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What Ontario General Contractors Need to Know about their Workers Right to Refuse Unsafe Work During the COVID - 19 Pandemic¹

The World Health Organization (“WHO”) has declared a pandemic as cases of the Coronavirus Disease 2019 (COVID-19) and Ontario has declared a state of emergency, so how does that impact General Contractors in Ontario.. More specifically, can work continue and when can workers refuse to do “unsafe work”?

This article reviews the responsibilities of employers under occupational health and safety legislation when faced with a refusal to work based on unsafe work. These responsibilities are also subject to obligations in any collective agreement in unionized workplaces.

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¹ Prepared by J. P’ng and modified by N. Keith, Fasken

² <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

³ Oliver Moore, “Coronavirus concerns prompt TTC disruption as handful of workers refuse to work”, *Globe and Mail* (12 March 2020), online: <<https://www.theglobeandmail.com/canada/toronto/article-coronavirus-concerns-prompt-brief-ttc-disruption-as-handful-of/>>.

⁴ “Production back up at Windsor Assembly after employees refuse work amid COVID-19 concerns”, *CBC News* (13 March 2020), online: <<https://www.cbc.ca/news/canada/windsor/wap-employees-line-stoppage-coronavirus-concerns-1.5496855>>.

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Who has a Right to Refuse Unsafe Work?

Under the Ontario workplace health and safety statute, the *Occupational Health and Safety Act* (“*OHSA*”), 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.⁵ The worker must advise their employer of the work refusal immediately and the circumstances when they exercise this legal right.

The statutory threshold required to justify a work refusal is quite low. A worker only need have a personal or 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.⁶

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 and reporting process 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.

⁵ *Occupational Health and Safety Act*, R.S.O. 1990, c.O.1, as amended, section 43(3).

⁶ See Chapter 5, *Canadian Health & Safety Law*, Norman A. Keith, Canada Law Book - Thompson Reuters.

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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 onreprising 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.

The general duty clause for employers, s. 25(2)(h) of the *OHSA*, *should review the MOL website on COVID-19 and advise workers to not attend at work if they have any symptoms identified on their website.*¹

¹ <https://www.ontario.ca/page/2019-novel-coronavirus#section-4>

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What Should Employers do to provide a Healthy & Safe Workplace?

Under the “general duty clause” of the *OHS Act*, 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,⁸ 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.⁹

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⁷ Public Health Agency of Canada, “Coronavirus disease (COVID-19): Prevention and risks” (17 March 2020), online: <<https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/prevention-risks.html>>.

⁸ Public Health Agency of Canada, “Coronavirus disease (COVID-19): Symptoms and treatment” (17 March 2020), online: <<https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/symptoms.html>>.

⁹ https://www.eeoc.gov/facts/pandemic_flu.html

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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.

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.

For further information, **please feel free to contact Norm Keith**, B.A., J.D., LL.M., CRSP, at 416-868-7824 or 416-540-3435 or nkeith@fasken.com.

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