

WORK REFUSALS: Answers to 10 Frequently Asked Questions



One of a worker's key rights under the OHS laws is the right to refuse unsafe work. Proper handling of refusals is challenging because you must not only determine whether the worker's fear is reasonable but also follow the procedures spelled out for refusals in the OHS laws while doing so.

Mishandle a work refusal and your company could be liable for a safety offence or wrongful termination. To help you avoid that situation, here are answers to 10 of the most frequently asked questions (FAQs) about work refusals.

10 WORK REFUSAL FAQs

Q Who Can Initiate a Work Refusal'

A Any worker—full- or part-time, temporary or permanent, new or experienced—can initiate a work refusal provided he has valid reasons for doing so.

Q When Can a Worker Refuse Unsafe Work'

A Although the standard for refusals varies slightly by jurisdiction, the focus is generally on whether the worker has "reasonable" grounds or cause to believe that the work or equipment poses an undue or unusual hazard or danger to himself or others. In determining whether the worker's grounds are reasonable, consider whether an average worker, with the same level of training and experience, using normal and honest judgment, would agree that the work or equipment poses an unacceptable hazard.

In addition, a worker's fear must be sincere. If the refusal is just a pretext to get out of an unpleasant task or avoid working with someone the worker dislikes, it isn't valid.

Example: Two workers at a ham processing plant separately refused to be reassigned to another assembly line because they disliked a third co-worker. They claimed that working with that co-worker raised health and safety issues. The supervisor suspended them each for one day after concluding that the two workers' real motive was to avoid working with the disliked co-worker and that they were only citing safety as a pretext. A labour arbitrator upheld this decision [*Midtown Meats Ltd. v. United Food and Commercial Workers International*].

Union, Local 175].

Note that there are limits on a worker's right to refuse unsafe work. For example, a worker generally may *not* refuse work if doing so would endanger someone else or if the danger is a normal part of the job, such as the risk of exposure to fire for a firefighter. (See the chart below for the limits on work refusals in each jurisdiction.)

Q Is a Refusal Justified if the Work Is Only Dangerous for that Worker'

A In most cases, the basis for a work refusal is a condition or circumstances that would pose a danger to *any* worker—not just the worker making the refusal. For example, working in a confined space without the appropriate respiratory protection would be dangerous for any worker. But a work refusal may still be valid if the condition or circumstance the worker is complaining about poses a danger only to him.

Example: A very tall driver refused to drive a small armoured truck because his position in the seat left little room to manoeuvre and made it hard for him to reach the controls. The employer dismissed his refusal, arguing that the truck was in good shape and didn't pose a problem for the other drivers. A health and safety officer ruled that making the tall driver drive a small truck posed a danger to him and thus his refusal was justified [*Garda du Canada Inc. v. Syndicat National des Convoyeurs de Fonds*].

So don't dismiss a work refusal if the danger posed is unique to a particular worker. Instead, investigate the refusal like any other refusal and determine whether it was reasonable for that specific worker to refuse to do that specific work. If so, the refusal is justified and you should take steps to accommodate the worker. For example, if a pregnant worker refuses to use a particular chemical because it poses a risk to her unborn child—even though other non-pregnant workers have no problems using that chemical—either let her use a different chemical to perform that job or reassign her to work that doesn't involve the use of or exposure to that particular chemical.

Q Can a Refusal Be Based Only on Unsafe Equipment'

A Although many work refusals are based on concerns about the safety of machinery and equipment, such as the lack of a machine guard or defective PPE, they can be based on other kinds of safety concerns. For example, courts have upheld refusals based on fears of:

- *Violence:* For example, the resident of a group house had the habit of standing outside and shouting threats at her postal carrier. And on one occasion, she threw a clipboard at the carrier's head. So the carrier refused to deliver mail to the house. The arbitrator ruled that the carrier's fears of violence were reasonable and upheld her refusal [*Caldwell v. Canada Post Corp.*];
- *Heat stroke:* For example, a federal arbitrator ruled that a railroad cook could refuse to work in an un-air-conditioned and poorly ventilated kitchen in the summer [*LeBlanc v. VIA Rail Canada Inc.*]; and
- *Illness:* For example, a prison guard initiated a work refusal based on fears of getting Hepatitis B. Each morning, he had to escort three inmates from their toilet-less isolation cells, waste buckets in hand, to a washroom. He was afraid that the inmates would toss the contents of their

waste buckets at him. An arbitrator ruled that the guard's refusal was valid because scientific evidence showed that Hepatitis B is transmitted through contact with feces, urine and semen [*Walton v. Treasury Board*].

Q What Should an Employer Do When a Worker Refuses Unsafe Work'

A Don't rush to judgment and dismiss a worker's refusal as laziness or insubordination. Writing a refusal off as frivolous and ordering the worker back to work without an investigation is likely to lead to liability.

Example: When a production line supervisor and a worker got into an argument, the worker became so upset that his hands started to tremble. So he refused to work and asked for the company's elected safety representative to investigate the refusal. The supervisor said no, believing the refusal was "totally ridiculous." When the worker persisted, the supervisor suspended him for two days. So the worker filed a grievance. An Ontario arbitrator upheld the worker's grievance, ruling that the supervisor should have taken the refusal seriously and followed the procedures required by law [*Lennox Industries (Canada) Ltd. v. United Steelworkers of America, Local 7235*].

So when a worker initiates a work refusal, you should do the following:

Notify the appropriate parties. Make sure that you notify anyone you're required to notify of a work refusal. For example, the OHS law may require you to notify the JHSC or health and safety representative, the worker's union representative and/or a government OHS inspector. In some jurisdictions, these parties must participate in or be present during the initial investigation of the refusal; in others, these parties are only notified after the investigation if the worker continues the refusal despite a finding that the work was safe.

Investigate the refusal. The OHS laws require you to investigate all workplace refusals, no matter how absurd or ridiculous they may appear. This investigation should be done immediately or promptly. The nature and extent of the investigation will depend on its circumstances. For example, if a worker refuses to work because he says his PPE isn't working properly, you might examine that PPE, speak to other workers who recently used it and check any inspection records for the PPE. But a refusal based on fears that a certain task poses the risk of musculoskeletal injury may be more complicated to investigate and even require bringing in an expert.

Take appropriate steps based on outcome of investigation. If your investigation reveals that the refusal was, in fact, justified, you're now on notice of the presence of a safety hazard and thus must take steps to protect workers from that hazard, such as providing the worker with adequate PPE that's in good working condition or repairing a broken machine. If your investigation concludes that the refusal *wasn't* justified, you should explain your findings to the worker and instruct him to do the work in question.

Q What Role Does the Government Play in Refusals'

A Workers won't always be satisfied with the results of your investigation into a refusal. For example, they may dispute your conclusion that the work is safe or challenge the fixes you implemented as inadequate. If a worker persists in his refusal, the government will have to get involved. You'll have to notify the agency responsible for enforcing the OHS laws, which will generally send an

inspector to investigate the refusal.

Q Can You Reassign a Worker During a Work Refusal'

A Yes, you generally can reassign a worker to another job until his refusal is resolved. The worker should be reassigned only to work he's reasonably capable of doing and shouldn't lose pay or other benefits if assigned to a job that normally pays a lower wage. But note that the worker should—and, in fact, may be required to—participate in the investigation into his refusal. So reassigning him may not always be practical.

Q Must You Pay a Worker During a Work Refusal'

A The OHS laws require you to pay a worker while his refusal is being investigated, whether he's doing reassigned work, participating in the investigation or simply waiting for its outcome. But in some jurisdictions, if the refusal is found to be frivolous, you don't have to pay the worker and, in fact, the worker may have to repay any wages paid for the period of the refusal. Failing to pay a worker exercising his refusal right may result in a safety violation.

Example: A customs officer refused to work because of safety concerns. A health and safety officer investigated the work refusal and ultimately determined that there was no danger. So the officer returned to work. But the employer refused to pay him for the time during his refusal. A Board ruled that the employer had violated the *Canada Labour Code* and ordered it to pay the officer any lost wages and benefits [*Ferrusi v. Treasury Board (Canada Border Services Agency)*].

Q Can You Assign Another Worker to Do the Refused Work'

A To keep production from slowing down, you may be tempted to assign another worker to do the job that's the subject of the refusal. But OHS laws limit your ability to reassign this work to another worker. That's because if the refusal is valid, you're unnecessarily exposing the replacement worker to a hazard.

So don't assign a replacement worker to do refused work until you've conducted a preliminary investigation of the refusal and determined that no danger exists. If you don't believe the work is unsafe but the worker continues to refuse, then you can assign the refused work to another worker but only if you:

- Are reasonably sure the replacement worker won't be exposed to imminent danger;
- Tell the replacement worker about the work refusal and the reason for it; and
- Allow the replacement worker to also refuse to do the work in question.

Q Can You Discipline a Worker for Refusing to Work'

A Employers may want to discipline a worker on the spot for refusing work, particularly if it looks like the refusal is frivolous or that the worker's fear is a pretext. But disciplining workers for exercising their right to refuse unsafe work is an illegal reprisal and will expose the company to liability. In fact, with new reprisal rules in Ontario, disciplining workers for refusals is even riskier in that province. (At OHS Insider.com, you can download a special report—Discipline & Safety: The "Reprisals" Challenge and How to Overcome

It—that'll tell you how to protect your company from reprisal claims.)

In addition, an employer who fires a worker over a work refusal could also be liable for wrongful dismissal, which could result in the employer having to pay the worker termination notice, lost benefits and various kinds of damages.

However, the protection against reprisals for exercising the right to refuse unsafe work ends when both the employer and OHS officials have concluded that the work is safe. At that point, if the worker continues to refuse, you may then discipline him.

BOTTOM LINE

Handling work refusals is one of the trickiest aspects of a safety coordinator's job. Failing to follow the proper procedures or not investigating a refusal at all can lead to OHS violations and wrongful termination lawsuits and undermine workers' confidence in the company and its commitment to worker safety. So it's important that you periodically review refusal basics so you can help your company avoid these consequences.

SHOW YOUR LAWYER

Caldwell v. Canada Post Corp., [2006] C.L.C.A.O.D. No. 11, March 27, 2006

Ferrusi v. Treasury Board (Canada Border Services Agency), [2007] PSLRB 1 (CanLII), Jan. 5, 2007

Garda du Canada Inc. v. Syndicat National des Convoyeurs de Fonds, [2005] C.L.C.A.O.D. No. 39, Sept. 14, 2005

LeBlanc v. VIA Rail Canada Inc., CLRB Decision No. 714, Board File: 950-93, Nov. 18, 1988

Lennox Industries (Canada) Ltd. v. United Steelworkers of America, Local 7235, [1999] O.L.A.A. No. 158, March 3, 1999

Midtown Meats Ltd. v. United Food and Commercial Workers International Union, Local 175, [2009] CanLII 7946 (ON L.A.), Feb. 25, 2009

Walton v. Treasury Board, [1987] 16 C.C.E.L. 190 [exact date unknown]

LIMITS ON RIGHT TO REFUSE UNSAFE WORK Under the OHS laws in each jurisdiction, workers may NOT refuse unsafe work:		
		RELEVANT LAW
FED	1) If the refusal puts the life, health or safety of another person directly in danger; or 2) The danger is a normal condition of employment [Sec. 128(2)].	<i>Canada Labour Code</i>
AB	If the danger is normal for that occupation [Sec. 35(2)(a)].	<i>OHS Act</i>
BC	No specified limits on refusal right.	<i>OHS Reg.</i>
MB	No specified limits on refusal right.	<i>Workplace Safety and Health Act</i>

NB	No specified limits on refusal right.	<i>OHS Act</i>
NL	No specified limits on refusal right.	<i>OHS Act</i>
NT/ NU	If the danger normally exists in that work [Sec. 13(1)(a)].	<i>Safety Act</i>
NS	1) If the refusal puts the life, health or safety of another person directly in danger; or 2) The danger is inherent in the employee's work [Sec. 43(9)].	<i>OHS Act</i>
ON	1) When the danger is inherent in the worker's work or is a normal condition of the worker's employment; or 2) When the worker's refusal to work would directly endanger the life, health or safety of another person [Sec. 43(1)]. <i>Note: The above limits apply only to workers designated in Sec. 43(2).</i>	<i>OHS Act</i>
PE	No specified limits on refusal right.	
QC	1) If the refusal to perform the work puts the life, health, safety or physical well-being of another person in immediate danger; or 2) If the conditions under which the work is to be performed are ordinary conditions in this kind of work [Sec. 13].	<i>OHS Act</i>
SK	No specified limits on refusal right.	<i>OHS Act</i>
YT	1) If the refusal to perform the work puts the life, health, safety or physical well-being of another person in immediate danger; or 2) If the conditions under which the work is to be performed are ordinary conditions in that kind of work [Sec. 15(5)].	<i>OHS Act</i>