

# OHS Law Regarding Work Refusals for Unsafe Work ... Get it Right



## **What Canadian Employers Need to Know about the Right to Refuse Unsafe Work During the COVID – 19 Pandemic**

The World Health Organization ('WHO') has declared a pandemic as cases of the Coronavirus Disease 2019 (COVID-19) continue to increase around the world and here in Canada. Canadian employers are increasingly dealing with occupational health and safety issues in their workplace. In particular, there has been a number of reported cases of workers exercising their right to refuse unsafe work, one of the most important protections that workers have under occupational health and safety legislation. This article will address that issue. However, this is not legal advice, and employers should not make decisions or take action until they receive legal advice from a competent legal advisor.

### **What is the Right to Refuse Unsafe Work'**

Under the Ontario workplace health and safety statute, the *Occupational Health and Safety Act* ('OHS'), workers are entitled to refuse to work when they have reason to believe, among other things, that the 'physical condition of the workplace', or the part in which they work, or any equipment, machine, device or thing they use or operate, is likely to endanger them. The worker must advise the employer of the work refusal immediately and the underlying circumstance when they exercise this legal right. The statutory threshold required to justify a work refusal is low. A worker need only have a subjective belief that they may be unsafe at work, which includes many circumstances related to COVID-19. The specific legal criteria may vary between jurisdictions. In every Canadian jurisdiction, however, the worker does not need to prove they are actually at risk in order to initiate a work refusal and trigger a mandatory investigation by the employer.

### **What must an Employer do in response to an Unsafe Work Refusal'**

If a worker exercises their right to refuse unsafe work, an employer must follow the mandatory investigatory requirement outlined in the legislation. In Ontario, this includes internally investigating the situation in the presence of the worker and either (1) a health and safety representative, or (2) a worker representative who is on the joint health and safety committee, or is chosen by

the workers based on knowledge, experience and training.

An employer must conduct an internal investigation by recording the circumstances of the work refusal and investigation, resolve it internally, and ensure that any necessary action to remedy the danger is taken. However, if the work refusal is not resolved internally, then the employer must notify the regulator, the Ministry of Labour ('MOL'). Until such time, the worker engaging in the work refusal must generally remain available in a safe place and be paid for their scheduled working time until the situation has been resolved.

If the worker continues to believe they are still endangered despite the employer's conclusions to the contrary, the worker may continue the work refusal. At this point, either the worker or employer, or their representatives, must contact the MOL and request a government health and safety inspector to visit the workplace, investigate the continued work refusal and make a determination if there is any 'likelihood of endangerment' of the refusing worker.

Throughout this process, the employer is generally entitled to assign alternative work to the refusing worker at the same rate of pay. However, the employer may not assign the work that is the subject of the refusal to another worker unless that other worker has been informed of the work refusal and the reasons given for the work refusal.

If the MOL inspector finds that the circumstance does not meet the statutory threshold required to justify the work refusal, the refusing worker may be ordered to return to work by the employer. If the MOL inspector finds otherwise, however, they will typically order the employer to remedy the hazard relating to the work refusal. Employers should also be aware of the prohibition on reprisal against a worker for exercising their right to refuse unsafe work. Under section 50 of the *OHSA*, reprisal includes engaging in intimidation, coercion, penalization, discipline, suspension, dismissal, or threats of those measures. This related protection applies at all times, including after an inspection.

### **Are there Exemptions to the Right to Refuse Unsafe Work'**

The right to refuse unsafe work is restricted for prescribed categories of workers, which includes firefighters, police officers, and certain healthcare workers, such as those employed in the operation of a hospital. These workers are not entitled to refuse unsafe work that is (1) inherent in their work or is a normal condition of their employment, or (2) when their refusal to work would directly endanger the life, health or safety of another person.

Outside of this list of prescribed workers, the right to refuse unsafe work is generally available to all workers, including those designated as 'essential services' pursuant to emergency management legislation.

### **How does this Right to Refuse Unsafe Work Apply during the COVID-19 Pandemic'**

The right to refuse unsafe work has arisen in the context of past infectious disease outbreaks and pandemics. In one case, two airline ticket agents engaged in a work refusal during the Severe Acute Respiratory Syndrome (SARS) outbreak for fear of contracting the illness while interacting with passengers. They insisted on wearing gloves and face masks in order to continue in their roles.

COVID-19 may result in workers exercising their legal right to express concerns to their employer and refusing to do unsafe work. However, the right should not be misused.

### **What can Employers do to provide a Healthy & Safe Workplace'**

Under the 'general duty clause' of the *OHSA*, and similarly in other jurisdictions, an employer has a general obligation to take reasonable precautions to protect the health and safety of its workers. In the context of an infectious disease outbreak, an employer could potentially face prosecution for violating the general duty clause by taking insufficient measures to protect workers. An employer can also expect workers to exercise their right to refuse unsafe work based on what they perceive as inadequate protections.

During the COVID-19 pandemic, it is essential that employers implement appropriate protective measures by following the latest guidance of their municipal and provincial public health agencies, as well as the latest guidance of the Public Health Agency of Canada ('PHAC'). Based on current PHAC guidance these measures should include the following: restricting individuals from the workplace based on the official criteria for recommended or required self-isolation, including returning from travels outside Canada; requiring employees who have even mild COVID-19 symptoms, as recognized by PHAC,<sup>8</sup> to stay at home, contact public health authorities, and follow their directions; encouraging social distancing to reduce transmission, which may include facilitating remote work arrangements and rearranging the workplace for other workers as practical; promoting good hygiene practices, including frequent hand-washing, avoiding the touching of one's face with unwashed hands, coughing or sneezing into one's elbow, and ensuring the regular cleaning of high-touch surfaces throughout the workplace; and consider assessing the health of workers before they enter the workplace by various means, including printed warning signs, interviews and possibly taking workers temperature before they enter the workplace, as has been done in other jurisdictions.

Employers should also be conducting ongoing workplace health and safety assessments, and working with their internal health and safety committees as applicable to keep policies and practices updated. Under occupational health and safety legislation, employers are also generally required to keep workers informed of known workplace risks and hazards, and more broadly provide them with the information necessary to protect their health and safety.

By applying such measures, employers may fulfill their general duty and be better prepared to demonstrate that unsafe work refusals are unnecessary in their workplace.

### **Conclusion**

The COVID-19 pandemic is a dynamic situation and in many ways unprecedented. Workers are understandably concerned about their safety in the workplace. At this uniquely sensitive time, it is especially important for employers to be visibly proactive in providing a safe workplace to alleviate these concerns and keep their workforce composed. Employers must also be aware of their specific obligations in the context of an unsafe work refusal, and ensure it is handled appropriately and in full compliance with legal requirements.

While the right to refuse unsafe work is always a possibility, that is all the

more reason for employers to always have a safe workplace to ensure such refusals are ultimately short-lived.

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