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Public Employee Speech in a Pandemic

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The authors explain that public employees concerned about virus exposure at work enjoy various protections from retaliation for speaking out about perceived unsafe working conditions.

The ongoing COVID-19 pandemic, coupled with the reopening of many workplaces across New York City and New York State, has cast a new light on workplace safety and the protections available to city and state employees who speak out regarding perceived dangerous conditions affecting fellow workers and the public. We are seeing protests, walkouts, and litigation around the country by both unions and individual workers, alleging unsafe working conditions and inadequate safety protocols in light of COVID-19.

In New York City, for instance, the city's largest teachers' union threatened a potential job action if safety concerns were not adequately addressed prior to the reopening of public schools for in-person instruction.[1]

And earlier in the pandemic, Amazon received media attention after firing a fulfillment center worker who led a walkout to demand that the building be closed and sanitized.[2]

In Houston, a city employee is suing, alleging she was fired for going public with concerns about workers being ordered to report in person during the height of the pandemic.[3]

For public employees, many of whom have been designated essential and continued to work through the worst of the pandemic, the ability to

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bring attention to health and safety concerns is protected by several different laws and even takes on constitutional proportions.

Meanwhile, even as many workplaces navigate returning to work, numerous cities and states countrywide are facing a second round of closures due to spikes in COVID-19 cases. On October 6, 2020, Governor Andrew M. Cuomo ordered a new round of restrictions in portions of New York City and surrounding suburbs experiencing rising COVID-19 cases, including shutting down schools.[4] In an ideal world, employers generate their return-to-work plans in consultation with their workforce and relevant unions to alleviate concerns about working conditions and to educate employees about the protocols being implemented to ensure employee safety. But, where this kind of collaboration does not occur or ultimately falls short, public employees concerned about virus exposure at work enjoy various protections from retaliation for speaking out about perceived unsafe working conditions.

FIRST AMENDMENT FREE SPEECH

Public employees are often the best positioned and the first to sound the alarm when government is not adequately serving or protecting its constituents. Still, public employees' right to free speech is not absolute: there are limitations, particularly in the wake of the U.S. Supreme Court decision in *Garcetti v. Ceballos*.[5] In *Garcetti*, the Supreme Court held that the First Amendment to the U.S. Constitution does not protect a public employee's speech when the speech is made in the course of the employee's official duties.

Garcetti sets out three factors that need to be met by an employee who seeks protection from retaliation by a public employer who is unhappy with having safety deficiencies raised in the public sphere.

First, the gatekeeping question asks whether the speech was made pursuant to the public employee's official duties. For instance, public health agency employees who are tasked with communicating public health guidelines would likely be speaking on a topic within their official duties if they commented upon those very guidelines. For most employees, however, the adequacy or implementation of safety protocols during the pandemic would not be within their official duties.

Next, a public employee would need to demonstrate that the speech was on a topic of "public concern." Here, the question is meant to weed out those situations where employee complaints are of a personal or individual nature, not relevant to the public. It is likely that concerns regarding the safety of government facilities and services, like, for example, the ongoing debate regarding the manner of reopening of schools, would be seen as raising a matter of public concern. Having hurdled these initial requirements, the public employee is then entitled to have the court balance the interest in

protecting free speech against the government agency's interest in efficient operations.

While *Garcetti* would protect public employee speech regarding the adequacy of safety conditions in public agencies in many cases, it is not absolute. It is also undeniable that *Garcetti* has had a chilling effect on public employee speech, including with respect to public employee whistleblowers identifying internal misconduct or other legitimate issues. However, with respect to workplace safety, various state and local labor laws and whistleblower protection laws help fill the gap left by *Garcetti*. Several of these additional layers of protection may also be available to employees and unions raising concerns regarding COVID-19.

TAYLOR LAW PROTECTIONS FOR CONCERTED ACTIVITY

Unions and protected collective bargaining rights are vital to addressing health and safety concerns. Unions across the country are pursuing legal action regarding pandemic-related workplace safety. In late June, the New York State Court Officers Association, which represents over 1,500 New York State court officers, filed suit in federal court against the State Office of Court Administration, alleging that the New York State court system failed to implement safety protocols to protect the union's members from COVID-19.[6] The union and its president are seeking at least $2 million in punitive damages. Meanwhile, in Nevada federal court, the Culinary Workers Union and Bartenders Union filed a complaint against the Bellagio, Signature, and Harrah's, alleging that the resorts' COVID-19-related rules and procedures were "wholly and dangerously inadequate."[7] And the Florida Education Association recently sought a temporary injunction against the resumption of in-person instruction in schools due to COVID-19 safety concerns.[8]

Unionized workers with COVID-19 workplace safety concerns should discuss their concerns with their union, which can address such issues via collective bargaining. Health and safety are mandatory subjects of bargaining[9] and, in New York, speech in furtherance of these collective efforts is protected from retaliation under New York's Taylor Law.[10]

Under the Taylor Law, employers may not deliberately "interfere with, restrain or coerce public employees in the exercise of their rights guaranteed [under the Taylor Law] for the purpose of depriving them of such rights," or "discriminate against any employee for the purpose of . . . discouraging . . . participation in the activities of . . . any employee organization."[11] To establish a violation, the employee must show that:

- The employee was engaged in a protected activity;
- The employer was aware of the protected activity; and

- The employer acted because of those activities and without legitimate business reasons for its action.[12]

To be protected, activity must be concerted, not individual. Actions taken by an employee individually and that are not on behalf of fellow employees or prompted or encouraged by his or her union, or which are not taken pursuant to established union policy or collective bargaining agreement, may not be protected.[13] Thus, to take full advantage of these protections, unions and employees must make clear that they are addressing a concern held by a group of employees rather than an individual grievance.

Indeed, health and safety are understood to be of such paramount concern that they may even provide an exception to New York's general statutory prohibition against public employee strikes. While Section 210(1) of the Taylor Law prohibits strikes and work stoppages, both PERB and New York courts have held that, in certain limited circumstances, hazardous work conditions justify a public employee's unilateral decision to stop work and a union's decision to recommend a work stoppage. In those cases, objective evidence of a bona fide fear that employees will suffer personal harm due to a workplace hazard overcomes the statutory presumption that the resulting work stoppage was unlawful.[14]

OSHA AND PESH WHISTLEBLOWER PROTECTIONS

Beyond collective bargaining, when thinking about workplace safety, many people immediately think of the Occupational Safety and Health Administration ("OSHA"), the federal agency that administers the Occupational Safety and Health Act of 1970 ("OSH Act"). While getting off to a slow start, OSHA has more recently levied $484,069 in proposed fines in connection with COVID-19 violations at 37 establishments, including respiratory protection violations.[15] OSHA has also issued multiple press releases reminding employers that it is illegal to retaliate against workers for reporting unsafe and unhealthful working conditions during the coronavirus epidemic. In March, New York Attorney General Letitia James urged any employee who believes their employer is in violation of labor laws or recent executive orders to file a complaint.[16]

In fact, the OSH Act does not directly apply to public employees.[17] However, a number of states, including New York, apply OSHA standards to public employees through state law by operating OSHA-approved state plans.[18] In New York, the New York Public Employee Safety and Health Bureau ("PESH"), created by the New York State Public Employee Safety and Health Act of 1980 ("PESH Act"), operates an OSHA-approved state plan covering all state and local government workers.[19] The PESH Act, N.Y. Labor Law Section 27-a, enforces safety and health standards promulgated by OSHA as well as several state standards.

OSHA has not issued new rules specific to COVID-19, but several existing OSHA provisions are relevant to the current situation: specifically, the OSH Act's general duty clause requires employers to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to . . . employees."[20] The Act also provides for safety guidelines specific to biological infectious agents.[21]

The OSH Act contains whistleblower protections for workers who complain to their employer, OSHA, or other government agencies about unsafe conditions in the workplace. Specifically, Section 11(c) of the OSH Act prohibits employers from retaliating against workers for raising concerns about safety and health conditions.[22] Activities protected under Section 11(c) include "reporting injuries, illnesses, or unsafe conditions to their employers, participating in OSHA inspections, and, under certain conditions, refusing to work when there is reasonable fear of death or serious injury."[23] Section 11(c) does not provide for a private cause of action, but is enforced by the Secretary of Labor.[24] To determine that unlawful retaliation took place, OSHA must find that:

- The employee engaged in protected activity under one of OSHA's whistleblower laws;
- The employer knew about or suspected the protected activity;
- The employer took an adverse action; and
- The protected activity caused the adverse action.[25]

Likewise, the PESH Act requires "[e]very employer [to] furnish to each of its employees, employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety or health of its employees."[26] The Act "encourages employees and their representatives to report violations of health and safety standards" by requesting an inspection.[27] Public employees may not be fired or discriminated against in any way for filing safety and health complaints or otherwise exercising their rights under the PESH Act.[28] Employees who believe they have experienced retaliation in violation of the PESH Act may file a complaint with the commissioner within 30 days of the violation.[29]

While information regarding COVID-related PESH complaints is not readily available, OSHA has continued to receive new whistleblower complaints, including COVID-19-related complaints, through the COVID-19 pandemic.[30] As of October 1, 2020, OSHA had received over 9,100 federal complaints and 1,226 referrals relating to COVID-19, most of them in the health care and retail industries; as well as over 28,500 state complaints and 3,444 referrals, 1,516 of which were in OSHA Region 2 (which includes New York).[31] OSHA issued a news release on April 8,

2020, "reminding employers that it is illegal to retaliate against workers because they report unsafe and unhealthful working conditions during the coronavirus pandemic."[32] The news release encouraged "'[a]ny worker who believes that their employer is retaliating against them for reporting unsafe working conditions [to] contact OSHA immediately.'" And on June 15, 2020, OSHA issued another news release reiterating the prohibition against retaliation, adding that, "[i]n all phases of reopening, employers need to plan for potential hazards related to the coronavirus."[33] OSHA's COVID-19 Frequently Asked Questions page encourages workers who are fired or otherwise experience retaliation for raising workplace safety and health concerns related to COVID-19 to submit a complaint to OSHA.[34]

PESH has issued no additional COVID-19 guidance or measures beyond OSHA, but appears to be recognizing COVID-19 measures issued by Governor Cuomo as enforceable.[35] Nonetheless, unions and public employees are utilizing the PESH process to address workplace concerns. In March 2020, the Police Benevolent Association, filed a PESH complaint against the NYPD for failure to provide personal protective equipment, or PPE.[36] On October 5, 2020, 46 public school teachers at nine campuses throughout New York City filed a PESH complaint alleging unsafe conditions in schools – namely, that inadequate ventilation in school buildings posed a health hazard and placed them at risk of COVID-19.[37]

OTHER WHISTLEBLOWER PROTECTIONS FOR PUBLIC EMPLOYEES

New York's Labor Law also contains a general duty provision requiring employers to provide "reasonable and adequate protection to the lives, health and safety of employees."[38] The broad whistleblower protections for reporting violations of the Labor Law, pursuant to N.Y. Labor Law Section 215, do not apply to state or municipal employees.[39] However, public employees are eligible for whistleblower protections with respect to public health and safety complaints. N.Y. Labor Law Section 740, commonly referred to as the whistleblower statute, prohibits all employers, public and private, from discharging, suspending, demoting, or otherwise retaliating against an employee because the employee, *inter alia*, (1) discloses to a supervisor or a public body[40] an unlawful activity, policy, or practice of the employer that creates and presents a substantial and specific danger to the public health or safety, or (2) objects to or refuses to participate in such activity, policy, or practice.

Pursuant to Section 740, employees may bring a civil action against their employer within one year of the alleged retaliation. Remedies available under Section 740 include injunctive relief, reinstatement, reinstatement of benefits, and compensation for lost wages. Section 741 provides

similar protections to health care employees reporting "improper quality of patient care or improper quality of workplace safety."[41]

Finally, pursuant to N.Y. Civil Service Law Section 75-b, a public employee may not be retaliated against for disclosing government information regarding a violation of the law resulting in a threat to public health and safety or improper governmental action. New York City Administrative Code § 7-805 provides similar protections to city employees. Civil remedies are generally available under these statutes only when the action the employee exposes is illegal and such illegal action presents a "substantial and specific danger to the public health or safety." This requirement has been narrowly interpreted by New York courts.

CONCLUSION

While the road ahead is filled with uncertainties and well-founded concerns, the way can be smoothed by public employers working collaboratively with workers and their unions not only establishing adequate health and safety precautions, but to communicate the policies and considerations underlying those precautions. This thoughtful and inclusive approach is more likely to create trust that the new procedures were developed to protect both the public and the public employees that serve them. Recognizing that this process does not always move smoothly, public employees and their unions can invoke several layers of protections if they feel the public employer has retaliated.

NOTES

1. *https://www.npr.org/sections/coronavirus-live-updates/2020/08/19/903927057/nyc-teacher-unions-*.

2. *https://www.nytimes.com/2020/04/03/nyregion/coronavirus-nyc-chris-smalls-amazon.html*.

3. *https://www.law360.com/articles/1319597/ex-hr-rep-says-houston-fired-her-over-covid-19-concerns*.

4. *https://www.nytimes.com/2020/10/06/nyregion/cuomo-shutdown-coronavirus.html*.

5. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

6. *https://www.law360.com/articles/1288654/ny-court-cops-sue-over-inadequate-covid-19-protections*.

7. *https://www.law360.com/articles/1287793/unions-slam-las-vegas-resorts-over-handling-of-covid-19*.

8. *See* Order Granting Motion For Temporary Injunction, *Florida Education Association v. Desantis*, Case No. 2020 CA 001450, 2020 WL 5028671 (Fl. Cir. Ct. Aug. 24, 2020).

9. N.Y. Civ. Serv. Law § 204.

10. The Public Employees Fair Employment Act (the "Taylor Law"), N.Y. Civ. Serv. Law §§ 200-214, grants public employees the right of organization and representation. The Taylor Law is administered by the New York State Public Employment Relations Board ("PERB").

11. N.Y. Civ. Serv. Law § 209-a.1(a) and (c).

12. *See*, *e.g.*, *Civil Service Employees Association, Inc., et al. v. Hudson Valley Community College*, 25 PERB ¶ 3039 (1992) (employee's investigation of a health and safety hazard, report to the Department of Labor, and refusal to obey a return-to-work order were protected, and disciplinary charges against the employee violated the Public Employees Fair Employment Act); *Civil Service Employees Assoc., Inc. et al. v. Village of New Paltz*, 25 PERB ¶ 3032 (1992) (safety complaint filed with employer on behalf of union was protected, and action taken against employee based on this complaint was unlawful under the Public Employees Fair Employment Act).

13. *Metropolitan Suburban Bus Auth.*, 23 PERB ¶ 3006 (1990). *Rosen v. Pub. Employment Relations Bd.*, 72 N.Y.2d 42, 50 (1988) (the Taylor Law protects the "formal organization of employees, or efforts to form an actual organization, rather than activity, albeit concerted, that is an informal and infrequent airing of grievances without recognized representatives"); s*ee also Incorporated Village of Westhampton Beach*, 35 PERB ¶ 3026 (2002) (holding that certain safety complaints were individual actions, not concerted, and therefore not protected where the employee was "not an elected or appointed representative of the [union] and . . . did not represent himself as such," "did not represent that he was speaking on behalf of the [union] or [its] members," and was not accompanied by any union representatives).

14. *See*, *e.g.*, *Buffalo Teachers Federation, Inc.*, 5 PERB ¶ 3025 (1972); *Van Vlack v. Ternullo*, 74 A.D.2d 827 (2d Dep't 1980), *rev'd*, 53 N.Y.2d 1003 (1981); *Acosta v. Wollett*, 77 A.D.2d 769 (3d Dep't 1980), *aff'd*, 55 N.Y.2d 761 (1981); *Local 252, Transport Workers Union of America v. PERB*, 89 A.D.2d 551 (1st Dep't 1982), *rev'd*, 58 N.Y.2d 354 (1983); *Joel Fredericson v. New York City Transit Auth.*, 32 PERB ¶ 4581 (1999); *Buffalo City School District v. Buffalo Teachers Federation, Inc.*, 53 PERB ¶ 8001 (2019).

15. *https://www.law360.com/articles/1316541/health-assisted-living-cos-top-osha-s-covid-violator-list*.

16. *https://cnycentral.com/news/local/think-your-employer-isnt-following-covid-19-mandates-nys-ag-wants-you-to-report-them*.

17. The OSH Act applies to private sector employees in businesses affecting interstate commerce and employees of the U.S. Postal Service, as well as former employees and applicants for employment. *https://www.whistleblowers.gov/retaliation_by_subject#employee-safety*.

18. *https://www.osha.gov/SLTC/covid-19/standards.html*.

19. Private sector employers and their workers are covered by federal OSHA. *https://www.osha.gov/stateplans/*. Public sector employers include state, county, town, and village governments, public authorities, school districts, and paid and volunteer fire departments. *https://labor.ny.gov/workerprotection/safetyhealth/DOSH_PESH.shtm*.

20. 29 U.S.C. § 654(a)(1).

21. 29 C.F.R. 1910.120(a)(3)(B).

22. Under the statute, "[n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." 29 U.S.C. 660(c)(1). Retaliation can involve "taking an adverse action against an employee for engaging in protected activity" and may include, inter alia, firing or lay-offs, demotions, denying overtime or promotion, reducing pay or hours, intimidating, harassing, or making threats. *See https://www.whistleblowers.gov/sites/wb/files/2019-06/FAQs.pdf* at 1-2.

23. *https://www.whistleblowers.gov/sites/wb/files/2019-06/FAQs.pdf* at 1; *see also https://www.whistleblowers.gov/retaliation_by_subject#employee-safety*.

24. 29 U.S.C. 660(c)(2). OSHA is also responsible for enforcing whistleblower provisions in a number of federal statutes. *https://www.whistleblowers.gov/statutes*.

25. *https://www.whistleblowers.gov/sites/wb/files/2019-06/FAQs.pdf* at 2; *see, also, https://www.osha.gov/OshDoc/data_General_Facts/whistleblower_rights.pdf* at 2.

26. N.Y. Labor Law § 27-a(3)(a).

27. *Hartnett v. New York City Transit Auth.*, 86 N.Y.2d 438, 443 (1995); N.Y. Labor Law § 27-a(5).

28. N.Y. Labor Law § 27-a(10)(a); *see, also, https://labor.ny.gov/formsdocs/wp/p208.pdf*.

29. N.Y. Labor Law § 27-a(10)(b).

30. *See* Summary Data for Federal and State Programs – Whistleblower Data, *https://www.whistleblowers.gov/covid-19-data#complaints_filed*.

31. *https://www.osha.gov/enforcement/covid-19-data#summary_data*.

32. *https://www.osha.gov/news/newsreleases/national/04082020*.

33. *https://www.osha.gov/news/newsreleases/national/06152020*.

34. *https://www.osha.gov/SLTC/covid-19/covid-19-faq.html#reporting*.

35. *https://labor.ny.gov/workerprotection/laborstandards/coronavirus-complaints.shtm* (noting that, pursuant to "various measures to protect workers during the COVID-19 global pandemic" enacted by Governor Cuomo, "your employer may not threaten or retaliate against you for complaining that the business should not be operating or has failed to take adequate safety and health measures").

36. *https://www.nycpba.org/press-releases/2020/pba-files-complaint-over-covid-19-gear/*.

37. *https://www.peer.org/nyc-schools-lack-ventilation-stop-covid/*.

38. N.Y. Labor Law § 210(1).

39. Pursuant to N.Y. Labor Law § 215, employers may not discharge, threaten, penalize, or in any manner discriminate or retaliate against an employee for, inter alia, making a complaint (either to management or to an external person or body) about a possible Labor Law violation or exercising any rights protected under the Labor Law. N.Y. Labor Law § 215(1)(a). Under § 215, employees may complain to the Department of Labor or bring a private civil action; remedies include civil penalties, payment of lost wages, damages, and any other appropriate relief. However, the protections afforded by § 215 do not

apply to "employees of the state or any municipal subdivisions or departments thereof." N.Y. Labor Law § 215(1)(c).

40. Prior to disclosing to a public body, an employee must first bring "the activity, policy or practice in violation of law, rule or regulation to the attention of a supervisor of the employer" and give his or her employer "a reasonable opportunity to correct such activity, policy or practice." N.Y. Labor Law § 740(3).

41. N.Y. Labor Law § 741(2).