OHSInsider
Your Easiest Path to OHS Compliance in Canada
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CONTENTS

OHS Compliance Cheat Sheet: Work Refusals

The Dangerous Work Refusal Dilemma

Refusing to perform assigned work is normally an act of insubordination for which a worker can be disciplined. But OHS laws create a special exemption that allows workers to refuse unreasonably dangerous work to protect their own or another person's safety. Disciplining workers for exercising their refusal rights is a form of reprisal or "discrimination" banned by the law. And the dangerous conditions that prompt the refusal may potentially be serious OHS violations that you must immediately address.

On the other hand, work refusals can be highly disruptive and are supposed to be used only as a last resort. That's why refusal rights are subject to strict limitations affecting both the nature of the worker's safety concern and the process of initiating the refusal. If the limitations aren't met, the refusal is invalid and you can discipline the worker for continuing to engage in it.

While it may sound simple, responding to a work refusal and assessing its validity is hard to do, especially in the heat and tension of the moment. Here are the 9 things you need to know to meet that challenge. Click here for a summary of the work refusal rules in each part of Canada.

1. Which Workers Can Refuse Dangerous Work

Refusal rights cover any worker asked to do a dangerous job or confront a dangerous condition—union or non-union, full-time or part-time, temporary or permanent, paid or

...continued on page 2

In the News

Risk of Inmate Attack ≠ Valid Grounds for Corrections Manager to Refuse Work

A Correctional Manager hurt his knee after being attacked by an inmate during a meeting. Five days later, he initiated a work refusal claiming that the employer's refusal to let him carry OC (oleoresin of capsicum) spray violated PPE requirements and put him in danger. The MOL investigator upheld the refusal but the federal OHS Tribunal reversed his ruling. True, attack by a violent inmate is always a possibility in a correctional institute. But, the Tribunal continued, unlike prison guards, CMs aren't at imminent risk on a daily basis. The attack that happened 5 days earlier was an unusual occurrence and was highly unlikely to happen again on the day the CM initiated the refusal. And because work refusals are meant only for imminent danger, the CM didn't have valid grounds to refuse [*Correctional Service of Canada v. Aldred*, 2019 OHSTC 11 (CanLII), May 13, 2019].

Railway Wins Temporary Reprieve from Order to Install Costly Light Towers

An MOL inspector investigating a railroad switch worker's death determined that lighting levels in the yard were out of compliance and ordered the railway to construct new light towers within 7 months. The railway took issue with the inspector's findings and claimed that his test methods were inaccurate and unfair. It also asked the federal OHS Tribunal to "stay," i.e., bar enforcement of the order until the appeal was decided. The Tribunal agreed, noting that the railway would have to spend at least $600,000 to comply with the order and finding that its interim safety measures, including furnishing workers with and requiring them to use LED rather than incandescent lamps in the yard, would provide adequate protection to workers in the meantime [*Canadian Pacific Railway Company*, 2019 OHSTC 12, May 28, 2019].

Work Refusals continued from cover

volunteer—as long as the danger is real and the proper refusal processes are followed.

2. When a Refusal Is + Is Not Justified

Although rules vary slightly by jurisdiction, a refusal is justified only if:

- The worker's safety concern is sincere;
- The worker is in reasonable danger; and
- The danger isn't normal for the job.

Sincere: First, workers must genuinely believe that they're in danger and not use the refusal as a pretext to get out of an unpleasant assignment.

Example: Two workers at a meat processing plant refuse to be reassigned to another assembly line claiming that a third co-worker poses a danger to their safety. The supervisor investigates and determines that the workers' real motive is to avoid working with the co-worker because they disliked the third worker. A labour arbitrator upholds the decision to suspend them [*Midtown Meats Ltd. v. United Food and Commercial Workers International Union, Local 175*].

Reasonable: Sincerity isn't enough. Workers must also have "reasonable" grounds to believe that work operations, conditions or equipment pose a danger to themselves or others. "Reasonable" is an objective standard that evaluates whether an average 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].

Unusual: 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.

No Work Refusals that Endanger Somebody Else

Six jurisdictions—Fed, AB, NS, ON, QC, YK—also ban work refusals if they'd endanger another person's health and safety.

3. How the Refusal Begins

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 their health and safety concerns. 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. Click here for a Model Work Refusal Tracking Form you can adapt.

4. The Initial Investigation Stage

After receiving notification of the refusal is the point in the process that you're most likely to get into hot water.

Typical scenario: Supervisors lose their cool, dismiss the workers' concerns and order them immediately back to work without an investigation. Of course, this 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*].

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Rule: Once workers let you know they're refusing, the supervisor or other person who receives the notice must take immediate action. The options:

- Correct the health and safety hazard that prompted the worker to engage in the refusal; or
- Investigate the situation and determine if there is a danger and, if so, how to correct it.

Most jurisdictions require that this initial 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 workers at the workplace to be present for work refusal investigations.

5. The Initial Investigation Findings

The initial refusal investigation must take place immediately and reach 1 of 2 conclusions:

- Danger + corrective actions taken or needed; or
- No danger + corrective actions unnecessary.

The worker now has a decision to make:

- Accept the corrective actions taken or no danger determination and return to work or
- continue the refusal.

6. The OHS Officer Investigation

If the worker opts to continue the refusal, the worker or employer must notify the provincial OHS regulatory agency of the refusal and ask it to intervene.

Upon receiving notification, the agency sends an official to investigate the situation and issue whatever orders he/she believes are necessary to resolve the situation.

Possible outcomes:

OHS Investigation Conclusion	Workers' Option(s)
Danger exists + corrective measures needed	Worker must end refusal + return to work when employer implements required measures
No danger exists	Worker must end refusal + return to work immediately

7. The Possibility of a Court Appeal

Although it doesn't happen very often, workers who are still unsatisfied at this point still have one more card to play: Appeal the OHS investigator's findings to a court or OHS or labour tribunal (depending on the jurisdiction).

8. What Happens to the Worker during the Refusal

Time spent during a refusal counts as work time for which the refusing worker is entitled to full pay and benefits. Most jurisdictions also stipulate that employers can reassign the worker to reasonable alternative work during the refusal.

In 6 jurisdictions—ON, PE, QC and the 3 territories—workers must remain at or near their normal workstation and make themselves available to the employer or investigators during the refusal.

9. What Happens to Other Workers during the Refusal

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:

- That the refusing worker has refused to do the work;
- Of the health and safety concerns cited by the refusing worker; and
- Of the worker's own rights to refuse dangerous work under OHS laws.

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.

OHS COMPLIANCE CALENDAR

Upcoming deadlines, regulatory changes, enforcement events and other developments you need to prepare for.

September 1	Manitoba	New Class 1 licensing requirements for semi-truck drivers take effect
September 27	BC	Deadline to comment on proposed: *Annual changes to OELs *New REIs for pesticides exposure *Logging transport safety regulations
September 30	BC	Expected date of govt. committee recommendations for workers' comp reform
October 1	Ontario	MOL MSDs & respiratory hazards targeted inspections initiative begins
November 1	PEI	New domestic violence leave regulations take effect

TOOL

Compliance Safety Talk: Your Right to Refuse Dangerous Work

Here's a Safety Talk to give your workers explaining their OHS right to refuse dangerous work, including: i. When a refusal is justified; and ii. How the refusal process works.

What's At Stake

You may be called on to do a job that you believe is unduly dangerous, such as working on a roof without fall protection or operating a machine with a broken safety device. In these situations, you have the right to refuse the work in the interest of health and safety. But you can also get into big trouble if you don't follow the rules. Here's what you need to know to properly exercise your refusal rights.

When You Can Refuse Work

You're allowed to refuse work under 4 conditions:

Condition 1. You Sincerely Believe There's a Danger

You can refuse work if you honestly believe that it would pose a danger to your own or another person's health and safety, like a co-worker. What you can't do is cry wolf and try to use your refusal rights to get out of a job you know isn't dangerous.

Condition 2. Your Belief Is Reasonable

Your health and safety concern must also be "reasonable." In other words, the hazard must be one that an average, everyday worker would consider dangerous. For example, a driver who genuinely believed his supervisor wanted to kill him lost his refusal case because there was no evidence that the supervisor actually was violent or posed any physical threat to the driver.

Condition 3. The Danger Is Unusual

Work refusals don't apply to dangers that are a normal part of a job. For example, a firefighter can't refuse to enter a burning building because they're afraid of getting burned. But they could refuse to drive a fire truck with defective brakes.

Condition 4. The Refusal Doesn't Endanger Anybody Else

Refusals aren't allowed if they endanger the health and safety of another person. For example, a worker serving as an attendant outside a confined space that co-workers have entered (and where nobody is available to take his place) can't refuse work if it would mean deserting his post.

What Happens Next: How the Refusal Process Works

You can't simply put down your tools and go home; you must follow the proper refusal procedures. Here's what you need to know about the refusal process.

Stage 1: Notification

First, you must immediately notify your supervisor or another company official that you're making a refusal and explain why you think the work is dangerous.

Stage 2: First Investigation

The supervisor may be able to fix the problem right on the spot so that you can end your refusal and get back to work. If that's not possible, the supervisor or somebody else will investigate the refusal in the presence of another worker. You also have the right to be present during the investigation. If not, you must stay at or near your workstation in case the investigators need you. You get pay and benefits for your time. The company may also have the right to reassign you to comparable work while the refusal process unfolds.

Stage 3: Notification of Investigation Findings

After the investigation ends, the supervisor or a company official will notify you of its findings. There are 2 basic possibilities:

- There's no danger and it's safe for you to return to work; or
- There was a danger but it's been or will be corrected.

If you're satisfied with those findings, you can end your refusal and return to work (if corrective actions are needed, you can return once they're taken).

Stage 4: Government OHS Official Investigation

If the initial investigation no-danger finding or corrective actions aren't enough to end your health and safety fears, you can take things to the next stage by notifying a government OHS official of the refusal. Upon getting this notification, an official will then come to the workplace and do his/her own investigation to determine if there's a danger and, if so, what the company must do to fix it. The investigator will let you know one way or the other.

Final Point

The OHS investigation is the end of the road for most refusals. But, if you're still unhappy and concerned about safety, you can continue the refusal by appealing to a court or special OHS tribunal. At that point, the refusal becomes a legal case that the lawyers must handle.

Visit OHSInsider.com to get the quiz that goes with this SafetyTalk!

ARTICLE

How to Create a Visitors Safety Policy

Sure, you have an OHS program for your own workers. But does that program also provide protection for outside vendors, customers and other visitors (which we'll refer to collectively as "visitors") who come to your workplace? Here's a look at this common OHS program blind spot and how to fix it. Click here for a Model Visitors Safety Policy that you can adapt.

3 Reasons You Need a Visitors Safety Policy

Several OHS directors tell the Insider that their upper managers and executives don't want to put a visitors safety policy because it's "unmanageable." If you encounter such resistance, here are 3 good arguments you can use to overcome it:

1. Visitors Are at Risk

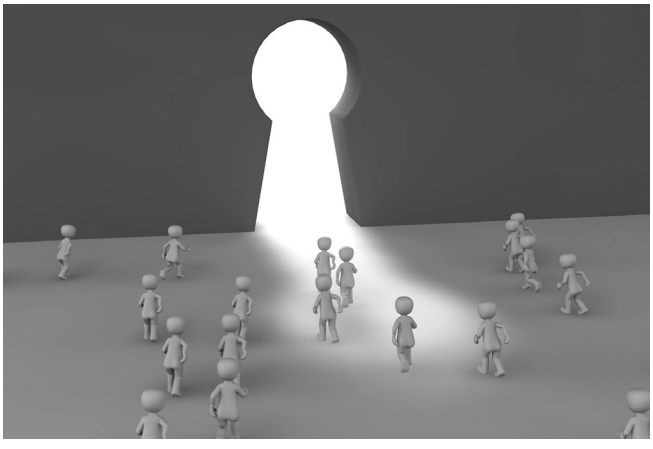
The people who work at your site every day can be trained to recognize dangers and take appropriate precautions. This isn't true of visitors who are at your workplace for only a short time. As a result, visitors are especially vulnerable to injuries and need to be carefully protected. "Keeping your workers safe is tough enough," notes one Ontario OHS director. "Protecting the visitors who walk around your workplace without having the same knowledge and appreciation of the hazards can be even trickier," she adds.

2. Visitors May Endanger Others

Visitors can also put the health and safety of others in the workplace at risk. For example, visitors may tinker with machines or safety systems, light up cigarettes around combustible fumes or distract workers performing vital safety functions, such as traffic control. And, of course, visitors may pose security risks or threats of violence.

3. Company May Be Liable for Visitors' Injuries

Perhaps the most effective way to overcome objections is to let company executives that the company could be held liable for a visitor's injury at the workplace under OHS and, in extreme cases, criminal law (under erstwhile Bill C-45, which requires persons in control of work to protect not only the workers but all persons suffering bodily injury as a result of the work).



The Right & Wrong Way to Implement a Visitors Safety Policy

Once you sell your C-suite on the idea of a visitors safety policy, you need to decide what kind of policy to implement.

Wrong Way: Some companies try to disclaim liability and make visitors responsible for their own safety. For example, they'll make all visitors sign and date a waiver like the following:

> *Visitors to the ABC Company workplace must agree to abide by all ABC safety policies and to accept responsibility for their own safety. ABC Company assumes no responsibility for the visitor's health and safety and shall in no way be liable for any injuries or accidents that occur.*

Although it may sound impressive, lawyers say that a waiver or disclaimer like this isn't worth the paper it's written on. "Simply requiring a visitor to sign a piece of paper like this won't absolve you of your legal duty to protect them against workplace hazards," according to a Toronto OHS lawyer. "Companies can't unilaterally disclaim their liabilities under OHS or criminal law," adds an Alberta lawyer.

Right Way: As a legal obligation, visitors' safety is just like worker safety. You're not expected to be perfect. All you're expected to do is use due diligence, that is, take all reasonable precautions to protect your visitors. The specific steps you take depend on the kind of industry you're in, the design of your workplace, the frequency and kind of visitors you get and other variables. For example, in certain especially dangerous industries like construction or mining, you might want to assign a company representative to escort the visitor through the workplace.

5 Things to Include in Visitors Safety Policy

While there's no such thing as a one-size-fits-all, the Insider Model Policy contains the necessary elements. Like the Model, your policy should:

- Require all visitors to sign in before entering and sign out before leaving the workplace;
- Let visitors know they'll be notified of hazards and emergency procedures when they log in (or soon afterwards);
- Tell visitors that they must use appropriate personal protective equipment and list what that is;
- Require visitors to obey all posted signs; and
- List the rules of conduct visitors must follow, e.g., no touching equipment, no smoking, no horseplay, staying out of restricted areas, etc.

ARTICLE

How to Use Progressive Discipline to Enforce Workplace Safety Rules

Why Progressive Discipline Is Crucial to OHS Compliance

There's no point in having safety policies and procedures (which we'll refer to collectively as "policies") unless you use discipline to enforce them. In fact, as far as liability goes, having policies that you don't enforce is worse than having no policies at all because it demonstrates failure to meet your own standards.

Example: A subcontract worker standing on a cross-member of a scaffold falls off and breaks his arm and elbow. The constructor says it's not to blame because the victim broke an express rule requiring workers to stand on 2 planks when doing support work on scaffolding. But the Ontario court nixes the constructor's due diligence defence because while it had good rules, it didn't enforce them. Violations happened all the time and the constructor just looked the other way, promoting a "culture of discretion" [*Ontario (Ministry of Labour) v. Reid & DeLeye Contractors Ltd.*, [2011] O.J. No. 3817].

But, while essential to OHS compliance, discipline is also fraught with legal peril under employment and labour laws, especially if the worker belongs to a union. Chances are, you'll end up having to defend your action before an arbitrator or court.

The good news is that there's a technique you can use to ensure that the disciplinary actions you use to enforce your safety policies stand up to legal challenge. Better yet, this technique can help you straighten out unsafe workers without need for litigation or arbitration. The technique is called progressive discipline and here's what you need to know to use it effectively.

What Progressive Discipline Is

Progressive discipline is a series of gradually sterner punishments. It usually starts with warnings for a first offence, mounts to suspensions and ultimately dismissal. At each stage you confront workers, explain what they did wrong, impose the appropriate punishment and warn of more serious discipline if they fail to clean up their act.

Progressive discipline works best against workers who commit repeat offences that aren't egregious or immediately life-threatening, such as not wearing hardhats or safety glasses. It's not appropriate for seriously dangerous safety violations that call for stronger and more immediate action even if they're a first offence. Arbitrators and courts will generally allow you to dispense with the warnings and suspend or even dismiss a first offender if the potential consequences of the safety violation are serious enough and if you punish all similar offences the same way, lawyers say.

By the same token, you need to consider "mitigating factors," that is, circumstances calling for more lenient treatment like long service, lack of previous offences, admission of wrongdoing and remorse. In short, you must apply progressive discipline flexibly, not by the numbers and make sure each of your decisions is justifiable and consistent.

Setting the Stage for Progressive Discipline

You must notify workers in advance that you use progressive discipline and explain the steps. If workers belong to a union, you'll likely have to negotiate the terms as part of the collective agreement. If workers are non-union, you should be able to impose the terms but need to ensure you clearly communicate them to workers as part of your HR policies or manual. Click here for a Model Progressive Discipline Policy that you can adapt.

You also need to keep records—memos, letters, notes from supervisors, photographs, etc.—each time you apply the policy and discipline a worker to justify the action and ensure you can defend it in court or arbitration. This is especially important if you wind up terminating the worker. You'll be courting disaster if you try to reconstruct events during the proceedings without written documentation to back you up, lawyers warn.

How to Implement the 4 Stages of Progressive Discipline

A basic progressive discipline policy provides for at least 4 levels of punishment: verbal counseling, written warning, suspension and termination. But there's no one way to do it and policies may vary depending on the company and collective agreement. For example, you may provide for multiple written warnings or impose an intermediate penalty like demotion between suspension and termination. For simplicity's sake, let's focus on the basic 4-level policy.

1. Verbal Counseling

Workers who commit safety violations should get verbal counseling. While it's akin to a warning, counseling is a softer, non-disciplinary process in which you simply have a conversation and bring a problem to the worker's attention. Specifically, you need to:

Explain specifically what the worker did wrong (or didn't do right) and why it's a problem.

Ask for an explanation. Make sure the violation isn't the result of a misunderstanding. For example, the worker may not have been trained how to use the equipment properly and the counseling should be directed to the supervisor. Lack of communication can lead to precisely what you want to prevent—a legal dispute. And getting the worker's side of the story will also help you prepare in

case a grievance or complaint is filed.

Ask the worker not to do it again. Don't be hostile during counseling and keep in mind that your goal is to correct, not punish, especially at this stage when you don't know if you're facing a chronic problem or an isolated incident.

Write a memo describing what you said and the worker's explanation. Give a copy to the worker and the union and keep another copy in your files. Click here or see below, for a Model Note to files documenting verbal counseling.

2. Written Warning

If the worker commits a safety violation after receiving verbal counseling, escalate by issuing a written warning:

- Remind the worker of previous counseling and briefly describe the circumstances;
- Indicate that you're issuing the written warning because of the worker's failure to heed the previous counseling;
- Explain what the worker did wrong;
- Warn of further discipline if the problem continues; and
- Ask the worker to sign the warning to acknowledge receipt and understanding of the warning.

Keep a copy of the signed warning in your files and give a copy to the worker and the union, if there is one. Click here for a Model Warning Letter.

3. Suspension

When and if the worker violates another safety rule, send a formal suspension letter.

- Summarize the previous incidents;
- Say how many days you're suspending the worker without pay;
- Make it clear that this is the final warning and that further misconduct may result in dismissal; and
- Send the letter to the worker and the union via certified mail, return-receipt requested.

Keep a copy in the files. Click here for a Model Suspension Letter.

4. Dismissal

If the problem continues, be prepared for the ultimate stage of progressive discipline: dismissal. Tell the worker you want to hold a formal meeting to discuss dismissal. The worker can then decide whether to have a union official or other representative attend.

At the meeting, go over all previous incidents and disciplinary actions. Indicate that the worker hasn't responded to the previous discipline and that the problem persists. Describe the most recent incident and cause dismissal. Give the worker or representative a chance to respond. If you're dissatisfied with the explanation, indicate that the worker is terminated.

Take careful notes of everything that happens at the meeting. Make sure at least one member of management attends as a witness. When the meeting ends write a final memo for the files summarizing what took place including your case and the worker's defence. If you send the worker a formal termination letter, be careful not to say anything that may box you in if the case goes to court or arbitration. For instance, indicate that the listed reasons for termination are "partial and not exhaustive," in case you want to bring up other grounds during the proceeding.

MODEL DOCUMENTATION OF VERBAL COUNSELING TO WORKER

Date _____ To: *Worker's Name* From: Supervisor

Subject: Documentation of Verbal Counseling for Not Following Safety Rules

Dear [*First name*]:

This memo is a written record of the events that took place on [*date*]. At approximately [*time*], you were seen [*describe violation(s)*]. At [*time*], I met with you to provide verbal counselling to explain what you did wrong and why it constitutes a danger and violation of Company safety rules. I asked for your response and you explained [*briefly summarize worker's explanation*]. We agreed that going forward, you would correct the problem and follow safety rules, specifically [*summarize specific agreed to corrective actions*].

As I explained, verbal counseling is a first step under the Company's progressive discipline policy. This memo of counseling will be placed in your personnel file but will be removed after [*time*], provided that you make good on your promise to work safely and follow safety rules. However, I also made it clear that further problems may result in more severe discipline up to and including termination in accordance with the progressive discipline policy.

[*First name,*] I hope you'll accept this counseling in the positive spirit in which it's intended. We all make mistakes. I have every confidence that you will use this incident as a learning experience and not make the same mistake in the future. I also want to remind you that I'm here to help you improve and become and that you can come to me any time with questions.

Supervisor signature: _____ Date: _____

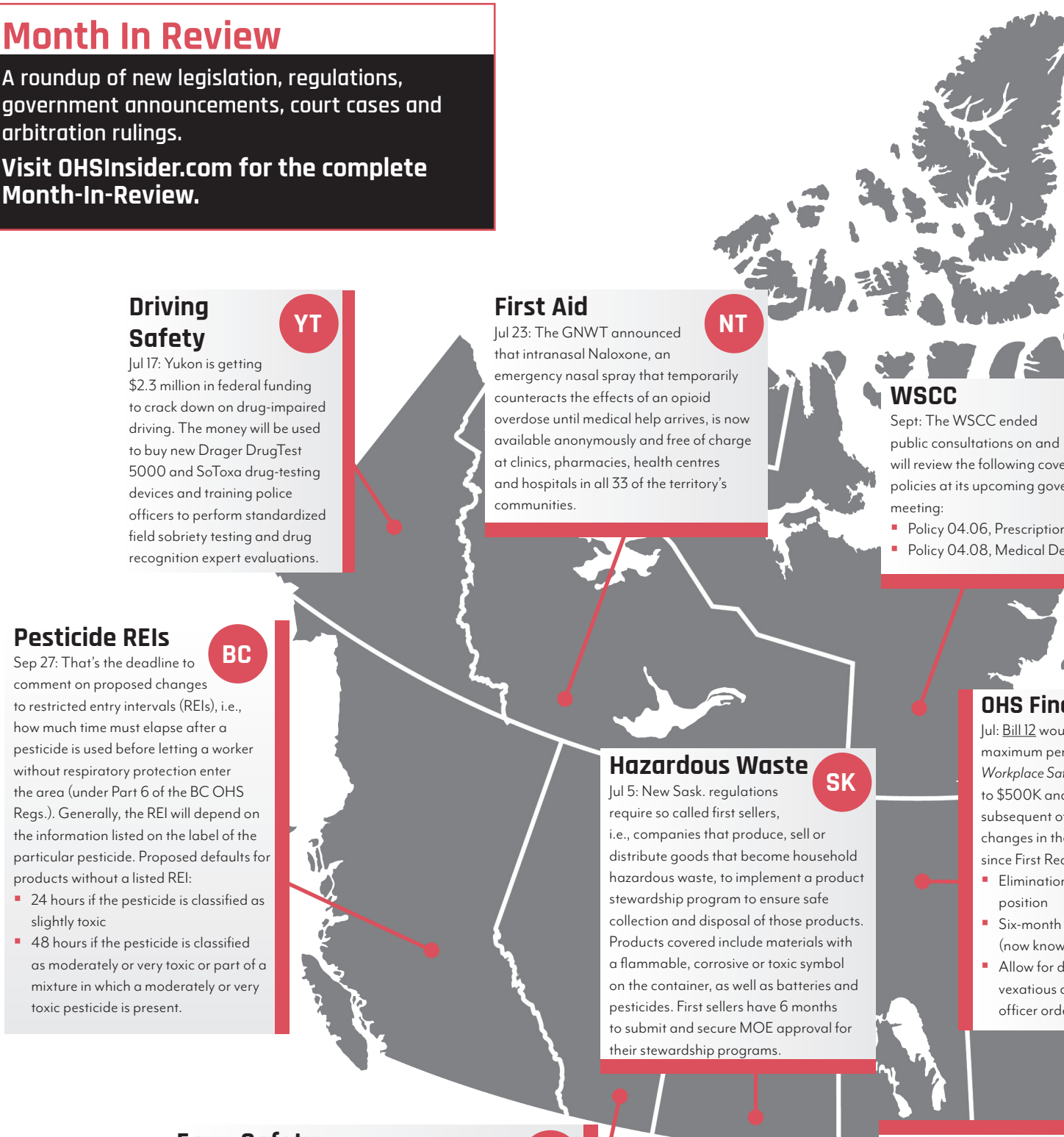
I have read and understood this memo: Worker signature _____ Date: _____

CC: OHS/HR Manager Name

Month In Review

A roundup of new legislation, regulations, government announcements, court cases and arbitration rulings.

Visit OHSInsider.com for the complete Month-In-Review.



Driving Safety — YT

Jul 17: Yukon is getting $2.3 million in federal funding to crack down on drug-impaired driving. The money will be used to buy new Drager DrugTest 5000 and SoToxa drug-testing devices and training police officers to perform standardized field sobriety testing and drug recognition expert evaluations.

First Aid — NT

Jul 23: The GNWT announced that intranasal Naloxone, an emergency nasal spray that temporarily counteracts the effects of an opioid overdose until medical help arrives, is now available anonymously and free of charge at clinics, pharmacies, health centres and hospitals in all 33 of the territory's communities.

WSCC

Sept: The WSCC ended public consultations on and will review the following cove policies at its upcoming gove meeting:

- Policy 04.06, Prescriptior
- Policy 04.08, Medical De

Pesticide REIs — BC

Sep 27: That's the deadline to comment on proposed changes to restricted entry intervals (REIs), i.e., how much time must elapse after a pesticide is used before letting a worker without respiratory protection enter the area (under Part 6 of the BC OHS Regs.). Generally, the REI will depend on the information listed on the label of the particular pesticide. Proposed defaults for products without a listed REI:

- 24 hours if the pesticide is classified as slightly toxic
- 48 hours if the pesticide is classified as moderately or very toxic or part of a mixture in which a moderately or very toxic pesticide is present.

Hazardous Waste — SK

Jul 5: New Sask. regulations require so called first sellers, i.e., companies that produce, sell or distribute goods that become household hazardous waste, to implement a product stewardship program to ensure safe collection and disposal of those products. Products covered include materials with a flammable, corrosive or toxic symbol on the container, as well as batteries and pesticides. First sellers have 6 months to submit and secure MOE approval for their stewardship programs.

OHS Fin

Jul: Bill 12 wou maximum per *Workplace Sa* to $500K and subsequent o changes in th since First Rec

- Eliminatior position
- Six-month (now know
- Allow for d vexatious c officer ord

Farm Safety — AB

Aug 31: That's the deadline to comment on the Alberta government's proposal to repeal Bill 6 and replace it with a new, supposedly more flexible and farm-friendly law called the Farm Freedom and Safety Act.

- New option for farm and ranch employers to get either WCB or market insurance to cover work injuries
- Employment standards exemptions for small farms as in New Brunswick.

OHS Regulation

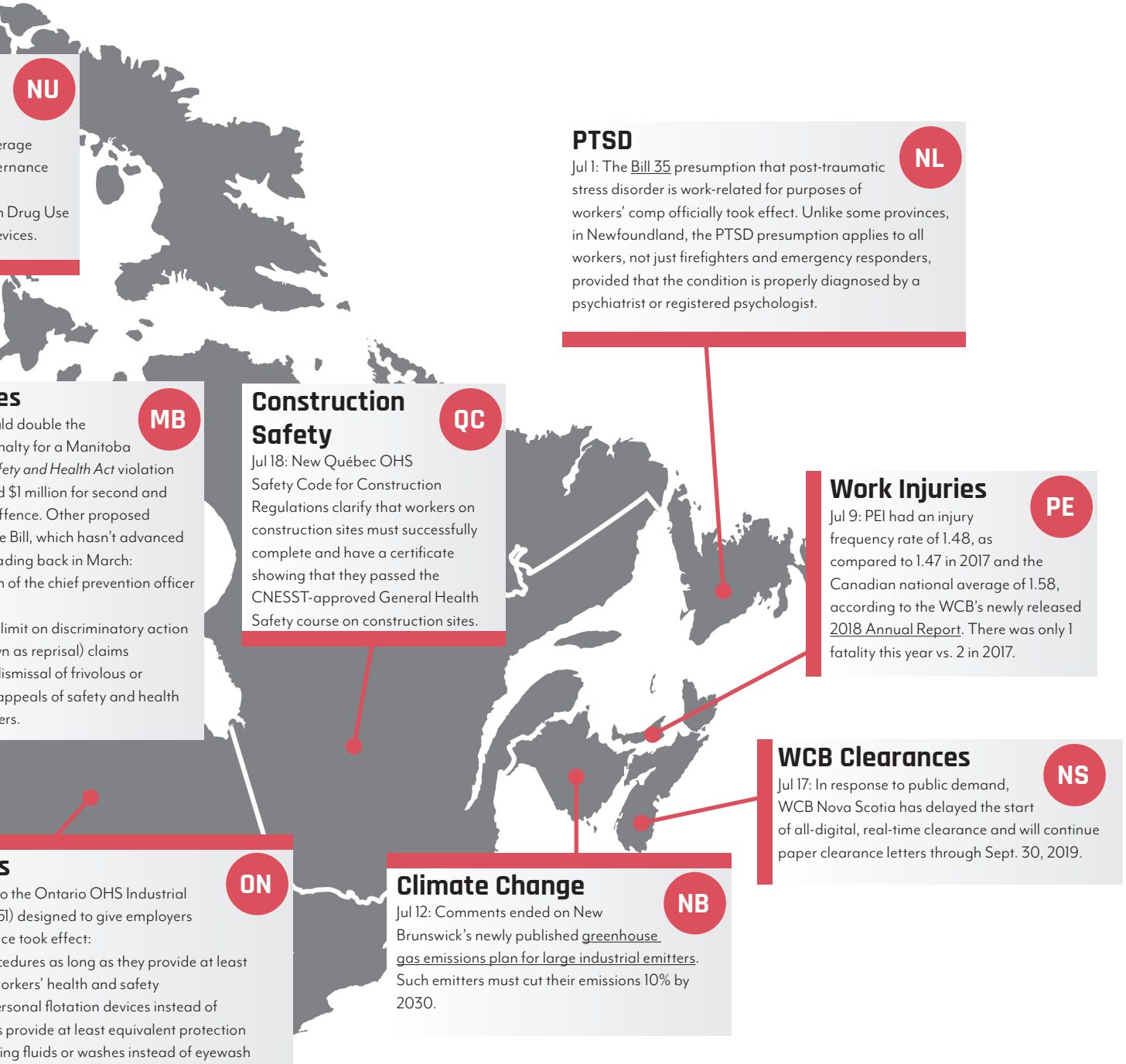
Jul 1: The following changes t Establishments Reg. (Reg. 85 greater flexibility in complian

- OK to use alternative proc equivalent protection to w
- OK for workers to wear pe lifejackets as long as PFDs
- OK to use antidotes, flush fountains or emergency sh permanent eye and skin in

Harassment & Violence

FED

Jul 27: Comments closed on a proposed new stand-alone regulation consolidating all of the different workplace harassment and violence rules set out in the Canada Labour Code and OHS Regs. into a single source. Substance-wise, the new stand-alone regulation will be pretty much the same as current rules but with a few significant tweaks designed to beef up protections and ensure a fair and effective process to receive, investigate and resolve employee claims.



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PTSD

NL

Jul 1: The Bill 35 presumption that post-traumatic stress disorder is work-related for purposes of workers' comp officially took effect. Unlike some provinces, in Newfoundland, the PTSD presumption applies to all workers, not just firefighters and emergency responders, provided that the condition is properly diagnosed by a psychiatrist or registered psychologist.

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ading back in March:
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ismissal of frivolous or
appeals of safety and health
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Construction Safety

QC

Jul 18: New Québec OHS Safety Code for Construction Regulations clarify that workers on construction sites must successfully complete and have a certificate showing that they passed the CNESST-approved General Health Safety course on construction sites.

Work Injuries

PE

Jul 9: PEI had an injury frequency rate of 1.48, as compared to 1.47 in 2017 and the Canadian national average of 1.58, according to the WCB's newly released 2018 Annual Report. There was only 1 fatality this year vs. 2 in 2017.

WCB Clearances

NS

Jul 17: In response to public demand, WCB Nova Scotia has delayed the start of all-digital, real-time clearance and will continue paper clearance letters through Sept. 30, 2019.

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s provide at least equivalent protection
ing fluids or washes instead of eyewash
owers as long as they're effective to prevent
juries.

Climate Change

NB

Jul 12: Comments ended on New Brunswick's newly published greenhouse gas emissions plan for large industrial emitters. Such emitters must cut their emissions 10% by 2030.

ASK THE EXPERT

Must We Protect Exposed Live Electrical Panels from Contact?

Question: Breaker panels have been installed on the end of 3 drying rooms of a cannabis facility under construction and they're live. They currently don't have doors on them (doors are being painted I'm told). Should there be some other covering on them? Should there be barricades or other things protecting panels from accidental contact with equipment? We're in Ontario.

Answer: Yes and Yes.

Explanation: Let me be clear that I'm a lawyer with zero knowledge of electricity and only a rudimentary grasp of electrical safety regs. But while I can't offer anything on the technical side, what I DO know is that you have a duty to guard against foreseeable risks. The origin of that duty in Ontario is OHS Act Sec. 25(2)(h) which requires employers to "take every precaution reasonable in the circumstances for the protection of a worker." (Every other province has a similar provision in its OHS Act).

My assumption is that the reason you're asking these Qs is that you do, in fact, recognize a hazard. If so, you need to deal with it.

Should Workers Be Disciplined for a Near Miss?

Question: If a worker commits a serious safety violation and causes a near miss incident to occur, should we discipline him even though nobody actually got hurt?

Answer: Yes.

Explanation: Workers who break safety rules and endanger their co-workers should be disciplined even if it causes only a near miss. What counts is the conduct, not the consequences. It's imperative to require your workers to do their jobs safely and hold them accountable when they don't. Otherwise, they'll keep on committing safety infractions until somebody actually does get hurt.

In addition to creating an unsafe culture, failure to enforce safety rules increases your liability risks for OHS violations. It's one of the first things OHS inspectors will point to in fining you. And it totally undermines your chances of proving due diligence in a prosecution.

How Many Certified Members Must the JHSC Have?

Question: How many members of the joint health and safety committee (JHSC) have to get certification training? We're in Ontario.

Answer: Two, one representing the workers and one representing the employer.

Explanation: Although you can't have fewer you can have more than the required minimum of two certified JHSC members. But only one of those certified members is allowed to perform the functions of a certified member under the OHS Act, e.g., investigating work refusals, on behalf of the constituency he/she represents.

If there's more than one certified member representing workers, the workers or their union must designate which one will exercise the certified worker member functions.

If there's more than one certified member representing the employer, the employer must designate which one will exercise the certified employer member functions.

Can You Make Workers Wear "Uncomfortable" PPE?

Question: Some of our custodial workers don't want to wear dust masks because they're "uncomfortable." Are we allowed to make them to use the masks for their safety after proper fit testing?

Answer: Yes.

Explanation:

Rule 1: Under OHS laws, you must ensure workers use appropriate PPE and respiratory protective equipment.

Rule 2: You must accommodate workers' disabilities to the point of undue hardship.

Rule 2 doesn't contradict Rule 1 in this case because mere lack of comfort isn't a disability. However, Rule 2 would apply if the refusal was based on a condition that was, e.g., hypersensitivities or allergies. In that situation:

1. You'd have the right to ask the worker to provide a doctor's note or other verification of the disability requiring accommodation; and
2. You wouldn't have to make accommodations that would endanger the worker's or another worker's health and safety; such accommodations would be deemed undue hardship.

Why a Good Contract May Not Be Enough to Avoid Liability for Contamination

In 1975, Control Data (CD), a company that manufactures computer punch cards, leases a plant in Ontario. The lease requires CD to comply with all environmental laws. CD sells the business to Axidata in 1986. As part of the deal, Axidata agrees to take over the lease, including the environmental obligations. Seven years later, Axidata discovers that the property is contaminated with toluene, a solvent used to clean printing presses. Most of the contamination occurred during CD's tenancy. Now it's spread to neighbouring properties. Axidata pays over $3 million to remediate and sues CD to recover its costs. The court finds CD responsible for 90% of the cleanup costs [*Monarch Construction Ltd. v. Axidata Inc.*].

THE PROBLEM

When a company does environmental damage to land, responsibility for cleaning up the contamination may stay with the company long after it severs ties with the property–even if the company only occupied the property as a tenant.

This is true even if the agreement in which the company assigned, that is, transferred the lease to a new tenant purports to end the company's responsibility for the property's environmental condition. These were the hard lessons learned by CD in the *Monarch* case.

EXPLANATION

The right of businesses and individuals to sell their interests in real estate to a buyer and move on is essential to a free market economy. But it also conflicts with a key principle of Canadian environmental law: "polluter pays." That principle holds that costs of cleaning up polluted property should be borne by the party or parties that created the mess, even after they've transferred all interests in the property. "Polluter pays" overrides free transfer of real property.

Thus, polluters can be saddled with environmental liabilities not only for the lands they currently occupy but for those they've owned or leased in the past. And, as the *Monarch* case demonstrates, this liability can last for decades.

THE FALSE SOLUTION

I know that you and your fellow officers and directors appreciate these risks. I also know that when the company sells a piece of land or assigns a lease our lawyers go through the documents carefully and insert language to limit the company's potential exposure to environmental liability. The point of this memo is to caution you against letting these contractual provisions lull you into a false sense of security.

Consider what happened in the *Monarch* case. When Axidata bought CD's printing business, it agreed to assume all of CD's liabilities under the lease, including the responsibility to comply with environmental regulations. Presumably, our company would include similar terms in any agreement we entered into.

It would take CD two decades to discover that the clause transferring responsibility to Axidata hadn't gotten it off the hook. Like any buyer would when assuming a seller's obligations under a lease, Axidata had insisted that CD represent and warrant in the sale agreement that it, CD, was in compliance with all terms of the lease on the date the sale closed. CD also agreed to "indemnify," that is, pay Axidata for any losses it incurred as a result of CD's failure to live up to its obligations under the agreement.

As it turned out, CD's representation and warranty was false; the company wasn't in compliance with environmental regulations at the time of the sale. After a lengthy legal battle, the Ontario court determined that CD was responsible for most of the contamination (and 90% of the cleanup costs):

- CD disposed of 90% of the toluene that caused the contamination;
- The tank in which CD stored the toluene leaked because it wasn't designed to hold flammable liquids;
- CD failed to equip the tank with a spill alarm or pump it regularly; and
- CD didn't instruct employees on proper use of the tank.

THE REAL SOLUTION

Liability for contaminated property is a complicated issue and I don't pretend to have a simple answer. But what I can tell you is that nobody else does, either. As the Monarch case plainly shows, contractual clauses that purport to end a company's environmental liabilities may offer little protection if contamination is later found on the property–especially if the company caused the contamination. In the world of "polluter pays," even the most ingenious of contracts may not fully insulate a company.

The only reliable way to avoid responsibility for remediation is not to commit contamination in the first place. Ultimately, then, it is not the lawyers but the environmental management system that represents the company's first line of defence against environmental liability for contaminated property.

SHOW YOUR LAWYER

Monarch Construction Ltd. v. Axidata Inc., [2007] O.J. No. 816, March 5, 2007

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IN THE NEWS

Plant Can't Ban Short Pants to Protect Workers from Aluminum Exposure

A window and door manufacturing plant revoked workers' right to wear Bermuda shorts at work. The union claimed the new long-pants-only rule violated the collective agreement; the plant argued it was an important safety policy to protect workers' lower legs from exposure to aluminum and PVC materials. The Québec arbitrator sided with the union. True, the collective agreement gave management the express right to revoke its agreement to allow workers to Bermuda shorts where "demanded by" health and safety. But the arbitrator wasn't impressed that the policy met that standard. Wearing shorts is really no different from wearing a short-sleeve shirt. The danger had to be a lot more immediate and compelling to invoke the right to revoke the Bermuda shorts rule, the arbitrator concluded [*International Union of Painters and Allied Trades, Glaziers and Glass Workers, Local 1135 c Jeld-Wen of Canada Inc.*, 2019 CanLII 60152 (QC SAT), July 4, 2019].

Firing Addicted Nurse for Stealing Drugs May Be Discrimination

A hospital fired a registered nurse with 28 years of service for stealing narcotic drugs. The union grieved contending that the nurse had a disability, drug addiction, and was thus entitled to accommodations. While agreeing that she was an addict, the arbitrator tossed the disability discrimination complaint and upheld termination. The union appealed and this time it won. The arbitrator's ruling was unreasonable, said the Ontario Superior Court. Having found that she was addicted and that addiction was a contributing factor to her stealing the drugs, the arbitrator should have recognized that the nurse had a valid legal claim and given her a chance to prove it at trial. In addition to ordering a new hearing, the court ordered the hospital to pay the $8K in legal costs the nurse incurred in bringing the appeal [*Ontario Nurses' Association v. Cambridge Memorial Hospital,* 2019 ONSC 3951 (CanLII), July 17, 2019].