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RETURN TO WORK – NOW WHAT?

COVID-19 created numerous employment issues as businesses closed down or adjusted their operations. Now with the opening of many businesses, new issues have arisen. Among them is whether an employee can refuse to return to work because of fear of contracting the virus. The simple answer is yes – maybe.

The Occupational Safety and Health Act (“OSHA”) requires an employer to provide a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” This is what is often referred to as the “general duty clause.” In addition, OSHA prohibits an employer from discharging or discriminating against any employee who exercises “any right afforded by” the Act. Among the rights that an employee has is “the right of an employee to choose not to perform his assigned task because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available.

In *Whirlpool Corp. v. Marshall*, a conveyor belt moved around the manufacturing facility 20 feet above where employees were working. In order to protect employees from being injured by parts falling off the conveyor belt, the employer installed a wire mesh screen. Periodically, as parts built up on the mesh, employees were directed to go on the mesh and clear the debris. On one occasion the mesh gave way and one employee fell to his death. When several employees were ordered to clear the mesh, they refused and were disciplined. They sued, alleging a violation of OSHA.

The United States Supreme Court agreed. It held that employees, who refuse a task that the employee reasonably believes poses a risk of death or serious injury, are protected by OSHA and disciplining that employee would be a form of illegal retaliation. The Supreme Court noted that although employees could refuse to do the work, the employer was not obligated to pay the employees.

Therefore, an employer who disciplines an employee who refuses to come to work because of a “reasonable apprehension” of contracting the coronavirus would likely be violating OSHA. Given the media reports and the current recommendation of the CDC, terminating employees (with some exceptions – for example healthcare workers) who refuse to come to work because of a reasonable apprehension of contracting the virus likely would be liable. However, although an employer may not terminate employees for refusing to come to work because of the virus, an employer is not obligated to pay those employees.

If you have any questions about this or any other employment issue, please feel free to contact **Bernard E. Jacques** at bjacques@mdmc-law.com.

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