OUTLINE OF RIGHTS UNDER U.S. NATIONAL LABOR RELATIONS ACT TO REFUSE TO WORK IN UNSAFE WORKING CONDITIONS

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INTRODUCTION

The recent international coronavirus pandemic has prompted worker activism, including refusals to work in unsafe conditions at the workplace. See, e.g., 'We Didn't Sign Up for This': Amazon Workers on the Front Lines https://www.nytimes.com/2020/04/03/nyregion/coronavirus-nyc-chris-smalls-amazon.html?referringSource=articleShare; As coronavirus spreads, so do reports of companies mistreating workers https://www.washingtonpost.com/business/2020/03/31/worker-retaliation-mistreatment-coronavirus/.

Below is a brief outline of the protections afforded to most private sector workers in the United States under the National Labor Relations Act (NLRA), 29 U.S.C.§ 151 *et seq*., drafted for International Lawyers Assisting Workers Network (ILAW Network) https://www.ilawnetwork.com/. It does not address other laws, such as the Occupational Safety and Health Act. (The Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq*, and regulations promulgated by the Department of Labor under that act provide additional protections for employees who refuse to perform unsafe work. See *Workers' Right to Refuse Dangerous Work* https://www.osha.gov/right-to-refuse.html**.** This paper does not address that statute or its regulations.)

THE NATIONAL LABOR RELATIONS ACT

The NLRA is administered by the National Labor Relations Board (NLRB). Procedures for filing charges alleging violations of the NLRA, investigations, issuance of complaints by the General Counsel, hearings, and appeals to the Board can be found on the NLRB's website. https://www.nlrb.gov/

NLRA Section 7, 29 U.S.C. § 157, protects the right of employees to engage in "concerted activity ... for mutual aid and protection." It is a violation of NLRA Section 8(a)(1), 29 U.S.C. § 158(1), for an employer "to interfere with, restrain, or coerce" employees in the exercise of Section 7 rights. The right to engage in concerted activities covers both union and non-union employees.

Other than Postal Service employees, the NLRA also excludes public employees. But not all whom we might think are private sector employees are covered by the NLRA. The definition of employee in NLRA Section 2(3), 29 U.S.C. § 152(3), does not include, among others, agricultural laborers, domestic service workers in the home, railway and airline workers (who are covered instead by the Railway Labor Act, 45 U.S.C. §§ 151 *et seq*.), independent contractors

and supervisors and managers. There is much controversy in the United States over the misclassification of employees as independent contractors, and the issue of who is a supervisor is frequently litigated.

CONCERTED ACTIVITIES

The NLRB summarizes this right as follows:

> You have the right to act with co-workers to address work-related issues in many ways. Examples include: talking with one or more co-workers about your wages and benefits or other working conditions, circulating a petition asking for better hours, participating in a concerted refusal to work in unsafe conditions, openly talking about your pay and benefits, and joining with co-workers to talk directly to your employer, to a government agency, or to the media about problems in your workplace. Your employer cannot discharge, discipline, or threaten you for, or coercively question you about, this "protected concerted" activity. A single employee may also engage in protected concerted activity if he or she is acting on the authority of other employees, bringing group complaints to the employer's attention, trying to induce group action, or seeking to prepare for group action. However, you can lose protection by saying or doing something egregiously offensive or knowingly and maliciously false, or by publicly disparaging your employer's products or services without relating your complaints to any labor controversy.

https://www.nlrb.gov/rights-we-protect/whats-law/employees/i-am-represented-union/concerted-activity

Concerted action over concerns about safety are clearly covered by Section 7. Section 7 encompasses the entire range of concerted action, including striking, over unsafe working conditions. In a seminal Supreme Court decision, *NLRB v. Washington Aluminum Co*., 370 U.S. 9 (1962), the Court ruled that it was unlawful to discharge non-union employees who struck over merely uncomfortable working conditions. See *NLRB v. Tamara Foods, Inc*., 692 F.2d1171, 1176 (8th Cir. 1982) (refusal of nonunion employees to work because they believed that ammonia fumes posed a danger protected; subsequent discipline violated NLRA).

Although an employer might not be required to pay employees who refuse to work in unsafe conditions for time not spent working, they cannot be fired for doing so. It is possible that the employer may be permitted to bring in substitutes to replace workers who refuse to work in unsafe conditions, but the workers who refused to work cannot be fired or permanently replaced for doing so (explained below).

NLRA SECTION 502 – REFUSALS TO WORK IN UNSAFE CONDITIONS

In addition to Section 7, the NLRA contains a provision expressly addressing refusal to work under abnormally unsafe working conditions. Section 502, 29 U.S.C. § 143, states in part that "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 [shall not] be deemed a strike under" the NLRA.

This provision covers both union and non-union employees, and it is important for union employees because they usually are covered by collective bargaining agreements forbidding strikes during the term of the contract.

The NLRB has construed three key phrases in Section 502: "in good faith," "because" and "abnormally dangerous." In *TNS, Inc*., 329 NLRB 602 (1999), unionized employees at a plant making ammunition containing depleted uranium refused to work because they believed in good faith based on objective evidence (e.g., reports of regulatory bodies) that the employer had failed to comply with safety regulations, which contributed to the work stoppage. The NLRB also explained that working with radioactive materials might be "dangerous," the facts of the case showed that the situation was "abnormally" so. The NLRB held that concern over safety need not be the only motive for the work stoppage to be protected under Section 502. (Thus, for example, if the employees who refused to work because of their concerns about abnormally dangerous working conditions also made other demands such as hazardous duty pay, the work stoppage would still be protected.) Important to the case was that, although the effects of exposure to radioactive material are cumulative over time, the threat to health of the workers was immediate. The NLRB said (at 605) that "Section 502 is applicable to abnormally dangerous threats to employee health and safety caused by cumulative exposure to radioactive and toxic substances, even where, as here, there may be no immediate, quantifiable physical injury." The work stoppage was therefore protected by Section 502.

The NLRB promulgated the following test:

> In order to establish that a work stoppage is protected under Section 502, the General Counsel must demonstrate by a preponderance of the evidence that the employees believed in good-faith that their working conditions were abnormally dangerous; that their belief was a contributing cause of the work stoppage; that the employees' belief is supported by ascertainable, objective evidence; and that the perceived danger posed an immediate threat of harm to employee health or safety.

TNS, Inc., 329 NLRB at 603 (1999). The NLRB found that the General Counsel (who litigates cases before the NLRB) had carried that burden.

The NLRB also held that the employer violated the law when it permanently replaced the workers who participated in the work stoppage. A bit of explanation is needed at this point. The NLRA makes a distinction between permanently replacing striking workers and terminating them. In a so-called "economic strike" - essentially a test of bargaining strength between a union and an employer - the employer is permitted to replace the strikers "permanently." This means that the replacement workers take the jobs of the striking employees, and if the union unconditionally offered to return to work but there were no longer sufficient openings to accommodate all of them, the employees without jobs to which to return are placed on a priority re-hire list. Because the TNS workers were not strikers, as provided in Section 502, the NLRB ruled that they had to be reinstated with backpay dating from the date that they offered to return to work. TNS later withdrew its recognition of the union because, it argued, it no longer represented a majority of employees, which included the replacements. Because the workers

could not lawfully be permanently replaced, the NLRB held that the withdrawal of recognition of the union was unlawful.

Although a court of appeals denied enforcement, basically holding that the NLRB was mistaken on the facts on which it relied and that the litigation had gone on for 17 years, it endorsed the test quoted above. *NLRB v. TNS, Inc.*, 296 F.3d 384 (6th Cir. 2002).

The current NLRB, on which only Board members appointed by President Trump serve, strongly tilts to management interests. It is therefore uncertain whether the NLRB will continue to adhere to *TNS*. (A pro-management NLRB member dissented in *TNS*.)

HEALTHCARE WORKERS

Issues of refusals to work in abnormally dangerous conditions may arise in the healthcare setting. Congress extended NLRA coverages to healthcare workers in 1974. Section 8(g), 29 U.S.C. 158(g), requires labor organizations to give ten days' notice "before engaging in any strike . . . or other concerted refusal to work at any health care institution[.]" Congress enacted the notice provision to protect against sudden disruptions in health care services resulting from labor disputes. As explained in the NLRB website:

> Section 8(g) prohibits a labor organization from engaging in a strike, picketing, or other concerted refusal to work at any health care institution without first giving at least 10 days' notice in writing to the institution and the Federal Mediation and Conciliation Service.

https://www.nlrb.gov/strikes By its terms, the notice provision applies to labor organizations, so it is not directly applicable to concerted activities by non-union healthcare workers. It is likely that concerted activities by non-union workers at healthcare institutions will not be judged on whether these employees had given the Section 8(g) notice. Rather, these issues will probably be decided on their individual facts as to whether they are protected by Section 7.

As noted, Section 502 says that refusing to work in abnormally dangerous is not a strike; it does not address picketing or "other concerted refusal to work." Although healthcare workers may well be expected to work in dangerous conditions, *TNS* explains that conditions may become "abnormally" so.

Anton Hajjar is a labor and employment lawyer admitted to practice in Washington, DC, and in Maryland. Please note that this paper is academic in nature and not intended to be legal advice.