1

Is There an Individual Right to Remote Work? A Private Law Analysis

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Introduction

One of the many legal uncertainties of the COVID-19 pandemic is the status of remote work. Since the expiration of government shutdown orders, companies have been calling employees back to the office. Yet, despite all efforts, the risk of workplace transmission remains.[1] Some employees are therefore asking to continue remote arrangements their employers adopted when forced to close under executive orders. Some employers are acceding; some are not. This article concludes that public law offers relatively little protection to individual employees in this context.[2] Companies, however, may be in breach of contract if they terminate employees with job security rights for refusing to return in person.

I. Employment at Will and Its Exceptions

Employees have good reasons for wanting to stay home, and employers have good reasons for wanting them on site. But the relative merit of these positions has no bearing on the parties' default rights. Most employees are at will: they have no contractual rights to continued employment, let alone to particular working conditions. If an employer does not accept a remote arrangement, the employee's

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1. The risk of workplace transmission has led some states to enact immunity laws protecting employers and businesses from private lawsuits. *See, e.g.*, H.B. 606, 133d Gen. Assemb. (Ohio 2020); Georgia COVID–19 Pandemic Business Safety Act, 2020 Ga. Laws 588 (to be codified at Ga. Code Ann. § 51-16-1). The issue has proved to be a stumbling block in Congressional efforts to pass additional COVID-related stimulus legislation. Kristina Peterson and Andrew Duehren, *No Agreement on Covid-Aid Liability Reached*, Wall St. J. (Dec.14, 2020, 7:56 pm), https://www.wsj.com/articles/bipartisan-group-to-unveil-covid-aid-legislation-11607975152.

2. This article does not address collective action. Employees who act in concert to protest unsafe working conditions, including through walkouts and work stoppages, may be protected under the National Labor Relations Act. 29 U.S.C. § 157. *See generally* Michael C. Duff, *New Labor Viscerality? Work Stoppages in the "New Work" Non-Union Economy*, 65 St. Louis U. L.J. (forthcoming 2021) (discussing scope and limits of protected concerted activity doctrine in relation to the pandemic).

recourse is to quit. It is a bitter pill, one that seems especially unfair given how different present working conditions are from what the employee originally agreed to. But under employment-at-will, each moment of the employment relationship is treated as a "new" contract.[3] The employer is free to terminate and insist on the employee's acceptance of the new normal—work amidst a pandemic—in exchange for reemployment.

There are various public law doctrines that can protect the employee in situations that pose health risks. However, they do not provide an obvious hook for claiming a right to remote work. Rather, such laws provide a wrongful discharge claim in case of employer retaliation for specific forms of protected conduct. For instance, the Occupational Safety & Health Act (OSHA) makes it illegal for an employer to take adverse action against a worker for reporting workplace safety violations.[4] State whistleblower laws and public policy doctrines are broader. Some protect employees for refusing to participate in unlawful activity and, in some cases, conduct that endangers public health and safety.[5] But they generally envision a situation in which an employee refuses a particular task or declines work for a short interval.[6] In other words, OSHA and other whistleblower laws protect protest behavior.

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3. *See, e.g.*, Asmus v. Pac. Bell, 999 P.2d 71, 81 (Cal. 2000) (treating company policy as an "implied in-fact unilateral contract," the modification of which was accepted by employees via their continued employment). I have critiqued this approach, proffering a view of at-will employment grounded in bilateral contract theory, *see generally* Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C.L. REV. 427 (2016); Rachel Arnow-Richman, *Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 FLA. L. REV. 1513 (2015), but it remains the dominant view.

4. 29 U.S.C. § 660(c). The statutory regulations specifically state that an employee is not entitled to walk off the job in response to safety conditions absent a truly imminent risk and insufficient time to address the matter though proper channels. *See* 29 C.F.R. § 1977.12(b)(1), (2) (2019). This might apply in situations where employees are subjected to close conditions in workplaces with known outbreaks, as has been the case in some meatpacking plants. *See* Anna Stewart, Ivana Kottasová & Aleesha Khaliq, *Why Meat Processing Plants Have Become Covid-19 Hotbeds*, CNN HEALTH (June 27, 2020, 11:32 AM), https://www.cnn.com/2020/06/27/health/meat-processing-plants-coronavirus-intl/index.html.

5. *See, e.g.*, NEW JERSEY STAT. ANN. § 34:19-3(c) (West 2018) (protecting employees who protest employer conduct that is "incompatible with a clear mandate of public policy concerning the public health, safety or welfare"); Becker v. Cmty. Health Sys., Inc., 359 P.3d 746, 747 (Wash. 2015) (recognizing claim by CFO pressured to resign following his refusal to alter company earnings report in potential violation of financial disclosure laws).

6. *See, e.g.*, Moore v. Warr Acres Nursing Ctr., LLC, 376 P.3d 894, 895 (Okla. 2016) (permitting claim where ill employee refused to work for three days for fear of jeopardizing health of nursing center residents); Parsons v. United Techs. Corp., Sikorsky Aircraft Div., 700 A.2d 655 , 665–66 (Conn. 1997) (permitting claim where employee refused work order to travel to Bahrain due to military and political unrest in the Persian Gulf region).

Relying on them in the case of an employee who refuses to come into the workplace altogether would require an extension of existing law.[7]

Congress's recently enacted pandemic-related legislation comes closer by giving employees some ability to stay at home. Qualifying workers can take partially paid, job-protected leave for a maximum of twelve weeks.[8] However, the employee must have a qualifying COVID-related reason for leave, such as the need to quarantine due to exposure.[9] A general fear of contracting the virus would not suffice.

Even if it did, a right to leave is not the same as a right to work from home. An employee seeking remote work is effectively requesting an accommodation, much like what the Americans with Disabilities Act (ADA) guarantees disabled workers.[10] Some employees might qualify for such protection, like those who have immune disorders or other impairments that make contracting COVID especially grave.[11] But employees are not disabled due merely to age, nor are accommodations available to employees due to close contact with a disabled family member. Moreover, ADA-qualifying employees are not entitled to their preferred accommodation.[12] A court could find that an employer's implementation of a lesser adjustment—such as providing a private office or reassigning the worker to a less contact-intensive shift—is a reasonable, and consequently sufficient, accommodation for the employee's disability.

In short, the public law rights of at-will employees are limited. Absent a statutory disability, an individual employee who refuses to come to work is unlikely to be protected, at least where the employer is following basic sanitation and social distancing protocols that reduce the risk of transmission.

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7. In addition, the conditions to which the employee objects would have to create a public health hazard, not just a risk to one particular employee based on his or her individual fears or susceptibilities.

8. Families First Coronavirus Response Act, Pub. L. No. 116-27, 134 Stat. 178 (2020).

9. *See id.* § 5102(a), 134 Stat. at 195 (permitting leave for symptomatic employees, those in self-quarantine, or those caring for an ill family member or child out of school). In addition, these new laws apply only to small employers of fewer than 500 employees. *Id.* § 5110(2)(B)(i)(I)(aa), 134 Stat. at 199.

10. *See* 42 U.S.C. § 12112(b)(5).

11. This is especially true since the ADA was amended in 2008 to broaden the definition of disability. *Id.* § 12102(4) ("The definition of disability . . . shall be construed in favor of broad coverage . . . to the maximum extent permitted by [this law]."). *See generally* Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 Ga. L. Rev. 937 (2012).

12. 29 C.F.R. § 1630.9 app. at 420 (2019) ("[T]he employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.").

II. Contract-Based Job Security Rights

The situation changes if the employee has contractual job security. Such security could come from a written contract guaranteeing a fixed term or through an indefinite just cause contract that is express or implied. Assuming there are no express terms as to work location or modality, the parties' rights depend principally on whether a refusal to work in person constitutes cause for termination, though other contract principles, such as material breach and excuse, can come into play.

A. What Is Cause?

Where the employee has a written contract, the question of what constitutes cause to terminate is often answered by express language. High-level executives, for instance, frequently have contracts that delineate the precise and exclusive grounds for performance-related termination. These grounds may include such things as "failure to perform," "misconduct," or "material breach," none of which clearly embraces an employee's a refusal to work in person.[13] The employee who is keeping up with work and interacting virtually with colleagues from home is not failing to perform. For the same reasons, that employee is unlikely to be in material breach. The employer could argue that the employee committed misconduct: it ordered the employee to return to the office and she refused, a possible act of insubordination. But "misconduct" in this context is generally understood to mean intentionally wrongful behavior or violations of law or policy, such as misappropriating funds or engaging in sexual harassment.[14] An employer that relies on such language to terminate a worker who is still performing, albeit from home, is on uncertain legal ground.

In contrast, employees with implied just-cause contracts or written agreements that do not define "cause" to terminate have less security. The common-law meaning of cause in such cases is any "fair and honest cause or reason, regulated by good faith."[15] Failure to show up at work—what the employer might characterize as excessive absenteeism—would ordinarily suffice. The employee can counter that she

13. For data on the incidence of various grounds for cause in CEO contracts, see Rachel Arnow-Richman, James Hicks & Steven Davidoff Solomon, Anticipating Harassment: MeToo and the Changing Norms Of Executive Contracts (2021) (unpublished manuscript) (on file with author); Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For*, 63 Wash. & Lee L. Rev. 231 (2006).

14. *See, e.g.*, Scherer v. Rockwell Int'l Corp., 766 F. Supp. 593, 603 (N.D. Ill. 1991), *aff'd*, 976 F.2d 356 (7th Cir. 1992) (holding that the plaintiff was properly terminated on the basis of misconduct after he sexually harassed his secretary); *cf*. Astra USA, Inc. v. Bildman, 914 N.E.2d 36, 38, 44 (Mass. 2009) (concluding that employee misconduct including conversion of company funds, waste of company assets, and fraudulent activity rose to the level of a material breach of the employment agreement).

15. Guz v. Bechtel Nat'l, Inc., 8 P.3d 1089, 1100 (Cal. 2000); Uintah Basin Med. Ctr. v. Hardy, 110 P.3d 168, 173 (Utah Ct. App. 2005).

is willing and able to perform, and the circumstances justify her insistence on being remote. But the legal standard, particularly in implied contract cases, is highly deferential to employers.[16] The viability of an ongoing work-from-home arrangement would likely be viewed as a matter of managerial discretion in the absence of any public mandate.[17] Should the question prove a close one, the burden of proof lies with the employee to demonstrate breach of contract.[18]

B. Excuse of Performance

As a practical matter, disputes over the termination of a written employment contract are assessed through the lens of cause. However, it is also possible to invoke general contract principles to excuse the employee's performance. Should an excuse doctrine apply, the employee's refusal to work in person would not constitute a breach.

One path would be for the employee to argue that the employer breached first, for instance, by subjecting the employee to unsafe working conditions. Some collective bargaining agreements expressly require that the employer provide a safe work environment. Individual contracts are unlikely to contain that language, but such an obligation could be implied based either on OSHA's general duty clause[19] or the implied duty of good faith.[20] The question then becomes whether the employer's breach is material, which likely turns on the reasonableness of the employer's risk mitigation efforts. Clearly, there is no way to completely prevent the spread of COVID. The employer that adopts measures consistent with current medical protocols is probably not in material breach.[21] One that fails to implement basic social distancing or mask requirements (or flagrantly fails to enforce its rules) might be. The difficulty for the employee is that, should a court find the employer

16. Cotran v. Rollins Hudig Hall Int'l, 948 P.2d 412, 423 (Cal. 1998) (jury must determine not whether employee wrongdoing in fact occurred but whether the employer, acting in good faith had reasonable grounds for so believing in determining whether employer breached implied contract); Pugh v. See's Candies, 171 Cal. Rptr. 917, 928 (Ct. App. 1981) (noting that "care must be taken . . . not to interfere with the legitimate exercise of managerial discretion" in determining what constitutes good cause to terminate an implied contract).

17. There is good reason to think, for instance, that employers' effective use of remote work arrangements during the COVID lockdown will help disabled employees convince future courts that remote work is a reasonable accommodation. *See* Michelle Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 WASH. U. J. L. & PUB. POL'Y (forthcoming 2020).

18. *Pugh*, 171 Cal. Rptr. at 928.

19. 29 U.S.C. § 654(a)(1).

20. RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. L. INST. 1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

21. This is particularly so if the employee is still receiving the principal benefit of the contract in the form of her salary. *Id.* § 241 (assessing materiality of a contract breach based, inter alia, on the "extent to which the injured party will be deprived of the benefit which he reasonably expected").

did not materially breach, she will be in breach for failing to return to work per her employer's instructions.

A different type of excuse occurs when a party's performance becomes impracticable due to unanticipated circumstances. Here the employee might claim that the health dangers of working in person should excuse any such obligation. A global pandemic fits the bill for an unforeseen event—one so extraordinary that neither party can be blamed for failing to anticipate it at the time of drafting.[22] Whether in-person work is impracticable, however, is a more nuanced question that will depend on such things as the contact-intensiveness of the work, the employer's mitigation efforts, and the employee's underlying health issues.[23] Moreover, impracticability merely forgives the employee's continued commitment to serve the employer; it generally does not provide a basis for suit. An employer could similarly invoke the doctrine, arguing that the economic fallout from COVID has made it all but impossible to retain the employee for the duration of her contract. In other words, impracticability is more shield than sword, and, even so, it is double-edged.

Conclusion

The pandemic has left both employers and employees in a state of legal uncertainty. Rather than rely on guesswork, the prudent and compassionate choice for employers is to continue temporary remote arrangements where feasible. Should an employer refuse, the affected employee will have to balance legitimate fears for her safety and her job. Beyond that, all anyone can do is wait. Fortunately, science is still at work.

22. *Id.* § 261 (discharging contractual duty where "performance is made impracticable without [by] an event the non-occurrence of which was a basic assumption on which the contract was made").

23. *See id.* cmt. d ("Performance may . . . be impracticable because it will involve a risk of injury to person or to property . . . that is disproportionate to the ends to be attained by performance.").