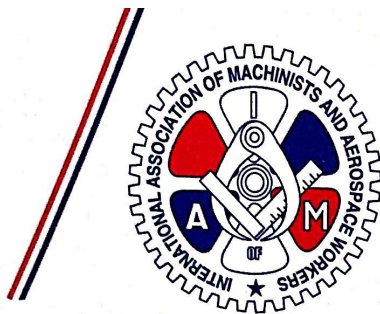


**International
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To: All IAM V-lodge and Website Users

From: Legal Department

Date: April 6, 2020

Re: Safety Strikes and COVID-19

Question Presented

Can safety strikes reasonably be used in the COVID-19-pandemic landscape, and, if so, for how long?

Overview

Because of protections outlined within various statutes, including the National Labor Relations Act (NLRA) and the Labor Management Relations Act (LMRA), private sector employees who refuse to work are unlikely to be subjected to **valid** discipline if they (1) act in good faith (2) because of abnormally dangerous conditions that objectively exist. Under these statutes, employees who acted concertedly will be on much stronger legal ground than an employee who acts for their own concerns—although there may be other anti-retaliation protections for those employees. Such strikes can usually be deployed for as long as the employer does not remedy the safety conditions at issue. However, given the unprecedented nature of this pandemic, along with the current state of the National Labor Relations Board, none of this can be asserted with complete certainty.

This memo focuses on collective action and related retaliation surrounding health and safety concerns. There may also be favorable language in state laws, or torts, for possible public-policy actions that we could use to protect workers from retaliation/discipline based on the employee attempting to remove himself/herself from a particular worksite, particularly if is consistent with an announced declaration of emergency in that locality/state. Those circumstances are not addressed within this memo. Furthermore, there are likely other protections available to employees on an individual (or even class-action) basis, such as failure to accommodate under the Americans with Disabilities Act (ADA); those protections are also not addressed within this memo.

The Right to Refuse to Work Under Section 502 of the LMRA

A "safety strike" involves employees choosing to withhold their labor over their working conditions. The right to strike over safety issues, referred to in Section 502 of the LMRA, 29 U.S.C. §143, arises in two main situations. First, where the collective bargaining agreement has an express or implied no-strike clause, the employer may seek to enjoin the strike or seek damages for the strike if it violates the no-strike clause. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970); *Teamsters, Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962). However, if the strike is a valid safety strike within the meaning of Section 502, then Section 502 bars the employer from obtaining an injunction or damages. Such employees will not be deemed to be engaging in an unlawful strike if the reason they refuse to work is "in good faith because of abnormally dangerous conditions."

Section 502 provides:

Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; **nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.**

Id. (emphasis added). *See Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 386, 94 S. Ct. 629, 641, 38 L. Ed. 2d 583 (1974) ("a work stoppage called solely to protect employees from immediate danger is authorized by s 502 and cannot be the basis for either a damages award or a *Boys Markets* injunction.").

In order to fall under the purview of Section 502, "a union seeking to justify a contractually prohibited work stoppage under S 502 must present 'ascertainable, objective evidence supporting its conclusion that an abnormally dangerous¹ condition for work exists.'" *Id.* at 387. This belief must be based on conditions that actually exist; in *Gateway Coal Co.*, the Supreme Court disagreed that an honest belief, "no matter how unjustified" invokes the protection of Section 502. Once such evidence is present, a refusal to work because of a good-faith apprehension of physical danger "is protected activity and not enjoinable, even where the employees have subscribed to a comprehensive no-strike clause in their labor contract." *Id.* In other words, "[w]hat controls is not the state of mind of the employee concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous.'" *Redwing Carriers, Inc. and Rockana Carriers, Inc.*, 130 NLRB 1208, 1209 (1960); *Gateway Coal Co. v. United Mine Workers of America, et al.*, 414 U.S. 368, 385-387 (1974).

¹ Not all circumstances surrounding safety issues will rise to this "abnormally dangerous" standard, of course. *See, e.g., Airborne Freight Corp. v. Teamsters Local 705*, 216 F. Supp. 2d 712 (N.D. Ill. 2002) (alleged battery of union steward by supervisor and employer's denial of water to employees on hot day was not sufficient to be a protected safety strike over "abnormally dangerous conditions for work" under LMRA).

However, circumstances may exist that still allow for an injunction to issue. In *Gateway Coal Co.*, the Court upheld the District Court's decision to issue injunctive relief conditioned upon the suspension of the two foremen who created the safety concern among the workforce, pending a decision by an arbitrator over the dispute. 414 U.S. at 387.²

The issue has been addressed extensively by the Sixth Circuit; for example, the Circuit held that the important question in a § 502 situation is not whether abnormal danger **actually** existed, but whether it was shown by **objective evidence** that the employees' working conditions "might reasonably be considered 'abnormally dangerous,'" because Section 502 "expressly limits the right of management to require continuance of work under what the employees in good faith believe to be 'abnormally dangerous' conditions." *TNS, Inc. v. NLRB*, 296 F.3d 384, 392 (6th Cir. 2002) (citing *Knight Morley Corp.*, 251 F.2d 753, 759 (6th Cir. 1957) (enforcing 116 NLRB 140, 146 (1956)) (§ 502's purpose was to give employees a right to walk off the job because of abnormally dangerous conditions)).

Section 502 Is Often Applied Together With Section 7 of the NLRA

Both the NLRB and many courts have concluded that such protections under Section 502 are to be applied within the context of also analyzing whether activity falls within the scope of protected activity under Section 7 of the NLRA, for which discipline cannot be imposed. See *Detroit Free Press, Inc.*, 245 N.L.R.B. 335 (1979) (one broken safety button not sufficiently "abnormally dangerous work condition" within the meaning of Section 502; question was whether, within the Section 502 context, the no-strike clause ... remove[d] their activity from the realm of protected Section 7 activity."); *Clark Eng'g & Const. Co. v. United Bhd. of Carpenters & Joiners of Am., Four Rivers Dist. Council*, 510 F.2d 1075, 1079 (6th Cir. 1975) ("Section 502 authorizes the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions of work....**When an employee is exposed to abnormally dangerous working conditions and quits work in good faith because of such conditions the section protects him from employer retaliation. The employee cannot be discharged...**") (emphasis added); *Nat'l Labor Relations Bd. v. Knight Morley Corp.*, 251 F.2d 753, 759 (6th Cir. 1957) ("[Section 502] expressly limits the right of management to require continuance of work under what the employees in good faith believe to be 'abnormally dangerous' conditions.").

Board law has expanded upon the description of what circumstances fall under Section 502's protection—and what circumstances do not. For example, in *Custodis-Cottrell, Inc.*, 283 NLRB 585 (1987), the Board upheld the ALJ's decision where the ALJ noted the following explanation of the language in Section 502 *not* being applicable in inherently dangerous workplaces where certain conditions have long been tolerated:

² While the prevalent body of law is that safety strikes are unenjoinable, there is a chance that if an employer seeks an injunction over a safety strike, the court could order that the dispute be arbitrated. That happened in *Gateway Coal Co.*, and it also happened in *Otis Elevator Co. v. Elevator Constructors Local 4*, 408 F.3d 1 (1st Cir. 2005), where the local union engaged in a work stoppage after a dispute erupted over the use of cranes to hoist plunger/cylinder units in buildings where the hoist had to be done manually—circumstances the union believed were unsafe. The company sued for injunctive relief, and the trial court ordered that the dispute be arbitrated instead. On appeal, the circuit court affirmed the district court's decision that the dispute be arbitrated pursuant to the process outlined in the parties' collective bargaining agreement.

Moreover, when the work involved is inherently dangerous, a finding of the existence of an "abnormally dangerous" work situation may not be based on previously existing conditions of longstanding endured by the employees for a considerable period prior to a work stoppage. As stated by the administrative law judge with Board approval in *Anaconda Aluminum Co.*, 197 NLRB 336 at 344 (1972):

Absent the emergence of new factors or circumstances which change the character of the danger, work which is recognized and accepted by employees as inherently dangerous does not become "abnormally dangerous" merely because employee patience with prevailing conditions wears thin or their forbearance ceases. [Citations omitted.]

And, the hazard presented by the "abnormally dangerous" working conditions must not be speculative. **Rather, the abnormally dangerous working conditions must put the employees in imminent peril.** *Mine Workers District 6 (Consolidation Coal Co.)*, 217 NLRB 541, 551 (1975).

(emphasis added).

The Sixth Circuit relied on *Gateway Coal Co.* to expressly bridge both Section 502 and Section 7 protections and apply them to safety strikers by asserting that Section 502 confers "special protection" on employees who quit work in the good faith belief that their workplace is abnormally dangerous, and that "this protection is meaningless if companies can simply replace these employees as if they were normal economic strikers." *TNS, Inc. v. NLRB*, 296 F.3d at 394. The Court upheld the Board's determination that employers may not permanently replace employees who engage in § 502 job actions, because such a determination "conforms with this Court's holding that "[w]hen a work stoppage properly results from abnormally dangerous working conditions, an employer cannot resort to the weapons available to him in an economically-motivated work stoppage." *Id.* (citing *Clark Eng'g & Constr. Co. v. United Bhd. of Carpenters & Joiners*, 510 F.2d 1075, 1080 (6th Cir.1975)).

Ultimately, when the lack of personal protective equipment is one of the issues that workers are striking over—even in conjunction with concerns over other working conditions—the safety element provides additional protection under the Act. For example, in *EYM King of Missouri*, 365 NLRB No. 16 (2017), the employer, a fast food establishment, claimed that the workers were only going on strike to secure a higher minimum wage for the fast food industry (therefore making the strike an economic one). However, the employees delivered a strike notice stating they were striking "because locally their workers have been subjected to injury because of lack of protective equipment," in addition to some unfair labor practices. The ALJ held—and the Board upheld—the fact that the surrounding circumstances should have indicated to the employer **that improvement of local working conditions** was also a reason for the work stoppage. The Board has explained that, "even if the purpose of the walkoff is not clearly communicated to the employer at the time, if from surrounding circumstances the employer should reasonably see that improvement of working conditions is behind the walkoff, it may not penalize the employees involved without running afoul of Section 8(a)(1)." *CGLM, Inc.*, 350 NLRB 974, 980 (2007).

Is This Right Unlimited In Duration?

It is not. If an employer fixes the safety issue, and the union continues to strike, the union may be in breach of its no-strike obligations under such language in a collective bargaining agreement sufficient to have an injunction issued against the strike behavior—even if the initial strike activity was protected. For example, in *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 387 (1974), the Court found that the company eliminated any safety issue by suspending the two foremen (who had created the safety issue that put the bargaining unit out on strike) pending a final arbitral decision. Under those circumstances, the Court concluded that the lower court did not abuse its discretion when it found that by continuing to strike, the union engaged in a “continued breach of its no-strike obligation” that would “cause irreparable harm to the [company].” *Id.*

Does Section 502 Apply To Non-Unionized Employees Working Collectively?

A safety strike is viewed as concerted activity, whether the employees are unionized or not. See *Curtis Mathes Mfg. Co.*, 145 NLRB 473 (1963) (citing *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9 (1962) (group of non-unionized employees walked off the job over lack of heating)).

As initial reading of the Supreme Court’s decision in *Gateway Coal Co.* would lead one to the conclusion that Section 502 only applies where there is a union contract with a no-strike obligation. The Court stated that Section 502 “provides a limited exception to an express or implied no-strike obligation.” The Supreme Court later confirmed this interpretation when it stated in *Whirlpool Corp. v. Marshall*, 445 U.S. 1 fn. 29 (1980), “The effect of [Section 502] is to create an exception to a no strike obligation in a collective-bargaining agreement,” citing *Gateway Coal Co.* And, there cannot be a no-strike obligation in a collective bargaining agreement without a union.

However, Section 502 of the Act reads in part as follows:

Nor shall the quitting of labor by *an employee or employees* in good faith because of abnormally dangerous conditions for work at the place of employment of such *employee or employees* be deemed a strike under this Act.

(emphasis added). Section 501(2) of the Act defines the term “strike” as:

any strike or other concerted stoppage of work by *employees . . .* and any concerted slow-down or other concerted interruption of operations by *employees*.

(emphasis added). Neither of these sections restrict the protections to *only* unionized employees.

Several NLRB ALJ decisions have punted on the issue, dismissing the cases on other grounds (such as a lack of an abnormally dangerous situation to begin with), so it is still unanswered whether the NLRB would apply Section 502 could to un-unionized employees. At least one court has. *Clark Eng’g & Const. Co. v. United Bhd. of Carpenters & Joiners of Am.*,

Four Rivers Dist. Council, 510 F.2d 1075, 1079 (6th Cir. 1975) (“Section 502 authorizes the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions of work. **The section does not mention a labor union; it is addressed solely to the rights of individuals....**When an employee is exposed to abnormally dangerous working conditions and quits work in good faith because of such conditions the section protects him from employer retaliation. The employee cannot be discharged...”)(emphasis added);

What is clear is that a safety strike where an employee or more are acting on behalf of themselves and/or others would still be protected under the NLRA, regardless of whether Section 502 would apply. See, e.g., *Beker Industries Corp.*, 268 NLRB 975 (1984); *Odyssey Capital Group, L.P., III*, 337 NLRB 1110 (2002) (“However, under Board precedent it is clear that these unrepresented employees’ concerted protest over safety was legally protected.”) (citing *Tamara Foods, Inc.*, 258 NLRB 1307 (1981)).

What Does This Mean For COVID-19 (And Unions Navigating This New Environment)?

There is (perhaps unsurprisingly) very little case law regarding epidemics or pandemics and the workplace. In 2009, nurses in California held a one-day safety strike over “Poor Readiness” by a hospital system regarding the H1N1 outbreak. The employer hospital system did not seek an injunction over the issue in that case, choosing instead to broadcast its displeasure with the nurses through the media. So there is no case law to review for this particular set of circumstances.

It is also unclear how healthcare employees and others who may be at higher risk for contracting COVID-19 would be viewed if the Section 502 argument were to be made. Can a healthcare worker in a hospital claim that COVID-19 is “the emergence of [a] new factor[] or circumstance[] which change[s] the character of the danger”? Or would such an employer claim that healthcare work, due to its daily potential exposure to all manner of pathogens, is “recognized and accepted by employees as inherently dangerous” and therefore cannot “become ‘abnormally dangerous’” just because of the novel coronavirus? One would assume that the argument would be stronger in non-healthcare settings, as those employees could credibly point to COVID-19 as a new factor that changes the character of the inherent danger present in their workplaces.

The argument that the “novel” nature of this coronavirus clearly makes it a new factor or circumstance that changes the character of the day-to-day danger healthcare workers face from influenza, etc. is a strong one—particularly in the face of a lack of protective equipment, because the day-to-day danger experienced by healthcare workers would normally be combatted by an ample supply of protective gear. This is a particularly strong argument given that OSHA and CDC guidance all requires sufficient PPE for healthcare workers and those in high risk groups who may be exposed to COVID-19. See, e.g., <https://www.osha.gov/Publications/OSHA3990.pdf>.

We should also be prepared for an employer’s claim that employees are part of critical duties that would cause their safety strike to lose protections under the Act. For example, in *International Protective Services, Inc.*, 339 NLRB 701 (2003), the Board found that a strike by the security guards’ union at federal buildings was not protected under the Act, and that the employer did not violate the Act by terminating the employees who participated in the unprotected strike. The Board reasoned that the guards were entrusted with critical responsibilities of protecting

persons and property, and that the union's strike was held with the reckless intention of placing the federal buildings and their occupants at risk. One could easily see an employer raising the claim that a group of employees were entrusted with "critical responsibilities"—particularly with respect to safety and healthcare issues—and therefore a strike would be so harmful as to lose protections under the Act.

Other Possible Health and Safety Arguments

Another possible source of protection for refusing to work is OSHA. OSHA regulations allow employees to refuse to work where there is the possibility of serious injury or death arising from hazardous conditions at the workplace:

However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

29 CFR 1977.12(b)(2). The Supreme Court has applied this regulation to protect employees from discrimination for refusing to work under dangerous conditions. *See Whirlpool v. Marshall*, 445 U.S. 1 (1980).

OSHA has issued detailed guidance about the types of safety precautions employers should take for employees working in high risk occupations, including treating known or suspected COVID-19 patients. *See* <https://www.osha.gov/Publications/OSHA3990.pdf> at pp. 23-25. According to OSHA, "Most workers at high or very high exposure risk likely need to wear gloves, a gown, a face shield or goggles, and either a face mask or a respirator, depending on their job tasks and exposure risks." *Id.* at 25. Respirators should be used when coming within six feet of known or suspected COVID-19 patients.

At <https://www.osha.gov/right-to-refuse.html>, OSHA has outlined what it believes employees should do to protect themselves in dangerous working conditions:

Your right to refuse to do a task is protected if **all** of the following conditions are met:

- Where possible, you have asked the employer to eliminate the danger, and the employer failed to do so; and
- You refused to work in "good faith." This means that you must genuinely believe that an imminent danger exists; and

- A reasonable person would agree that there is a real danger of death or serious injury; and
- There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

You should take the following steps:

- Ask your employer to correct the hazard, or to assign other work;
- Tell your employer that you won't perform the work unless and until the hazard is corrected; and
- Remain at the worksite until ordered to leave by your employer.

If your employer retaliates against you for refusing to perform the dangerous work, contact OSHA immediately.

However, there is no private right of legal action available under the statute, and OSHA has a poor record of enforcement. Nevertheless, the thrust of the OSHA regulations may be useful in other proceedings like arbitration, and unemployment and workers' compensation.

Ultimately, where an employer is not providing adequate PPE, employees should request it. If the employer refuses to provide it, and employees reasonably believe they will contract COVID without it, they are likely protected from retaliation if they refuse to come to work until the appropriate PPE has been provided.

Best Practices for Employees

1. Do not refuse a direct request from a supervisor without a good reason.
2. If you believe you are being asked to do something unsafe, refer to safety guidelines with your manager and explain why you think it is not safe.
3. If possible, propose reasonable safe (or at least safer) alternatives. Request appropriate PPE or other OSHA-recommended safety precautions.
4. In the healthcare industry, employees should find out if the employer has a policy regarding when a care provider can refuse to treat a patient, and invoke any such reasons that apply.
5. If you have a condition that you believe would be exacerbated by having to take care of COVID-19 patients, make that known to the employer and request a reasonable accommodation. Get a doctor's note supporting your request if possible.
6. If you face discipline, contact your Union Rep immediately.