

Compliance Alert: Why COVID-19 Work Refusals Will Be Hard to Justify



One of the key challenges HR directors are facing during this pandemic is how to deal with COVID-19 work refusals. We know from previous pandemics that fear of infectious illness may be grounds for workers to exercise their refusal rights. And most jurisdictions have issued guidance confirming that this also applies to the latest infectious illness, COVID-19. But there's something a little different this time around.

Infection Fears Must Be Reasonable

There've been at least 9 reported refusal cases involving SARS, Hepatitis B and Ebola. In all but 2 of them, the refusal was invalid. The primary reasoning was that the worker's fears of were too speculative and not supported by medical evidence showing how the disease spread. Example: Custom agents concerned about getting SARS from recently arrived immigrants were ordered back to work because:

- Their job didn't require them to encounter new immigrants; and
- Even if it did, there was no medical evidence showing that you can get SARS by being close to a person who has it.

Infection Risk Must Be Greater than to General Public

Unlike SARS, you *can* get COVID-19 by being near a person who has an infection. But that doesn't mean the customs agents would have had a valid refusal. Explanation: The fear must be not only reasonable but also involve what the OHS laws call an "undue" hazard. Simply being exposed to risk of infection at work isn't enough. After all, workers run the risk of catching a contagious illness from another person any time they leave the home and go to work. But so does everybody else. An OHS work refusal is justified only if because of the nature of the job, the risk is greater than what normal people face in the course of their life.

This point was first made in a BC case involving refusals by pregnant teachers who feared catching H1N1 from students. The BC OHS Officer found the refusal invalid. "While I acknowledge the workplace would be characterized as a higher risk environment," there was no evidence showing that the teachers were

“specifically susceptible” or that being in the workplace was any riskier than being in the community [Review Reference #: R0112820, Oct. 21, 2010].

As the OHS Officer acknowledged, the personal characteristics of the refusing worker do come into play in assessing the risk. Thus, the case for refusal will be stronger for workers who are older, pregnant, or have immunity or other pre-existing medical conditions increasing their vulnerability to COVID-19 infection. But as the BC case shows, it’s not just personal traits but also the nature of the work that matters. Thus, even though the teachers were pregnant, they lost their H1N1 refusal because their job and workplace weren’t at unusually high risk.

Government guidance indicates that the same analysis applies to COVID-19. For example, in its recent COVID-19 bulletin, WorkSafeBC explains that refusal rights apply only to an “undue hazard,” which it explains “is an unwarranted, inappropriate, excessive, or disproportionate risk, *above and beyond the potential exposure a general member of the public would face through regular, day-to-day activity*” (emphasis added).

And in one of the first work refusals involving COVID-19, the Ontario MOL ordered 166 car plant workers back to work after initiating a refusal when a co-worker was placed in self-isolation finding that the refusal didn’t “meet the criteria of a work refusal.”

Setting + Circumstances

Workplaces that do pose higher hazards of COVID-19 than being in the general public include health care facilities, labs, ambulances and other settings involving frequent and close contact, i.e., closer than the 6-foot social distancing buffer, with COVID-19 patients. But that doesn’t mean all health care workers automatically have valid grounds for refusing work. If they did, after all, the entire health system would break down.

Explanation: The “undue hazard” rule applies to not just the setting but the conditions of the work. More specifically, refusal rights don’t apply to the normal hazards of a job; there must be something that makes the hazard unusual or undue, like the failure to follow the required health and safety measures. Example:

- **Not Undue Hazard:** A nurse is asked to physically examine a patient with COVID-19;
- **Undue Hazard:** A nurse must physically examine a COVID-19 patient without using gloves, a respirator and other required PPE.

The best illustration of how these principles play out in real life is the case of the prison guard who was afraid that inmates would douse him with their waste buckets and cause him to get Hepatitis B. In finding the refusal justified, the federal arbitrator noted that feces and urine do cause Hep B infection and that the prison had no measures in place to protect the guard from being the victim of an inmate waste bucket assault.