

OSH Law Primer, Part VII: Refusals to Work and Whistleblower Protection

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This is the seventh installment in a series of articles intended to provide the reader with a very high-level overview of the Occupational Safety and Health (OSH) Act of 1970 and the Occupational Safety and Health Administration (OSHA) and how both influence workplaces in the United States.

By the time this series is complete, the reader should be conversant in the subjects covered and have developed a deeper understanding of how the OSH Act and OSHA work. The series is not—nor can it be, of course—a comprehensive study of the OSH Act or OSHA capable of equipping the reader to address every issue that might arise.

The [first article](#) in this series provided a general overview of the OSH Act and OSHA; the [second article](#) examined OSHA's rulemaking process; the [third article](#) reviewed an employer's duty to comply with standards; the [fourth article](#) discussed the general duty clause; the [fifth article](#) addressed OSHA's recordkeeping requirements; and the [sixth article](#) discussed the rights of employees and employers. In this, the seventh article in the series, we examine the rights of employees not to work and to not be subject to retaliation for reporting workplace health and safety concerns.

Quick Hits

- The OSH Act does not provide workers the right “to walk off the job because of potential unsafe conditions at the workplace.”
- OSHA regulations state that employees who have “no reasonable alternative” may refuse in good faith to expose themselves to “dangerous condition[s]” and will “be protected against subsequent discrimination.”
- Enforcement of a worker's right to refuse work under dangerous conditions resides with the secretary of labor.

As discussed in the sixth article in this series, the OSH Act and the various regulations and standards issued by OSHA afford employees certain rights. Among the rights granted by them are the right to raise concerns about workplace health and safety without retribution or retaliation and the right to refuse to work. The latter is a right protected by a number of federal laws.

Section 11(c) of the OSH Act prohibits discrimination against an employee because he or she filed a

complaint, took part in any legal proceeding brought by OSHA, or exercised “on behalf of himself or others ... any right afforded” by the OSH Act.

The secretary of labor has interpreted this clause to entail a right to refuse to work and promulgated a regulation found at 29 C.F.R. § 1977.12, which states:

- In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise “of any right afforded by this Act.” Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (section 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.
- (1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, *there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace.* Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards. (Emphasis added.)

(2) 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. (Emphasis added.)

An employee cannot be disciplined for refusing to perform work if:

- the refusal is made in good faith;
- the refusal is based upon the existence of a dangerous condition such that “a reasonable person ... would conclude that there is a real danger of death or serious injury”;
- there is insufficient time to deal with the hazard through the use of the ordinary enforcement mechanisms provided by the OSH Act and/or agencies that can intercede on behalf of the employee; and
- “where possible,” the employee tried to get his employer to eliminate or correct the perceived dangerous conditions.

The “right[s] afforded” employees under Section 11(c) of the OSH Act are broadly interpreted. For instance, when an employee reports a work-related injury, the employee exercises a “right afforded” by the OSH Act. An employer that takes an adverse employment action (disciplines or discharges) against an employee following the report of a work-related injury needs to ensure that it does so for a legitimate reason—e.g., the employee’s violation of a safety rule —or it may be in violation of the OSH Act.

Enforcement of the rights afforded employees under Section 11(c) of the OSH Act resides with the secretary of labor who can bring an action to enforce an employee’s Section 11(c) rights. An employee who believes he or she suffered retaliation in violation of Section 11(c) must file a complaint with the secretary within thirty days of the alleged retaliation.

Upon receiving the complaint, the secretary makes a determination whether Section 11(c) has been violated. If the determination is that a Section 11(c) violation occurred, then the secretary may bring suit against the employer. Employee attempts to force the secretary to sue on their behalf have proven unsuccessful.

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