

Refusing Unsafe Work

A WEB WOVEN OF STATE AND FEDERAL LAWS AND REGULATIONS PROTECTS NEW JERSEY WORKERS FROM HAZARDOUS WORKING CONDITIONS

Daniel L. Saperstein | July 20, 2011



Across the river, the musical production "Spiderman: Turn off the Dark" recently almost spun its way off Broadway. The Occupational Safety and Health Administration, reacting to a string of accidents, had issued three violations to the musical for subjecting actors to hazardous high-flying stunts. With worker safety making national headlines and proposed legislation in the U.S. Congress intending to amplify employee protections, a familiar debate has resurfaced: whether, and under what conditions, employees may refuse dangerous work assignments.

Under defined conditions, New Jersey employees have the right to refuse unsafe work, thanks to the following statutes and regulations: (1) Occupational Safety and Health Act (OSHA) 29 CFR §1977.12 (the OSHA regulation) as well as federal safety statutes that cover select industries; (2) the National Labor Relations Act (NLRA) and Labor Management Relations Act (LMRA); and (3) New Jersey's Conscientious Employee Protection Act (CEPA) and Public

Employees' Occupational Safety and Health Act. This right only stands to grow if Congress passes the Protecting America's Workers Act of 2011 (PAWA). Given the increased legislative and media attention to worker safety, New Jersey employers need to be especially cognizant of their obligations (and potential obligations) under both federal and state law.

Current Federal Safety Law

OSHA, the primary federal worker safety statute, which applies to any employer engaged in a business affecting commerce (excluding the United States or any state or political subdivision of a state), does not expressly provide for the right of employees to refuse hazardous work assignments. The OSHA regulation confirms that, as a general matter, there is no such right in the act, and employers can typically take disciplinary action, without legal consequence, against an employee who refuses to perform his routine job functions in light of alleged safety concerns.

Nevertheless, the OSHA regulation itself affords limited protections where there is a real danger of death or serious injury. The employee must demonstrate that he or she has refused to work in good faith. In addition, before discontinuing work, the regulation requires that an employee inform the employer of the alleged hazard (if possible), ask the employer to rectify the danger, and pursue the regular channels of statutory enforcement (unless there is insufficient time).

Although OSHA-administered industry statutes do not likely apply to many New Jersey employers, they provide insight into the varying standards that employees must establish to refuse unsafe work. Some of these statutes, including the Energy Reorganization Act and the Pipeline Safety Improvement Act, limit the protection to refusing to perform unsafe work that is itself illegal (as prohibited by the statute or other related federal law), if the employee has apprised the employer of the alleged illegality.

There are other industry statutes that not only apply to illegal activity, but also provide employees the right to refuse *non*-illegal unsafe work, if certain conditions are met. For example, the Surface Transportation Assistance Act, the National Transit Systems Security Act and the Federal Railroad Safety Act guarantee covered employees the right to not only refuse to violate the law, but to refuse to work when confronted by a hazardous safety or security condition. (Of course, the employee's claim must meet certain criteria specified in each statute).

Thus, New Jersey employers should check whether they are covered by and subject to any of the above-mentioned industry statutes, so as to avoid liability for infringing on the employee's right to refuse unsafe work assignments.

Federal Labor Law

When refusing to perform unsafe work, employees may also invoke the protections of Section 7 of the NLRA and/or Section 502 of the LMRA. Union and nonunion employees alike can invoke the Section 7 right to engage in concerted activity for the purpose of "mutual aid or protection." For instance, the Supreme Court held in *NLRB v. Washington Aluminum Co.* that employees had a Section 7 right to walk out over unsafe working conditions. Employers should note that, unlike the federal safety laws, the Section 7 activity must be concerted (although the term "concerted" can be defined broadly).

Section 502 of the LMRA protects an employee or employees who, in good faith, halt work on account of abnormally dangerous conditions. The section created an exception to the employer-union negotiated no-strike clause contained in most collective bargaining agreements, statutorily permitting an employee or employees to walk off the job because of abnormally dangerous conditions. In defining the legal standard, in *Gateway Coal Co. v. United Mine Workers of Am.*, the Supreme Court held that there must be "ascertainable, objective evidence" to prove the dangerous condition. Also required is a showing that the condition creates "some identifiable, presently existing threat." Therefore, not every employee threatened by what he or she perceives to be an abnormally dangerous condition is protected under the section.

New Jersey Law

New Jersey statutory protections have the potential to be even broader than the rights guaranteed under federal safety and labor law. Under New Jersey's whistleblower statute, CEPA, an employer (with 10 or more employees) cannot take retaliatory action against an employee who objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes is (1) in violation of a law, or a rule or regulation promulgated pursuant to law; (2) fraudulent or criminal; or (3) incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

Like New York and other states, CEPA entangles federal and state law by allowing an employee to refuse unsafe work in violation of *any* law, rule or regulation. Unlike the OSHA regulation and some of the industry statutes, however, under CEPA, if the alleged unsafe work assignment is not illegal, the employee's refusal must implicate public safety, not merely the safety of the individual employee or fellow employees. Nonetheless, the right under New Jersey state whistleblowing law to refuse unsafe work is (and has the potential to be) quite expansive.

With respect to New Jersey state safety laws, private sector employers are covered by the federal OSHA. Public employers should note, however, that New Jersey's Public Employees' Occupational Safety and Health Act expressly disavows the right of public employees to walk off the job because of potential unsafe conditions. Rather, if a public employer refuses to correct an allegedly hazardous condition, a public employee may request an inspection of the workplace or seek the assistance of various public agencies. Although a public employer typically has the right to take disciplinary action against a public employee who refuses unsafe work, a public employee subjected to such discipline may file a discrimination complaint with the Commissioner of Labor and Workforce Development. The employee would have to show that he refused, in good faith, to expose himself to imminent danger, had no reasonable alternative to such refusal, and believes that the adverse employment action resulted from the refusal.

Proposed Federal Safety Law

PAWA would amend OSHA to prohibit discipline against an employee for refusing to violate any provision of OSHA, or for refusing to perform his job duties, if the employee has a reasonable apprehension that performing such duties would result in serious injury to, or serious impairment of the health of, the employee or other employees. Similar to the OSHA regulation, under PAWA the employee must act in good faith and, as a reasonable person would, conclude that there is a hazard resulting from the circumstances. Further, to be afforded the protections of PAWA, when practicable, the employee shall have communicated or attempted to communicate the safety or health concern to the employer and have not received a response from the employer that reasonably addresses the concern.

It should further be noted that PAWA is not a stand-alone proposal, but part of a larger trend at the federal level to increase worker protections to refuse unsafe work. Although many New Jersey employers will not be affected by the proposed Miner Safety and Health Act (MSHA), like PAWA, MSHA also prohibits retaliation against an employee for refusing to perform his occupational duties. A reaction to the recent outcry over mining accidents, MSHA would permit a miner or other employee of an operator to refuse to work if the miner or other employee has a good-faith and reasonable belief that performing such duties would pose a safety or health hazard to the miner or other employee or to any other miner or employee.

Employers must be especially wary of the many ways in which they can become ensnared in this web of federal and state laws (and held liable), for taking disciplinary action against employees who refuse unsafe work. In the coming months or years, such protections may become even broader with the passage of proposed legislation and increased media scrutiny. Employers should be careful to prepare supervisors, and other personnel in positions of authority, for the likelihood of employees refusing to perform certain work because it is perceived as unsafe. To avoid protracted legal battles, employers should also regularly evaluate their policies and practices to make sure that they comply with the current state of the law.

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