

# OHS Work Refusals Response & Compliance Game Plan



Refusing to perform assigned work is normally an act of insubordination worthy of discipline. But under Canadian OHS laws, workers have the right to perform work that they reasonably believe endangers their own or another person's health and safety. "Discriminating" or punishing workers for lawfully exercising their OHS refusal rights can get you into a lot of trouble. By the same token, work refusals can bring operations to a halt. To minimize undue disruption, employers must be prepared for any work refusals that occur at their own workplace. Effective work refusal response requires 2 things:

- An understanding of refusal rights so that you can determine whether a particular refusal is or isn't justified; and
- A clear process for bringing, investigating and resolving refusals.

Here's a 13-step game plan you can follow to deal with refusals swiftly, effectively and compliantly.

## Step 1. Ensure Refusing Worker Has OHS Refusal Rights

The right to refuse dangerous work or jobs extends to just about any worker covered by the OHS laws, whether union or non-union, full-time or part-time, temporary or permanent, paid or volunteer. One notable exception is in Ontario, where the right to refuse includes exceptions for certain kinds of workers that the general public counts on to do their jobs without disruption, including:

- Police officers;
- Firefighters;
- Correctional officers;
- Workers employed in operating a/an hospital, sanatorium, long-term care home, psychiatric institution, mental health centre, rehab facility, residential group home or facility for persons with behavioural or emotional problems or disabilities, ambulance service, first aid clinic or station, laboratory operated by the Crown, or laundry, food service, power plant or technical service or facility used in conjunction with an institution, facility or service.

## Step 2. Ensure Refusing Workers' Fear of Danger Is Sincere

Workers must genuinely believe that they're in danger and not use the refusal as a pretext to get back at management, avoid an unpleasant assignment or carry out any other purpose not related to health and safety. If the fear is insincere, the refusal is unjustified and there are grounds for discipline.

**Worker Has Political Agenda:** Workers can't use refusals to advance an agenda or make a point, even if it's safety related. **Example:** Federal arbitrator nixes longshore worker's refusal because gangways "didn't meet Code." The worker was a union rep and JHSC member fed up with what he perceived as the company's foot dragging in implementing gangway safety measures and brought the refusal not out of immediate concern for safety but to advance his "hidden agenda" [*Jordan v. Neptune Bulk Terminals (Canada) Ltd.*, 2019 OHSTC 19].

**Worker Uses Refusal to Vent:** Courts consider the entire context and look for behaviour suggesting that workers are abusing their refusal rights to air some other grievance. **Example:** PEI board finds loading dock workers' refusal to work outdoors in wet clothes as insubordination noting that temperature indoors was exactly the same 4.5° C and that the workers had been complaining for days about the relocation of the parking lot and that the refusal was just another form of protest [*Cavendish Farms Ltd. v. U.F.C.W., Local 1252*].

**Refusal Is Personal:** Courts look for signs of previously existing bad blood suggesting that workers are using the refusal to get back at somebody with whom they have a personal conflict. This is especially true if the refusal comes immediately after a confrontation. **Example:** Right after his supervisor throws him out of the lunchroom, a worker refuses to operate a crane but the Ontario court doesn't buy it saying that the timing of the incident was the key and that the concern over absence of hand signals was bogus because there was nobody else on the floor at the time [*Inco Metals Co.*].

## Step 3. Ensure Refusing Workers' Fear of Danger Is Reasonable

Sincerity isn't enough. Workers must also have "reasonable" grounds to believe that work operations, conditions, equipment or locations pose a danger to themselves or others. "Reasonable" is an objective standard that evaluates whether an ordinary person in the same circumstances would consider the operation, equipment or condition dangerous.

**Example:** A supervisor sneers and stares at a bus driver for a few seconds before muttering something under his breath and walking away. The bus driver is shaken and genuinely believes his life is in danger. But the Ontario OHS Tribunal upholds the finding of no danger citing the lack of evidence that the supervisor was violent or threatening. The "sneering" incident wasn't a condition that would cause a reasonable person to fear for his life, the Tribunal ruled [*Hassan v. City of Ottawa (OC Transpo)*, 2019 OHSTC 8].

## Step 4. Ensure Feared Danger Is Undue

Even if the fear is sincere and the danger is real, the refusal may still not be justified if it's an inherent and normal part of the job. However, workers who do dangerous jobs are allowed to refuse work that puts them at abnormal and non-inherent risk. Example:

**Invalid Refusal:** A firefighter refuses to enter a burning building due to risk of fire and smoke inhalation;

**Valid Refusal:** A firefighter refuses to enter burning buildings because the employer doesn't furnish appropriate PPE and respiratory protective equipment (assuming the refusal doesn't occur in Ontario where firefighters don't have OHS refusal rights).

## **Step 5. Ensure Work Refusal Doesn't Endanger Somebody Else**

Six jurisdictions (Fed, AB, NS, ON, QC, YK) provide that the right to refuse work doesn't apply if the refusal would endanger another person's health and safety. **Example:** A worker designated to serve as attendant during an entry into a confined space containing an atmosphere that's immediately dangerous to life, health and safety can't engage in a refusal because it would endanger the crew required to enter the space.

## **Step 6. Ensure Worker Properly Reports the Refusal**

Up to now, we've focused on the reasons and circumstances of the refusal. Keep in mind that there's another dimension to work refusal compliance, namely, following the proper procedures for initiating, investigating and resolving refusals. The starting point is how the work refusal begins. Refusing workers can't just pack up and go home. They must immediately notify their supervisor or employer that they're engaging in a work refusal and explain why so that their health and safety concerns can be investigated. Although it's not specifically required, it's a good idea to have workers complete a written notice as part of a larger form you can use to track the refusal.

## **Step 7. Immediately Investigate the Refusal**

Once workers let you know they're refusing, the employer or supervisor who receives the notice must immediately investigate the situation. It's at this point that companies are apt to get into trouble. **Typical scenario:** Employers or supervisors lose their cool, dismiss the workers' concerns without an investigation and order them to get back to work immediately or else. Rush to judgment is a blatant OHS violation.

**Example:** A production line worker engages in a work refusal and invokes his right to have the workplace health and safety representative investigate. Believing the worker's safety concern to be "totally ridiculous," the supervisor flatly refuses and orders him back to work. When the worker persists, the supervisor suspends him for 2 days. The Ontario arbitrator upholds the worker's grievance, ruling that the supervisor didn't follow the refusal procedures required by the OHS law [*Lennox Industries (Canada) Ltd. v. United Steelworkers of America, Local 7235*].

**Compliance Pointer:** Many jurisdictions require that the initial employer or supervisor investigation be done in the presence of the refusing worker and:

- A worker member of the workplace joint health and safety committee (JHSC), if there is one;
- The workplace health and safety representative, if there is one; or
- If there's no JHSC or health and safety representative, another worker

chosen by the refusing worker or maybe the union.

## **Step 8. Take Appropriate Actions After Completing Initial Investigation**

The point of the initial investigation is to determine whether the worker has reasonable grounds for refusing. If you determine that there is a danger, take immediate actions to correct or ensure that the employer corrects the problem. Once you're satisfied that the danger has been resolved or that the danger doesn't exist, notify the refusing worker of your conclusion and advise them to return to work.

## **Step 9. Enable Further Investigation If Refusal Continues**

In most jurisdictions, workers may continue the refusal if they're not satisfied with the initial investigation's findings and/or corrective actions taken. While rules vary, the next stage in the process is for the refusing worker or employer to notify the provincial OHS agency of the refusal and ask it to intervene. Upon receiving notification, the OHS agency must send an official to investigate the situation and determine whether there is a danger and, if so, how to resolve it. The OHS official must then issue a written report to the employer and refusing worker of its decision. Potential outcomes:

<b>OHS Investigator's Conclusion</b>	<b>Employer's Duty</b>	<b>Worker's Duty</b>
Danger exists	*Implement all remedial measures OHS official orders *Appeal	Return to work when employer implements all required measures
No danger exists or refusal is unjustified		*End refusal and return to work *Appeal

**Compliance Pointer:** Whether an OHS official's ruling on a work refusal can be appealed depends on the laws of the particular province. Thus, for example, while appeals are allowed in Québec, in Northwest Territories and Nunavut, the OHS official's orders are final.

## **Step 10. Consider Reassigning Refusing Worker**

You're generally allowed to temporarily reassign a refusing worker to alternative work with no loss of pay or benefits while the work refusal investigation is pending. In Ontario, Northwest Territories, Nunavut, Prince Edward Island and Québec, refusing workers must remain at or near their normal workstation and make themselves available to the employer or investigators during the refusal investigation. Under federal OHS law, workers affected by stoppages, including those on the next shift, caused by the work refusal are entitled to full pay and benefits for their time and can be reassigned to suitable temporary work while the refusal continues.

## **Step 11. Determine If You Have to Pay Refusing Worker for Refusal Time**

In some jurisdictions, including Ontario, time spent during a refusal counts as

work time for which the refusing worker is entitled to full pay and benefits, regardless of whether the worker is reassigned to other work. **Caveat:** In Newfoundland and Prince Edward Island, employers don't have to pay refusal time to a worker that's not assigned to alternative work unless the refusal is reasonable and, in the case of PEI, ultimately upheld.

## **Step 12. Follow Rules for Assigning Other Workers to Perform Refused Work**

Most jurisdictions allow the employer to assign somebody else to do the refused work, provided that it determines that there's no danger and that it notifies the other worker, in writing:

- That the refusing worker has refused to do the work;
- The reasons the worker refused the worker; and
- Of the worker's own OHS work refusal rights.

In Ontario, the employer must provide such notification in the presence of a JHSC worker member, safety rep or a worker selected by the union or workers to represent them.

## **Step 13. Don't Retaliate or Take Reprisals Against Workers for Refusing**

Last but not least, it's illegal to terminate, discipline, transfer, cut the pay or benefits of or take any other adverse action against workers for exercising their OHS refusal rights. However, protection against discrimination and retaliation doesn't apply when it's definitively determined that the refusal was frivolous or made in bad faith by a worker that knew there wasn't justification for refusing.