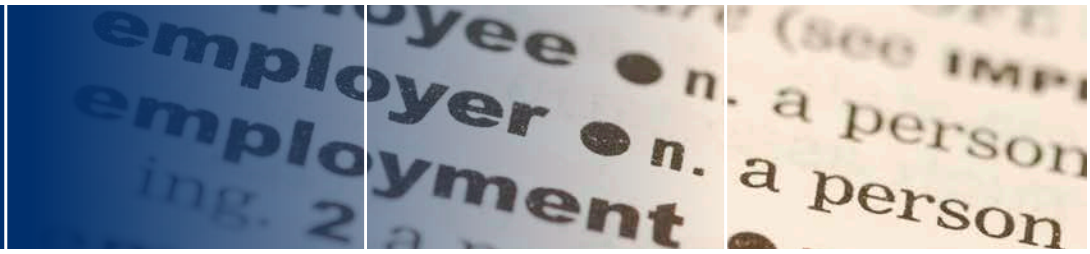
WILSON ELSER
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

EMPLOYMENT
& LABOR




NEWSLETTER
March 2015

# The Rights of an Employee to Object to Working in an Unsafe Situation

*You are a stressed manager facing a critical deadline. Just at this moment an employee – call him Joe – appears before you and says that he is uncomfortable working alongside Sue, a co-worker who has recently informed Joe that she has not been vaccinated against measles. Joe tells you that he has never had measles and is concerned he might become infected, citing government warnings in the news about the risk of adult-onset measles.**

Frustrated, you warn Joe that if he does not return to his work station immediately, you will fire him. Joe's response is polite and respectful, but firm. In sum, he says that he is sorry, but his safety is more important than his job. He offers to work in another area, away from Sue. Joe then adds that he is not the only employee who has the same concern, and that he is speaking for others who also are fearful of being around Sue. Fearing the spread of insubordination more than a theoretical contagion, you fire Joe for his refusal to work alongside Sue. *Continued*


Kevin C. Donovan
Partner,
New Jersey
973.735.5760
kevin.donovan@wilsonelser.com


Barbara Hopkinson Kelly
Partner,
New Jersey
973.735.5765
barbara.kelly@wilsonelser.com

For more information about Wilson Elser's Employment & Labor practice, visit our website.

* The Centers for Disease Control (CDC) provides running updates on the current measles outbreak. See the CDC's "Measles Cases and Outbreaks" at http://www.cdc.gov/measles/cases-outbreaks.html.The CDC also has provided a fact sheet on the health risk posed by measles, "Complications of Measles," at. http://www.cdc.gov/measles/about/complications.html.

Or consider this scenario: Sally, a new technician in a waste-water treatment plant who works with pretreated sewage, approaches you, her supervisor, to express her concern that the plant's current safety protocols may be inadequate to deal with the pathogens inherent in the water being treated. Sally can point to no particular shortcoming in the plant's operations and in fact has limited knowledge of the plant's safety protocols. Instead, she simply seems nervous over news reports about the Ebola virus and speculates that the plant is not ready to deal with the virus if it "gets into the water supply." She refuses to return to work. Attempts to reason with her are in vain, so you suspend her while you reach out to the human resources department for advice.

Does Joe have any legal cause of action against you and the company? Does Sally? The answer is found in a number of federal laws that apply to this situation.

## OSHA

The Occupational and Safety Health Act, 29 U.S.C. § 651 *et seq*., imposes on employers a duty to provide a safe workplace. This "general duty" requirement encompasses more than just guarding against dangerous machinery; it extends to making sure that the workplace is reasonably free from unhealthy situations. Employees are generally protected from retaliation for filing complaints about unsafe working conditions.

Regulations under OSHA also address the situation of an employee who reasonably fears that staying on the job will expose him to an imminent serious risk of injury, including serious illness. 40 C.F.R. § 1977.12. While there is no express right to walk off the job, the regulations observe that "occasions might arise when an employee is confronted with a choice between not performing assigned tasks and subjecting himself to serious injury or death arising from a hazardous condition at the workplace." Provided that the employee acts in good faith, has an objectively reasonable, supported belief that he is confronted with "a real danger of death or serious injury," and realistically has no other choice but to refuse to put himself in the situation then confronting him (*i.e*., refuses to perform an assigned task), the employee is protected from an adverse employment action. The employee is expected first to bring the situation to the attention of the employer and seek a correction of the dangerous condition.


OSHA does not protect every worker who truly believes that he is facing a serious safety threat. As noted, the belief will be tested to determine if it was objectively reasonable. For further guidance, *see* "OSHA Notice on Workers' Right to Refuse Dangerous Work."

OSHA clearly sets a high bar for an employee to exercise the right to refuse to work. Sally's uninformed and unsupported fears certainly do not meet the standard. While Joe may seem to present a closer case, in our scenario Sue does not actually have measles; she simply is not vaccinated against the disease. (If Sue has never had measles, is likely to be exposed to measles, and refuses to be vaccinated, the situation presents an entirely different set of legal issues.) Still, in light of the OSHA regulations, a manager confronted with the scenario should contact the human resources department or legal counsel to have them look further into the entire issue surrounding Sue and Joe.

*Continued*

## NLRA

The National Labor Relations Act, 29 U.S.C. § 151 *et seq*. (NLRA), also may provide Joe and/or Sally with protection.

While most often invoked in the context of a unionized environment or during a campaign for unionization, the NLRA also protects workers in non-union settings. In our case, Joe told his employer that he was speaking on behalf of other workers who supposedly shared his safety concerns. The NLRA protects from discipline an employee – whether in a unionized workplace or not – who engages in "concerted activity"; that is, activity that involves more than a single employee's personal concerns. While Joe's refusal to work alongside Sue due to his own unique concern probably would not protect him from discipline, his statement that he was a spokesman for others raises the issue of concerted activity.


The NLRA also protects an individual who claims that his actions are a preface to concerted activity; that is, that the individual can show that he was about to rally others to his position. *See Parexel International, LLC and Theresa Neuschafer*, 356 NLRB No. 82 (Jan. 28, 2011), *review dismissed by, Parexel Int'l, LLC v. NLRB*, 2012 U.S. App. LEXIS 11036 (D.C. Cir. May 3, 2012). In this case, Sally's unfounded concern, raised simply by her and on her own behalf, would not appear to be protected under
the NLRA.

If Joe or Sally is part of a unionized workforce, the NLRA, as amended by the Labor Management Relations Act of 1947, has a special provision that allows either to walk off the job if he/she perceives a significantly unsafe condition, even if his/her union has negotiated a "no strike" clause otherwise prohibiting work stoppages. 29 U.S.C. § 143 provides: "[N]or 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." A subjective belief that a serious safety risk exists, even if held in good faith, is not enough to confer protection. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 386-387 (U.S. 1974) ("[A] union seeking to justify a contractually prohibited work stoppage under § 502 must present ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists.") (citations omitted).

## STATE LAW & POSSIBLE FEDERAL LAW PREEMPTION

Of course, state laws may provide Joe or Sally with their own protections. However, the interaction of state protections with federal laws covering the same subject matter may raise the question of whether the particular state law is preempted by federal law. For example, while the so-called "*Garmon* doctrine" has its exceptions, states are generally prohibited from regulating conduct that is either arguably protected or prohibited by the NLRA. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). If Joe were

in fact discharged for engaging in protected concerted activity, that would be a matter for the National Labor Relations Board, which enforces the NLRA.

*Continued*

## CONCLUSION

Confronted with an employee who refuses to work in what he or she perceives to be a situation that places the employee at imminent risk of serious injury, the prudent employer will tread carefully in reacting to what may seem on its face to be simply insubordination. Consulting with experienced human resources professionals and seeking appropriate legal advice will help to avoid legal liability. The Employment & Labor practice lawyers at Wilson Elser are available to assist employers in working through the complexities of issues that may arise when an employee complains about a potential workplace safety issue.

Members of Wilson Elser's Employment & Labor practice, located throughout the country, provide one convenient point of contact for our clients. Please contact any of the following partners to access the experience and capabilities of this formidable team.

**Contacts:**

National Practice Chair
Ricki Roer
ricki.roer@wilsonelser.com
212.915.5375

Northeast

**By Region:**

Midatlantic
Robert Wallace
robert.wallace@wilsonelser.com

Yoora Pak
yoora.pak@wilsonelser.com

Southeast
Anthony P. Strasius
anthony.strasius@wilsonelser.com

Rodney Janis
rodney.janis@wilsonelser.com

Midwest
David Holmes
david.holmes@wilsonelser.com

Southwest
Linda Wills
linda.wills@wilsonelser.com

West
Dean Rocco
dean.rocco@wilsonelser.com

Steve Joffe
steve.joffe@wilsonelser.com