

HR CLINIC

May 2020

WHEN FEAR IS A PROTECTED REASON TO SKIP WORK

When workers are “scared” to report to the worksite during the pandemic, an important question to consider is why they are afraid: is it a generalized fear or a specific, protected reason.

Despite an employer’s best efforts to create a safe work environment, some employees may refuse to come to worksites based on nothing beyond a general fear of rejoining public life while the pandemic continues.

After decisions about who can and can’t work remotely are made and communicated, then disciplining or firing employees who refuse to come in, out of a generalized fear, is likely permissible in many circumstances. Additionally, employers are not typically required to allow employees to continue to work remotely if the employer can demonstrate that it has complied with all appropriate measures to reduce the risk of exposure in the workplace.

OSHA

Employers should abide by the Occupational Safety and Health Act’s (OSHA’s) general duty clause, that states that they must keep their places of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm. The following action steps should be considered when addressing potential workplace hazards, including:

- ▶ Screening employees and visitors for fever.
- ▶ Using social-distancing techniques such as staggered shifts, reworked use of space, restricted in-person meetings and limited customer volume.
- ▶ Offering personal protective equipment (PPE) that is consistent with Occupational Safety and Health Administration guidance.
- ▶ Reviewing cleaning techniques and considering additional cleaning measures the employer could implement.
- ▶ Adopting a flexible work-from-home policy.

NLRA

Employees may have rights under the National Labor Relations Act’s (NLRA’s) “protected concerted activity” protections for employees with respect to the terms and conditions of their work. That said, whether an employer can be held liable for an employee’s exposure to the coronavirus in the workplace is uncertain.

The information contained in this HR Clinic is intended for educational purposes and to provide a general understanding of regulatory events, legislative changes and the law – not to provide specific legal advice.



The key in determining if an activity “is potentially covered under the NLRA” is whether two or more employees are joining together to speak out or otherwise protest a practice or action. In any case, single-employee actions are typically not covered by the NLRA.

ADA

Under the Americans with Disabilities Act (ADA) and state equal employment opportunity laws, if an employee is concerned about returning because he or she is at a higher risk of severe illness from COVID-19 than others, the employee likely has a disability and is protected. If that’s the case, the employer should discuss possible accommodations (such as extra social-distancing or work-from-home) with the employee to address his or her concerns.

When an employee has anxiety related to contracting the coronavirus, the employee nonetheless might have a disability requiring reasonable accommodation if the anxiety rises to the level of a disability under ADA or state law.

Employees also may be concerned about returning to work if they live with higher-risk individuals. Such a living arrangement likely does not afford the employee a right to reasonable accommodation under the ADA or state law, but ... there might be an associational disability-discrimination claim if the employer treats employees in these circumstances less favorably than others regarding worksite return policies.

Other Discrimination Claims

If some workers are permitted to telecommute and others aren’t, there is a risk of potential discrimination or retaliation claims. So, an employer should make sure it has a legitimate business reason for its decision. For this reason, it is wise to document (based upon operational needs) which categories of employees are prioritized for return to the workplace to ensure consistency and reduce the risk of bias claims.

FFCRA

Employers should also be reminded to comply with the Families First Coronavirus Response Act (FFCRA). For example, an employee may be taking care of a sick relative or providing care for a child out of school and therefore may be protected.

Due to the Covid-19 disruption, the regulatory environment remains fluid. Please check in with your HRWS team at [866.691.7757](tel:866.691.7757) or email us directly with any questions.