

May Employees Refuse to Return to the Post-COVID-19 Workplace?



SITUATION

After weeks of operating remotely, non-essential business Baktu Works (BW) is thrilled to re-open its doors and recall its employees from temporary layoff. But it soon becomes clear that at least some employees are far less enthusiastic. Six different employees decline the invitation to return to work, at least for the near future, each for a different reason.

QUESTION

Which employee(s) has/have a valid reason not to return to work?

- A. Anita Sitter would love to return to work but the schools are still closed and she has no one to care for her kids
- B. Ben Farraway wants to return but is stranded in Asia due to COVID-19 travel restrictions
- C. Clay Minstead is perfectly capable of working but prefers to stay home and collect CERB benefits
- D. Dane Jurus is dubious of the company's infection measures and exercises his OHS refusal rights
- E. Etta Hazard wants to keep working but has an immune disorder and has been told by her doctor that getting COVID-19 would likely kill her
- F. Flora Septic is gung-ho for a return but is in self-isolation having just tested positive for COVID-19

ANSWER

Of these employees, the only one that clearly *does not* have grounds for refusing to return is Clay Minstead.

EXPLANATION

Refusal to report to work is normally grounds for discipline up to and including termination. But there are notable exceptions, particularly in times of pandemic. These scenarios illustrate the various protections available to

employees on temporary layoff or who were recently terminated and who decline the invitation to come back to work for reasons related to COVID-19. Let's go through each employee one at a time.

A. Anita Sitter Has Grounds to Take Unpaid Leave

Almost all jurisdictions have adopted protections for employees who don't have COVID-19 but have to miss work to care of family members who do, or for kids that have to stay home due to school or daycare closures. More specifically, Anita can take unpaid COVID-19 leave as long as she gives the company reasonable notice. Anita wouldn't be entitled to pay for leave time, unless her contract or collective agreement provides otherwise.

B. Ben Faraway Has Grounds to Take Unpaid Leave

The same analysis applies to Ben who wants to report to work but can't report to the workplace due to COVID-19 restrictions. Explanation: Unpaid leave protects employees affected by and acting in compliance with government COVID-19 emergency orders, including travel bans. As a result, Ben is eligible for unpaid COVID-19 leave, unless leave time is compensable under his contract or collective agreement.

C. Clay Minstead Does NOT Have Grounds to Refuse Recall

There's no protection for employees who can work but voluntarily choose not to. So, the company can terminate Clay for just cause without notice. And what Clay is about to learn once he puts in a claim is that by declining re-employment or recall from temporary layoff and getting fired for cause, he's also ineligible to collect CERB or EI benefits.

D. Dane Jurus Has Grounds to Refuse Work but Must Follow OHS Procedures

If Dane's concerns about the adequacy of the company's COVID-19 infection control measures prove justified, they're valid grounds for a work refusal under OHS laws. However, Dane must follow the refusal procedures required by his jurisdiction's OHS laws. And that means showing up for work to initiate the refusal. In other words, OHS refusals can't be phoned in even during the pandemic. Exception: WorkSafeNB has suggested that remote refusals would be allowed in New Brunswick, but only if the employer agrees to the alternative procedures.

E. Etta Hazard Is Entitled to Reasonable Accommodations & May Also Have Grounds to Refuse

Etta's immunity deficiency would be considered a "disability" under human rights laws requiring accommodations to the point of undue hardship. The question then becomes what accommodations the company must make. One potential solution is to let her work from home. But there may be some reason that Etta has to be at the site, e.g., she's the only employee licensed to carry out a particularly crucial operation. If letting Etta work from home would impose undue hardship, the company would likely have to take additional safety measures to protect Etta from infection, e.g., physically isolating and ventilating her work station from the rest of the workplace. And, if Etta still doesn't feel safe, she could initiate an OHS work refusal as a last resort.

F. Flora Septic MUST NOT Return to Work

Flora not only can but must not return to work. More precisely, Flora should notify the company that she has COVID-19 and when she contracted it so a determination can be made about how long she must remain in self-isolation before being allowed to return. Like Anita and Ben, Flora qualifies for unpaid leave (which may be paid depending on the terms of her contract or collective agreement) and can't be fired simply because she has COVID-19. The company can also require Flora to verify her need for leave, but can't demand a doctor's note.