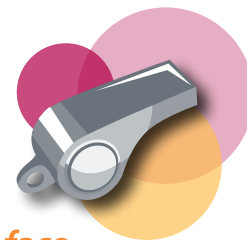


Workplace Whistleblower



Perspectives on whistleblower situations that employers frequently face

She Refuses To Work Unless You Fix It Her Way... What Do You Do?

Hypothetical, based upon a real fact pattern: An employee has raised workplace safety concerns and refuses to work until changes are made to her satisfaction. What should the Company do?

Employee's Workplace Safety Concerns

This scenario essentially asks two questions. The first of what an employer should do when an employee raises a workplace health and safety concern is often straightforward. The employer should thank the employee for raising her concerns, inform the employee that it takes her concerns seriously and will investigate them, and remind the employee that she is expected to raise any safety concerns she has in the future. The employer should then investigate the concerns and correct any hazards that may exist. Finally, the employer should let the employee know the results of the investigation.

Employee's Work Refusal

The second question of what an employer should do when an employee refuses to work until her safety concerns are met to her satisfaction is more complicated and depends on the specific circumstances. As an initial matter, OSHA does not permit employees the right to "walk off the job because of potential unsafe conditions." *29 CFR 1977.12(b)(1)*. However, an employee is permitted to refuse to perform work she: (1) reasonably, and in good faith, believes poses an imminent risk of death or serious bodily injury; and (2) reasonably believes there is insufficient time to correct the hazard through ordinary means, such as through an OSHA complaint. *29 CFR 1977.12(b)(2)*. Further, the employee's apprehension of serious injury or death is measured by an objective standard of a reasonable person under the circumstances. *Id.* In other words, the employee is not permitted to refuse work if her apprehension is out of line with her co-workers.

Thus, when the employee refuses to perform her job duties, the employer must evaluate whether: (1) the employee's refusal is made in good faith and not intended to harass; (2) the job the employee refuses to perform actually poses an imminent risk of death or serious bodily injury; and (3) the employee's apprehension is objectively reasonable under the circumstances. If the employer determines that the employee's work refusal has merit, it should immediately cease those job functions and correct the hazardous condition. On the other hand, if the employer determines that the employee's work refusal is not made in good faith or is not objectively reasonable under the circumstances, then the employee's refusal is not protected and the employer may be able to take appropriate remedial action, including transfer or discipline.

Employer Steps

A Company faced with an employee's health and safety concerns and work refusal should consider the following steps:

- Step 1:** Inform the employee that the Company takes her workplace safety concerns seriously and will investigate them, it appreciates the fact she brought the concerns to the Company's attention, and it expects her to do the same in the future. Also assure the employee that the Company will not retaliate against her for raising her workplace concerns, or permit anyone else to retaliate against her.
- Step 2:** Immediately investigate the facts regarding the employee's work refusal. This investigation should evaluate whether: (1) the employee's refusal is made in good faith and not intended to harass; (2) the job the employee refuses to perform actually poses an imminent risk of death or serious bodily injury; and (3) the employee's apprehension is objectively reasonable under the circumstances.
- Step 3:** If the investigation determines that the employee's work refusal has merit, the Company should immediately cease operations related to the work refusal and correct any hazards. The Company should advise the employee the corrective action and direct the employee to resume her normal work operations once the hazard has been abated.
- Step 4:** If the employee refuses to resume work after the hazard has been abated because the changes are not made to her satisfaction, the Company should consider whether the employee's work refusal remains reasonable. If not, the Company should consider whether it is possible to transfer the employee to a different position or revise their work duties so that it does not involve the complained of activity. If this is not possible the Company should consider discipline.
- Step 5:** If the investigation determines that the employee's work refusal is not made in good faith or not objectively reasonable, the Company has several options. First, the Company can advise the employee that it does not believe the complaint is reasonable and request the employee return to work. Next, the Company could consider transferring the employee to a different position. Finally, if the employee refuses to be transferred, consider whether appropriate discipline is necessary. If the Company chooses discipline, it is critical that the basis for the decision is well documented.

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