

# Brief Your Supervisors: Is Fear of Catching Coronavirus Valid Grounds for a Work Refusal?



## What's At Stake

Don't be surprised if one of your employees engages in a work refusal out of fear of catching coronavirus from a co-worker, client or member of the public. While it might seem overly dramatic, such a refusal may be justified, especially if the individual to which the employee is exposed has recently traveled to Wuhan, China, or another high risk area. Result: Dismissing the employee's fears out of hand can get you into serious trouble under OHS laws. Here's what you and your supervisors need to know to properly handle coronavirus-related work refusals.

## What the OHS Laws Say—And Don't Say

The OHS laws clearly allow employees to refuse work when they have "reasonable" cause to fear serious injury or illness to themselves and/or others. As with all work refusals, the supervisor who receives the refusal must take it seriously and overcome the temptation to engage

in knee-jerk rejection and order the employee back to work before making a determination about whether the employee's concerns are reasonable and a danger exists.

Unfortunately, that's easier said than done. The OHS statutes and regulations don't go into details or specifics about what makes a refusal reasonable. The only official source to go for guidance are the cases in which a court or arbitrator had to apply the principles to real-life refusals. Although there haven't yet been any reported cases on coronavirus refusals, there have been several cases involving refusals related to other infectious illness outbreaks like SARS, hepatitis B (Hep B) and Ebola. Of course, supervisors aren't likely to know about these cases. So, it's up to you to debrief them to ensure they're prepared to deal with illness-related refusals. Here's how to do that.

## How to Brief Your Supervisors

First, be sure that supervisors understand that they must do their own investigation of each work refusal and make an appropriate decision based on their findings. Explain that knowing how courts and arbitrators across Canada have ruled on other infectious illness work refusals will help them make legally sound determinations when dealing with coronavirus refusals by their own employees.

## The 4 Questions to Ask

The *Insider* found 8 cases where a court or arbitrator had to decide whether an employee's infectious illness work refusal was reasonable. The employee lost all but 2 of these cases. But it wasn't just the outcome but the approach that was important. The 4 questions the courts and arbitrators asked are the ones the supervisor needs

to consider in making his/her own determination.

## 1. How Is the Infection Transmitted?

One of the key issues in determining the reasonableness of infectious disease refusals is how the disease is transmitted. The problem with coronavirus is that we still don't know much about how the disease spreads. However, it seems clear that you can contract the virus from being in contact with an infected individual. The validity of coronavirus-based refusals will depend on the knowledge that emerges as we learn more about the disease.

Thus, for example, during the SARS outbreak, there were a number of refusal cases brought by employees who feared contracting the disease by working near individuals who'd recently arrived from Asian countries where SARS had reached pandemic levels. Employers in 3 cases were able to shoot down the refusals in arbitration by relying on reports from the World Health Organization (WHO) and other medical evidence showing that SARS isn't spread by being in proximity to an infected individual.\_

**Refusal Fails:** Two Air Canada ticket agents at Pearson Airport in Toronto refused to work near passengers arriving from Hong Kong unless they could wear surgical masks and gloves, because they were afraid of getting SARS. Citing the WHO report, the federal arbitrator upheld Air Canada's determination that the agents weren't at high risk of contracting SARS and didn't need PPE [*Cole v. Air Canada*].

**Refusal Succeeds:** Each morning, a prison guard had to escort 3 inmates from their toilet-less isolation cells, waste bucket in hand, to a washroom. The guard was afraid that the inmates would toss the contents of their

waste buckets at him and he'd contract Hep B. The federal arbitrator found the refusal valid based on scientific evidence showing that Hep B is transmitted through contact with feces, urine and semen [*Walton v. Treasury Board*].

## 2. Does the Employee Work with or near People who Are Infected?

If we learn that coronavirus infection does spread by being in close proximity to infected individuals, supervisors will have to consider whether the refusing employee is, in fact, exposed any such individuals.

**Refusal Fails:** A federal arbitrator nixed an airport customs agent's refusal to work unless he would wear PPE as his job involved little to no contact with newly arrived passengers from SARS-infected parts of Asia [*Chapman v. Canada (Customs and Revenue Agency)*].

**Refusal Fails:** Theoretical possibility of treating a patient with Ebola wasn't enough to justify the refusal of 2 Ontario paramedics who couldn't prove they'd have actual exposure.

## 3. Are the Employee's Fears Sincere

Courts and arbitrators will dismiss coronavirus-related work refusals if there's evidence that employees are abusing their refusal rights and their fears of contracting the illness aren't sincere. ([Click here](#) to find out more about how to tell the difference between a proper and improper refusal.)

## 4. Are Adequate Measures Already in Place to Address the Employee's Concerns?

A key factor in any work refusal case is what, if

anything, the employer has already done to address the hazard and whether those measures are adequate. Evidence that the employer is stonewalling will almost always tip the case in the employee's favour. Conversely, employers "score points" by being able to show that they took steps to address the employee's concerns.

**Refusal Fails:** Federal arbitrator strikes refusals of HRDC employees scared of getting SARS from Asian immigrants they might encounter on the job, citing the measures the agency had taken to reassure and protect workers, including providing educational materials about SARS and holding daily briefings on the local and regional health situation [*Caverly v. Canada (Human Resources Development)*].

**Refusal Fails:** A railroad crew refused to board a train for a scheduled trip after learning that 28 passengers from the previous trip had contracted a gastrointestinal virus. According to the arbitrator, the company had taken the steps necessary to manage the risk, such as thoroughly scrubbing down the cars, sanitizing the washrooms and keeping the crew informed [*Hogue-Burzynski v. VIA Rail Canada*].

**Refusal Succeeds:** Québec CSST (as it was called at the time) upheld the refusal of 2 paramedics citing the employer's failure to implement adequate measures and PPE to protect workers from Ebola.

## **Take 9 Measures to Minimize Infectious Illness Risks**

End your briefing by providing a checklist of measures that address concerns giving rise to a coronavirus- or other infectious illness-based work refusal. Explain that the more of the following measures that are in

place at the time of refusal, the harder it will be for the employee to justify the refusal as reasonable:

- Educated employees about the infectious illness and how it's transmitted;
- Encouraged employees to get vaccinations or provided vaccinations in-house (currently, there is no coronavirus vaccine available);
- Kept employees updated on illness-related developments in the workplace and community, e.g., by posting regular updates on the company's website;
- Took basic hygiene measures, such as providing soap, hand sanitizers and paper towels and keeping sinks and surfaces that people touch (such as door knobs) clean;
- Posted signs, posters and notices reminding employees to wash their hands properly, use cough etiquette, keep social distances, etc.;
- Adopted work practices that promote social distance, such as using conference calls instead of face-to-face meetings;
- Screened employees and visitors entering the workplace for signs of transmittable illness;
- Furnished PPE to employees exposed to infection risks; and
- Managed cases of infection at work, including telling those suspected of having an illness to go home immediately and monitoring which employees get infected, where they work, etc.

## SCORECARD

### INFECTIOUS ILLNESS WORK REFUSAL CASES

CASE	GROUND FOR REFUSING	OUTCOME	EXPLANATION
<i>Caverly v. Canada (HRSD)</i>	HRSD worker fears getting SARS from immigrants	Refusal Invalid	Worker not exposed to infection risk, but HRSD should have done a better job of addressing concerns

<i>Chapman v. Canada (Customs and Revenue Agency)</i>	Customs agent fears getting SARS from new Asian immigrants	Refusal Invalid	Custom agents don't encounter individuals with SARS; even if they did, they can't get it from proximity to infected individuals
<i>Cole v. Air Canada</i>	Air Canada ticket agents fear getting SARS from Asian passengers	Refusal Invalid	Medical evidence shows SARS isn't transmitted by proximity to infected individuals; airline adequately addressed SARS concerns
<i>Hogue-Burzynski v. VIA Rail Canada</i>	Railroad crew members fear getting intestinal virus from sick passengers on previous trip	Refusal Invalid	Railway took steps to minimize risk and workers had to accept that risk as part of their job
<i>Swan River Valley Hospital (Re)</i>	Hospital workers fear getting Hepatitis B	Refusal Invalid	Not reasonable to require hospital to vaccinate all workers, especially when they didn't demand vaccination in collective bargaining
<i>Walton v. Treasury Board</i>	Prison guard fears getting Hepatitis B from inmates	Refusal Valid	Fear of being doused with waste bucket is reasonable given that Hepatitis B is spread via contact with feces, urine and semen
Unreported	Quebec paramedics fear getting Ebola from patients	Refusal Valid	Employer didn't have ample infection control measures in place
Unreported	Ontario paramedics fear getting Ebola from patients	Refusal Invalid	Risk of paramedics actually being exposed only hypothetical