the type of work stoppage, they usually cannot be terminated. A work stoppage does not have to be a "safety strike."

In the unionized setting, the same rules apply if there is no collective bargaining agreement in place. For example, if the union contract has expired and no new agreement has been reached, the employees remain free to strike for almost any reason without being terminated. However, if the parties' contract is in effect, then whether or not the employees have the right to engage in a work stoppage may depend on the provisions of that contract.

Because of the nature of a pandemic or other health-related circumstances, work stoppages, as well as bargaining or discussions of working conditions, often

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involve the potential for safety-related work stoppages or other job actions.

Protections for a "Safety" Strike

In both union and non-union situations, and whether or not there is a union contract in place prohibiting strikes, there is a special provision in the National Labor Relations Act that protects employees who "quit labor" because of abnormally dangerous conditions of work. Such a quitting of labor is deemed to not be a strike, but the refusal to work must be in good faith and supported by ascertainable, objective evidence that the working conditions are abnormally dangerous.

Likewise, OSHA finds that an employee has the right to refuse to work if, and only if, all of the following conditions are met:

1. A real, imminent danger of death or serious injury exists. The danger must be one that the employee reasonably and in good faith believes is present and that a "reasonable person" would believe is present;
2. Where possible, the employee has asked the employer to eliminate the danger;
3. The employer has failed to do so;
4. The employee refuses to work because the employee genuinely believes that an imminent danger of death or serious injury exists, rather than a subterfuge to pressure the employer or disrupt the business; and
5. There is not enough time to get the hazard corrected through regular enforcement channels.

This approach presents a sincere attempt to recognize and balance legitimate refusals to work under legitimate fear of imminent harm with the risk that, under the guise

of a safety issue, employees will overreach to pressure employers to react.

Violations of "No-Strike" Clause

As indicated above, generally unless a strike is a legitimate "safety" strike entitled to special protections, a strike or work stoppage during the term of a union contract may nonetheless be prohibited and may subject striking employees to discipline, including termination, even if the strike is because the employees are concerned about their safety. However, the employer must read the no-strike clause carefully to determine whether or not the work stoppage does, in fact, violate the contractual prohibitions. For example, does the clause allow "safety" strikes that may have a more liberal definition that the NLRB or OSHA standard? Does the clause permit "sympathy" strikes (strikes in support of other employees even if the striking employees are not in any imminent safety danger)? Does the clause allow strikes of short duration (for example, for 24 hours) before any adverse action can be taken?

Intermittent Work Stoppages, Sit Down Strikes, Partial Strikes

Generally, while employees are permitted to engage in work stoppages designed to put pressure on employers to try to influence change, that right is balanced with the general right of the employer to use certain economic weapons and other tactics in order to remain in operation. Many of the tactics developed by unions over the years have attempted to create such pressure while, at the same time, depriving the employer of the right to operate and, therefore, have been found by the NLRB to be unlawful.

One such tactic is the intermittent work stoppage, a device where the union or a group of employees strikes for a short period of time, perhaps a few hours or a few

days, then returns to work. The employees will then work for several more days and then, without warning, will engage in another work stoppage lasting only a few hours or a few days. In each instance, the work stoppage is timed to effectively prevent the employer from planning or engaging in a normal course of business.

An intermittent work stoppage is unprotected, and employees who engage in the tactic can be disciplined. The difficulty with intermittent work stoppages is that the NLRB has been somewhat inconsistent in how many times the employees can engage in the tactic before it loses its protection. However, several short work stoppages that were part of a common strategy to harass the employer were unprotected. But, several short work stoppages, each to publicize different grievances, remained protected.

A partial strike is another tactic designed to put maximum pressure on the employer yet make it difficult for the employer to conduct business as usual. A partial strike is one where employees will perform some, but less than all, of their jobs. For example, employees may work during their normal scheduled hours but may refuse all overtime. Or, they may perform some tasks but refuse to perform others. Or, they may engage in a slowdown or "work to rules" tactics where they perform exactly (but the minimum of) what is required of them. In such cases, the NLRB again tries to enforce the balance between the employees' right to pressure the employer with the inability of the employer to conduct normal business operations.

Sit down strikes are, as their name suggests, circumstances where employees simply refuse to perform any work yet they refuse to leave the employer's property when directed to do so, thereby depriving the employer of productive use of its own property. Sit down strikes have routinely been found to be unlawful although there are cases where employees have briefly

refused to return to work, insisting that they are only refusing to work pending a meeting with management to discuss a serious issue. At that point, the employer can either agree to meet with the employees and then direct them to return to work; or, the employer can refuse such meeting and direct them to return to work. In either case, once the employees have been directed to return to work, they must either do so or leave the property and convert their activities into a real strike.

In each of the above examples of non-conventional work stoppages or in whatever other tactic the union and employees may adopt, the employer should try to remain calm, not overreact, review the potentially applicable provisions of the union contract, and promptly seek the advice of labor counsel.

We conclude our Back to Basics series tomorrow highlighting how traditional labor law can assist with issues outlined in the CARES Act. If you have any questions regarding potential work stoppages or labor and employment issues, please do not hesitate to contact Howard Bernstein, Gerald Golden, Jason Kim or your Neal Gerber Eisenberg attorney.

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